



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 6

WEDNESDAY 28 JUNE, 2023

Vol. 103—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

103 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2023 WAIRC 00320

RESCIND LOCATION ALLOWANCE GENERAL ORDER 2 OF 2022 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

COMMISSION IN COURT SESSION

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER C TSANG

COMMISSIONER T KUCERA

DATE

TUESDAY, 13 JUNE 2023

FILE NO.

CICS 2 OF 2023

CITATION NO.

2023 WAIRC 00320

Result

General Order issued

Representation

Mr R Dobson and Ms M Williams on behalf of the Honourable Minister for Industrial Relations

Dr T Dymond on behalf of UnionsWA

General Order

HAVING heard from Mr R Dobson and Ms M Williams on behalf of the Honourable Minister for Industrial Relations and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT each award cited in Schedule A of this General Order be varied by substituting the table within the first subclause of the location allowance provisions contained in each such award with the table at Schedule B of this General Order.
2. THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2023.
3. THAT this General Order replace the General Order in Matter No. CICS 2 of 2022 which hereby shall be rescinded.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

SCHEDULE A

<u>Title of Award or Order</u>	<u>Clause No.</u>
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Animal Welfare Industry Award	14
Artworkers Award	20
The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002	5.14
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award 2006	12
Cleaners and Caretakers Award, 1969	3.6
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks (Timber) Award	31
Clerks (Unions and Labor Movement) Award 2004	37
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award, 1990	21
Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011	17.6
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award, 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Fast Food Outlets Award 1990	35
Foremen (Building Trades) Award 1991	15
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989	31
The Horticultural (Nursery) Industry Award No. 30 of 1980	6
Independent Schools Administrative and Technical Officers Award 1993	22
Independent Schools (Boarding House) Supervisory Staff Award	22
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18

Industrial Spraypainting and Sandblasting Award 1991	19
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Local Government Officers' (Western Australia) Award 2021	17.2
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Award 2021	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003 - The	8.4

SCHEDULE B

Replacement Table of Weekly Location Allowances

The table below replaces the table of weekly allowances in each clause listed in Schedule A

TOWN	PER WEEK
Agnew	\$24.70
Argyle	\$66.60
Balladonia	\$25.80
Barrow Island	\$43.40
Boulder	\$10.60
Broome	\$39.90
Bullfinch	\$11.50
Carnarvon	\$20.50
Cockatoo Island	\$43.70

Coolgardie	\$10.60
Cue	\$25.50
Dampier	\$34.80
Denham	\$20.50
Derby	\$41.40
Esperance	\$7.10
Eucla	\$27.80
Exmouth	\$36.60
Fitzroy Crossing	\$50.40
Halls Creek	\$58.40
Kalbarri	\$9.00
Kalgoorlie	\$10.60
Kambalda	\$10.60
Karratha	\$41.90
Koolan Island	\$43.70
Koolyanobbing	\$11.50
Kununurra	\$66.60
Laverton	\$25.40
Learmonth	\$36.60
Leinster	\$24.70
Leonora	\$25.40
Madura	\$26.80
Marble Bar	\$64.80
Meekatharra	\$22.00
Mount Magnet	\$27.60
Mundrabilla	\$27.30
Newman	\$23.80
Norseman	\$22.10
Nullagine	\$64.70
Onslow	\$43.40
Pannawonica	\$32.30
Paraburdoo	\$32.20
Port Hedland	\$34.60
Ravensthorpe	\$13.00
Roebourne	\$48.30
Sandstone	\$24.70
Shark Bay	\$20.50
Southern Cross	\$11.50
Telfer	\$59.40
Teutonic Bore	\$24.70
Tom Price	\$32.20
Whim Creek	\$41.50
Wickham	\$40.00
Wiluna	\$25.00
Wyndham	\$62.30

2023 WAIRC 00269

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
COMMISSION IN COURT SESSION

CITATION : 2023 WAIRC 00269
CORAM : CHIEF COMMISSIONER S J KENNER
 SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T B WALKINGTON
HEARD : TUESDAY, 9 MAY 2023
DELIVERED : FRIDAY, 12 MAY 2023
FILE NO. : CICS 3 OF 2023
BETWEEN : UNIONSWA INCORPORATED
 Applicant
 AND
 MINISTER FOR INDUSTRIAL RELATIONS, CHAMBER OF COMMERCE AND
 INDUSTRY OF WESTERN AUSTRALIA (INC), AUSTRALIAN RESOURCES AND
 ENERGY EMPLOYER ASSOCIATION
 Respondents

Catchwords : Industrial law (WA) - Application for General Order - Provisions in industrial instruments for days declared special public holidays - Payment for working on special public holidays - General Order issued
 Legislation : *Bank Holidays Act 1970* s 5
Fair Work Act 2009 (Cth) s 115(1)
Industrial Relations Act 1979 (WA) s 6, s 26(1) s 50, s 80BB
Industrial Relations Legislation Amendment Act 2021 (WA) s 120
Minimum Conditions of Employment Act 1993 (WA) s 30
Public and Bank Holidays Act 1972 (WA) s 7
 Result : General Order issued

Representation:

Mr C Fogliani of counsel on behalf of UnionsWA Incorporated

Mr R Andretich of counsel on behalf of the Hon. Minister for Industrial Relations

No appearance on behalf of Chamber Of Commerce and Industry Of Western Australia (Inc)

No appearance on behalf of Australian Resources and Energy Employer Association

Solicitors:

UnionsWA : Fogliani Lawyers

Minister for

Industrial Relations : State Solicitor's Office

Case(s) referred to in reasons:

Amalgamated Engineering Union of Workers of Western Australia and Others v Forwood Down W.A. Ltd. and Others (1971) 51 WAIG 1205

Australian Workers' Union, Westralian Branch, Industrial Union of Workers ; The West Australian Shop Assistants and Warehouse Employees' Industrial Union of Workers, Perth and Others v Sundry Employers (1946) 26 WAIG 354

Re Electricians (State) Award (No 3) (1970) AR (NSW) 305

*Reasons for Decision***COMMISSION IN COURT SESSION:****The application**

1 This application seeks a General Order under s 50 of the *Industrial Relations Act 1979* (WA) to apply to all awards, industrial agreements, enterprise orders and employer-employee agreements made under the *Act*. The General Order sought is in relation to special public holidays appointed by proclamation under s 7 of the *Public and Bank Holidays Act 1972* (WA).

- 2 The application arises from the proclamation made by the Governor of Western Australia under the *PBH Act* that 22 September 2022 would be a special public and bank holiday in this State, following the declaration of a National Day of Mourning on the passing of Her Majesty Queen Elizabeth II. The application seeks to remedy a gap in awards of the Commission which prescribe higher rates of pay for working on a public holiday set out in the award, but make no provision for such payments for working on such a special public holiday, applying throughout the State.
- 3 The application, as amended by order of the Commission in Court Session dated 2 May 2023 ([2023] WAIRC 00248) is in the following terms:

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 **special public holiday** means any special day appointed by proclamation under section 7 of the *Public and Bank Holidays Act 1972* (WA) 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 special public holiday.
- 4 The terms of the proposed General Order make it clear in par 4(c), defining ‘special public holiday’, that it is limited to a day proclaimed to be such, in accordance with s 7 of the *PBH Act* and no other day. Furthermore, by proposed par 5, it is intended that penalty rates, normally applying in circumstances where an employee works on a public holiday as prescribed by an industrial instrument, will also be payable where an employee is required to work on a special public holiday, as proclaimed. In this sense, the application seeks to do no more than align payment for working on such a public holiday, with the general industrial principle that employees working outside of ordinary hours of work, including on holidays, are entitled to penalty rates of pay for doing so.
- 5 The application was the subject of a Notice published in the Western Australian Industrial Gazette, and on the Commission’s website on 22 February 2023, giving notice of the proceedings and inviting any written submissions to be filed with the Commission’s Registry by 2 May 2023: [2023] WAIRC 00064; (2023) 103 WAIG 99. A written submission was received from the Western Australian Local Government Association.
- 6 The application is unopposed.

Some history

- 7 In 1946, the Court of Arbitration of Western Australia established a minimum standard for all Western Australian employees in private industry of ten public holidays each year: ***Australian Workers’ Union, Westralian Branch, Industrial Union of Workers; The West Australian Shop Assistants and Warehouse Employees’ Industrial Union of Workers, Perth and Others v Sundry Employers*** (1946) 26 WAIG 354 at 355. Which of these ten days were designated as public holidays was left to be specified by individual awards, although convention and common law meant that New Year’s Day, Good Friday, Easter Eve, Easter Monday, Christmas Day (25 December) and 26 December were universally recognised.
- 8 Issues regarding the entitlement to payment when a public holiday is observed, payment when a public holiday is worked, and taking days off work in lieu of public holidays, were also dealt with by the provisions of individual awards.
- 9 As at 1971, s 5 of the then *Bank Holidays Act 1970* allowed the Governor to appoint, by proclamation, ‘special days’ to be observed as bank holidays throughout the State or in any city, town or district. It had become common for communities in country districts to request holidays or half day holidays to be appointed for local occasions such as agricultural shows, race meetings and commemorative events: see *Second Reading Speech Hansard* 19 September 1972 p 3397.
- 10 Also in 1971, several unions applied to the Industrial Commission to amend the *Metal Trades (General) Award* and eight other private sector awards to add to the existing ten holidays ‘any other day which may, from time to time, be gazetted as a public holiday.’: ***Amalgamated Engineering Union of Workers of Western Australia and Others v Forwood Down W.A. Ltd. and Others*** (1971) 51 WAIG 1205. The Industrial Commission refused the claim. In doing so, Cort C said at 1206:

Sufficient evidence was put with regard to disputes on earlier holiday provisions to cause doubt on the wisdom of granting a provision so worded but, in any event, it was not shown that ten days without loss of pay is an unreasonable provision for workers covered by an award of this Commission.

- 11 The Industrial Commission did, however, grant a rate of pay of double time and a half for time worked on the then recognised public holidays in those awards the subject of the unions' application: see 1207. This followed the New South Wales Industrial Commission decision in *Re Electricians (State) Award (No 3)* (1970) AR (NSW) 305.
- 12 When the *Public and Bank Holidays Bill* was introduced shortly after the decision of the Industrial Commission, it had as its main purpose the rationalising of the administration of all public and bank holidays. As the then Minister for Labour, Mr Taylor, explained, while the Industrial Commission's 1971 decision made changes to several awards to standardise the entitlement to a day off work on ten public holidays without loss of pay, the decision applied only to workers covered by the relevant State awards, creating a disparity between employees who were award covered, and those who were not. The *PBH Act* was designed to enshrine the ten public holidays into legislation, so that all employees at least have the same standard ten public holidays apply to them: *Second Reading Speech Hansard* 8 August 1972.
- 13 As well as listing the ten public holidays, the *PBH Act* contained a further provision to allow the Governor to make a proclamation from time to time, to appoint a special day, specified in the proclamation, to be a public holiday throughout the State or within a district. The Minister for Labour's specific example of the application of special public holidays was for a 'Royal Visit'.
- 14 Despite the development of some general principles and standards in relation to public holidays, uniformity remained elusive. The *Minimum Conditions of Employment Act 1993* (WA) provided an entitlement for all employees other than casual employees, who are not required to work on a day 'solely because that day is a public holiday' to be paid as if the employee worked on that day: s 30. The term 'Public Holiday' is defined in the *MCE Act* to mean the days listed in Schedule 1, being 11 named public holidays (Easter Sunday having been recently added to the list: *Industrial Relations Legislation Amendment Act 2021*, s 120) as well as 'any special day appointed by proclamation under the *Public and Bank Holidays Act 1972* s 7 to be a public holiday.' However, the *MCE Act* is silent about payment when an employee works on a public holiday. For State system employees, such entitlements were left to industrial instruments.

Contentions

- 15 In its submissions, UnionsWA identified a range of different public holiday and overtime clauses in awards of the Commission, which do not entitle an employee working on a special public holiday, proclaimed to apply throughout the State, to higher rates of pay. It was submitted that the granting of the application for a General Order, would remedy this situation. In making an order in the terms sought, UnionsWA contended that the Commission would be acting consistent with the objects of the *Act* in s 6, and in accordance with equity, good conscience and the substantial merits of the case under s 26(1)(a) of the *Act*. It would also be in the interests of affected employees to ensure that they are appropriately remunerated when required to work on special public holidays, which, in turn, is in the interests of the community as a whole: s 26(1)(c) *Act*.
- 16 Whilst no evidence has been led in support of the application, it was submitted by UnionsWA that in the absence of any objection to the making of a General Order, evidence is unnecessary, as the gap in existing awards and industrial agreements is self-evident. In the absence of any opposition to the application from employers in the State industrial relations system, UnionsWA submitted that there is nothing before the Commission which would suggest that granting the application would have a detrimental economic impact for the purposes of s 26(1)(d) of the *Act*, especially given the relatively rare circumstances in which special public holiday proclamations are made. There have been only two such proclamations over the last 15 years or so, the first made in June 2010 (cancelled in December 2010 with a substitute day declared) and the second made for the National Day of Mourning.
- 17 UnionsWA also submitted that the effect of the General Order, if made, would not create an entitlement where an award presently does not provide for payment of higher rates of pay on public holidays. The application only seeks to extend an existing obligation to pay higher rates of pay under awards for working on public holidays, to special public holidays as defined.
- 18 Submissions were made on behalf of the Minister, who supports the application, as amended. One issue raised by the Minister was that whilst reference was made in the application to the *Farm Employees Award 1985* as an award affected by the application, that award does not, somewhat uniquely, contain a clause providing for penalty rates being payable on public holidays. Accordingly, it would not be covered by the General Order.
- 19 In addition to the submissions from UnionsWA and the Minister, the WALGA submission referred to the application for the General Order and noted that it was disseminated widely amongst all WALGA members for their comment. Members of WALGA were also informed that they were able to make an individual submission in relation to the application, in response to the Notice of these proceedings published by the Registrar.
- 20 The WALGA written submission also outlined the relevant provisions of three local government awards providing for public holiday and public holiday entitlements. Two State awards contain provisions for public holidays and payment for working on them, with only one providing for payment on proclaimed special public holidays. A third example cited is a former national system award, now a State instrument under s 80BB of the *Act*, which, by s 115(1) of the *Fair Work Act 2009* (Cth), recognised the National Day of Mourning as a public holiday. This award provides for payment for working on such days. These local government awards are an illustration of inconsistencies that occur in relation to this issue.
- 21 WALGA confirmed that none of its members had indicated opposition to the application. Two local governments responded to the effect that it was current practice for payment of penalty rates where an employee works on a special public holiday in any event.

Consideration

- 22 The declaration of a National Day of Mourning for 22 September 2022 and the proclamation of a special public holiday throughout the State by the Governor under s 7 of the *PBH Act* revealed the existence of a lacuna in awards of the Commission. Whilst most awards provide for prescribed public holidays, and that working on such prescribed public holidays

attracts a penalty rate of pay, usually of double time and one half, there is generally no such entitlement to penalty rates when working on a special public holiday proclaimed to apply throughout the State.

- 23 Given the very infrequent occurrence of such proclamations being made, we are satisfied that, in accordance with ss 6 and 26(1) of the *Act*, the making of such a General Order would be consistent with the objects of the *Act* and with the equity, good conscience and substantial merits of the case. We are also satisfied that given the relative rarity of the proclamation of special holidays under the *PBH Act*, the cost impact of granting the application would not be of significant magnitude to outweigh the substantial merits of the case.
- 24 Accordingly, we are satisfied that a General Order ought to be made. This will extend the same entitlement to higher rates of pay for working on a public holiday under current terms of industrial instruments made under the *Act*, to those employees who are required to work on a special public holiday.
- 25 A minute of proposed order now issues.

2023 WAIRC 00276

**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-

MINISTER FOR INDUSTRIAL RELATIONS, CHAMBER OF COMMERCE AND INDUSTRY
OF WESTERN AUSTRALIA (INC), AUSTRALIAN RESOURCES AND ENERGY EMPLOYER
ASSOCIATION

RESPONDENTS

CORAM

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

DATE

THURSDAY, 18 MAY 2023

FILE NO.

CICS 3 OF 2023

CITATION NO.

2023 WAIRC 00276

Result

General Order issued

Representation

Applicant

Mr C Fogliani of counsel

Respondents

Mr R Andretich of counsel on behalf of the Hon. Minister for Industrial Relations
No appearance on behalf of the Chamber of Commerce and Industry of Western Australia
(Inc)
No appearance on behalf of Australian Resources and Energy Employer Association

General Order

HAVING heard Mr C Fogliani of counsel on behalf of UnionsWA Incorporated, Mr R Andretich of counsel on behalf of the Hon. Minister for Industrial Relations, and there being no appearance on behalf of Chamber of Commerce and Industry of Western Australia (Inc) or the Australian Resources and Energy Employer Association, the Commission in Court Session, pursuant to the powers conferred on it by section 50 of the *Industrial Relations Act 1979* (WA) hereby makes a General Order in the terms set out in the attached Schedule.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

SCHEDULE

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 will prevail.

3. This General Order shall come into effect from the date it is issued and will operate in accordance with its terms unless it is otherwise varied or revoked.

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 *special public holiday* means any special day appointed by proclamation under section 7 of the *Public and Bank Holidays Act 1972* (WA) 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 special public holiday.

FULL BENCH—Proceedings for Enforcement of Act—

2023 WAIRC 00299

APPLICATION PURSUANT TO SECTION 84A OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2023 WAIRC 00299
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA
HEARD	:	TUESDAY, 11 APRIL 2023, WEDNESDAY, 12 APRIL 2023, WRITTEN SUBMISSIONS 14 APRIL 2023
DELIVERED	:	FRIDAY, 26 MAY 2023
FILE NO.	:	FBM 1 OF 2022
BETWEEN	:	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND JANET REAH Respondent
FILE NO.	:	FBM 2 OF 2022
BETWEEN	:	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH Respondent

Catchwords	:	Industrial Law (WA) - Applications pursuant to section 84A - Enforcement of orders of the Commission - Whether industrial action taken was in breach of Commission orders - Obligations of union and union officials under the Act - Characterisation of contraventions - Agreed penalty - Relevant principles applied - Declarations and orders issued
Legislation	:	<i>Health Services Act 2016</i> (WA) <i>Industrial Relations Act 1979</i> (WA) s 7; s 81CA(1); s 82(2) & (3); s 83; s 83E; s 83EA; s84A; s 84A(4)(a); s 84A(5)(a)(ii); s 84A(8) <i>Industrial Relations Legislation Amendment Act 2021</i> (WA)
Result	:	<i>Declarations and orders issued</i>
Representation:		
Counsel:		
Applicant	:	Ms M Saraceni of counsel and with her Mr S Pack of counsel
Respondent	:	Mr T Hammond SC of counsel and with him Ms B Burke of counsel
Solicitors:		
Applicant	:	Francis Burt Chambers
Respondent	:	Central Law Chambers

Case(s) referred to in reasons:

ACCC v Coles Supermarkets Australia Pty Ltd [2015] FCA 330
 ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640
 Attorney General v Times Newspapers Ltd [1974] AC 273
 Australasian Meat Industry Employees' Union and Others v Mudginberri Station Pty Ltd (1986) 161 CLR 98
 Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 113
 Australian Building and Construction Commissioner v McDermott (No 2) [2017] FCA 797
 Australian Building and Construction Commissioner v Pattinson and Another [2022] HCA 13; (2022) 399 ALR 599
 Australian Leisure and Hospitality Group v Director of Liquor Licensing [2012] WASC 463
 Australian Securities and Investments Commission v Chemeq [2006] FCA 936
 Barbaro v The Queen (2014) 253 CLR 58
 Callan v Smith [2021] WAIRC 00216; (2021) 101 WAIG 1155
 Construction, Forestry, Mining and Energy Union and Another v Director, Fair Work Building Industry Inspectorate and Another [2015] HCA 46; (2015) 258 CLR 482
 Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
 Department of Health v Australian Nursing Federation, Industrial Union of Workers Perth [2022] WAIRC 00792; (2022) 102 WAIG 157.
 Foster v Australian Competition and Consumer Commission [2014] FCA 240
 Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
 Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch) [2004] WAIRC 10828; (2004) 84 WAIG 694
 Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Director General, Department of Education and Training: [2010] WAIRC 00089; (2010) 90 WAIG 127
 Miller v Minister of Pensions [1947] 2 All ER 372
 Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth [2013] WAIRC 00089; (2013) 93 WAIG 274
 Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth [2013] WAIRC 00100; (2013) 93 WAIG 276
 Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72
 Ponzio v Caelli Constructions Pty Ltd [2007] FCAFC 65
 Royer v The State of Western Australia [2009] WASCA 139
 Secretary of State for Justice v Prison Officers Association [2019] EWHC 3553 (QB)
 Secretary of the Ministry of Health v NSW Nurses and Midwives Association [2022] NSWSC 1178
 SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 347 ALR 405
 The Registrar of the Western Australian Industrial Relations Commission v The State School Teachers Union of W.A. (Incorporated) [2008] WAIRC 00270; (2008) 88 WAIG 333
 The Registrar v CFMEU (1989) 69 WAIG 2317

The Registrar v LHMWU [2008] WAIRC 01393; (2008) 88 WAIG 1937
 Volkswagen Aktiengesellschaft v ACCC [2021] FCAFC 49
 Yardley v Betts (1979) 22 SASR 108

Reasons for Decision

KENNER CC:

Background facts¹

Negotiations for industrial agreement

- 1 In mid-July 2022 the Australian Nursing Federation, Industrial Union of Workers Perth started negotiations with the West Australian Department of Health for a replacement industrial agreement to apply to members of the ANF employed in public hospitals throughout the State. As part of its industrial campaign, the ANF conducted a general meeting of its members in mid-October 2022 to discuss the negotiations for a replacement industrial agreement. At that meeting, the members of the ANF present adopted a motion directing the relevant ANF officials to continue their negotiations with the employer and, significantly for the purposes of the present applications, authorised the union to engage in an escalating campaign of industrial action. That campaign of industrial action included the prospect of strike action to take place sometime between 24 and 30 November 2022.
- 2 Subsequently, in early November 2022 the Department of Health commenced proceeding in this Commission under s 44 of the *Industrial Relations Act 1979* (WA) for a compulsory conference. The purpose of the application was to seek the assistance of the Commission in negotiating a replacement industrial agreement. A number of compulsory conferences between the parties took place before the Senior Commissioner over the period of early to mid-November 2022. At a compulsory conference on 15 November 2022, the Department of Health made an offer to the ANF which included a wage increase of three percent. This offer was a conditional offer, and the condition was that the ANF cease its campaign of proposed rolling stoppages. Preparations by the ANF were well underway by that time to commence the rolling stoppages, which were to commence at public hospitals in the metropolitan area over a two-week period starting on 16 November 2022.
- 3 As a result of events at this compulsory conference, the ANF agreed ‘in principle’ to the Department’s offer, and that the proposed rolling stoppages would not take place. Members would vote on whether to accept the offer or not. At a meeting on 17 November 2022 of ANF members at Fiona Stanley Hospital, the ANF secretary, Ms Reah, addressed the meeting, and subsequently, the media. She said words to the effect that she regarded the offer as ‘divisive and inadequate’, and if the members voted against it, then the ANF campaign would resume, but not by way of rolling stoppages, but rather, a State-wide strike.
- 4 Later, on the same day, Ms Reah communicated with ANF members by email. Her email contained statements to the effect that the employer’s offer was ‘not good enough’, ‘divisive’ and ‘unfair’; if the ANF members thought that the employer offer was not good enough, they should vote ‘no’ in an upcoming poll in relation to the offer; and, if the majority voted ‘no’, the ‘next step will be a one-day strike in all WA Public Health workplaces across the State within a week of the vote closing’.
- 5 The next day, on 18 November 2022, an online poll was opened by the ANF to enable members to vote in relation to the Department’s offer. It was to remain open until 22 November 2022.

Order of 18 November 2022

- 6 A further compulsory conference was convened by the Senior Commissioner on 18 November 2022 between representatives of the ANF and the Department of Health. The compulsory conference was convened, in particular, against the background of the meeting at Fiona Stanley Hospital where Ms Reah addressed the members present. As a result of the compulsory conference, the Senior Commissioner made orders that the conduct of the ballot of ANF members to vote on the employer’s offer be deferred and that there not be any public statements or commentary, by the ANF about voting for or against the offer, or a claim for a better offer: *Department of Health v Australian Nursing Federation, Industrial Union of Workers Perth* [2022] WAIRC 00792.
- 7 The reasons for the Senior Commissioner’s order were set out in lengthy recitals. They referred to the background to the negotiations between the employer and the ANF and what appeared, contrary to the agreement in principle reached on 15 November 2022, to be a deterioration in industrial relations between the parties, including proposed industrial action. The Senior Commissioner’s concerns, as expressed in the recitals to the orders, can be summarised as follows:
 - (a) There was internal division within the leadership of the ANF in relation to the offer.
 - (b) Public statements being made by officers of the ANF were likely to mislead members.
 - (c) If the ballot to be conducted of members concerning the offer was to proceed as planned, then this would not enable the members of the ANF to take part in a fully informed and considered way; and a deterioration in industrial relations as a result of these events was likely.
- 8 For the purposes of these reasons, and for ease of exposition, I will adopt the descriptor used by the Registrar in her particulars of claim in relation to each of the Senior Commissioner’s orders, which will appear in brackets after each order. The orders made were as follows:

ORDERS:

¹ This summary of the background facts is adapted from the Statement of Agreed Facts filed by the parties in these proceedings on 24 March 2023.

1. THAT the ANF, by its officers, employees and members, must defer the conduct of any ballot, poll or survey of members to gauge the level of support for acceptance of the Offer until 9:00 a.m. on 28 November 2022;

(Defer Ballot Order)

2. THAT from the time of issue of this Order and the conclusion of any ballot conducted in compliance with this Order, the ANF, by its officers and employees, are not to make any public statements, commentary or media statements, whether in writing or verbally, which:
 - a. portray the ANF, its officers or employees as maintaining a claim for a replacement agreement with terms that are better than the Offer;
 - b. direct or encourage in any way its members to vote for or against acceptance of the Offer.

(No Further Claim Order)

3. That the parties have liberty to apply at short notice to vary, extend or amend these orders.

RECOMMENDS:

4. THAT the ANF disable its Facebook page comments until the conclusion of any ballot conducted in compliance with the above Orders;
 5. THAT the parties not engage in any further bargaining until 11:59 pm on 8 January 2023.
- 9 After the orders were made, on 21 November 2022 the ANF lodged an appeal to the Full Bench against the orders and additionally, an application to stay them was also made. The stay application was listed for hearing on the afternoon of 25 November 2022, but shortly before the hearing was due to commence, the ANF sought and was granted leave to discontinue the application: 2022 WAIRC 00806. On 6 December 2022, the appeal to the Full Bench was discontinued: 2022 WAIRC 00837.

Order of 23 November 2022

- 10 Between 18 November 2022, and 23 November 2022, and contrary to the Defer Ballot Order, the ballot remained open up until its closure at 3pm on 22 November 2022. Furthermore, over the same period, and contrary to the No Further Claim Order, Ms Reah made continuous public statements in the media and through the ANF social media to the effect that the ANF would ignore the Senior Commissioner's order and would continue to press for a better offer. In particular, at a meeting of the ANF Council on 18 November 2022, the Council resolved unanimously to 'support the decision of the Industrial team to ignore the orders issued (C40/2022) on the 18/11/2022'.
- 11 In her media engagements, Ms Reah also announced that, in the event that the Department's offer was not upheld in the ballot, the ANF would be conducting a State-wide strike at all public hospitals in Western Australia. In particular, in the mid-afternoon on 22 November 2022, Ms Reah addressed ANF members and the media at Fiona Stanley Hospital. At the meeting she announced that the majority of those voting in the ballot had rejected the offer and that there would be a one-day State-wide strike on 25 November 2022. Members would take part in a rally at Parliament House and then march to the offices of the Minister for Health.
- 12 From that time, and up until a further compulsory conference held before the Senior Commissioner on 23 November, the ANF continued to make preparations for a State-wide strike on Friday 25 November, including preparation of a 'Strike Guide'. The ANF also offered to pay a 'strike pay subsidy' of \$150 to those members of the union whose pay was docked for taking part in the industrial action. In addition, the ANF published a list to its members of bus services to transport them from their workplace to the Parliament House rally and contained information of the departure locations.
- 13 At the resumed compulsory conference on 23 November 2022 before the Senior Commissioner, the Department of Health sought interim orders under s 44(6) of the *Act* to stop the industrial action that was planned for 25 November 2022 from occurring. In the recitals to the interim order that the Senior Commissioner made, she set out the relevant events that had taken place in the days leading up to the compulsory conference. In particular, the Senior Commissioner referred to the ANF announcement on 22 November 2022 of a coordinated State-wide strike to take place on 25 November 2022. She referred to the ANF claim for a five percent wage increase across the board and that the planned industrial action was being taken in support of it. The Senior Commissioner referred to the short period of notice given to the Department of Health in relation to the planned industrial action and the evidence adduced by the Department, as to the impact of such action on the health system in the State and the extreme risk posed by it.
- 14 The Senior Commissioner was not persuaded that the risks of the planned industrial action could be adequately managed or mitigated. The Senior Commissioner concluded that on the material before her, 'there is a serious and significant risk that the planned industrial action will compromise public health and safety, and the health and safety of employees as described in the Department of Health's evidence. The Department of Health has a statutory duty under the *Health Services Act 2016* (WA) to manage the State's health system, to protect the health of West Australians and to provide access to safe, high quality health services. The West Australian community has a clear interest, if not a right, to be able to access safe, high quality health services': *Department of Health v Australian Nursing Federation, Industrial Union of Workers Perth* [2022] WAIRC 00798.
- 15 Being satisfied as to these matters, the Senior Commissioner then made orders under s 44(6) of the *Act*. As with the 18 November 2022 orders, I will adopt the descriptors used by the Registrar. The orders were in the following terms:

ORDERS:

1. THAT the respondent, by its officers, employees and members, must refrain from taking and cease the **specified industrial action**.

Specified industrial action means industrial action on and from 25 November 2022 comprising work stoppages, being absent from duty, walking off the job or closing hospital beds.

But excludes:

- (a) attendance at a rally organised by the ANF where the attendance is outside rostered work hours.
- (b) absences due to genuine illness or injury, or for carer's leave or on approved leave; and
- (c) work stoppages by an employee based on the employee's reasonable concern about an imminent risk to their health or safety; where the employee did not unreasonably fail to comply with a direction of the **Employer** to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Employer means any employer party to the *WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2020*.

(No Strike Order)

2. THAT by no later than 10.00 am on 24 November 2022, the respondent is to inform its members employed by an **Employer** of the terms of this Order and direct its members to comply with this Order* by:
 - (a) email transmission to such members;
 - (b) publication of the Order on the respondent's website;
 - (c) publication of the Order on the respondent's Facebook page; and
 - (d) placing a copy of this Order on the notice boards usually used by any **Employer** for the purposes of communicating with the Employees.

*Note that the respondent may be liable for a failure by its members to comply with this Order in accordance with the principles in *Ducasse v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1995) 76 WAIG 330 at 333.

(Notice Order)

3. THAT the respondent, by its officers, employees, agents and members are not to direct, encourage, in any way, employees working for any **Employer** to engage in any **specified industrial action**, including by paying or offering to pay employees who are absent from duty without authorisation or walk off the job.

(No Encouragement Order)

4. THAT the respondent by its officers, employees, agents and members are not to engage in public commentary or media statements which incite, promote, encourage, or notify of any **specified industrial action**.

(No Public Comment Order)

5. THAT, subject to compliance with these Orders, the parties attend a reconvened compulsory conference on Friday, 2 December 2022 at 10.30 am.
6. This Order remains in force until 23 January 2023 or until varied or revoked by the Commission.
7. The parties have liberty to apply to vary, revoke or extend this Order.

- 16 Very shortly after the compulsory conference, outside the Commission premises, Ms Reah addressed the media. Her address included statements to the effect that:

Nurses do not want to strike, but they want to be paid fairly, they want reasonable workloads, that's all they want, but this government keeps annoying the nurses and escalating things further.

- 17 In the same address, Ms Reah stated:

We've had enough, we are rallying Friday, we are striking, bring it on.

- 18 Later that same day, Ms Reah took part in an interview on the ABC Radio Perth where, during the course of the interview, she said:

We will stop the strike if the government comes up with the 5 % across the board, plus the \$3000 cost of living payment, plus the ratios. Otherwise it's a strike, nothing less will do now.

- 19 That same day, in response to the Senior Commissioner's order of 23 November 2022, and before the ink on the order was dry, Ms Reah, in her capacity as Secretary of the ANF, wrote to the Senior Commissioner. The letter, at Annexure L to the Form 1 General Application in application FBM 2 of 2022 was in the following terms:

Dear Commissioner

Please see my response to your orders.

1. The ANF will be continuing with the strike on 25th November, and we will also be going ahead with the rally at Parliament House.

2. The ANF is still providing transport to our members to the rally using a private bus company.
3. The ANF is still providing a strike pay subsidy to our members.
4. The ANF is still encouraging members to strike tomorrow, and we are encouraging our members to also attend the rally.
5. The ANF members are taking all reasonable steps to ensure the safety of patients during the hours of the strike. However, we note this government has failed in its duty to provide a safe environment for both patients and staff over the last two years.
6. I will continue to speak with our members, the media and the community about the problem facing our members.
7. I will not be doing anything to assist the government or the WA Industrial Commission to shut down the strike that is planned for the 25th November.
8. Please be advised there is currently a vote being conducted of the entire ANF Council, with regard to whether they support the strike action on 25th November, and that vote is scheduled to conclude by 6pm tonight.

Your sincerely

Janet Reah

State Secretary

Australian Nursing Federation IUWP

- 20 This is a staggering piece of correspondence. The letter is written in a tone of belligerent noncompliance. It is dripping with contempt. I have never seen a letter like it addressed to a Member of this Commission.
- 21 Later that evening on 23 November 2022, Ms Reah sent an email to ANF members, attaching a copy of a document entitled 'ANF Strike Guide 2022' which contained details regarding the strike and the rally and that they could get a strike pay subsidy of \$150.
- 22 The next day, on 24 November 2022 in the morning, an urgent vote of the ANF Council by email was taken in relation to the Senior Commissioner's orders and the planned strike. The Council supported the strike by members of the ANF. By 10am that day, the ANF had failed to comply with the Senior Commissioner's Notice Order, by the time required for its compliance.
- 23 During the day of 24 November 2022, Ms Reah communicated with ANF members and held various press and radio interviews confirming that the industrial action would be proceeding on 25 November; the ANF would defy the orders made by the Commission not to strike; a \$150 strike subsidy would be available to all ANF members who have their pay deducted for taking part in the strike; and arrangements were put in place for industrial action to take place in the regions. The communications from Ms Reah and the ANF to the membership also referred to bus transport having been arranged and that 'the ANF will be assisting the Horizons West with any legal action that is brought against them'.
- 24 Around midday on 24 November 2022, the Associate to the Senior Commissioner summonsed Ms Reah and others to attend a compulsory conference before the Commission at 9.15 am on 25 November 2022. In response to the summons, late on the evening of 24 November, in an email to members of the ANF, headed 'strike is still on and ANF buses are still running' amongst a number of things, Ms Reah said:

The WA Industrial Commission is still trying to get me into a hearing prior to the rally – but I will not be available as I have an important appointment with ANF members at 11 am.

- 25 On the morning of 25 November 2022, Ms Reah took part in an early morning radio interview where she publicly announced that she would not respond to the summons to attend the conference before the Senior Commissioner and added that:

I'm sorry to say to the West Australian Industrial Commission that my members come first.

- 26 Regrettably, that statement reflects a profound misunderstanding of the obligations of the ANF, as a registered organisation, and its Secretary, as the principal officer, under the *Act*.
- 27 Ms Reah failed to attend the conference before the Senior Commissioner as summonsed.

State-wide strike on 25 November 2022

- 28 On 25 November 2022, and in breach of the No Strike Order, at least 1,758 members of the ANF employed in the public health system, took industrial action by walking off the job or failing to report for duty. The industrial action included various rallies throughout the State including at Parliament House and Dumas House in Perth, and in Albany, Broome, Bunbury, Geraldton, and Karratha. Bus services provided by Horizons West, arranged and paid for by the ANF, transported members to the rally at Parliament House. Some 1,470 members of the ANF registered for this transport.
- 29 In preparation for the various rallies, the ANF provided various paraphernalia to members who took part in the industrial action. Speeches were made to those gathered at the rallies by Ms Reah and others on behalf of the ANF.

The aftermath

- 30 On 27, 28 and 29 November 2022, Ms Reah and the ANF engaged in various communications to members and with the media, referring to their claim for a five percent wage increase for ANF members, and reimbursing members who had their wages deducted for the industrial action, in the sum of \$150.
- 31 On 28 November 2022, the Senior Commissioner issued a direction to the Registrar to commence proceedings before the Full Bench for the enforcement of the Senior Commissioner's orders of 18 and 23 November 2022 and the summons issued to Ms Reah on 24 November to attend the compulsory conference on 25 November 2022. Additionally, the Senior Commissioner

consulted with the ANF, in accordance with s 73(3)(b) of the *Act*, as to why she should not direct the Registrar to issue to the ANF a summons to appear before the Commission in Court Session on a date to be specified, to show cause why its registration should not be cancelled or suspended, in relation to its conduct in failing to comply with her orders of 18 and 23 November 2022.

- 32 On 3 December 2022, at an urgent meeting of the Council of the ANF, amongst other things, it was resolved that:
- (a) the ANFIUWP Council will pay any fines incurred as a consequence of any alleged breach of orders on behalf of (a) the ANFIUWP and (b) the Secretary (c) any employees and (d) any members; and
 - (b) that, consistent with previous resolutions of Council, the ANF provides a reimbursement of up to \$150 for those who have had their wages docked for participating in the strike of 25 November 2022 and further, that applications for those who were rostered to work a casual shift on that day be referred to the ANF Executive for decision.
- 33 On 7 December 2022, Ms Reah communicated with members on the ANF Facebook page and, when referring to future negotiations for a replacement industrial agreement, she said:
- We will not be defying any future orders of the WAIRC not to strike, although we will certainly appeal any such orders – to give our members that option if possible.
- 34 On 17 February 2023, the Executive of the ANF passed various resolutions including authorising the payment of a \$150 strike pay subsidy to 10 members whose casual shifts were cancelled because of their intention to attend the strike and a further \$60, for a member of the ANF for a parking ticket incurred on the day of the strike. Further, as at 27 February 2023, the \$150 strike subsidy payment had been paid to some 930 ANF members for the industrial action on 25 November 2022, in the total sum of \$139,500.
- 35 It is common ground that during the course of the events outlined above, widespread media coverage took place where the ANF publicly and repeatedly communicated its defiance of the Senior Commissioner's orders of 18 and 23 November 2022, and criticisms of the Commission for issuing them.

Applications to the Full Bench

The applications and the relief sought

- 36 The Registrar commenced these proceedings under s 84A of the *Act* in response to the failure by Ms Reah to respond to the summons to attend the compulsory conference on 25 November 2022, and the ANF's failure to comply with the Senior Commissioner's orders. The particulars of claim in both applications are largely reflected in the SOAF and by their responses, the conduct is largely admitted by both Ms Reah and the ANF. The relief sought in the applications by the Registrar is set out in the particulars of claim and is as follows:

RELIEF SOUGHT

74. As against the ANF, the Applicant seeks that the Full Bench:
- (a) declares that it is proved that the ANF contravened, or failed to comply with the:
 - (i) 18 November 2022 Orders; and
 - (ii) 23 November 2022 Orders;
 - (b) imposes such penalty as it thinks fit in respect of the at least 2,736 contraventions according to s 84A(5)(a)(ii) of the IR Act;
 - (c) directs the ANF pay the penalties imposed within 28 days of the date of the order imposing the penalty;
 - (d) directs that such penalty imposed be paid to the State of Western Australia; and
 - (e) directs that the ANF pay the Applicant's allowable costs of this application under s 84A(5) and (6) of the IR Act.
75. As against Ms Reah, the Applicant seeks that the Full Bench:
- (a) declare that it is proved that Ms Reah failed to comply with the s 44(3) summons issued to her;
 - (b) imposes such penalty as it thinks fit in respect of Contravention A according to s 84A(5)(a)(ii) of the IR Act;
 - (c) directs that such penalty imposed be paid to the State of Western Australia within 28 days of the date of the order imposing the penalty; and
 - (d) directs that Ms Reah personally pay the penalty personally and not seek or accept any reimbursement, indemnity or similar from the ANF or any other person.
- 37 Attached to the applicant's particulars of claim was 'Schedule 1 - Summary of contraventions'. The Schedule set out in table form, a summary of contraventions over the various dates on which the contraventions were alleged to have taken place. As a matter of broad approach, and as will be dealt with later in these reasons, the Registrar contended that each act of contravening the Senior Commissioner's orders by the ANF through its offices, employees and members constituted a separate contravention, with each contravention attracting the maximum penalty under s 84A(5)(a)(ii) of the *Act*. For example, in relation to the industrial action that took place on 25 November 2022, set out at Table C of the Schedule, it is contended by the Registrar that there were 1,808 contraventions of the Senior Commissioner's orders, reflecting a contravention by each member of the ANF that took industrial action in breach of the order.

38 Similarly, in relation to the contraventions concerning the provision of bus services to ANF members, the Registrar alleged that each of the 808 ANF members who registered for bus services on 25 November 2022, constituted a separate breach of the 23 November 2022 order. Likewise, in Table E, 939 contraventions are particularised, reflecting ANF members who received a 'strike pay subsidy' of \$150, between 25 November 2022 and 27 March 2023. During the course of the proceedings, the Registrar updated the Schedule and a copy of the 'Updated Schedule 1 – Summary of alleged contraventions' is Annexure A to these reasons.

The course of the proceedings

- 39 The applications were listed for hearing before the Full Bench on 11 and 12 April 2023, with the Full Bench having earlier directed that the proceedings be heard together. Both the Registrar and Ms Reah and the ANF filed detailed written outlines of submissions in support of their respective contentions.
- 40 As to factual issues, despite the very extensive SOAF, by which almost all of the allegations advanced by the Registrar were admitted, there remained three outstanding issues which the parties agreed required factual findings by the Full Bench. Those factual issues remaining in contention, as set out at par 58 of the applicant's outline of submissions, are:
- (a) With respect to alleged contraventions C-1 to C-1,808, how many employees engaged in Specified Industrial Action on 25 November 2022, and is the conduct of all of those employees attributable to the ANF?
 - (b) With respect to contraventions E-14(1 to 808), how many employees who took part in Specified Industrial Action on 25 November 2022 did the ANF agree to provide and/or actually provide with bus services on the day?
 - (c) With respect to contraventions E-15(1 to 938), to how many Members has the ANF paid a strike pay subsidy in respect of the 25 November 2022 industrial action?
- 41 Aside from these narrow factual issues remaining contentious, a threshold issue arises on the cases put by both the Registrar and Ms Reah and the ANF, that being one of characterisation. That characterisation issue is whether, as maintained by the Registrar, and as set out in Annexure A to these reasons, each act of noncompliance with the Senior Commissioner's orders by the ANF, through its officers, employees and members, constituted a separate contravention which can attract a separate penalty. Or, as advanced by Ms Reah and the ANF, there were only single contraventions of the two orders made by the Senior Commissioner. Further, in reliance upon the approach taken in civil penalty cases generally in various Australian jurisdictions, Ms Reah and the ANF contended it was better to look more broadly at the course of conduct of the ANF rather than the approach of the Registrar, which was described as being somewhat mathematical in its design. There were also further challenges originally advanced by Ms Reah and the ANF to the validity of some the Senior Commissioner's orders, however, for reasons which I will come to shortly, it is no longer necessary for me to consider those questions.
- 42 On the first day of the hearing, counsel for the Registrar opened her case and the Full Bench dealt with the issue of tender of a number of documents. These included an agreed bundle of material and the Applicant's Bundle of Non-Agreed Documents, including an electronic file of media reports. Various other documents were tendered, which documents will remain confidential, relating to the issue of registrations for bus transport to the Parliament House rally and the payment of the strike pay subsidy, containing lists of names of members of the ANF and detailed payroll records from the Department of Health, and particularising the names of those employees who sought and obtained unpaid leave to participate in the industrial action on 25 November 2022.
- 43 In traversing the relevant factual background, as summarised at the outset of these reasons, counsel for the Registrar emphasised that the conduct of the ANF, in defiance of the Senior Commissioner's orders, reflected a deliberate industrial strategy to not comply with the orders of the Commission and to wilfully defy the Commission's authority.
- 44 In particular, counsel referred to the letter from Ms Reah to the Senior Commissioner dated 24 November 2022, set out earlier in these reasons. Counsel referred to this letter as an extraordinary display of open defiance of the authority of the Commission, which defiance was compounded by almost immediate and repeated media statements by Ms Reah on behalf of the ANF, to the same effect. Counsel described, in my view accurately, that the conduct of Ms Reah and the ANF could only be described as contumacious in nature and reflected a campaign of open defiance of the Commission throughout the dispute.
- 45 Without needing to focus on all of the submissions she made, the Registrar sought penalties for each of the 3,590 cumulative contraventions that she contended were established on the evidence, as set out in Annexure A. Counsel referred to the increase in the maximum penalty in s 84A(5)(a)(ii), from \$2,000 to \$10,000 resulting from the *Industrial Relations Legislation Amendment Act 2021* (WA), which came into effect on 20 June 2022. It was submitted that the increase of 500% to the maximum penalty reflects the Parliament's intention that contraventions of orders of the Commission should be viewed very seriously.
- 46 Evidence was then led from Mr Vincent, the Acting Director, NurseWest and the Director Assurance and Knowledge Management, Health Support Services for the Department of Health. Evidence was also led from Dr Codreanu the Director of Disaster Preparedness and Management Directorate for the Department of Health. Finally, evidence was called from Mr Balla, who was, at November 2022, the Managing Director of the bus services company Horizons West. Mr Balla was summonsed to appear and produce documents in relation to the ordering of buses by the ANF to transport members to the Parliament House rally on 25 November 2022. I will return to the evidence given by these witnesses later in these reasons, when considering the factual issues remaining in contention.
- 47 As to the Applicant's Bundle of Non-Agreed Documents, the Full Bench admitted the material provisionally over the initial objection of Ms Reah and the ANF, and informed the parties that the material would be considered as a matter of weight. The Applicant's Bundle of Non-Agreed Documents comprised some 265 pages of material, including ANF communications to members; communications from Mr Olson of the ANF to the media; numerous media articles from print and electronic media

outlets, in relation to the State-wide strike; social media photos and videos in relation to the State-wide strike; numerous electronic files comprising radio shows and interviews and audio and visual media reports in relation to the dispute.

- 48 To the extent that the material includes direct communications by the ANF with its members, including notices of meetings of the ANF Council to discuss resolutions in connection with the dispute, that material is directly relevant to the issues in dispute. Likewise, radio, television and social media articles containing direct statements by Ms Reah on behalf of the ANF as to the actions of the ANF, is similarly relevant. However, the numerous press reports and articles written by journalists on behalf of print and electronic media outlets concerning the industrial dispute between the ANF and the Department of Health are of limited value.
- 49 As senior counsel for Ms Reah and the ANF pointed out, and counsel for the Registrar acknowledged, such material cannot be tested, and its prejudicial effect has the potential to outweigh any probative value. The content of this material reflects largely the interpretation of the events as they unfolded by the writer of the article, and constitute opinions which are not of assistance to the Full Bench in determining the issues in dispute, and will be given little, if any weight.
- 50 The other material however, which is referred to at various points in the SOAF, in terms of the conduct and behaviour of the ANF and Ms Reah, will be given weight by the Full Bench. It is part of 'bringing to life' the various allegations made by the Registrar, and the tone and context in which various statements made by Ms Reah on behalf of the ANF, are to be regarded.
- 51 The Registrar's case then closed.

The parties confer

- 52 On the opening of the case for Ms Reah and the ANF, senior counsel informed the Full Bench that they did not intend to lead any evidence. Senior counsel also informed the Full Bench that as a result of discussions with counsel for the Registrar, the remainder of the hearing day could be profitably used by the parties conferring amongst themselves about the future conduct of the matter. The Full Bench agreed with this course and the matters were then adjourned until Wednesday, 12 April.

An agreed position emerges - but some difference in approach

- 53 At the commencement of the proceedings on Wednesday, 12 April, counsel for the Registrar informed the Full Bench that the conferral of the parties had led to an agreed position in relation to a proposed penalty for consideration by the Full Bench. The proposed penalty against the ANF was the amount of \$350,000. A table prepared by the Registrar headed 'Applicant's Breakdown of Agreed Penalty for Contraventions by ANF' was provided to the Full Bench. This represented, as I understood it, the Registrar's allocation of proposed penalties for each contravention within the various categories of contravention set out in the tables in Schedule 1, attached as Annexure A to these reasons. For ease of reference, the table is set out as follows:

**Applicant's Breakdown of Agreed Penalty
for Contraventions by ANF**

Contravention #	Summary	Number of contraventions	Maximum penalty	Proposed penalty
A-1	Breach of Defer Ballot Order by proceeding with ballot	1	\$10,000	\$8,000 (\$8,000 per contravention)
B-1 to B-12	Breach of No Further Claim Order	12	\$120,000	\$20,000 (\$1,666.67 per contravention)
C-1 to C-1,808	Breach of No Strike Order	1,808	\$18,080,000	\$200,000 (\$110.62 per contravention)
D-1 to D-4	Breach of Notice Order	4	\$40,000	\$10,000 (\$2,500 per contravention)
E-1 to E-12	Breach of No Encouragement Order through communications to ANF Members	12	\$120,000	\$25,000 (\$2,083.33 per contravention)
E-14	Breach of No Encouragement Order through provision of bus services	808	\$8,080,000	\$15,000 (\$18.56 per contravention)

E-15	Breach of No Encouragement Order through payment of strike pay subsidies	939	\$9,390,000	\$50,000 (\$53.25 per contravention)
E-16	Breach of No Encouragement Order through distribution of paraphernalia	1	\$10,000	\$2,000 (\$2,000 per contravention)
F-1 to F-5	Breach of No Public Commentary Order	5	\$50,000	\$20,000 (\$4,000 per contravention)

TOTAL: \$350,000

Note: This range has been prepared having regard to the totality of the overall penalties, and therefore a reduction to one penalty may result in an increase to other penalties.

- 54 Counsel for the Registrar submitted that the table, and the agreed penalty amount, should be considered along with the course of conduct principle and the totality principle, for the purposes of fixing a final penalty sum.
- 55 Senior counsel for Ms Reah and the ANF confirmed the agreed position in relation to the \$350,000 total penalty against the ANF in application FBM 2 of 2022, and the maximum penalty of \$10,000 for Ms Reah in relation to application FBM 1 of 2022. Senior counsel then made some brief submissions in relation to the approach that ought to be taken to apportionment, having regard to the course of conduct and totality principles.
- 56 Senior counsel contended that a better way of approaching the matter would be to apportion the total sum agreed in accordance with Schedule 1, which contains 39 categories of contraventions. Applying this methodology, and allocating the total agreed sum of \$350,000 amongst them, leads to a dollar figure contravention of \$8,974.35 per category of contravention. This sum is close to the maximum \$10,000 penalty prescribed by s 84A(5)(a)(ii) of the *Act*. The Full Bench requested the parties file further brief written submission as to the approach to be taken by the Full Bench to the agreed penalty position, given it raised somewhat novel issues for consideration. I will deal with these issues later in these reasons.

Initial undertakings

- 57 The Full Bench raised with senior counsel for Ms Reah and the ANF the issue of an undertaking as to future conduct. In particular, counsel's attention was drawn to an article in the West Australia newspaper of 11 April 2023, in which Ms Reah was reported as not denying the contravention of the Senior Commissioner's orders, but adding that she had no regrets over organising the strike action. The Full Bench invited senior counsel to obtain instructions from Ms Reah and the ANF in relation to an undertaking about their future conduct.
- 58 Following a brief adjournment, senior counsel announced he had obtained instructions from his clients and the undertaking in essence put to the Full Bench was that for the duration of the dispute in application C40 of 2022, being the matter before the Senior Commissioner, all further orders of the Commission would be complied with in the usual form and manner. Senior counsel explained the context for such an undertaking which, with respect, was somewhat underwhelming to the Full Bench.
- 59 The Registrar in response considered that the undertaking proffered fell far short of what could be regarded by the Full Bench as a mitigating circumstance under s 84A(4)(a) of the *Act*. The Registrar submitted that additionally, given the conduct and behaviour of Ms Reah and the ANF, there was no contrition or remorse expressed as a part of the undertaking and that it ought to be given little weight.
- 60 The Full Bench provided senior counsel for Ms Reah and the ANF a further opportunity to proffer additional undertakings and commitments as to future conduct, all of which was requested by 4 pm Friday, 21 April 2023.

Further undertakings provided to the Full Bench

- 61 The day after the conclusion of the hearing, on 13 April 2023, both Ms Reah and the ANF filed documents entitled 'Undertaking As To Future Conduct'. Given the importance attached by the Full Bench to undertakings in the context of the allegations advanced by the Registrar, and the matters agreed as set out in the SOAF, I reproduce the undertakings in full as follows. Ms Reah's undertaking states:

This undertaking is given on behalf of Janet Reah, Secretary, Australian Nursing Federation, Industrial Union of Workers Perth ('ANFIUWP'), on 13 April 2023, in relation to her personal future conduct with respect to industrial matters.

Ms Reah understands that the facts giving rise to the proceedings in FBM 1 and FBM 2 are of the utmost gravity for her personally and also for the ANFIUWP, of which she is the principal officer.

These proceedings have given her a greater appreciation of the position of privilege held by organisations registered under the Industrial Relations Act 1979 (WA) ('IR Act') and the benefits flowing from that privilege to members of the ANFIUWP.

Further she appreciates the provisions of s 61 of the IR Act that she as a member of the ANFIUWP and the ANFIUWP as a registered organisation are 'subject to the jurisdiction of the Court and the Commission and this Act.'

Ms Reah has reflected on the facts giving rise to the applications in FBM 1 and FBM 2 and wishes now to reassure the Full Bench that her future conduct in relation to matters within the jurisdiction of the Western Australian Industrial Relations Commission ('WAIRC') will be unqualifiedly according to the provisions of the IR Act.

Further, in future Ms Reah would like to reassure the Full Bench that she will comply with all orders of the WAIRC and will, if it is considered necessary or appropriate, exercise the appeal options available under the IR Act.

62 The undertaking from the ANF is as follows:

This undertaking is given on behalf of the Australian Nursing Federation, Industrial Union of Workers Perth ('ANFIUWP'), on 13 April 2023, in relation to its' future conduct with respect to industrial matters.

The ANFIUWP understands that the facts giving rise to the proceedings in FBM 1 and FBM 2 are of the utmost gravity for the ANFIUWP.

These proceedings have given the ANFIUWP a greater appreciation of the position of privilege held by organisations registered under the Industrial Relations Act 1979 (WA) ('IR Act') and the benefits flowing from that privilege to members of the ANFIUWP. Further, the ANFIUWP appreciates the provisions of s 61 of the IR Act that the ANFIUWP as a registered organisation is 'subject to the jurisdiction of the Court and the Commission and this Act'.

The ANFIUWP has reflected on the facts giving rise to the applications in FBM 1 and FBM 2 and wishes now to reassure the Full Bench that its' future conduct in relation to matters within the jurisdiction of the Western Australian Industrial Relations Commission ('WAIRC') will be unqualifiedly according to the provisions of the IR Act.

Further, in future the ANFIUWP would like to reassure the Full Bench that it will comply with all orders of the WAIRC and will, if it is considered necessary or appropriate, exercise the appeal options available under the IR Act.

This undertaking is given by Ms Janet Reah, Secretary and principal officer of the ANFIUWP as the elected Secretary on behalf of the Council and membership of the ANFIUWP.

63 I regard these undertakings as significant for the purposes of s 84A(4)(a) and in the consideration of the agreed penalty, in the context of specific and general deterrence. I turn now to consider s 84A of the *Act*.

Approach to section 84A of the Act

64 Section 84A is in Part III – Enforcement of Act, awards, industrial agreements and orders. This part of the *Act* deals exclusively with enforcement and plays no part in the machinery of dispute resolution by the Commission under the *Act*. Division I establishes the Industrial Magistrates Court which exercises exclusive general and prosecution jurisdiction for the enforcement of a range of industrial instruments and legislation and for the prosecution of offences under the *Act*. Within its general jurisdiction, under s 81CA(1), the Court also exercises a civil penalty jurisdiction for contraventions of relevant legislation involving a civil penalty provision, which jurisdiction is prescribed by s 83E and for serious contraventions, s 83EA of the *Act*, which is set out in Division II.

65 Also, in Division II in s 82, is the jurisdiction of the Full Bench to hear and determine applications made under s 84A, which jurisdiction is exclusive to the Full Bench by s 82(2). The exclusive jurisdiction of the Full Bench as to enforcement of the *Act*, or a direction, order or declaration made or given under ss 32, 44(6) or 66, does not extend to a civil penalty provision or an offence provision: s 82(3). As noted earlier in these reasons, the increase in the maximum penalty in s 84A(5)(ii) from \$2,000 to \$10,000, came into effect from June 2022.

66 Section 84A of the *Act* relevantly provides as follows:

84A. Certain contraventions of Act, enforcement of before Full Bench

(1) Subject to this section, if a person contravenes or fails to comply with —

(a) any provision of this Act (other than section 42B(1), 44(3) or 74) or an order or direction made or given under section 66 —

(i) the Minister; or

(ii) the Registrar or a deputy registrar; or

(iii) an industrial inspector; or

(iv) any organisation, association or employer with a sufficient interest in the matter;

or

(b) section 44(3) or a direction, order or declaration given or made under section 32 or 44, the Registrar or a deputy registrar at the direction of the Commission,

may make application in the prescribed manner to the Full Bench for the enforcement of that provision, order, direction, declaration or section.

[(2) *deleted*]

(3) Subsection (1) does not apply to a contravention of or a failure to comply with —

(a) a civil penalty provision; or

(b) a provision of this Act if the contravention or failure constitutes an offence against this Act.

(4) In dealing with an application under subsection (1) the Full Bench —

- (a) must have regard to the seriousness of the contravention or failure to comply, any undertakings that may be given as to future conduct, and any mitigating circumstances; and
 - (b) before proceeding to a hearing of the application, must invite the parties to the application to confer with it, unless in the opinion of the Full Bench such a conference would be unavailing, with a view to an amicable resolution of the matter to which the application relates.
- (5) On the hearing of an application under subsection (1) the Full Bench may —
- (a) if the contravention or failure to comply is proved —
 - (i) accept any undertaking given; or
 - (ii) by order, issue a caution or impose such penalty as it considers just but not exceeding \$10 000; or
 - (iii) direct the Registrar or a deputy registrar to issue a summons under section 73(1);
 - or
 - (b) by order, dismiss the application,
- and subject to subsection (6), in any case with or without costs, but in no case can any costs be given against the Minister, the Registrar, a deputy registrar, or an industrial inspector.
- (6) In proceedings under this section costs cannot be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.
- (7) Where the Full Bench, by an order made under this section, imposes a penalty or costs it must state in the order the name of the person liable to pay the penalty or costs and the name of the person to whom the penalty or costs are payable.
- (8) The standard of proof to be applied by the Full Bench in proceedings under this section is the standard observed in civil proceedings.

67 The terms of s 84A of the *Act* were considered in *The Registrar of the Western Australian Industrial Relations Commission v The State School Teachers Union of W.A. (Incorporated)* [2008] WAIRC 00270; (2008) 88 WAIG 333. This case involved an application for the enforcement of an order of the Commission made under s 44 of the *Act* by the Registrar. Industrial action had been taken on 28 February 2008 by the SSTU, in the form of a stop work meeting of schoolteachers employed in public schools throughout the State, in connection with industrial agreement negotiations. On 25 February 2008, Harrison C issued orders on the application of the employer, the Department of Education and Training. The orders made were in the usual terms that the proposed industrial action not take place; that there be no further industrial action in the form of stop work meetings concerning negotiation for a new industrial agreement; and that the union take all reasonable steps to inform its members as to the terms of the Commission's orders. The orders also required the parties to confer with a view to the resolution of the issues in dispute, on 29 February 2008, with further compulsory conference proceedings to be held before the Commission on 29 February 2008.

68 It was common ground in that matter, which was the subject of a short, 'Agreed Matters' document, that the SSTU did contravene the Commission's order, in that the stop work meeting did take place and furthermore, the union did not take reasonable steps to immediately inform its members of the need to comply with the order. As a part of the Agreed Matters, the SSTU gave an undertaking to, in future, comply with orders of the Commission. The undertaking was the subject of a joint submission by the parties to the proceedings, that its acceptance would be an appropriate disposition of the matter before the Full Bench, for the purposes of s 84A(5)(a)(i) of the *Act*.

69 Importantly, in those proceedings, the allegation advanced by the Registrar, which was a common position, was that the taking of the industrial action, and the failure by the SSTU to inform its members of the Commission's orders, constituted a *contravention* and the case before the Full Bench was argued, and determined, on that basis (emphasis added). Furthermore, and also importantly, the order in *SSTU* was in quite different terms to the orders made by the Senior Commissioner the subject of these proceedings, and is a matter of significance. I will turn to these matters in more detail later in these reasons. Accordingly, the issues arising in these proceedings, specifically the characterisation of the contraventions for the purposes of s 84A of the *Act*, did not arise for consideration in *SSTU*.

70 In *SSTU*, Ritter AP, in considering the nature and purpose of the enforcement jurisdiction of the Full Bench under s 84A made some general observations at [70] to [76] as follows:

70 Section 84A provides for applications for 'enforcement'. However the purpose of the section is not just to enforce, in the sense of trying to coerce or ensure compliance with particular orders of the Commission or sections of the *Act*. Importantly the focus of the section is also to reinforce the requirement for parties to comply with the *Act* and the orders of the Commission, and to allow the Commission to publicly admonish and take sanctions against transgressors.

71 As such a purpose of s84A is similar to an application for contempt of court. (See *Witham v Holloway* (1995) 183 CLR 525 at 533, *Australasian Meat Industry Employees' Union and Others v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106-108, *Construction, Forestry, Mining and Energy Union v BHP Steel (Ais) Pty Ltd* (2003) 196 ALR 350 at [35]-[36] and *Australian Competition and Consumer Commission v World Netsafe Pty Ltd and Another* (2003) 204 ALR 537 at [10]-[11]). Indeed the contravention of an order of a court is one of the classic examples of contempt. Accordingly, although the focus of the Full Bench must be on the statutory regime contained in s84A of the *Act*, observations made by courts in the context of contempt are of some assistance.

- 72 The Act does not contain any separate process for dealing with a breach of an order as a contempt of court, save in the instances of the Industrial Appeal Court (IAC) and the President, ‘in the exercise of the jurisdiction conferred on him by this Act and when presiding on the Full Bench or sitting or acting alone...’ (See ss92(1) and (4) of the Act). The IAC and the President have the ‘same power to punish contempts of its power and authority as has the Supreme Court in respect of contempts of Court ...’ (s92(1)). Section 92(2) specifically says that a contempt may be punished by a fine, ‘without prejudicing the generality of the power...’. The powers of the Supreme Court for a civil or criminal contempt include committal (meaning imprisonment) and the imposition of a fine. Apart from any inherent limitations against excessive fines, there is no maximum to the fine that can be imposed (See *Kennedy v Lovell* [2002] WASCA 226 at [6]). It is not clear why the legislature has drawn a distinction between the disposition of a breach of an order of the President, as a member of the Commission when acting alone or as part of the Full Bench and those made by other members of the Commission, given that the Commission is a court of record (s12 of the Act). As I will elaborate a little later on there is also a different regime in place for dealing with a contempt, by amongst other things the breach of an order, in the Magistrates Court of Western Australia and the State Administrative Tribunal of Western Australia (SAT).
- 73 The purpose of taking proceedings against someone for acting in breach of a court order are clear. In *BHP Steel, Tamberlin and Goldberg JJ* (with whom Moore J agreed) cited *Mudginberri Station* and said at paragraph [36]: ‘The majority emphasised (at CLR 107) that the underlying rationale of the exercise of the contempt power was that it is necessary to uphold and protect the efficient administration of justice. In the case of an imposition of a fine or where committal is ordered, the purpose is to protect the efficient administration of justice by demonstrating that the court's orders will and must be enforced. If a court lacks the means to enforce its orders then they could be disobeyed with impunity and ultimately litigants would suffer and administration of justice would be brought into dispute: see *Lowe & Sufrin, Borrie & Lowe's Law of Contempt*, 3rd ed, 1996, p 4. There is an important distinction between casual disobedience, where it may readily appear that the primary purpose of exercising the power is to vindicate the rights of the successful party, and instances of disobedience accompanied by public defiance, where the primary purpose of exercising contempt power is to establish the court's authority: see *Mudginberri* at CLR 108.’
- 74 Similarly, McHugh J in *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 said at [88]: ‘If breaches of the orders of the courts were regarded as of little moment, respect for and observance of the law would inevitably deteriorate and, ultimately, pose a threat to social order.’ (Citing *Mudginberri* at [115]); and see also Kirby J in *Pelechowski* at [147]-[149].
- 75 The observation of McHugh J was applied by Heerey J in *Mobileworld Communications Pty Ltd v Q and Q Global Enterprise Pty Ltd* [2004] FCA 1200 at [22] and Spender J in *World Netsafe* at [11].
- 76 In my opinion these comments are apposite to this s84A application. The fact that both *Mudginberri Station* and *BHP Steel* were cases of union industrial action in breach of court orders supports this. These judicial comments establish that there is a public interest in applications for the ‘enforcement’ of the disobedience of an order of the Commission (see *Mudginberri Station* at 107).
- 71 As to the factors of seriousness, any proffered undertakings and circumstances of mitigation, as identified factors to consider in s 84A(4)(a), Ritter AP observed at [78] to [87]:

(d) Seriousness

- 78 If a failure to comply or contravention of one of the matters specified in s84A(1) is proved, s84A(4)(a) requires the ‘seriousness of the contravention or failure to comply’ to be taken into account in dealing with the application. It seems clear that the reason why the Full Bench must take into account ‘seriousness’ is because there is a myriad of conduct which might comprise a failure to comply or a contravention covered by s84A.
- 79 Section 84A(1) applies to 5 different matters, being a contravention or failure to comply with:
- (i) any provision of *the Act*;
 - (ii) an order or direction made under s66;
 - (iii) section 44(3) (a summons to attend at a compulsory conference);
 - (iv) a direction, order or declaration given or made under s32; or
 - (v) a direction, order or declaration given or made under s44.
- 80 In the present application there has been the contravention of an order of the Commission made under s44 of *the Act*. In assessing seriousness the focus is on what the order required and how it was contravened.
- 81 I have earlier set out the relevant submissions by the parties about how seriousness is to be determined. In my opinion the question of seriousness needs to be looked at by reference to all of the relevant facts and circumstances. I do not think that any narrow or compartmentalised view is appropriate. For example I do not think there is necessarily a distinction between the manner of a breach and the consequences thereof or that the former is necessarily the primary focus of the section rather than the latter. Instead I think the appropriate methodology is to take an overall view of seriousness on the basis of a synthesis of the context, facts and circumstances which are relevant in any particular case. Different factors might be present or dominant in one case and not another.
- 82 This analysis and what follows is supported by cases on contempt and primarily those constituted by the breach of a court order. Examples are *World Netsafe*, *BHP Steel*, *Mobileworld Communications* and *Mudginberri Station*. In *World Netsafe*, Spender J at [16]-[17] set out principles to guide the ‘appropriate penalty’. So too did Malcolm CJ (Murray and Steytler JJ agreeing) in *Kennedy v Lovell* at [14]ff, albeit in the different context of the failure to obey

a summons issued by a Royal Commission. I have found these helpful. As to the relevance, the consequences of a contravention, in assessing seriousness, I am reinforced in the view I take by this observation of Spender J in *World Netsafe* at [17]:

'As always, in assessing the seriousness of a contempt, the practical consequence of the contemnor's failure to comply and its effect upon the effective administration of justice in the case in question is a relevant factor.'

83 Without intending to be exhaustive, in assessing the seriousness of a contravention of an order of the Commission, relevant facts and factors will usually be:

- (i) The type of order which was contravened.
- (ii) The circumstances in which the order was made.
- (iii) The reasons why the contravention occurred.
- (iv) Linked to (iii), the nature of the contravention; how it occurred and whether it was deliberate, unintentional or inadvertent.
- (v) Linked to (iii) and (iv) whether there had been other breaches of the same order or related orders.
- (vi) The consequences of the contravention upon:
 - (aa) The functioning of the Commission.
 - (bb) The public.
 - (cc) The other party to any industrial dispute.
- (vii) The status of the contravener.

84 I will later follow this process of analysis in assessing the seriousness of the respondent's contravention.

(e) Undertakings

85 The effect of an undertaking upon the appropriate disposition depends upon the nature of the undertaking, by whom it is given, and the nature and seriousness of the failure to comply or contravention. I will later consider the respondent's proffered undertaking but for present purposes it can be contrasted to a situation where, for example, a person largely through ignorance fails to attend when summonsed under s44 of *the Act*, and then undertakes to the Full Bench that he/she will attend the next hearing date.

86 *The Registrar v McGlew* (2006) 86 WAIG 400 illustrates the point. There, Mr McGlew, an employee of a respondent employer was without his knowledge nominated by that employer as the appropriate person to be summonsed to represent it at a s44 conference. Mr McGlew received late notice of the summons, was then advised by more senior employees to ignore it and by the time the matter came before the Full Bench the industrial dispute was settled. The Full Bench decided it was appropriate to accept Mr McGlew's undertaking *'to comply with any future summons or similar order of the Commission requiring me to attend a conference or any other matter requiring my presence before the Commission'*.

(f) Mitigation

87 Facts and circumstances of mitigation are those which make the contravention or failure to comply less serious or are otherwise relevant in reducing the extent to which the disposition is required to be punitive. Again without attempting to be extensive, mitigatory factors of the second type can be:

- (i) The provision of an apology or other expressions of remorse or public contrition.
- (ii) A lack of relevant record of failures to comply or contraventions
- (iii) Admissions of the contravention or at least relevant facts which deserve recognition by the Commission as indicating *'the willingness of the offender to facilitate the course of justice'* (*Cameron v The Queen* (2002) 209 CLR 33 at [14]). The consequence of this will be the saving of the time and resources of the applicant and the Commission.
- (iv) Related to (i) and where relevant a cessation of the contravening conduct or demonstration that the *'lesson has been learned'*.

72 The other member of the Full Bench to comment on the approach to s 84A, as set out above, was Smith SC (as she then was). Senior Commissioner Smith was in general agreement with Ritter AP as to the approach to s 84A, having a similarity with contempt proceedings, and its purpose to protect the efficient administration of the Commission and the enforcement of its orders. She said that in addition to the factors identified above in the extract of Ritter AP's reasons at [83], as to seriousness of a contravention, the fact of wilful or deliberate disobedience, as opposed to careless, accidental, negligent, unintentional disobedience, or conduct in haste, was the most important consideration: at [170].

73 Given the deliberate nature of the conduct in *SSTU*, and the very public nature of the defiance of the Commission's order, both Ritter AP and Smith SC found the conduct of the union in that case as being *'contumacious'*. It was not *'casual, accidental or unintentional'* in the sense in which those phrases were discussed in *Mudginberri Station*, referred to in the extracts set out above. In all of the circumstances a financial penalty of \$1,500 was imposed, and not the maximum penalty of \$2,000. As to this matter, Ritter AP at [143], noted the low level of the maximum financial penalty, and the very small amount of a fine which would be imposed for each member of the union. Ritter AP observed that given the purposes of a financial penalty to impose a punishment which has some *'sting'*, and to obtain deterrence, it was difficult to see how even the maximum fine would achieve that outcome in the circumstances of that case before the Full Bench.

- 74 Both parties referred to *SSTU* in their written and oral submissions, and neither argued that it should not be followed, in relation to the general approach to s 84A of the Act. This is subject to the caveat that I have noted above that the characterisation issues arising in this case, did not arise for consideration in *SSTU*. With that qualification, I will adopt and apply the approach in *SSTU* for present purposes. This is consistent with the general law in this jurisdiction that the Full Bench should follow its earlier decisions unless persuaded they are clearly wrong: : *Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch)*: [2004] WAIRC 10828; (2004) 84 WAIG 694; *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Director General, Department of Education and Training*: [2010] WAIRC 00089; (2010) 90 WAIG 127 (See too *The Registrar v LHMWU* [2008] WAIRC 01393; (2008) 88 WAIG 1937 where *SSTU* was discussed and applied).
- 75 Furthermore, it is also pertinent to observe that whilst there is separate provision made for the enforcement by the Industrial Magistrates Court of civil penalty provisions in Part III of the Act in s 83E and s 83EA, the nature and scope of the jurisdiction of the Full Bench under s 84A should be regarded as analogous to a civil penalty jurisdiction. This being so, the principal purpose of such enforcement provisions is deterrence, both specific and general. The most recent statement of the High Court in this regard is found in *Australian Building and Construction Commissioner v Pattinson and Another* [2022] HCA 13; (2022) 399 ALR 599. This case involved proceedings for a civil penalty under s 546(1) of the *Fair Work Act 2009* (Cth), against the CFMMEU and one of its officers. The plurality (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), when commenting on the nature of such proceedings, said at [15] to [17]:
- 15 Most importantly, it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence. The plurality in the *Agreed Penalties Case* said:
- ‘[W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:
- ‘Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*] ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.’
- 16 In a similar vein, in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner*, the Full Court of the Federal Court cited the decision of French J in *Trade Practices Commission v CSR Ltd* and the reasons of the plurality in the *Agreed Penalties Case* as establishing that deterrence is the ‘principal and indeed only object’ of the imposition of a civil penalty: ‘[r]etribution, denunciation and rehabilitation have no part to play’.
- 17 In explaining the deterrent object of civil penalty regimes such as that found in the Act, the majority of this Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* approved the statement by the Full Court of the Federal Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* that a civil penalty:
- ‘must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business’.
- 76 I would add in this context, specifically referring to the enforcement of industrial instruments, what was said by the Full Bench in *Callan v Smith* [2021] WAIRC 00216; (2021) 101 WAIG 1155, a case I will discuss in more detail below, where it was observed at [30]:
- The courts have said many times in the context of industrial legislation that the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance. The High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2010) 258 CLR 482 confirmed and stated clearly that the primary, if not the only object of penalties in industrial relations legislation, is protective in promoting the public interest in compliance. The plurality cited French J’s statement in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; (1991) 13 ATPR 41-076 (20 December 1990):
- The principal, and I think probably the only object of the penalties...is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.
- 77 I will turn now to consider, in addition to the facts agreed, the evidence led in the proceedings, and the limited factual matters remaining in dispute.
- The evidence and findings as to factual matters in dispute**
- 78 The standard of proof in these proceedings is the civil standard, on the balance of probabilities: s 84A(8) Act. That standard is whether, on the evidence, a tribunal of fact may reach an affirmative conclusion on the basis of it being ‘more probable than not’: *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373-374 per Denning J.
- 79 Dr Codreanu is responsible for developing and implementing procedures concerning the management of health issues in disaster situations. This involves coordinating the Department’s operational response. Prior to becoming the Director, Dr Codreanu was Medical Advisor to the State Health Incident Coordination Centre and from June 2021 to November 2022, was the State Health Incident Controller. Overall, Dr Codreanu as the Director, is responsible for activating and overseeing the SHICC when dealing with any incidents that are likely to have an impact on the delivery of health services within the health system in the State.

- 80 Dr Codreanu outlined the structure of public health services provided throughout the State. He referred to the *Health Services Act 2016* (WA) which establishes the 'Health Service Providers', which include:
- (a) the North Metropolitan Health Service;
 - (b) the East Metropolitan Health Service;
 - (c) the South Metropolitan Health Service;
 - (d) the WA Country Health Service; and
 - (e) the Child and Adolescent Health Service.
- 81 The overall responsibility for the Department of Health rests with the Chief Executive Officer.
- 82 Dr Codreanu gave evidence that of the 47,000 employees employed in the health system, some 19,226 nurses and midwives are employed under the *WA Health System – Australian Nursing Federation – Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2020 (Agreement)*. From media reports in October 2022, Dr Codreanu said he became aware of the possibility of industrial action being taken by the ANF. The SHICC was engaged in preparations for the possibility of various types of industrial action over the period of October to November 2022. He said that he was notified of the possibility of rolling stoppages at public hospitals which were going to occur from about mid-November 2022 at Fiona Stanley Hospital. Dr Codreanu said that he became aware that this had been called off.
- 83 On 22 November 2022, Dr Codreanu was involved in an urgent meeting between the Chief Executives of State Health Service Providers to discuss the possibility of a State-wide strike to take place on 25 November 2022. The purpose of the meeting was to discuss ways of mitigating the risk of such industrial action to the State health system. The next day on 23 November, the SHICC was activated, because the prospect of the strike was regarded as a major incident which needed an emergency response for disaster preparedness. Dr Codreanu testified that the risks posed by a State-wide strike were very significant.
- 84 Dr Codreanu said that given the important role played by nurses and midwives in the State's health system, the absence of nurses and midwives from the system could have a potentially disastrous impact, both for the health system generally, and for individual patients. He said that even if the worst impact of a one day strike were avoided, there are risks in relation to patients who have important surgeries and procedures delayed or deferred, which may result in poorer health outcomes for those patients. This has a flow on impact to the patients' families, friends, carers and employers. In the case where procedures are deferred, Dr Codreanu said this can have a knock-on effect, causing further delays in the scheduling of other required procedures. Those nurses remaining working in the system, are placed under added stress when a strike takes place.
- 85 Dr Codreanu said that risk management in the case of industrial action, is more effective to manage the greater the degree of notice of the industrial action that is given. Appropriate time enables the health system to put in place necessary contingencies; to communicate internally and communicate externally; and to inform the public regarding how the health system will be managed during any industrial action. In the case of the State-wide strike on 25 November 2022, Dr Codreanu said that it was hard to prepare for it because of uncertainty concerning a number of factors, including the number of nurses and midwives across some 80 hospitals and community clinics that may participate; whether, after the proposed rallies employees would return to work or take the whole day off; the extent to which nurses and midwives, not members of the ANF, would also go on strike; and whether high risk clinical areas such as intensive care units, emergency departments, coronary care units, neonatal and labour wards and operating theatres, would be exempt. He said that having only two days' notice of the strike meant he had no idea of the magnitude of the impact. A large part of the difficulty in responding was managing the uncertainty.
- 86 Another factor was whether the industrial action would extend beyond one day. Dr Codreanu said that at the time, these potential risks were made worse because the ANF was defying orders of the Commission; conflicting communications were emerging from the union, which was encouraging employees to strike; these communications and this encouragement could extend to agency or NurseWest staff, upon whom the Department of Health needed to rely for staffing shortfalls; transport was being offered by the union to members; and it was unclear as to how many employees would take part in the industrial action.
- 87 Given all of these uncertainties, Dr Codreanu's evidence was that it was far more difficult to make preparations to minimise the impact on the State health system and a State-wide strike was a much greater risk to both the health system and a larger number of patients. A significant uncertainty identified by Dr Codreanu regarding replacement agency nursing staff, was how many of them would actually turn up for work on the day of the strike.
- 88 Whilst the operational response to the strike was undertaken by individual Health Service Providers, the SHICC provided an overall controller function, on behalf of the entire health system. In terms of preparations undertaken by Health Service Providers on an operational level, these included deferral of all Category 2 and Category 3 surgeries; deferring all non-urgent patient appointments; and deferring all non-emergency work.
- 89 Additionally, in addition to Category 2 and Category 3 elective surgery, some Category 1 elective surgeries were also cancelled as a consequence of the strike. Category 1 elective surgery is described as 'urgent' as it has the potential to deteriorate quickly to the point where it may become an emergency situation. Some 87 Category 1 elective surgeries were cancelled. The remaining, of a total of 338 cancellations, were Category 2 (166) and Category 3 (85). In material compiled for Dr Codreanu by the Department of Health, attached as TAC1 to his witness statement, was a summary of the effects of the State-wide strike on 25 November 2022. This material was taken from information provided directly by Health Service Providers and also business records of the various health bodies.
- 90 Annexure TAC1 sets out an overall summary of the Department of Health response to the industrial action. While I do not intend to set out all of the material included in it, Dr Codreanu cited some examples of deferred health care, to illustrate the impact of the State-wide strike, from information provided by Health Service Providers. These examples included:

- (a) the resection of tumour and insertion of an auditory brainstem implant, which is a 12-hour procedure involving a multi-disciplinary team and is a collaborative surgery with substantial post-operative care in intensive care (Category 2);
 - (b) a hemi glossectomy which similarly requires 12 hours of surgical time and involves two operating teams consisting of multiple specialist clinicians and is extremely difficult to reschedule (Category 1);
 - (c) a biopsy to confirm prostate cancer (Category 1); and
 - (d) the cancellation of the full elective caesarean list at Osborne Park Hospital.
- 91 The impact of the cancellation of 338 elective surgeries and 350 outpatient appointments as a result of the strike, was compounded by the effect of the COVID-19 pandemic, which had already significantly impacted the waitlist for elective surgery. The knock-on effect was exacerbated, in that not only were immediate patients affected, but future patients were also affected where their surgery needed to be postponed as a result of the rebooking of other surgery.
- 92 There were also direct financial costs incurred by the Department of Health as a result of the strike. This included \$40,378 for external staff (808 agency and NurseWest staff); \$12,000 in standing up and staffing of the SHICC between 24 November and 26 November 2022; and approximately \$620,000 in lost activity based funding that would otherwise have flowed to Health Service Providers, had elective surgery not been cancelled.
- 93 Whilst Dr Codreanu, based on reports from Health Service Providers over the period 25 and 26 November 2022, concluded that preparations taken enabled the health system to continue functioning at an acceptable level, and potentially disastrous effects of the strike were avoided, inescapably, from Dr Codreanu's evidence, the impact of the State-wide strike across the health system was very significant. I do not regard the good management by those responsible for enabling the health system to operate at an acceptable level, to be in any way, a mitigating circumstance in favour of the ANF. Rather, it is a testament to the efforts of those staff responsible for the disaster management of the health system, all health staff who were at work on 25 November 2022, and in particular, those nurses and midwives both directly employed, and agency staff, who remained at work.
- 94 On the evidence I am satisfied, and I find, that the State-wide strike by the ANF had a major impact on the State health system. The act of cancelling large numbers of elective surgeries and outpatient appointments alone, is very significant. One cannot discount the profound effect on those patients who had their elective surgery cancelled, including some that were Category 1 - Urgent and had major procedures cancelled. The ultimate outcome and any possible adverse consequences may not be known for some time. The cancellation of elective surgery of this kind not only impacts the individual patient, but the flow-on effects to other elective surgeries, combined with the impact of pandemic related delays, places additional strain on an already stretched health system. Those staff left to work in the system State-wide, attempting to cover the gaps left resulting from those striking, no doubt placed additional strain on those staff.
- 95 Mr Vincent testified that Health Support Services provides shared services to all of the public health system in the State including the Department of Health and all Health Service Providers. This includes payroll, employment contracts, procurement, IT and the engagement of casual nurses through NurseWest.
- 96 In response to a witness summons, Mr Vincent produced to the Commission on 20 March 2023, a series of reports from Health Support Services business records, listing those nurses and midwives employed under the *Agreement*, who were recorded as having applied for or taken unpaid strike leave, or sick or personal leave on 25 November 2022. A copy of the report was annexure JV1 to Mr Vincent's witness statement. Additionally, Mr Vincent also provided to Dr Codreanu an email dated 29 March 2023, which contained a copy of the same report, along with a summary and some explanatory comment. That was annexure JV2 to Mr Vincent's witness statement.
- 97 In terms of the origin of the information, Mr Vincent explained in JV2 that the data on numbers of employees on personal leave and strike leave for 25 November 2022, is derived from the rostering systems used by each Health Service, which record rosters and leave types. This system then feeds into and forms the basis for payments to employees, under the payroll systems used by each Health Service Provider.
- 98 The total number of employees on 'strike leave unpaid' or 'unpaid strike leave', with the different description depending on the payroll system in use, was 1,812, as set out in the table in JV1. In his explanatory note in JV2, Mr Vincent referred to what appeared to be duplicate records, which contained 16 entries for individuals with the same first and last names, but different employee identification numbers, who were rostered on different shifts. Whilst Mr Vincent accepted in cross-examination that the quality of the data is dependent on the accuracy of the inputs into the system, and this may be why there is an overlap, as opposed to each being an individual employee, he explained why in JV2, he reduced the number from 1,812 to 1,808 employees on unpaid strike leave.
- 99 The additional table in JV2, containing the duplicate entries, is a screenshot of a larger table in an excel spreadsheet that contained further information as to leave type. This further information described the leave type for this duplicate group as either unpaid strike leave or strike leave unpaid, as opposed to other types of leave, such as personal leave. Mr Vincent explained that the reason he reduced the total number to 1,808 from 1,812, was some of the persons highlighted in the table had personal leave against their name, and not strike leave. Of the total of 16, eight were on unpaid strike leave. Accordingly, Mr Vincent halved this number to four, to account for any overlap.
- 100 Mr Vincent also said that the data in JV1 and JV2 was extracted from the respective data systems in March 2023. Given this, employees had the opportunity to correct any errors in their recorded data, because it is the basis for what they are paid. Thus, those who may have been incorrectly recorded as having been on unpaid strike leave, rather than personal leave, which is paid leave, have an incentive to correct any such error.
- 101 It is an agreed fact that at least 1,758 ANF members took part in industrial action on 25 November 2022, by walking off the job or failing to report for duty.

- 102 Mr Vincent's evidence as to the number of relevant employees who were rostered on unpaid strike leave is derived from business records of the Department of Health used in its payroll system. That information, I am able to assume, has a sufficient degree of rigour to regard it as reliable. Also relevant, is Mr Vincent's evidence that employees are able to correct their records. Given the financial penalty of a day's absence being incorrectly recorded as unpaid strike leave, I am satisfied on balance that any errors in recording would have been resolved from the time of the industrial action to March 2023, when the records were extracted from the system.
- 103 I am satisfied, especially in light of the explanations given by Mr Vincent as to the small variation in the final numbers, that the information is sufficiently accurate for me to find, on balance, that the total number of employees taking industrial action on 25 November 2022, by walking off the job or failing to report for duty, was 1,808. Whilst that finding is made, the related issue is a basis upon which I can be satisfied on balance, that those 1,808 employees were members of the ANF. As to this matter, the Registrar submitted that a number of uncontested matters of fact, support a finding on balance, that the 1,808 employees taking part in the industrial action were more likely than not, members of the ANF. First, the Registrar points to the agreed fact that the ANF has approximately 19,000 members working in the public sector. Second, that the *Agreement*, as at January 2023, covered some 19,226 employees. Thirdly, that it was ANF members who received the many communications and were provided incentives by the ANF to take industrial action on 25 November 2022.
- 104 From all of this, I can I be satisfied that it was more probable than not that the additional 50 employees who took industrial action were members of the ANF. The residual figure of 50 employees is a very small figure compared to the total ANF public sector workforce. Of the 19,226 employees covered by the *Agreement*, nearly 99 percent are ANF members, on the basis of the 19,000 estimate from the ANF, of its public sector membership. Extrapolating this to the evidence, I am satisfied on balance, that the 1,808 employees were members of the ANF.
- 105 As to the numbers of members of the ANF who took the bus to the rally at Parliament House on 25 November 2022, as noted above, it is an agreed fact that 1,470 ANF members registered for the buses on the ANF iFolio system. The buses were supplied by Horizons West, and were booked and paid for by the ANF. Mr Balla, who was the then Managing Director of the company in November 2022, in response to a witness summons, appeared and produced to the Full Bench, invoices and related documents for bus services provided to the ANF. In his evidence he said some 28 buses were supplied, of various passenger capacities including 24, 50 and 75 person buses.
- 106 The ANF paid for the supplied buses on 7 December 2022. Whilst he was not entirely sure, Mr Balla said Mr Olson on behalf of the ANF, first made contact with the company to tentatively book buses on or about 21 November 2022. Mr Olson spoke with the office staff about this. Mr Balla accepted, when it was put to him in cross-examination, that nothing in the materials he produced contained information as to how many people actually got on the buses on 25 November 2022.
- 107 The Registrar submitted, and the ANF did not contest, that a comparison between exhibits A3 and A8, being the lists of staff recorded as having taken unpaid strike leave on 25 November 2022 and those members of the ANF registering for bus transport to the rally, at Parliament House, contained 808 names common to both lists. Whilst it may be inferred, it must be accepted that this evidence does not establish whether in fact, those members of the ANF registering for bus transport, and who took unpaid strike leave, did take the bus to the rally. However, for the following reasons, I am not persuaded that proof of the latter fact is necessary.
- 108 The No Encouragement Order made by the Senior Commissioner on 23 November 2022, prohibited the ANF from encouraging, 'in any way', employees to walk off the job or to fail to attend for duty. This part of the order is very general and broad, and, as a matter of ordinary and natural meaning, is not to be limited by the words that follow, which include by paying or offering to pay employees to do so. There are plainly other ways the ANF could encourage their members to strike, which encouragement it did provide. To 'encourage' means to 'give courage to; urge; advise; stimulate by help, reward etc; promote, assist, ...' (*The Concise Oxford Dictionary*). In my view, to offer to provide free bus transport to members to enable them to walk off the job or to be absent from duty, so they can attend a rally as a key part of an act of industrial action, and the taking up of that offer by a process of registration of intent, was an act of encouragement by the ANF.
- 109 It would be undoubtedly a convenient and cost free means for a member of the ANF to travel directly from their normal place of work to the Parliament House rally, to participate in the industrial action. It is open to infer, and I do infer, that it was done to do precisely that which was expressly prohibited by the No Encouragement Order, that being to encourage participation by ANF members to take part in the strike on 25 November 2022.
- 110 Accordingly, I am satisfied, on balance, that 808 members of the ANF contravened or failed to comply with the No Encouragement Order in this respect.
- 111 Finally, is the issue of the payment of the strike pay subsidy. It is an agreed fact that as at 27 February 2023, a strike pay subsidy of \$150 was paid to 930 members of the ANF, at a total cost of \$139,000. However the Registrar submitted that by further and better discovery of documents given by the ANF through Mr Olson on 27 March 2023, an updated list of strike subsidy payments made to members showed the total number of members paid was 939. This appears to have been accepted by the ANF, where, at par 19(c) of its written submissions, the figure of 939 is accepted as the number of members who received such a payment. Accordingly, I find that the number of members of the ANF paid a strike pay subsidy was 939.
- 112 In the context of all of the above, I now turn to consider the approach the Full Bench should adopt to the agreed penalty, and whether the Full Bench should regard it as an appropriate outcome in the circumstances of this case.

Approach to agreed penalty

Contentions

- 113 The Registrar made submissions in relation to the proposed agreed penalty of \$350,000. It was acknowledged that it was for the Full Bench to determine, under s 84A(5)(a)(ii) of the *Act* what the appropriate penalty to impose should be. The agreement of the parties is not binding on the Full Bench. The Registrar referred to *Volkswagen Aktiengesellschaft v ACCC* [2021]

FCAFC 49 at [124] to [131] (citing and applying *Construction, Forestry, Mining and Energy Union and Another v Director, Fair Work Building Industry Inspectorate and Another* [2015] HCA 46; (2015) 258 CLR 482 (*The Agreed Penalties Case*); *Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72). She submitted that, analogously with these civil penalty cases, and having regard to the terms of the *Act*, the following principles should be applied:

- (a) The Full Bench must be persuaded that the penalties proposed by the parties are just.
- (b) If the Full Bench is persuaded of the accuracy of the parties' agreement as to the facts and consequences, and that the agreed penalties proposed are just in all of the circumstances, it would be highly desirable in practice for the Full Bench to accept the parties' proposal and therefore impose the proposed penalties.
- (c) In considering whether the agreed and jointly proposed penalty is just, it is necessary to bear in mind that there is no single just penalty, but rather a permissible range of penalties within which no particular figure can necessarily be said to be more appropriate than the other.
- (d) The Full Bench should generally recognise that the agreed penalties are most likely the result of compromise and pragmatism on the part of the Registrar (as the relevant regulator), and to reflect, amongst other things, the Registrar's considered estimation of the penalty necessary to achieve deterrence, and the risks and expense of litigation had it not been settled.
- (e) The Full Bench is not limited to simply determining whether the jointly proposed penalty is within the permissible range, however that might be expected to be a highly relevant and 'perhaps determinative' consideration.

114 In the *Agreed Penalties Case*, the High Court determined that its decision in *Barbaro v The Queen* (2014) 253 CLR 58, which dealt with submissions as to the available range of sentences in criminal proceedings, had no application to civil proceedings. Accordingly, that case did not preclude the acceptance by a court of an agreed penalty in civil enforcement proceedings. In canvassing the relevant authorities, the plurality, (French CJ, Kiefel, Bell, Nettle and Gordon JJ) referred to the decision of the Full Court of the Federal Court in *Mobil Oil* and observed at [32] as follows:

By way of explication, the Full Court added five observations, in substance as follows (68):

- (1) As noted in *Allied Mills* and *NW Frozen Foods*, the rationale for giving weight to a joint submission on penalty rests on the saving in resources for the regulator and the court, the likelihood that a negotiated resolution will include measures designed to promote competition and the ability of the regulator to use the savings to increase the likelihood of other contraveners being detected and brought before the courts.
- (2) *NW Frozen Foods* does not mean that a court must commence its reasoning with the penalty proposed by the parties and then limit itself to a consideration of whether the penalty proposed is within the range of permissible penalties. That is one option, but another is to begin with an independent assessment of the appropriate range of penalties and then compare it with the proposed penalty.
- (3) The decision in *NW Frozen Foods* represented a correct application of the approach enunciated by Sheppard J in *Allied Mills* (69). As Sheppard J stated, the court is not bound by the figure suggested by the parties. Rather, the court has to satisfy itself that the submitted penalty is appropriate while acknowledging that, uninformed by the agreed penalty submission, the court might have selected a slightly different figure (70). That approach is correct in principle and it has been cited with approval by the High Court of New Zealand in *Commerce Commission v New Zealand Milk Corporation Ltd* (71).
- (4) The decision in *NW Frozen Foods* is consistent with the imperative recognised in *Australian Competition and Consumer Commission v Ithaca lee Works Pty Ltd* (72) that the regulator should explain to the court the process of reasoning that justifies a discounted penalty.
- (5) The decision in *NW Frozen Foods* allows for the following possibilities:
 - (a) if the court is not satisfied that the evidence or information offered in support of an agreed penalty submission is adequate, it may require the provision of additional evidence, information or verification and, if that is not forthcoming, may decline to accept the agreed penalty;
 - (b) if the absence of a contradictor inhibits the court in the performance of its task of imposing an appropriate penalty, the court may seek the assistance of an amicus curiae or an individual or body prepared to act as an intervener;
 - (c) if the court is not prepared to impose the penalty proposed by the parties, it may be appropriate to allow the parties to withdraw their consent and for the matter to proceed on a contested basis.

115 As to FBM 1 of 2022, the parties have agreed that the penalty appropriate to be paid by Ms Reah personally is \$10,000. The Registrar submitted that by reason of Ms Reah's conduct, in deliberately and publicly flouting the summons to attend the compulsory conference before the Senior Commissioner on 25 November 2022, the maximum penalty payable by Ms Reah, was appropriate. She submitted that the conduct of Ms Reah constituted a deliberate and very public defiance of the Commission's authority which ought to be the subject of the maximum penalty, as a matter of specific and general deterrence. Whilst acknowledging the admission by Ms Reah of her contravention, the Registrar submitted that this mitigating factor is not of great weight when regard is had to her overall conduct. Furthermore, the Registrar submitted that the Full Bench has the

power to make an order that Ms Reah pay the penalty personally, which order is appropriate in the circumstances of this particular case.

- 116 As to application FBM 2 of 2022, the Registrar submitted that the agreed penalty of \$350,000 was appropriate, having regard to the overall conduct of the ANF, which can only be described as contumacious. The agreed penalty would be, in those circumstances, a just outcome. Whilst acknowledging there is a dispute between the parties as to how the contraventions ought to be characterised, the Registrar made a number of submissions as to the seriousness of the ANF's conduct for the purposes of determining a penalty under s 84A of the *Act*, and why the Full Bench should regard the agreed penalty amount of \$350,000 as within a range of appropriate penalty outcomes in this case.
- 117 First, it was contended that as discussed in *SSTU*, the power of the Full Bench under s 84 in relation to compliance has similarities with contempt proceedings in a superior court of record. As such, proceedings under s 84A before the Full Bench should be regarded as aiming to protect and uphold the authority of the Commission and to maintain public confidence in the Commission, analogously with the role of contempt with maintaining public confidence in the integrity of the court: *Attorney General v Times Newspapers Ltd* [1974] AC 273. The purpose of penalties for non-compliance should act as both a specific and general deterrent.
- 118 It was also submitted that in relation to this factor, consideration should be given to the seriousness of each contravention and how that conduct relates to the 'norms of industrial behaviour which the IR Act seeks to establish',
- 119 As to norms of industrial behaviour, it was submitted that participation in the State industrial relations system by a registered organisation, requires that orders made by the Commission are to be obeyed, not substantially, but completely: *The Registrar v CFMEU* (1989) 69 WAIG 2317 at 2319. As a function of registration as an organisation under the *Act*, and all of the privileges and rights that registration confers, these carry with them duties and responsibilities, including that of complying with the Commission's orders: *The Registrar v LHMU* [2008] WAIRC 01393; (2008) 88 WAIG 1937 per Ritter AP at [124]. A belief by a union that it is acting in its members' interests cannot surmount its obligations to comply with orders of the Commission, and nor is it open to a union to fail to comply with an order simply because it views the order as inappropriate or invalid: *Foster v Australian Competition and Consumer Commission* [2014] FCA 240; *Secretary of State for Justice v Prison Officers Association* [2019] EWHC 3553 (QB) at [61].
- 120 Importantly, in civil penalty proceedings, the penalty must be set at a level which cannot be regarded by the contravenor, or others tempted to engage in similar behaviour, as merely a cost of doing business: *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (per French CJ, Crennan, Bell and Keane JJ at [66]). In this context, the Registrar contended that it was clear that the ANF considered that potential financial penalties imposed by the Commission, resulting from the State-wide strike, was seen as a cost of doing business. Evidence of this was said to be repeated public statements by the ANF, as a large and well-resourced union, that it would pay any fines imposed upon it or individual members. An indication of its capacity is the payment of about \$140,000 to members, as a strike pay subsidy.
- 121 Thus, the Registrar submitted, any penalty imposed by the Full Bench, must be at a level to act as a proper deterrent to such conduct and behaviour. Furthermore, the conduct of the ANF, in relation to both the 18 and 23 November 2022 orders, constituted a planned and deliberate course of defiance. The union planned to, and did conduct its industrial strategy regardless of any intervention by the Commission. This conduct and behaviour was made worse, by the repeated public statements by the most senior representatives of the ANF, that it would continue with its industrial campaign, regardless of any cost or intervention by the Commission. Such public commentary was, as submitted by the Registrar, and should be seen to be a significantly aggravating factor, challenging the independence, authority and integrity of the Commission.
- 122 As the conduct of the ANF has resulted in multiple contraventions, the Registrar submitted that it would be appropriate for the Full Bench, in assessing the agreed penalty, to have due regard to the course of conduct and totality principles in its determination. This requires a court to have regard to any underlying interrelationship between factual and legal dimensions of two or more contraventions, to ensure that a contravenor is not punished twice for what is essentially the same 'offence'. Importantly though, this does not mean that multiple contraventions must be regarded as a single contravention, for the purposes of imposing an appropriate penalty: *Callan* at [58] to [60]. Further, once aggregate penalties are determined, the totality principle requires a review of it, to ensure the final penalty to be imposed is appropriate and commensurate with the overall offending: *Callan* at [70]. In general terms, the Registrar submitted that the agreed penalty of \$350,000 is by a large measure, the highest penalty imposed under s 84A of the *Act*.
- 123 It was submitted that the circumstances of this case are the first occasion on which the Full Bench is considering the imposition of multiple penalties for multiple contraventions of an order of the Commission. In reliance on *Callan*, the Registrar contended that the reasoning in that case applies equally to the enforcement jurisdiction of the Full Bench under s 84A of the *Act*, and at [16] to [18] of her written submissions regarding agreed penalties, she observed that:
16. In the recent decision of *Callan v Smith* [2021] WAIRC 00216, the Full Bench determined that the maximum penalty under s 83(4) of the IR Act may be imposed in respect of each contravention which is proven. Sections 83 and 84A are materially identical in that:
- (a) the application may be made under s 83(1) or s 84A(1) if a person 'contravenes' the relevant obligation, which may readily apply to multiple contraventions;
 - (b) the power to impose a penalty under s 83(4)(a) or s 84A(5)(a) is in respect of 'the contravention' which is proved, being a single, identifiable, individual contravention; and
 - (c) the principal purpose of each of s 83 and s 84A is deterrence and compliance, which supports such a construction rather than a construction which would result in multiple contraventions being penalised as a single contravention.

17. Further, s 84A(4)(a) requires the Full Bench to have regard to the seriousness of 'the contravention', being the single, identifiable, individual contravention for which it may impose a penalty.
 18. The Full Bench should conclude that s 84A(5)(a) confers on it the power to impose, amongst other things, a penalty of up to \$10,000 for each contravention which is proved.
- 124 As to the important issue of characterisation in these proceedings, the Registrar made a number of responses to the criticisms advanced by Ms Reah and the ANF, in relation to the Registrar's approach. The Registrar submitted that there are five sound reasons for her approach to characterisation and they are as follows. First, it is incumbent on her to specifically identify the particular alleged contraventions in order that the Full Bench is able to properly consider them, and equally, that Ms Reah and the ANF know the case put against them. Second, the specific number of contraventions advanced need to be identified, so that the outer limits of penalties that the Full Bench may impose, are clearly defined.
- 125 Third, the total number of contraventions and hence total maximum penalties, provide a benchmark against which to determine an appropriate penalty, having due regard to the course of conduct and totality principles. Fourth, the Registrar submitted that it is for the Full Bench to assess and make a finding in relation to the number of proven contraventions, which the Registrar submitted were readily ascertainable. The Full Bench is not being asked to undertake its own enquiry as to all possible instances of contraventions.
- 126 Finally, it was submitted that there may well be circumstances where it is unnecessary and impossible to define a particular number of contraventions however, the present case is not one of them. In this regard, the Registrar referred to *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330. In that case the Federal Court found that Coles Supermarkets had engaged in misleading conduct under the *Australian Consumer Law* when advertising certain bread products in its supermarkets. In that matter, there was a concession of at least 85 million contraventions of the *ACL*, each of which attracted a maximum penalty of \$1.1 million, leading to possible total maximum penalty of trillions of dollars.
- 127 The Registrar submitted that whilst there may have been even many more contraventions than that estimate in *Coles Supermarkets*, there was little point in endeavouring to determine the actual number, given that the court would never impose such a maximum penalty, in any event. However, in the present case, the respondent submitted that the issues are far more confined, and the Full Bench is in a position to make findings as to contraventions, as particularised by the Registrar. Further, even on Ms Reah's and the ANF's characterisation, as referred to in their submissions, this takes the penalty close to the total agreed between the parties.
- 128 The Registrar contended that for all of these reasons, and having regard to the totality of the conduct of the ANF, the agreed penalty amount of \$350,000 in relation to application FBM 2 of 2022 is just and appropriate in all of the circumstances. The Registrar further submitted that the breakdown of the agreed penalty as she proposes, as set out in the table above, properly reflects the relative seriousness of each contravention and category of contraventions.
- 129 The submissions of Ms Reah and the ANF commenced with reference to the decision of the High Court in the *Agreed Penalties Case*. It was submitted that consistent with the principles discussed in that case, the parties have conferred amongst themselves and proposed an agreed penalty for the Full Bench to consider, whilst accepting it is ultimately for the Full Bench to determine whether that agreed penalty is appropriate.
- 130 In relation to the issue of characterisation, supplementing their oral submissions made to the Full Bench on the last day of the hearing on 12 April 2023, it was contended that apportioning the \$350,000 across the 39 categories of alleged contraventions, as set out in the Updated Schedule of Contraventions provided to the Full Bench by the Registrar, that are attached to these reasons for decision, is the most convenient and appropriate method to adopt. In taking this course, it was submitted that the penalty allocation for each of the 39 categories of contraventions, is an amount of \$8,974.35. This amount is towards the upper end of the maximum penalty of \$10,000, as provided for in s 84A(5)(a)(ii) of the *Act*. Having due regard to the principles discussed in *SSTU*, it was submitted by Ms Reah and the ANF, that in making unqualified undertakings in the terms that they have, and through wide ranging admissions, they have facilitated the course of justice, which is a relevant factor to take into account.
- 131 Furthermore, the submission was made that there has not been a s 84A enforcement action previously taken against the ANF and nor has there been any such action taken against Ms Reah. The general submission was made that both parties have now learned their lessons and neither have engaged in any further ongoing contravening behaviour.
- 132 In considering the relevant factors discussed in *SSTU*, including the seriousness of the contravention, undertakings given, mitigation and a lack of any prior contravening behaviour, it was acknowledged by Ms Reah and the ANF that there was a need for a penalty to be imposed at the higher end of that available to the Full Bench. Having regard to these matters, and adopting the proposed approach by Ms Reah and the ANF, the combined total of 39 distinct contraventions attracting its own penalty, at the upper end of the scale, for a single contravention, is appropriate. This approach pays due regard to the course of conduct principle and the totality principle in reaching a final determination. Moreover, they submitted that the need for deterrence is also satisfied.
- 133 As to the approach adopted by the Registrar, in reliance upon *Callan*, Ms Reah and the ANF submitted that this approach was not an appropriate one to adopt. It was submitted that in contrast to award or agreement enforcement claims, which were described as a 'relatively straightforward exercise to ascertain contraventions', ascertaining contraventions of orders of the Commission is more difficult. It was also contended that a mathematical, forensic approach to calculating penalties, may lead to a crushing or oppressive outcome, similar to the potential outcome in *Coles Supermarkets*. On the other hand, Ms Reah and the ANF submitted that their approach, leading to a penalty at the upper end of the penalty range for each of the 39 groups of contraventions, will not only reflect the seriousness of the conduct, but ensure there is an appropriate 'sting' in the penalty outcome, and pays due regard to deterrence.

134 Even if the Full Bench were to make findings of contraventions of the Senior Commissioner's orders as proposed by the Registrar, Ms Reah and the ANF submitted that the approach adopted in *Coles Supermarkets* is still applicable, that is, to adopt the course of conduct approach, despite there being a large number of individual contraventions.

Characterisation - consideration

135 As noted above, both parties made reference to the decision of the Full Bench in *Callan*. In that case, which involved an appeal to the Full Bench from a decision of an Industrial Magistrate imposing penalties for the contravention of an award, the Full Bench was required to determine, from the statutory scheme in s 83 of the *Act*, whether it was open to the Full Bench to impose a penalty under s 83(4) for each and every individual contravention of an industrial instrument.

136 In the proceedings at first instance, the Industrial Magistrate found that based on admissions by the respondent, there had been underpayments of an employee of the respondent on 282 separate occasions, totalling some \$31,396.94 over a two-year period from 2015 to 2017. The Industrial Magistrate decided that the maximum penalty of \$2,000 as it then was, on a construction of the relevant statutory provisions, applied to all of the 282 contraventions and a single penalty of \$1,700 was imposed.

137 The Full Bench upheld the appeal and overturned the decision of the Industrial Magistrate. The Full Bench found on the evidence before the Court, that it was open to impose the maximum penalty for each and every contravention of the award. On this basis, the Full Bench reassessed the penalty for the total number of contraventions in the amount of \$37,840, reduced that amount to \$22,704, having regard to the course of conduct principle in determining the final penalty amount to be imposed, which has at its source, the 'one transaction principle' applied in criminal sentencing: *Royer v The State of Western Australia* [2009] WASCA 139 per Owen JA at [19] to [34].

138 The Full Bench stressed that the totality or 'one transaction' principle only applies at the second step in sentencing, after the penalty for each individual contravention or offence has been determined and provides no warrant to impose a single penalty for multiple contraventions, unless the relevant statutory provision enables this to occur: *Callan* at [60] and also citing *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113. It is to be noted that there is no equivalent of s 557(1) of the *Fair Work Act 2009* (Cth), requiring multiple acts that contravene the *FW Act* to be regarded as a single contravention, in Part III of the *Act* dealing with enforcement.

139 Section 83 of the *Act*, dealing with the contravention or the failure to comply with the terms of an industrial instrument, was, at the time that *Callan* was decided, in the following terms:

83. Enforcing awards etc.

- (1) Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision —
- (a) the Registrar or a deputy registrar;
 - (b) an industrial inspector;
 - (c) in the case of an award or industrial agreement, any organisation or association named as a party to it;
 - (d) in the case of an award, industrial agreement or order, an employer bound by it;
 - (e) any person on his or her own behalf who is a party to the instrument or to whom it applies;
 - (f) if an employee under an employer-employee agreement is a represented person, a representative acting on his or her behalf.
- (2) In this section —
- instrument to which this section applies*** means —
- (a) an award; and
 - (b) an industrial agreement; and
 - (c) an employer-employee agreement; and
 - (d) an order made by the Commission, other than an order made under section 23A, 32, 44(6) or 66.
- (3) An application for the enforcement of an instrument to which this section applies shall not be made otherwise than under subsection (1).
- (4) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order —
- (a) if the contravention or failure to comply is proved —
 - (i) issue a caution; or
 - (ii) impose such penalty as the industrial magistrate's court thinks just but not exceeding \$2 000 in the case of an employer, organisation or association and \$500 in any other case;
 - or
 - (b) dismiss the application.
- (5) If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in subsection (4) the industrial magistrate's court may, in addition to

imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.

- (6) An order under subsection (5) —
 - (a) may be made subject to any terms and conditions the court thinks appropriate; and
 - (b) may be revoked at any time.
- (7) An interim order may be made under subsection (5) pending final determination of an application under subsection (1).
- (8) A person shall comply with an order made against him or her under subsection (5).
Penalty: \$5 000 and a daily penalty of \$500.

[Section 83 inserted: No. 20 of 2002 s. 155(1).]

- 140 As a result of amendments to the *Act* effective from June 2022, whilst some of the language in s 83 has been altered, the penalty provisions in s 83(4) are expressed in the same terms.
- 141 I have set out the terms of s 84A earlier in these reasons. Importantly, both s 83 and s 84A of the *Act* are concerned with the subject matter of a relevant person contravening or failing to comply with the relevant instruments set out in s 83(1) (now read with s 7 of the *Act*) and 84A(1). Relevant persons, in either case, may make an application ‘for the enforcement of the provision’, in the case of s 83(1), or of ‘that provision, order, direction, declaration or section’, in the case of s 84A(1).
- 142 On the hearing of such an application, the Industrial Magistrates Court in the case of proceedings under s 83, and the Full Bench in the case of proceedings under s 84A, may, ‘if the *contravention* is proved’ (s 83(4)) or ‘if the *contravention* or failure to comply is proved’ (s 84A(5)(a)) grant a remedy (emphasis added). The focus of both s 83(4) as it then was as considered in *Callan*, and as it is now, and in s 84A(5)(a), as a matter of ordinary meaning, is on ‘a singular, identifiable, individual contravention or failure to comply’. The definite article ‘the’ in this context is indicative of specificity and particularly [sic], and there is specificity in the following words ‘contravention’ and ‘failure’. Neither of those words are expressed other than in the singular sense’: *Callan* at [45].
- 143 The Full Bench in *Callan* at [46] to [48] went on to say:
- 46 No support for an alternative, unnatural meaning is properly gained by reference to the words ‘contravenes or fails’ in s 83(1). Subsection 83(4) uses the nouns ‘contravention’ and ‘failure’. Subsection 83(1) uses the respective verbs ‘contravenes’ and ‘fails.’ There is no room grammatically or conceptually for reading this verb form of the present simple verb ‘contravene’, as excluding a single contravention or necessarily referencing multiple contraventions. By way of illustration, it is both correct to say that by her one contravention she contravenes the section and to say that by her ten contraventions she contravenes the section. Accordingly, s 83(1) is not context that supports the learned Industrial Magistrate’s limiting construction of s 83(4).
 - 47 Further, s 83(1), being the definite or specific condition which the definite article in s 83(4) references, speaks of ‘a provision’ of ‘an instrument’ indicating a single contravention is contemplated.
 - 48 The purpose of the enforcement regime of the *IR Act*, as discussed above, supports the words being their natural and ordinary meaning. In particular, it is supported by the object of promoting the public interest in compliance with industrial instruments. It would be contrary to that object if multiple instances of non-compliance were penalised as a single non-compliance.
- 144 The language used in the *Act*, and in ss 83 and 84A, should, unless the contrary intention is indicated, be construed in its ordinary and natural sense: *Australian Leisure and Hospitality Group v Director of Liquor Licensing* [2012] WASC 463 per Hall J at [22]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405 per Edelman J at [94]. Further, whilst rebuttable, the presumption is that where the drafter of legislation uses the same word or phrase in a statute, the same meaning is intended: *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 per Hodges J at 452 (all referred to and discussed in D Pearce *Statutory Interpretation in Australia* 9th Edition at [4.6] to [4.11]).
- 145 On this basis, the approach to the construction of s 83(1) of the *Act*, adopted by the Full Bench in *Callan*, should also be adopted in relation to s 84A(5) of the *Act*. As with s 83, the language of ss 84A(1), (2), (3) and (4), when read with (5)(a), speaks to a ‘singular, identifiable, individual contravention or failure to comply’: *Callan* at [45]. Each individual contravention of an order attracts the maximum penalty. This applies to each of the separately identifiable contraventions or failures to comply with the Senior Commissioner’s orders, as articulated in the Registrar’s application in FBM 2 of 2022.
- 146 The consequences of this approach will depend on the terms of the relevant order of the Commission, which is sought to be enforced. In the case of the Senior Commissioner’s orders made on 23 November 2022, they were detailed and specific. There was not, for example, a single order that the ANF take all reasonable steps to cease or refrain from taking industrial action. There were multiple orders and each order proscribed separately identified conduct and behaviour by the ANF, through its officers, employees and members. The No Strike Order, set out above, defined ‘Specified industrial action’, as ‘industrial action on and from 25 November 2022 comprising work stoppages, being absent from duty, or walking off the job, or closing hospital beds’.
- 147 The action of an employee being ‘absent from duty’ or ‘walking off the job’, involved an individual action of an employee. Each such action of an employee, contrary to the terms of the order, was a clear contravention of its terms. As was submitted by the Registrar, whilst the actions of the employees, as members of the ANF, were, as is admitted by the ANF, attributable to it, this does not alter the character of the contravention to be singular in nature, whether that attribution be direct or vicarious: *Secretary of the Ministry of Health v NSW Nurses and Midwives Association* [2022] NSWSC 1178 at [626]-[633]; [656]-[657]; *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797 at [87].

- 148 Similarly, the No Encouragement Order, prohibited the ANF, by its officers, employees, agents and members, to ‘encourage, in any way’ employees to engage in specified industrial action, ‘including by paying or offering to pay employees who are absent from duty without authorisation or walk off the job’. Each offer to pay and the payment of the ‘strike pay subsidy’ by the ANF, to each member, who walked off the job, or who was absent from duty, on the same basis as the No Strike Order, constituted an individual contravention. Each request for payment, and each payment made by the ANF to a member, was a single transaction, which transactions were expressly and unequivocally prohibited by the No Encouragement Order.
- 149 Likewise, was the arrangement put in place by the ANF for bus transport for members to attend the Parliament House rally on 25 November 2022. The actions of members of the ANF, registering for bus transport on 25 November 2022, was an individual, and conscious act taken by each member, as part of the process established by the ANF, through its ‘iFolio’ system, to give effect to, and to facilitate and to ‘encourage’ each member to ‘walk off the job or fail to report for duty’, in clear contravention of the No Encouragement Order. This conduct cannot be reasonably regarded in any other way.
- 150 In light of my conclusions as to the construction of s 84A of the *Act*, and the adoption of the approach taken by the Full Bench in *Callan*, the contentions of the Registrar are to be preferred. I accept the Registrar’s submissions at pars [19] to [28] of her written submissions, as to the approach to agreed penalties, as summarised above.
- 151 Importantly, such an approach enables the Full Bench to determine the outer limits of the maximum penalties that may be applicable in any particular case, before weighing in the balance both the course of conduct and totality principles, to establish an appropriate, final penalty amount. This process must have regard of course, to the factors in s 84A(4)(a) of the *Act*, as discussed and applied in *SSTU*, and in light of my additional observations set out above.
- 152 I now turn to consider whether, in light of the above principles and findings of fact, and having regard to all of the circumstances of this case, the Full Bench should regard the agreed penalty as an appropriate outcome.

Agreed penalty - consideration

Ms Reah

- 153 The parties agree that the penalty of \$10,000, which is the maximum penalty, would be appropriate in the case of the application against Ms Reah. I agree. As the leader of the ANF and its principal spokesperson during the course of the dispute leading to the State-wide strike, she was at all material times, the public face of the ANF campaign. Ms Reah’s failure to comply with the summons to the s 44 conference before the Senior Commissioner on 25 November 2022, was an act of deliberate non-compliance by Ms Reah. Despite the summons issued to attend the compulsory conference, Ms Reah, very publicly, indicated she would not comply with the summons and attend the compulsory conference. This defiance was played out in a number of media interviews on and around that time. Given the nature of this defiance, a specific and general deterrent needs to be at a significantly high level to make it clear that such acts of non-compliance will not be tolerated by the Commission.
- 154 Given the undertaking as to future conduct, set out above, it is certainly hoped that Ms Reah has learned her lesson, and that there will not be any repeat of the behaviour she engaged in during the course of this very public industrial dispute. Both parties agreed that the penalty ought to be paid personally by Ms Reah. I am persuaded that this would be appropriate, and that the Full Bench has the power to order that she does so, having regard to s 84A(7) of the *Act*.

ANF

- 155 In relation to the ANF, assessing whether the Full Bench should find the agreed penalty as appropriate requires consideration of the s 84A(4)(a) factors as discussed and applied in *SSTU*, and as adopted for present purposes in these proceedings.
- 156 I am satisfied on the evidence, and having regard to the approach to characterisation which I prefer, that the ANF committed the total number of contraventions of the orders made by the Senior Commissioner on 18 November and 23 November 2022, as outlined in the above schedule of Applicant’s Breakdown of Agreed Penalty. Applying the maximum penalty of \$10,000 prescribed by s 84A(5)(a)(ii) of the *Act*, to all of the contraventions would lead to a financial penalty well beyond what the Commission would impose and would be manifestly crushing and oppressive.
- 157 In terms of assessing the seriousness of the ANF’s conduct, it was not only contumacious, but in my view, it was at the most extreme end of the seriousness criterion. The genesis of the ANF’s conduct lay in mid-July 2022, with the commencement of negotiations for a replacement industrial agreement with the Department of Health. This is in and of itself, entirely unexceptional. Such negotiations take place as a regular feature of the State industrial relations system. Between mid-July and early October 2022, negotiations continued. By early November 2022, the Department had made two offers to the ANF, which offers included nurse to patient ratios, a claim strongly pursued by the ANF, and wage increases consistent with the State Government’s Wages Policy.
- 158 Importantly, on 12 October 2022, the Council of the ANF met and passed resolutions, one of which was to authorise a campaign of escalating industrial action, in support of the ANF claims. This was to culminate in strike action between 24 and 30 November 2022. The die was then cast. As subsequent events show, this predetermined and calculated course, was not going to be deviated from, regardless of possible sources of intervention. This, most appositely, included any intervention by this Commission.
- 159 I need not repeat what occurred subsequently and the proceedings before the Senior Commissioner on 18 and 23 November 2022. What is of most seriousness, is the public defiance of the Commission and the denunciation of the Commission’s orders. The public nature of the calculated and wilful course of conduct by the ANF, which course of conduct was prosecuted vigorously through the media, including print, digital, radio and television and various social media outlets, made the conduct manifestly worse.
- 160 From the material before the Full Bench, the tone of the ANF communications in the media, largely through Ms Reah as its principal spokesperson, was the same tone as that used in her letter to the Senior Commissioner, dated 22 November 2022, set out earlier in these reasons, that being belligerent non-compliance.

- 161 Not only did the Council of the ANF, the highest decision making organ of the union, set the course on 12 October 2022, but it reaffirmed it on 18 November 2022, the date of the Senior Commissioner's first order. On that day, as set out in the SOAF, the Council met and resolved, unanimously, to ignore the Senior Commissioner's Defer Ballot Order. This was affirmed between 18 and 23 November 2022, by Ms Reah in numerous media statements and also in internal communications to members of the ANF.
- 162 As to the ignoring of the Senior Commissioner's No Strike Order made on 23 November 2022, again the Council, for a third time, convened urgently early in the morning on 24 November 2022, the day before the State-wide strike, and affirmed its commitment to proceeding with the unlawful industrial action.
- 163 Most contumaciously, on 3 December 2022, after the State-wide strike, the Council of the ANF again convened and resolved to pay any fines arising from the contravention of the Senior Commissioner's orders, and, in plain defiance of the No Encouragement Order, resolved to pay the strike pay subsidy to affected members. It is clear from the former act alone, that the Council of the ANF saw the maximum penalty of \$10,000 for a contravention of the Senior Commissioner's orders, as a cost of doing business. In my view, the offer of and payment of the strike pay subsidy to ANF members should be seen in the same light. This brings into sharp focus the need for both specific and general deterrence.
- 164 The role of the Council, as the ultimate decision making body in the ANF, in repeatedly endorsing the campaign of non-compliance, and making a decision to breach the No Encouragement Order, is a significantly aggravating factor. This is analogous with corporations and consumer protection civil penalty cases which, in setting penalties, take into account the role of senior management of a corporation.
- 165 In light of my findings on the evidence, the impact of the State-wide strike on the State health system was very significant. Additionally, in making the orders that she did on 23 November 2022, the Senior Commissioner had evidence before her, set out in some detail in the recitals to the orders, as to the impact the strike would have on the State health system, and the public. She also expressed her concerns about the short period of notice given by the ANF in taking the industrial action, and its lack of preparedness in mitigating the risks of the action. These issues were demonstrated clearly in Dr Codreanu's evidence before the Full Bench. The widespread cancellation of elective surgeries, including some Category 1 – Urgent elective surgeries, and multiple other Category 2 and Category 3 elective surgeries, along with hundreds of outpatient appointments, is a serious consequence.
- 166 That the State health system responded to the State-wide strike, by triggering the Department of Health disaster response mechanism, in and of itself, speaks volumes as to the seriousness criterion in this case. As I have already observed, the fact that those engaged in crisis management of the health system avoided the disastrous consequences of the strike, is a credit to those involved.
- 167 As to the nature of the ANF as a registered organisation, it is a large and very well resourced organisation. It has been registered under the *Act*, and its predecessors, since 1924. It has a membership of some 35,000 members, 19,000 of whom are employed in the State health system. The ANF has its own legal services division, providing a range of legal services to members. It is a party to awards and industrial agreements of this Commission and has been so for many years. Given this, it ought to have been well aware of its obligations as a registered organisation under the *Act*. One would trust that this is emphatically understood now.
- 168 It is important to observe that a conciliation and arbitration system, as exists in this State, is characterised by the rule of law and not the law of the jungle. If registered organisations under the *Act*, from which registration they reap all of the benefits and privileges that they enjoy, thumb their nose at the system from which they derive their status, standing and privileges, then they risk having those attributes taken away.
- 169 As to the undertakings criterion, I have set out earlier in these reasons the initial, and the final undertakings that Ms Reah and the ANF have given to the Full Bench. I have already noted that the undertakings given are of considerable weight. They are not, as opposed to the *SSTU* case, proffered as an appropriate outcome, under s 84A(5)(a)(i) of the *Act*. I regard both undertakings as evidence of lessons learned by both Ms Reah and the ANF, as a result of these proceedings.
- 170 As to mitigating circumstances, it is to be acknowledged that in their responses, both Ms Reah and the ANF largely admitted the allegations in the Registrar's very detailed particulars of claim. The SOAF reflects this. This is deserving of due recognition by the Full Bench, of their preparedness to facilitate the course of justice and the avoidance of a lengthy, contested hearing.
- 171 It is the case that there has been no prior s 84A enforcement action against the ANF, that has been the subject of a determination by the Full Bench. The ANF has been the subject of orders to cease industrial action in 2013: *Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth* [2013] WAIRC 00089; (2013) 93 WAIG 274; *Minister for Health v The Australian Nursing Federation, Industrial Union of Workers Perth* [2013] WAIRC 00100; (2013) 93 WAIG 276. In these respects, the Registrar submitted that the ANF had not been a 'good corporate citizen', in the sense that it had been the subject of orders of the Commission in response to industrial action taken by its members. I take this into account, although at the margin, for the purposes of assessing the appropriateness of the agreed penalty as examples, albeit not recent, where intervention by the Commission in the making of orders to stop industrial action by the ANF has been necessary.
- 172 I turn now, in light of these general observations, to the agreed penalty amount of \$350,000. It is, as the parties submitted, a very substantial penalty in this jurisdiction. For it to be assessed by the Full Bench to be appropriate, it needs to reflect the seriousness of the multiple contraventions engaged in by the ANF, and it needs to be considered to be within an appropriate range of penalty outcomes. To recap what was said in *Mobil Oil*, it is for the court to determine an appropriate penalty. This process is not an exact science, and, within a permissible range, one figure may not necessarily be more appropriate than another. It is also not useful for the court to conclude whether any agreed penalty would have been arrived at independently by the court.

- 173 I have accepted the approach adopted by the Registrar concerning the characterisation issue and why, in assessing penalty, it is appropriate in this case. The approach of the ANF, to apportion equally, according to the 39 categories of conduct set out in the amended Schedule 1, carries the difficulty that near the maximum amount is allocated to each category. This gives little room for the Full Bench to adjust the penalty amount if it were considered appropriate to do so. For example, as I shall discuss shortly, various categories of contraventions may be more serious than others, and which should be reflected in the penalty amounts apportioned for each.
- 174 In this case, unlike in *Coles Supermarkets*, from both the SOAF and the evidence led in the proceedings, a conclusion has been able to be reached on balance, as to the total contraventions for each of the Senior Commissioner's orders not complied with. The breakdown advanced by the Registrar strikes a balance between those categories of contraventions where there are a large number of individual contraventions, such as for C-1 to C-1,808; E-14 and E-15, compared to the rest. It would be plainly punishing and oppressive to impose the maximum penalties for each of these three categories. I consider that some resort to the course of conduct principle is helpful in this analysis.
- 175 In the case of contraventions C-1 to C-1,808, the individual contraventions of the No Strike Order, can be viewed broadly as a single course of conduct, involving members of the ANF walking off the job or being absent from duty, and taking 'specified industrial action', as defined in the order, on 25 November 2022. Looking at the individual contraventions globally in this way, leads to the figure of \$200,000. Taken as a proportion of the agreed figure of \$350,000, this reflects 57% of the total, which I think is appropriate, as it can be seen as the more serious action. The other categories of contraventions, whilst still serious contraventions, were more in the nature of facilitating the strike action that took place, or those concerned with circumstances surrounding it, and following it.
- 176 In this respect, E-14, dealing with the provision of bus services, was facilitative. This compares to E-15, the contravention involving payment of the strike pay subsidy, which involved the breach of an express provision of the No Encouragement Order. These contraventions in E-15 also took place over an extended period of time on the affidavit evidence of Mr Olson, well after the day of the strike, over several months, where arrangements were put in place to process payments. Each step involved a conscious decision making process, in considering and approving a request for payment, and depositing the funds in the member's bank account, flouting the No Encouragement Order. It is only appropriate looked at in this way, that the total penalty amount be considerably higher than for E-14. The other contraventions, both in terms of individual apportionment, per contravention, and the allocation against the total figure, are similar, ranging from approximately \$1,600 to \$2,500, and \$10,000 to \$25,000, respectively.
- 177 The figure for F-1 to F-5, the public commentary category, while lesser in number, is appropriately higher in my view, given what I have said and found above, regarding the very public way the ANF breached the orders. As to A-1, the breach of the Defer Ballot Order, there was only one contravention, but it was a serious one. A figure near the maximum is appropriate.

Conclusions

- 178 Taking all of this into account, and stepping back to look at the total penalty to be imposed by the Full Bench, whilst in some respects, given all of the circumstances of this case, it may be seen to be at the lower end of the range, I consider the agreed penalty to be a just and appropriate outcome. It reflects the serious nature of the conduct of the ANF as a whole, which conduct occurred over a considerable period of time. I will make a declaration that Ms Reah failed to comply with a summons issued under s 44(3) of the *Act* on 24 November 2022, and that she personally pay a penalty of \$10,000 to the State, within 21 days. I will make a declaration that the ANF contravened, or failed to comply with, the orders of the Senior Commissioner of 18 November 2022 and 23 November 2022, and that it pay a penalty of \$350,000 to the State, within 21 days. Minutes of proposed declarations and orders now issue.

EMMANUEL C:

- 179 I respectfully agree with the Chief Commissioner's summary of background facts, description of the conduct, statement of the legal principles and authorities to be applied, findings of fact and conclusion about the characterisation issue. Broadly, I agree with the Chief Commissioner's reasons, other than in relation to the penalty amount that the ANF should be ordered to pay.
- 180 In essence, I consider that a penalty of \$350,000 would not be a just and appropriate outcome. That penalty is insufficient to meet the requirements of specific and general deterrence in this matter. I am concerned that the resolution proposed by the parties reflects an outcome that the contravening party may simply see as an acceptable cost of doing business.
- 181 Without being overly mathematical, I consider that the proposed penalties in respect of at least two categories, being E-1 to E-12 (Breach of No Encouragement Order through communications to ANF members) and E-15 (Breach of No Encouragement Order through payment of strike pay subsidies) referred to at [53] and [174] - [176] above, fall below the appropriate range of penalties for the particular conduct in the circumstances of this matter. In addition, whether by calculating the categories together or looking at the aggregate of the total penalties, I consider that an overall penalty of \$350,000 falls short of what is needed for specific and general deterrence.
- 182 The parties have used a mix of tools of analysis, including the course of conduct principle and totality principle, to present a final outcome to the Commission. The use of those tools is appropriate, but the way the parties have applied the tools in this instance has resulted in an excessive discount, taking the penalty below the appropriate range of penalties. That is particularly so given:
- (a) the seriousness of the ANF's conduct, which involved an extensive number of breaches, took place over a considerable period of time and had a major impact on the State health system;
 - (b) the overall contumacious nature of the ANF's conduct, which was planned, deliberate, wilful, public and defiant; and
 - (c) the ANF's repeated public statements that it would defy the Commission's orders.
- 183 While the calculation of an appropriate penalty is not an exact science, it nonetheless must be sufficient to achieve the requirement of deterrence. In my view a penalty of \$350,000 is below the appropriate range.

184 For these reasons, if I were to impose a penalty described by the Chief Commissioner at [178] as being at the lower end of the range, I would order that the ANF pay a penalty of \$480,000.

185 I otherwise agree with the reasons, declarations and orders proposed by the Chief Commissioner.

KUCERA C:

186 I respectfully agree with the Chief Commissioner's reasons in this matter. In addition, I have in the paragraphs that follow, made some additional observations that are of relevance to the penalty the Full Bench has imposed.

187 As the Chief Commissioner's reasons explain, this matter involves an application to a Full Bench for the enforcement of orders Senior Commissioner Cosentino made on 18 and 23 November 2022 (**orders**).

188 The orders were made in the context of the current round of bargaining for a replacement enterprise agreement (**bargaining**) between the Australian Nursing Federation, Industrial Union of Workers (ANF) and the West Australian Department of Health (**Department of Health**).

189 In Western Australia, there are rules under *the Industrial Relations Act 1979 Act* that apply to parties involved in bargaining for industrial agreements which they need to follow: *The Registrar of the Western Australian Industrial Relations Commission v The State School Teachers Union of WA (Incorporated)* [2008] 88 WAIG 333 (*SSTU*) Beech CC at [155]. This includes the requirement to bargain in good faith under s 42B of the *Act*.

190 To ensure these rules are followed, the Commission, in its capacity as an independent industrial umpire, is empowered under s 44 of the *Act* to make orders and give such directions as may be necessary, to prevent the deterioration of industrial relations during a bargaining dispute.

191 When exercising these powers, the Commission can make orders requiring a negotiating party to do something or to refrain from doing a particular thing. Depending on the circumstances of a particular case, orders the Commission can make include those requiring a ballot to gauge employee support for a proposed industrial agreement and the timing of that ballot.

192 In disputes over bargaining, the Commission retains the power to decide, whether particular industrial action should be permitted to occur. When deciding this, the Commission must have regard to the public interest. The Commission may, having regard to the interests of the community who may be affected, need to issue orders to stop or prevent parties from taking industrial action: *SSTU* per Beech CC at [155].

193 Once the Commission (as in this case) determines that it is in the public interest to issue orders, those orders must be complied with. It is for this reason there are financial and other consequences for parties who refuse to comply, which the Registrar may pursue through enforcement proceedings to a Full Bench of the Commission under s 84A of the *Act*.

194 In such proceedings the Full Bench, when deciding the penalty to be imposed for a breach of the Commission's orders, under s 84A of the *Act* is required to consider the seriousness of the conduct in issue, including whether it was deliberate and intended, the circumstances in which the order was made and the effect of the contravention upon the community: *SSTU* per Ritter AP at [83].

195 Deterrence, both specific and general, is a relevant consideration when determining penalty: *Australian Securities and Investments Commission v Chemeq* [2006] FCA 936 per French J at [90].

196 Specific or personal deterrence is the principle that requires the Full Bench to impose a penalty to deter parties in breach of the Commission's orders from repeating their conduct: *Ponzio v Caelli Constructions Pty Ltd* [2007] FCAFC 65 (*Ponzio*) per Lander J at [93].

197 General deterrence is the principle that requires the Full Bench to impose a penalty to warn others of the consequences if they choose not to play by the rules. It is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108, also see *Ponzio* per Lander J at [93].

198 With general deterrence, the penalty should be of a kind that would be likely to act as a deterrent in preventing similar contraventions by like-minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others: *Ponzio* per Lander J at [93].

199 When setting a civil penalty, it must be fixed with a view to ensuring it will not be regarded by the offender or others as an acceptable cost of doing business: *ABCC v Pattison and Anor* [2022] HCA 13; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [66].

200 The penalty to be fixed by the Full Bench is directed at maintaining the integrity of the industrial relations system, which means there will not only be consequences for industrial organisations that do not comply with the Commission's orders, but there will equally be financial and other consequences for employers that do the same.

Lead up to the nurses' strike

201 When weighing up the seriousness of the breach of the Commission's orders, it is important to look to the circumstances in which the orders were made and the conduct that followed. In relation to this, bargaining between the ANF and the Department of Health, commenced in or around mid-July 2022.

202 As the bargaining continued, the Council of the ANF met on 12 October 2022 and endorsed a campaign of escalating industrial action in support of its claims, which included rolling stoppages and a strike to be held between 24 and 30 November 2022 (**industrial action**).

203 Following this meeting, members of the ANF negotiating team, which included its Secretary, Janet Reah, and its Chief Executive Officer, Mark Olson, participated in several conferences with the Department of Health which were held at the Commission.

204 Ms Reah, who is Mr Olson's successor is relatively new to the role of Secretary. She was initially appointed to the position to fill the casual vacancy that was created after Mr Olson resigned from the position of Secretary in July 2022. Ms Reah was elected to the position on 17 October 2022.

205 Mr Olson held office as Secretary for more than 23 years. Over that time, Mr Olson was involved in several negotiations for enterprise agreements between the ANF and the Department of Health. Following his resignation, Mr Olson was appointed to the position of ‘Chief Executive Officer’ (CEO).

ANF accepts the offer in-principle

206 On 15 November 2022, the Senior Commissioner held a compulsory conference between the ANF and the Department of Health. During this conference, the Department of Health made a conditional wages and conditions offer (**offer**).

207 The offer was made on the condition the ANF would cease its campaign of rolling stoppages which were by this date, scheduled to commence in public hospitals in the Perth metropolitan area, on 16 November 2022.

208 The ANF accepted the offer in principle and agreed the rolling stoppages would not take place. The ANF also agreed it would put the offer to its members for a vote.

209 Later on 15 November 2022, Ms Reah and Mr Olson attended a meeting at the Fiona Stanley Hospital (FSH). It is reasonable to conclude that whatever confidence Ms Reah and Mr Olson might have had, that the ANF’s members would support the offer, quickly evaporated at this meeting.

210 Following the meeting at FSH, the ANF’s position publicly shifted, from accepting the offer to actively opposing it. The ANF instead decided to revert to the course the ANF Council decided to take on 12 October 2022.

211 To this end the ANF opened an online poll to run from 18 to 22 November 2022. Ms Reah announced that if members voted the offer down, the next step would be a one-day strike within a week of the vote closing.

212 The evidence establishes that although Mr Olson in his capacity as CEO, who took an active part in negotiations for the ANF, both as a negotiator and spokesperson, stepped back from bargaining after the meeting at FSH, he nevertheless remained involved in organising the industrial action the subject of this application.

213 I make this observation because although Ms Reah may have been relatively new to the position of Secretary, she was not surrounded by novices.

214 The ANF is a large well-resourced organisation with experienced staff and officials, which at the time, included Mr Olson. Inexperience provided no excuse for the conduct that followed. Ms Reah and those around her, ought to have done more to ensure the ANF as an organisation complied with its obligations under the *Act*.

Defer Ballot and No Further Claim Orders

215 In response to the ANF’s shift in position on the offer, the Senior Commissioner at the request of the Department of Health convened a further compulsory conference on 18 November 2022. At the conclusion of this conference the Senior Commissioner issued the orders, the terms of which the Chief Commissioner set out in his reasons and defined as the ‘Defer Ballot’ and ‘No Further Claims Orders’.

216 The Defer Ballot and No Further Claims Orders were by no means onerous or extraordinary. In the context of bargaining for an enterprise agreement and in circumstances where the ANF had accepted the offer in principle, it was reasonable for the Department of Health and the Commission to gauge from a ballot of the ANF’s members whether they accepted the offer or not.

217 Having accepted the offer, the ANF, as the representative of its members and pursuant to its obligations to bargain in good faith, was at the very least required to put the offer, in the terms it had agreed to accept in principle, to its members for a vote. However, after the issuance of the Defer Ballot and No Further Claims Orders, the ANF was required to hold a ballot in the manner the Senior Commissioner had ordered.

218 It is noteworthy the Senior Commissioner at that time, had not put a stop to the ANF’s members plans to take industrial action. All she was directing the ANF and its members to do was to participate in a ballot, albeit to be concluded on a date a week or so after the industrial action it had foreshadowed, was supposed to begin.

219 Whilst that might have necessitated a deferral of industrial action some ANF members might have been keen to commence, a ballot result free from influence one way or another, may have given the ANF and its members more strength to their arm in bargaining.

220 The result might have also brought the dispute between the ANF and the Department of Health closer to a resolution.

Defer Ballot Order defied

221 The ANF made no effort to comply with the Defer Ballot and No Further Claims orders. Furthermore, and as the Chief Commissioner found, the ANF actively and deliberately, resolved to and defied the Defer Ballot and No Further Claims Orders, doing so in a very public way.

222 It is regrettable the ANF failed to inform its members of the content of the Defer Ballot and No Further Claims orders or to provide them with a copy. If the ANF had done so, perhaps its members may have understood from the recitals, the reasons why the Senior Commissioner made them and why she had directed the ANF to defer its ballot.

223 It is reasonable to conclude from its response to the Defer Ballot and No Further Claims Orders, that the ANF had decided to escalate the dispute. As I have indicated, the ANF could have deferred its plans to take industrial action and complied with the Defer Ballot and No Further Claims Orders. Instead, it chose not to do so.

Further orders issued

224 On the afternoon of 22 November 2022, Ms Reah released the results of the ANF’s Ballot. She then announced the ANF would be holding a State-wide strike on 25 November 2022, which was in line with the industrial action the ANF Council endorsed on 12 October 2022 (**State-wide strike**).

- 225 To encourage its members to take part in the State-wide strike, the ANF published a 'Strike Guide', offered a \$150 strike pay subsidy to members participating in the strike (**strike payment**) and organised buses to make it easier for members to walk off the job and attend the rally at Parliament House (**rally**).
- 226 On 23 November 2022, the Senior Commissioner held a further compulsory conference, at which the Department of Health sought interim orders under s 44 of the *Act* to stop the State-wide strike. It is evident the Senior Commissioner concluded that unlike the rolling stoppages which the ANF called off when it accepted the offer, the potential risks the planned State-wide strike presented to the provision of public health care in WA, could not be adequately managed or mitigated.
- 227 It is for this reason the Senior Commissioner issued orders on 23 November 2022 which are set out in the Chief Commissioner's reasons and relevantly defined as the 'No Strike Order', the 'Notice Order', 'No Encouragement Order' and the 'No Public Comment Order'.
- 228 The No Strike Order identified the industrial action the Senior Commissioner determined the ANF's members could not take. The No Encouragement Order identified the conduct the ANF was not to engage in, to enable and encourage its members participation in the State-wide strike.

ANF further defies Commission orders

- 229 The inescapable findings regarding the ANF's defiance of the No Strike Order, the Notice Order, No Encouragement Order, and the No Public Comment Order are provided in the Chief Commissioner's reasons.
- 230 His reasons also set out the correspondence Ms Reah sent to the Senior Commissioner regarding her response to the orders. Ms Reah's letter threw caution to the wind. As an example of blatant non-compliance, it outstripped the union's resolution in *SSTU* which Beech CC described at [151] as 'difficult to find a more blatant example of a union defying a Commission order'. Ms Reah's letter was by far, more extreme.
- 231 The sentiment expressed in Ms Reah's letter was not an aberration, as it was subsequently supported and her conduct endorsed, by way of resolutions the ANF Council carried on 24 November 2022, referred to in paragraph 74 of the Statement of Agreed Facts, to support the State-wide strike.
- 232 In breach of the No Encouragement Order, the ANF organised buses for members participating in the State-wide strike to attend the rally. It paid the strike payment to 939 members who participated in the State-wide strike.
- 233 With the expenditure it outlaid on providing buses and the payment of \$140,000 in strike payments, it is clear the ANF decided to run the gauntlet of the potential consequences it could face for contravening the Commission's orders.
- 234 Put another way, it is reasonable to conclude the ANF took the view that any penalties it might face for its breach of the orders, were a cost of doing business.

Agreed penalty proposal

- 235 During the proceedings, the Registrar, and the ANF reached agreement on a proposed penalty to be considered by the Full Bench in the sum of \$350,000.
- 236 In his reasons the Chief Commissioner included the table provided by the Registrar which grouped the ANF's breaches of the orders into some nine categories. The Registrar's table also suggested the penalty that should be imposed for each category by reference to course of conduct and totality principles, as well as the other criteria for assessing the seriousness of the contraventions.
- 237 The approach of the ANF in determining how the agreed penalty should be apportioned was to divide the agreed total penalty of \$350,000 by reference to the 39 categories that were contained in Schedule 1 of the Registrar's particulars of claim (**Schedule 1**), resulting in a penalty of \$8,974.35 per category of contravention.
- 238 The ANF submitted this would mean that for each of the 39 categories of breaches described in Schedule 1, the ANF would be fined an amount close to the upper end of the maximum penalty of \$10,000 under the *Act*, for each category of breach.

Number and characterisation of breaches

- 239 I agree with the Chief Commissioner's assessment of the number of breaches the ANF may be said to have engaged in, and how those breaches are to be characterised. On this, I also accept the Registrar's table setting out the number and type of breaches engaged in.
- 240 To assess the seriousness of the breaches of the Commission's orders, it was necessary for the Registrar to go through the exhaustive process of identifying and quantifying the number of breaches of the orders. It was also necessary for the purposes of setting a range of potential penalties, even if the application of the totality principle meant the Full Bench would never have imposed a potential maximum penalty for each individual breach.
- 241 Having regard to the way in which the orders were drafted, the manner of and number of contraventions the ANF engaged in, the Chief Commissioner's conclusion the 3,590 individual contraventions which the Registrar particularised, were each capable of constituting a single contravention for which the ANF was potentially liable for multiple penalties is unavoidable.
- 242 I similarly do not accept the ANF's submission the decision in *Callan v Smith* (2021) 101 WAIG 1155 (*Callan*) has no application in this case. Whilst I understand the ANF's submission that ascertaining the number of individual contraventions in cases involving award or agreement enforcement claims may not be as difficult as those where breaches of the Commission's orders to prevent industrial action are alleged, the number of contraventions in this matter were ultimately able to be nailed down, identified and agreed upon with some clarity.
- 243 One example of a category of contraventions to which *Callan* is particularly applicable is in respect of the strike payments the ANF admitted it paid to 939 of its members, who took part in the State-wide strike. The strike payments were referred to in paragraphs [53], and [174] - [176] of the Chief Commissioner's reasons.

244 Like an underpayment of wages claim where an employer commits multiple contraventions of the same type on each occasion an underpayment occurs, the ANF breached the No Encouragement Order each time it decided a member was eligible to receive and paid the strike payment.

245 As the Chief Commissioner found, this conduct took place over an extended period of time, well after the day of the State-wide strike. This level of non-compliance was not a one-off, it involved a series of distinct and separate intentional decisions to breach an order of the Commission, each time a strike payment was made.

246 Such conduct, as it would be treated in an underpayment of wages claim, is serious and as in *Callan*, would not be treated as a single contravention, even if it was a part of a continuing course of conduct. It would also attract a higher overall penalty.

Significant disruption to the public health service

247 One of the matters to be considered when weighing the seriousness of the contravention under s 84A(4) of the *Act* is impact on the public and the other party to the industrial dispute: *SSTU* per Ritter AP at [83].

248 As the Senior Commissioner anticipated prior to the issuance of the orders, the impact of the State-wide strike on the public health system was significant. The cancellation of elective surgeries and outpatient appointments is a serious consequence, the effects of which are doubtless still being felt by patients and within the public health system.

249 As aggrieved as nurses may have been, it is critical those members of the community who rely upon the public health system are not suddenly, or without reasonable warning, left in the lurch. It is therefore important that when determining a penalty, these consequences are discouraged and are not repeated.

Penalty and undertakings

250 In dealing with an application under s 84A of the *Act*, which includes making an assessment as to penalty, the Full Bench must have regard to any undertakings that may be given as to future conduct: *SSTU* per Beech CC at [162] – [163].

251 As the Chief Commissioner observed, the ANF had two attempts at providing undertakings regarding its future conduct, the most recent of which came after the proceedings were adjourned.

252 The provision of an undertaking can be mitigatory in that it is indicative of contrition and the respondent having ‘learned its lesson’: *SSTU* per Ritter AP [133].

253 It is my view that without the most recent undertaking provided by the ANF, the Full Bench would have been left with no option but to impose a penalty higher than that which the parties had agreed upon.

254 This is because the ANF had not expressed to the Commission any remorse or contrition for its conduct and appeared to have no regrets it had breached the orders. Such conduct is the hallmark of a party that views the imposition of fines as an acceptable cost of doing business, which in the context of determining civil penalty proceedings, attracts stiffer fines.

255 The purpose of such fines is to compel future compliance. If undertakings in combination with a pecuniary penalty can secure a similar result, then it is relevant to have regard to those undertakings when setting penalties.

256 Having received the ANF’s most recent undertaking, to which I attach significant weight, I agree with the Chief Commissioner the agreed penalty is a just and appropriate outcome in the circumstances of this case.

257 In combination with what is a substantial financial penalty, the ANF is by its undertaking, on notice there will be significant further consequences for any future non-compliance with the Commission’s orders.

258 I otherwise agree with the Chief Commissioner’s reasons, his declarations, and proposed orders.

ANNEXURE A

UPDATED SCHEDULE 1

Summary of alleged contraventions

Abbreviations used:

POC = Applicant’s Particulars of Claim

SAF = Statement of Agreed Facts

R = Respondents’ Response

TAC = Witness statement of Tudor Adrian Codreanu

All admissions by the Respondents recorded below are subject to its arguments as to the validity of the 18 and 23 November Orders.

Table A: 18 November 2022 Order- Order 1 (No Ballot Order)

#	Date	Summary of contravention	Respondents’ position	References
A-1	18 to 22 November 2022	The ANF proceeded with survey of members, closing on 22 November 2022.	Admitted (R [12]).	SAF [40].

Table B: 18 November 2022 Order- Order 2 (No Further Claim Order)

#	Date	Summary of contravention	Respondents' position	References
B-1	18 November 2022	Ms Reah gave an interview to 6PR Radio on 18 November 2022 regarding the deficiency of the Offer and the one-day strike to occur if the Offer Ballot result is negative.	Admitted (R [12]).	SAF [44].
B-2	19 November 2022	Ms Reah gave a statement to press on 19 November 2022 regarding continuing a campaign to get "the best possible outcome" for the ANF's members.	Admitted (R [12]).	SAF [46].
B-3	20 November 2022	ANF Facebook post on 20 November 2022 regarding the ANF not accepting government wages policy and the "fight for a fair wage deal" not being over.	Admitted (R [12]).	SAF [49].
B-4	20 November 2022	ANF Instagram post on 20 November 2022 in same terms as contravention above.	Admitted (R [12]).	SAF [49].
B-5	20 November 2022	Ms Reah emailed all ANF members on 20 November 2022 in same terms as contravention above.	Admitted (R [12]).	SAF [49].
B-6	21 November 2022	Ms Reah gave an interview on 6PR Radio on 21 November 2022 explaining that the Offer was "not going to cut it", and if it was rejected in the Offer Ballot, there would be a strike unless the government put "a 5% deal on the table".	Admitted (R [12]).	SAF [51].

B-7	22 November 2022	Ms Reah announced the Offer Ballot result and that there would be industrial action in pursuit of pay rise at Fiona Stanley Hospital on 22 November 2022.	Admitted (R [12]).	SAF [57].
B-8	22 November 2022	ANF Facebook post on 22 November 2022 explaining the better offer sought by the ANF and stating that the government could stop the pending industrial action by agreeing to it.	Admitted (R [12]).	SAF [60].
B-9	22 November 2022	ANF Instagram post on 22 November 2022 in same terms as contravention above.	Admitted (R [12]).	SAF [60].
B-10	22 November 2022	Ms Reah emailed all ANF members on 22 November 2022 in same terms as contravention above.	Admitted (R [12]).	SAF [60].
B-11	25 November 2022	Ms Reah gave a speech at rally on 25 November 2022 referring to ANF members fighting for a 5% pay rise.	Admitted (R [12]).	SAF [96].
B-12	27 November 2022	ANF issued a media alert on 27 November 2022 which includes reference to the ANF seeking a 5% pay rise.	Admitted (R [12]).	SAF [100].

Table C: 23 November 2022 Order - Order 1 (No Strike Order)

#	Date	Summary of contravention	Respondents' position	References
C-1 to C-1,808	25 November 2022	On 25 November 2022, 1,808 ANF members took industrial action by walking off the job or being absent from duty, the actions of each Member amounting to a separate contravention.	Partly admitted (R [14]). ANF only able to verify 930 at time of R. ANF says this is one contravention, not 1,758 contraventions (or, presumably, not 1,808 separate contraventions as now alleged).	SAF [91]. TAC attachments TAC2 and TAC3.

Table D: 23 November 2022 Order- Order 2 (Notice Order)

#	Date	Summary of contravention	Respondents' position	References
D-1	23 November 2022	The ANF failed to email the orders made on 23 November 2022 to its Members.	Admitted (R [15]).	SAF [75].
D-2	23 November 2022	The ANF failed to publish the orders made on 23 November 2022 on its website.	Admitted (R [15]).	SAF [75].
D-3	23 November 2022	The ANF failed to publish the orders made on 23 November 2022 on its Facebook page.	Admitted (R [15]).	SAF [75].
D-4	23 November 2022	The ANF failed to place a copy of the orders made on 23 November 2022 on notice boards.	Admitted (R [15]).	SAF [75].

Table E: 23 November 2022 Order - Order 3 (No Encouragement Order)

(i) *Contraventions relating to communications to ANF Members*

#	Date	Summary of contravention	Respondents' position	References
E-1	23 November 2022	Ms Reah emailed a "Strike Guide" to ANF Members.	Admitted (R [16]).	SAF [72].
E-2	23 to 25 November 2022	The ANF published and maintained a "Strike Guide" on its Facebook page between 23 and 25 November 2022.	Admitted (R [16]).	SAF [61].
E-3	23 to 25 November 2022	The ANF published and maintained a "Strike Guide" on its Instagram page between 23 and 25 November 2022.	Admitted (R [16]).	SAF [61].
E-4	23 to 25 November 2022	The ANF published and maintained "bus lists" on its iFolio website between 23 and 25 November 2022, by which Members could sign up to take a bus from various locations to a rally at Parliament House on 25 November 2022.	Admitted (R [16]).	SAF [62] and [64].
E-5	24 November 2022	Ms Reah emailed ANF Members on 24 November 2022 regarding a rally to be held at Bunbury and attaching a "Strike Guide".	Admitted (R [16]).	SAF [77].
E-6	24 November 2022	Ms Reah emailed ANF Members on 24 November 2022 regarding a "strike Subsidy" to be paid by the ANF to members who participated in industrial action and lost wages as a result.	Admitted (R [16]).	SAF [81].
E-7	24 November 2022	ANF Facebook post on 24 November 2022 referring to the strike and the provision of bus services.	Admitted (R [16]).	SAF [82].

E-8	24 November 2022	ANF Facebook post on 24 November 2022 providing information on the “strike subsidy” available to Members and how to claim it.	Admitted (R [16]).	SAF [83].
E-9	24 November 2022	Ms Reah emailed ANF Members on 24 November 2022 to confirm the strike “is still on” and referring to the provision of bus services.	Admitted (R [16]).	SAF [84].
E-10	25 November 2022	ANF Facebook post on 25 November 2022 in same terms as contravention above.	Admitted (R [16]).	SAF [85].
E-11	25 November 2022	ANF Instagram post on 25 November 2022 in same terms as contravention above.	Admitted (R [16]).	SAF [85].
E-12	25 November 2022	ANF Facebook post on 25 November 2022 regarding noise makers, signage and badges provided by the ANF to members participating in the rally.	Admitted (R [16]).	SAF [86].
E-13	-	[Withdrawn]	-	-

(ii) Contraventions involving provision of bus services to ANF members

#	Date	Summary of contravention	Respondents' position	References
E-14 (1 to 808)	25 November 2022	808 ANF Members who engaged in Specified Industrial Action registered for bus services to be provided by the ANF on 25 November 2022, an unknown number of whom were provided with such bus services on 25 November 2022, each amounting to a separate contravention.	Admitted (R [17]) before the update by which the Applicant specified 808 as a specific number of Members and separate contraventions, and by which it expanded the scope of the contravention to include agreeing to provide bus services in addition or in the alternative to actually providing bus services.	SAF [93]. Comparison of bus registration records discovered by ANF and Department of Health records produced by Mr Vincent (to be filed before the hearing if the parties are unable to agree further facts).

(iii) Contraventions involving payment of strike subsidy

#	Date	Summary of contravention	Respondents' position	References
E-15 (1 to 938 <u>939</u>)	Between 25 November 2022 and 27 March 2023	The ANF has paid a "strike pay" subsidy of \$150 to 938 939 ANF Members because they had taken part in the industrial action and had their pay docked as a result, each payment amounting to a separate contravention.	Partly admitted (R [18]) before the update by which the Applicant has increased the number from 930 to 938 <u>939</u> . ANF says this is one contravention not 930 contraventions (or, presumably, not 938 <u>939</u> separate contraventions as now alleged).	SAF [110]. Updated strike pay records discovered by the ANF on 27 March 2023 (to be filed before the hearing if the parties are unable to agree further facts).

(iv) Contraventions involving provision of paraphernalia

#	Date	Summary of contravention	Respondents' position	References
E-16	25 November 2022	On 25 November 2022, the ANF distributed to its Members taking part in rallies around the State signage, banners, noise-makers, badges and other paraphernalia in support of the strike.	Partly admitted (R [19]). It appears the ANF admits the conduct (at least insofar as it relates to the distribution of paraphernalia). It is not entirely clear whether the ANF admits that conduct amounts to a contravention.	SAP [94].

Table F: 23 November 2022 Order- Order 4 (No Public Commentary Order)

#	Date	Summary of contravention	Respondents' position	References
F-1	23 November 2022	Ms Reah addressed the media after a hearing in the Commission on 23 November 2022 and announced there would be a rally and a strike on Friday 25 November 2022.	Admitted (R [21]).	SAP [70].
F-2	23 November 2022	Ms Reah gave an interview on ABC Radio Perth on 23 November 2022 stating that there would be a strike and nothing other than a better offer (including 5% pay rises) would prevent it.	Admitted (R [21]).	SAP [71].
F-3	24 November 2022	Ms Reah gave a press conference on 24 November 2022 stating the ANF would defy the Commission's orders not to take industrial action and would strike on Friday 25 November 2022.	Admitted (R [21]).	SAP [79].
F-4	24 November 2022	Ms Reah gave an interview on ABC Pilbara- Regional Drive radio on 24 November 2022 in relation to strike on 25 November 2022, and discussed how the strike would affect regional WA.	Admitted (R [21]).	SAP [80].
F-5	24 November 2022	Ms Reah provided information to the ABC by email giving notice of rallies to be held at regional locations.	[New allegation] <u>Admitted (Respondents' Submissions [112]).</u>	Email produced by the ABC (to be filed before the hearing if the parties are unable to agree further facts) <u>(Applicant's bundle of non-agreed documents, C1 p 18).</u>

Table G: Ms Reah

#	Date	Summary of contravention	Respondents' position	References
G	25 November 2022	Ms Reah failed to attend a compulsory conference as summoned without good reason.	Admitted (R [22]).	SAF [88].

2023 WAIRC 00304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT**-and-**

JANET REAH

RESPONDENT**CORAM**

FULL BENCH

CHIEF COMMISSIONER S J KENNER

COMMISSIONER T EMMANUEL

COMMISSIONER T KUCERA

DATE

TUESDAY, 30 MAY 2023

FILE NO/S

FBM 1 OF 2022

CITATION NO.

2023 WAIRC 00304

Result

Declaration and order issued

Appearances**Applicant**

Ms M Saraceni of counsel and with her Mr S Pack of counsel

Respondent

Mr T Hammond SC of counsel and with him Ms B Burke of counsel

Declaration and Order

THIS matter, having come on for hearing before the Full Bench on 11 and 12 April 2023, and having heard Ms M Saraceni of counsel and with her Mr S Pack of counsel on behalf of the applicant, and Mr T Hammond SC of counsel and with him Ms B Burke of counsel on behalf of the respondent, and reasons for decision having been delivered on 26 May 2023 the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

1. DECLARES that Ms Reah failed to comply with a summons issued under s 44(3) of the *Industrial Relations Act 1979* (WA) on 24 November 2022.
2. ORDERS that Ms Reah personally pay a penalty of \$10,000 to the State of Western Australia within 21 days.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2023 WAIRC 00305

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT**-and-**

AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

RESPONDENT**CORAM**

FULL BENCH

CHIEF COMMISSIONER S J KENNER

COMMISSIONER T EMMANUEL

COMMISSIONER T KUCERA

DATE

TUESDAY, 30 MAY 2023

FILE NO/S

FBM 2 OF 2022

CITATION NO.

2023 WAIRC 00305

Result	Declaration and order issued
Appearances	
Applicant	Ms M Saraceni of counsel and with her Mr S Pack of counsel
Respondent	Mr T Hammond SC of counsel and with him Ms B Burke of counsel

Declaration and Order

THIS matter, having come on for hearing before the Full Bench on 11 and 12 April 2023, and having heard Ms M Saraceni of counsel and with her Mr S Pack of counsel on behalf of the applicant, and Mr T Hammond SC of counsel and with him Ms B Burke of counsel on behalf of the respondent, and reasons for decision having been delivered on 26 May 2023 the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

1. DECLARES that the Australian Nursing Federation, Industrial Union of Workers Perth contravened, or failed to comply with, the orders of the Senior Commissioner made on 18 November 2022 and 23 November 2022.
2. ORDERS that the Australian Nursing Federation, Industrial Union of Workers Perth pay a penalty of \$350,000 to the State of Western Australia within 21 days.

By the Full Bench
(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

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

2023 WAIRC 00284

REVIEW OF FARM EMPLOYEES' AWARD 1985 SCOPE CLAUSE PURSUANT TO S 37D OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-
(NOT APPLICABLE)

RESPONDENT

CORAM

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

DATE

FRIDAY, 19 MAY 2023

FILE NO/S

CICS 18 OF 2022

CITATION NO.

2023 WAIRC 00284

Result	Order issued
Representation	
Intervener	Ms J Corkhill of counsel

Order

WHEREAS on 1 May 2023 the Western Australian Farmers Federation (**WA Farmers**) filed a Form 1A application seeking to intervene in the proceedings and to appear by video link;

AND WHEREAS WA Farmers was invited to file any written grounds in support of its application by 8 May 2023;

AND WHEREAS any party who opposed either the application being dealt with on the papers or the substantive application to intervene and appear by video link to file submissions in opposition by 10 May 2023;

AND WHEREAS on 8 May 2023, the representative for WA Farmers filed written grounds in support of WA Farmers' application to intervene and appear by video link. In those submissions, WA Farmers stated:

- (a) it has a Dairy Council established pursuant to its Rules;
- (b) its Dairy Council has 52 members who are dairy farmers;
- (c) its Dairy Council seeks to represent the interests of dairy farm employers in Western Australia;
- (d) statistics provided by the national services body for the dairy industry, Dairy Australia, indicate that the majority of dairy farming businesses in Western Australia are in the Western Australian state industrial relations system;

- (e) dairy farms in the Western Australian state industrial relations system have never been covered by an award and currently operate subject to the *Minimum Conditions of Employment Act 1993* (WA);
- (f) certain proposed changes to the *Farm Employees Award 1985* in APPL 58 of 2022 will have a significant effect upon the day to day operation of dairy businesses if the Award's scope is varied to cover dairy farms; and
- (g) WA Farmers' representative is located in South Australia, provides advice and representation to Dairy Australia on industrial relations matters, and has appropriate video conferencing technology to participate in the proceedings by video link;

AND WHEREAS no submissions were received in opposition to the application;

AND WHEREAS the Commission in Court Session has considered the application on the papers;

NOW THEREFORE, the Commission in Court Session, being of the opinion that the WA Farmers has a sufficient interest in the matter and pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the Western Australian Farmers Federation be granted leave to intervene in the proceedings.
- (2) THAT the Western Australian Farmers Federation be permitted to appear at the conference listed for Wednesday, 31 May 2023, by video link.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2023 WAIRC 00262

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2023 WAIRC 00262
CORAM : SENIOR COMMISSIONER R COSENTINO
HEARD : MONDAY, 1 MAY 2023
DELIVERED : MONDAY, 8 MAY 2023
FILE NO. : APPL 58 OF 2022
BETWEEN : COMMISSION'S OWN MOTION
 Applicant
 AND
 (NOT APPLICABLE)
 Respondent

CatchWords : Industrial Law (WA) – Award variations on Commission's Own Motion under s 40B – Farm Employees Award 1985 – Outdated provisions – *Minimum Conditions of Employment Act 1993* (WA)

Legislation : *Equal Opportunity Act 1984* (WA)
Fair Work Act 2009 (Cth)
Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth)
Industrial Relations Act 1979 (WA)
Long Service Leave Act 1958 (WA)
Minimum Conditions of Employment Act 1993 (WA)
Public and Bank Holidays Act 1972 (WA)
Vocational Education and Training Act 1996 (WA)

Result : Award varied

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

Dr T Dymond on behalf of UnionsWA

Ms J Corkhill of counsel on behalf of the Pastoralists and Graziers Association of Western Australia and the Western Australian Farmers Federation (Inc)

Case(s) referred to in reasons:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Kalgoorlie Consolidated Gold Mines Pty Ltd & Ors (2004) 84 WAIG 2568

Reasons for Decision

- 1 The Commission, of its own motion, initiated this matter for variation of *the Farm Employees Award 1985* under s 40B of the *Industrial Relations Act 1979* (WA). Section 40B allows the Commission to vary an award for any one or more of the following purposes:
 - (a) to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under s 50A;
 - (b) to ensure that the award does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993* (WA) (MCEA);
 - (c) to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984* (WA);
 - (d) to ensure that the award does not contain provisions that are obsolete or need updating; and
 - (e) to ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.
- 2 The Commission provided notice of its intention to vary the Award to Unions WA, the Chamber of Commerce and Industry, the Australian Resources and Energy Employer Association, the Minister for Industrial Relations, the Western Australian Farmers' Federation (Inc) (**WA Farmers**) and each of the parties to the Award being the Australian Workers' Union (**AWU**) and all named individual employers.
- 3 The Commission then convened a conference to seek input from interested parties about the issues with the Award, and the appropriate drafting revisions to address them.
- 4 The Minister was represented at the conference by Mr Brendon Entekin of the Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety. The AWU was represented by Mr Dunne and Ms Ong. The Commission is grateful to each of Mr Entekin, Ms Ong and Mr Dunne for their assistance.
- 5 After this conference, the Commission published notice of the proposed variations to the Award, pursuant to s 40B(2). The Commission also gave notice to the parties named in s 40B(2) and to the Pastoralists and Graziers Association of Western Australia (**PGA**) of a hearing to afford them an opportunity to be heard in relation to the proposed variations.
- 6 WA Farmers and PGA applied for and were granted permission to intervene on the basis they each had a sufficient interest in the matter.
- 7 The only matter raised by the PGA in relation to the proposed variations was that some of the requirements of proposed clause 5 'Hours of Work' were new and would likely require some employers to change the manner in which work was organised to comply with the new requirements. This applied to the proposed minimum hours for part-time workers, and the requirements for written agreement to vary part-time hours. Therefore, the PGA sought a period of time, preferably 12 months, to enable it to educate its members about the changes and allow employers to make any necessary changes.
- 8 WA Farmers made submissions only on behalf of the members which its Dairy Council represented. It acknowledged that the Award does not currently cover the dairy farming industry. Its submissions were made on the hypothetical basis that the dairy farming industry might be covered by the Award in the future as a result of change to the Award's scope clause.
- 9 WA Farmers pointed out that if that occurs, proposed clause 5 'Hours of Work' provisions of the Award be new for dairy farmers. Further, it says the part-time minimum hours of work provisions are ill suited to the nature of dairy farm work, especially milking and calf rearing activities.
- 10 The clause 8 entitlement to annual leave loading would also be new to the dairy farm industry.
- 11 WA Farmers therefore also suggested that, if dairy farms were to be covered by the Award, there ought to be a transitional period for implementation of the new requirements.
- 12 In light of these issues, I considered it appropriate to defer dealing with certain clause 5 matters until after CICS 18 of 2022 is decided. CICS 18 of 2022 is an application of the Commission's Own Motion to vary the scope of the Award under s 37D of the Act. It will then be clear whether or not dairy farm employers and employees will be covered by the Award. Any proposal for transitional provisions can also be dealt with at that time.
- 13 Accordingly, I adjourned consideration of the proposed new clauses 5.10 and 5.11 in the Notice dated 28 March 2023, and consideration of transitional, implementation and consequential matters for further hearing. I otherwise ordered that the Award be varied in accordance with the variations set out in the Schedule which follows these reasons.
- 14 In the following paragraphs, I set out briefly the rationale for the variations contained in the Schedule.

General

- 15 The Award has not been reviewed or substantively varied in over 25 years. The last substantive variations made to the Award were in 1998: (1998) 78 WAIG 2559 and (1998) 78 WAIG 1471. On those occasions, the Award was varied by the insertion of text to align with the provisions of the Act concerning superannuation and maintenance of employee records.
- 16 Several clauses of the Award referred to laws and industrial instruments that have since been repealed, superseded or have become obsolete. The Award also referred to persons and organisations who no longer exist. By the variations, these references have been removed or updated.
- 17 The Award contained gendered language. The variations have substituted gender neutral language for gendered language.

Conditions less favourable than *Minimum Conditions of Employment Act 1993 (WA)*

- 18 Clause 7 of the Award dealing with hours of work provided that the hours of work shall be by agreement between the employer and the employee provided, 'subject to necessary attention to stock', all employees shall be allowed one full day off each week. This provision was identified as potentially being less favourable than s 9A of the MCEA, which provides an employee is not to be required or requested by an employer to work more than 38 hours per week and reasonable additional hours as determined under s 9B.
- 19 Clause 7 has therefore been varied to ensure it is not inconsistent with s 9A of the MCEA.
- 20 Clause 8 was titled Holidays and Annual Leave. It dealt with both public holidays and annual leave. In respect of public holidays, it omitted Easter Sunday as a public holiday and referred to Foundation Day rather than Western Australia Day as a public holiday.
- 21 Clause 8 has been divided into two clauses dealing separately with public holidays and annual leave. The public holiday provisions have been updated to reflect current gazetted public holidays. Provision has been made to ensure that all special public holidays proclaimed under s 7 of the *Public and Bank Holidays Act 1972 (WA)* are recognised as public holidays for Award purposes.
- 22 Clause 8(3)(a) of the Award has been removed as being contrary to the MCEA as determined in *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Kalgoorlie Consolidated Gold Mines Pty Ltd & Ors* (2004) 84 WAIG 2568.
- 23 The Award's provisions in relation to annual leave were also less favourable than the MCEA in that:
- (a) under the Award, annual leave accrues after 12 months of continuous service, whereas annual leave accrues on a weekly basis under the MCEA;
 - (b) the Award made no provision for payment for annual leave in advance as provided for in s 44 of the MCEA; and
 - (c) the Award did not allow for annual leave to be taken in one or two periods except in special circumstances and by mutual consent of the employer, employee and the relevant union.
- 24 A new clause dealing with annual leave, which aligns with the provisions of the MCEA, has been inserted whilst preserving the other conditions associated with annual leave in the Award, including leave loading.
- 25 Clause 9 of the Award was titled Sick Pay. Clause 9 has been updated to refer to personal leave rather than sick pay. Clause 9 was less favourable than the MCEA in that:
- (a) leave was only available for reasons related to personal health or injury, whereas the MCEA enables personal leave to be taken for illness or injuries affecting a member of the household of the employee as well as unexpected emergencies;
 - (b) leave under the Award accrued on a monthly basis rather than a weekly basis as provided in the MCEA;
 - (c) the Award provided for only five days of sick leave in the first year of service, whereas the MCEA provides for two weeks' leave or 76 hours in the first year of service;
 - (d) the Award precluded the ability to take any period exceeding 10 weeks in a year of service as sick leave; and
 - (e) the Award did not make any provision for unpaid personal leave.
- 26 The variations are intended to align the provisions of the Award concerning personal leave with the MCEA whilst preserving those conditions of the Award which are more favourable than the MCEA.
- 27 Clause 11 dealing with bereavement leave was less favourable than s 27 of the MCEA in that:
- (a) it was confined to the death of a relative occurring within Australia;
 - (b) it was confined to days prior to and on the day of the funeral; and
 - (c) it required proof of death to be furnished.
- 28 The variation incorporates the provisions of the MCEA in relation to bereavement leave.
- 29 The rates of pay for junior employees 19 years, 18 years, and 17 years as contained in the Award were also less than the junior rates of pay under s 13 of the MCEA by 5% in each case. The variations increase the junior rates of pay to align with legislated minimum rates of pay.

Other provisions updated

- 30 The title of the Award has been updated to remove the year of the Award, consistent with current practice in naming awards. The reference to the Award replacing a 1946 Award has also been removed for the sake of brevity, where the passage of time means that identifying the Award's predecessor has no real utility.
- 31 Similarly, as the term of the Award has long since passed, the term clause has been deleted. It served no purpose.
- 32 A new definitions clause has been inserted, and definitions from elsewhere in the Award have been moved to the definitions clause.
- 33 Clause 2A of the Award deals with the application of the September 1989 State Wage Principles for their duration. As the September 1989 State Wage Principles are no longer operative, the clause is unnecessary and so has been deleted.
- 34 Clause 5 was headed 'Contact of Service'. This clause has been renamed 'Employment Relationship'. It has been varied to mirror the provisions of the *Pastoral Industry Award 2020*, a modern award made under the *Fair Work Act 2009 (Cth) (FWA)*, about the types of employment and the information that must be given to an employee about their employment status and employment conditions. The provisions about termination have been moved from this clause to a separate clause 21, with amendments to align with the FWA.
- 35 Clause 10 of the Award deals with wages records. It required an employer to keep records of the name of an employee, the wages and allowances paid and any deductions made from wages. Additional recordkeeping requirements are contained in s 49D of the Act. This clause has been varied to align with the requirements of the Act.

- 36 Similarly, clause 10(2) was inconsistent with the provisions of s 49J of the Act concerning entry to investigate breaches.
- 37 The Award defined ‘farm tradesman’ as a farm hand who had completed an apprenticeship in farming. Under the *Vocational Education and Training Act 1996* (WA), there are no current prescribed vocational education training qualifications for ‘farming’. The definition has therefore been updated to refer more generally to a person who holds a qualification under the *Vocational Education and Training Act 1996* (Cth).
- 38 A new clause is inserted to include trainee rates of pay and conditions of employment derived from the *AWU National Training Wage (Agriculture) Award 1994*. This will mean that conditions that apply to trainees in the industry covered by the Award can be found in one place, removing the need to refer to both applicable awards.
- 39 The parental leave provisions of the Award have been updated to align with the provisions of the National Employment Standards under the FWA, which apply to all employers and employees in Australia.
- 40 A new clause is inserted dealing with Family and Domestic Violence Leave consistent with the MCEA and the FWA, noting that the provisions of the FWA dealing with family and domestic violence leave are expected to extend to state system employees in the near future in accordance with the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth).
- 41 The gazetted Long Service Leave Provisions of the Award have been varied to refer to the provisions of the *Long Service Leave Act 1958* (WA) (**LSL Act**), in lieu of the Long Service Leave Provisions published in Volume 65 of the Western Australian Industrial Gazette: (1985) 65 WAIG 1. Section 4A(4) of the LSL Act provides that it does not apply
 ...to an employee who has a separate LSL entitlement to take long service leave and to be paid on termination instead of long service leave that is at least equivalent to the entitlement to WA LSL to take long service leave and to be paid on termination instead of long service.
- 42 Section 4A(2) defines ‘separate LSL entitlement’ to mean
 ...an entitlement to long service leave, and a payment on termination instead of long service leave, under an award, agreement or enactment.
- 43 The Long Service Leave Provisions referred to in the Award are not equivalent to the entitlement to the Long Service Leave under Part III of the LSL Act because, amongst other things, the qualifying period of continuous service under the LSL Act is 10 years, compared with 15 years under the gazetted Long Service Leave Provisions. In short, Part III of the LSL Act applies and the gazetted Long Service Leave Provisions do not.
- 44 Clause 19 of the Award deals with superannuation. Aside from its references to defunct and deregistered superannuation schemes, it also contained potentially discriminatory clauses and was otherwise inconsistent with the provisions of s 48B of the Act. The variations are intended to bring the superannuation provisions of the Award in line with the requirements of s 48B of the Act.
- 45 The arrangement of the Award has been updated for clarity, logic and consistency with contemporary industrial instruments.
- 46 Other variations and substitutions have been made to aid clarity of meaning without being intended to affect the substantive operation of the relevant clause. For example, ‘transfer’ has been substituted for ‘transmission/transmitted’, ‘old employer’ and ‘new employer’ for ‘transmitter’ and ‘transmittee’, ‘illness or injury’ for ‘ill health or injury’ and ‘20%’ for ‘20 per centum’.
- A post script**
- 47 I do not suggest the variations made in this matter are the entirety of variations that are desirable to modernise the Award or to ensure it is consistent with the facilitation of the efficient organisation and performance of work according to the needs of the industry and enterprises within in, balanced with fairness to the employees in the industry. For example, the variations do not affect the scope of the Award. A review of the scope of the Award is the subject of separate proceedings under s 37D of the Act: CICS 18 of 2022.
- 48 I also note that while the Award contains four classifications from ‘farm hand’ to ‘tradesperson’, all four classifications attract the same pay rate, being the state minimum wage. This is obviously anomalous. Arguably the Commission may, of its own motion, vary the wages under the Award pursuant to s 40B(e) of the Act. I consider it preferable to leave this matter for another occasion with the considered input of those whose interests are directly affected.

SCHEDULE

Current Award	Variations
1. – TITLE This award shall be known as the “Farm Employees” Award, 1985 and replaces Award No. 6 of 1946 as varied, consolidated and varied.	1. – TITLE This award shall be known as the Farm Employees’ Award.
1B. – MINIMUM ADULT AWARD WAGE (1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause. (2) The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is \$819.90 per week. The minimum adult award wage	NO VARIATIONS

<p>for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide \$819.90 by 38 and multiply by the number of ordinary hours prescribed for a full-time employee under the award. The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2022.</p> <p>(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions.</p> <p>(4) Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.</p> <p>(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the <i>Minimum Conditions of Employment Act 1993</i>.</p> <p>(6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the <i>Minimum Conditions of Employment Act 1993</i>.</p> <p>(7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.</p> <p>(8) Subject to this clause the minimum adult award wage shall –</p> <p>(a) Apply to all work in ordinary hours.</p> <p>(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all</p>	
---	--

<p style="text-align: center;">purposes of this award.</p> <p>(9) Minimum Adult Award Wage</p> <p>The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2022 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.</p> <p>Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.</p> <p>(10) Adult Apprentices</p> <p>(a) Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a fulltime apprentice aged 21 years or more working under an award that provides for a 38 hour week is \$696.50 per week.</p> <p>(b) The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide \$696.50 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.</p> <p>(c) The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2022.</p> <p>(d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.</p> <p>(e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on</p>	
--	--

<p>superannuation and during any period of paid leave prescribed by this award.</p> <p>(f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.</p>	
<p>2. – ARRANGEMENT</p> <p>1. Title 1B. Minimum Adult Award Wage 2. Arrangement 2A. State Wage Principles - September 1989 3. Area and Scope 4. Term 5. Contract of Service 6. Apprentices 7. Hours 8. Holidays and Annual Leave 9. Absence Through Sickness 10. Record of Wages 11. Bereavement Leave 12. Accommodation 13. Protective Clothing 14. Wages 15. First Aid Kit 16. Representative Interviewing Employees 17. Long Service Leave 18. Liberty to Apply 19. Superannuation Appendix - Resolution of Disputes Requirement Schedule A. - Respondents Schedule B. - Parties to the Award Appendix - S.49B - Inspection Of Records Requirements</p>	<p>2. – ARRANGEMENT</p> <p>GENERAL</p> <p>1. Title 1B. Minimum Adult Award Wage 2. Arrangement 3. Area and Scope 4. Definitions 5. Employment Relationship 6. Apprentices</p> <p>HOURS OF WORK</p> <p>7. Hours</p> <p>WAGES AND ALLOWANCES</p> <p>8. Wages 9. Trainees 10. Superannuation 11. Record of Wages 12. Accommodation 13. Protective Clothing</p> <p>LEAVE</p> <p>14. Personal Leave 15. Annual Leave 16. Public Holidays 17. Bereavement Leave 18. Family and Domestic Violence Leave 19. Long Service Leave 20. Parental Leave</p> <p>TERMINATION OF EMPLOYMENT</p> <p>21. Termination</p> <p>OTHER</p> <p>22. First Aid Kit 23. Rights of Entry 24. Dispute Resolution</p> <p>Schedule A. Respondents Schedule B. Parties to the Award</p>
<p>2A. – STATE WAGE PRINCIPLES - SEPTEMBER 1989</p> <p>It is a term of this award that the union undertakes, for the duration of the Principles determined by the Commission in Court Session in Application No. 1940 of 1989 not to pursue any extra claims, award or overaward except when consistent with the State Wage Principles.</p>	<p>CLAUSE DELETED</p>
<p>3. – AREA AND SCOPE</p> <p>This award shall apply throughout the State of Western Australia to employees employed:-</p> <p>(a) On farms in connection with the</p>	<p>NO VARIATIONS</p>

<p>sowing, raising, harvesting and/or treatment of grain, fodder or other farm produce.</p> <p>(b) On farms or properties in connection with the breeding, rearing or grazing of horses, cattle, sheep, pigs or deer; or</p> <p>(c) In clearing, fencing, well sinking, dam sinking or trenching on such farms or properties except employees who are bound by the award of the Australian Conciliation and Arbitration Commission and known as the "Pastoral Industry Award, 1965" as varied or replaced from time to time and the award of the Western Australian Industrial Commission, known as the "State Research Stations, Agricultural Schools and College Workers" Award No 23 of 1971 as varied, and as varied or replaced from time to time. Provided that this award shall not apply to the land and premises occupied by:-</p> <p>(1) Any institutions declared by proclamation under the "<i>Aboriginal Affairs Planning Authority, Act, 1972</i>";</p> <p>Or</p> <p>(2) Any of the following institutions:-</p> <p>Parkerville Children's Home Incorporated; Tom Allan Memorial Home for Boys, Weeribee; St Joseph's Farm and Trades School, Bindoon; Christian Brothers' Agricultural School, Tardun.</p>	
<p style="text-align: center;">4. – TERM</p> <p>The term of this award shall be for one year from the beginning of the first pay period commencing on or after the date hereof.</p>	<p style="text-align: center;">4. – DEFINITIONS</p> <p>(a) "Apprentice" means an apprentice under the <i>Vocational Education and Training Act 1996</i> (WA), or any successor legislation.</p> <p>(b) "Appropriate state legislation" means the <i>Vocational Education and Training Act 1996</i> (WA) or its replacement.</p> <p>(c) "Approved training" means training which is specified in the training plan which is part of the training agreement registered with the state training authority. It includes training undertaken both on and off the job, in a traineeship and will involve formal instruction both theoretical and practical, and supervised practice in accordance with a traineeship scheme approved and accredited by the state training authority.</p> <p>(d) "Board and lodging" means a reasonable supply and standard of food together with a reasonable standard of accommodation.</p> <p>(e) "Commission" means the Western Australian Industrial Relations Commission.</p> <p>(f) "Complying superannuation fund or scheme" means a superannuation fund or scheme:</p> <p>(a) that is a complying superannuation fund or scheme within</p>

	<p>the meaning of the <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth), and</p> <p>(b) to which, under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme.</p> <p>(g) “Tradesperson” shall mean a person who has satisfactorily completed the approved apprenticeship in a qualification relevant to agriculture or who has been issued with an approved trade certificate and provides proof satisfactory to the employer of such qualification or who has by other means achieved a standard of knowledge deemed by their employer as equivalent thereto and is appointed as such in writing by the employer.</p> <p>(h) “Trainee” means an employee who is undertaking a traineeship.</p> <p>(i) “Traineeship” means a structured employment-based training program approved by the state training authority that leads to the trainee gaining a nationally recognised qualification. Traineeships may be full time or part time (including school based arrangements).</p> <p>(j) “Training contract” means a legally binding agreement between an employer, an apprentice/trainee and their legal guardian, where required, to undertake a traineeship.</p> <p>(k) “Training plan” outlines the training delivery and assessment strategy to be undertaken throughout the training contract. It is developed by the nominated registered training organisation in negotiation with the employer and trainee.</p> <p>(l) “Union” means The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers.</p>
<p>5. – CONTRACT OF SERVICE</p> <p>(a) An employer shall have the option of engaging an employee other than an apprentice either under terms of weekly hiring or as a casual employee. An employee not specifically engaged as a casual employee, shall be deemed to be employed on terms of weekly hiring. A casual employee shall mean an employee engaged and paid as such.</p> <p>(b) If the engagement is on terms of weekly hiring, it shall be terminated only by a week’s notice or by payment or forfeiture of one week’s pay in lieu of notice by either side. Provided that this clause shall not affect the right of the employer to dismiss an employee without notice for incompetence or misconduct and in such cases wages shall be paid up to the time of dismissal</p>	<p>5. – EMPLOYMENT RELATIONSHIP</p> <p>(1) Employees under this award will be employed in one of the following categories:</p> <p>(a) full-time;</p> <p>(b) part-time; or</p> <p>(c) casual.</p> <p>(2) At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, part-time or casual.</p> <p>(3) A full-time employee is an employee who is engaged to work an average of 38 hours per week over a 4 week period.</p> <p>(4) A full-time employee must be provided with a written statement setting out their classification, applicable rate of pay and terms of engagement.</p> <p>(5) A part-time employee is an employee who:</p> <p>(a) is engaged to work less than an average of 38 hours per week over a 4 week period;</p> <p>(b) has reasonably predictable hours of work; and</p> <p>(c) receives on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.</p> <p>(6) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least:</p>

	<p>(a) the hours worked each day;</p> <p>(b) which days of the week the employee will work; and</p> <p>(c) the actual starting and finishing times each day.</p> <p>(7) Changes in part-time hours under subclause (6) may only be made by agreement in writing between the employer and employee. Any agreed variation to the regular pattern of work will be recorded in writing.</p> <p>(8) A part-time employee must be paid for ordinary hours worked at the ordinary hourly rate prescribed for the class of work performed.</p>																																		
<p style="text-align: center;">6. – APPRENTICES</p> <p>(1) Apprentices may be taken to the trade of “Farm Tradesman” in the ratio of one apprentice for every two or fraction of two (the fraction not being less than one) “Farm Tradesmen” and shall not be taken in excess of that ratio unless:</p> <p style="padding-left: 40px;">(i) the Union so agrees</p> <p style="text-align: center;">Or</p> <p style="padding-left: 40px;">(ii) the Commission so determines</p> <p>(2) Where an employer or manager usually and customarily works at the trade he may be counted as a “Farm Tradesman” for the purposes of subclause (1) of this clause.</p>	<p style="text-align: center;">6. – APPRENTICES</p> <p>(1) Apprentices may be engaged in the ratio of one apprentice for every two or fraction of two (the fraction not being less than one) tradespersons and shall not be engaged in excess of that ratio unless:</p> <p style="padding-left: 40px;">(i) the Union so agrees</p> <p style="text-align: center;">Or</p> <p style="padding-left: 40px;">(ii) the Commission so determines.</p> <p>(2) Where an employer or manager usually and customarily works at the trade they may be counted as a tradesperson for the purposes of subclause (1) of this clause.</p>																																		
<p style="text-align: center;">7. – HOURS</p> <p>The hours of work shall be by agreement between the employer and the employee provided that subject to necessary attention to stock, all employees shall be allowed one full day off each week.</p>	<p style="text-align: center;">7. – HOURS</p> <p>The hours of work will be by agreement between the employer and the employee provided that:</p> <p style="padding-left: 40px;">(a) such agreement complies with Part 2A of the <i>Minimum Conditions of Employment Act 1993</i> (WA); and</p> <p style="padding-left: 40px;">(b) subject to necessary attention to stock, all employees must be allowed one full day off each week.</p>																																		
<p style="text-align: center;">8. – HOLIDAYS AND ANNUAL LEAVE</p> <p>(1)</p> <p style="padding-left: 40px;">(a) The following days or the days observed in lieu shall be allowed as holidays without deduction of pay, namely:-</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">New Year's Day</td> <td>Labour Day</td> </tr> <tr> <td>Australia Day</td> <td>Foundation Day</td> </tr> <tr> <td>Good Friday</td> <td>Sovereign's Birthday</td> </tr> <tr> <td>Easter Monday</td> <td>Christmas Day</td> </tr> <tr> <td>Anzac Day</td> <td>Boxing Day</td> </tr> </table> <p style="padding-left: 40px;">Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.</p> <p style="padding-left: 40px;">(b) Where</p> <p style="padding-left: 80px;">(i) a day is proclaimed as a public holiday</p>	New Year's Day	Labour Day	Australia Day	Foundation Day	Good Friday	Sovereign's Birthday	Easter Monday	Christmas Day	Anzac Day	Boxing Day	<p style="text-align: center;">8. – WAGES</p> <p>The following shall be the minimum hourly rates of wages payable to employees covered by this award:-</p> <p>(1) Adult Employees:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 80%;"></th> <th style="text-align: right;">TOTAL \$</th> </tr> </thead> <tbody> <tr> <td style="padding-left: 40px;">Farm Hand</td> <td></td> </tr> <tr> <td style="padding-left: 40px;">(a) With less than twelve months experience in the industry</td> <td style="text-align: right;">21.58</td> </tr> <tr> <td style="padding-left: 40px;">(b) With twelve months experience in the industry</td> <td style="text-align: right;">21.58</td> </tr> <tr> <td style="padding-left: 40px;">(c) General Farm Hand</td> <td style="text-align: right;">21.58</td> </tr> <tr> <td style="padding-left: 40px;">(d) Tradesperson</td> <td style="text-align: right;">21.58</td> </tr> </tbody> </table> <p>(2) Junior Employees - other than Apprentices:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 70%;"></th> <th colspan="2" style="text-align: right;">Percentage of the rate for a Farm Hand with less than twelve months experience</th> </tr> </thead> <tbody> <tr> <td style="padding-left: 40px;">15 years of age</td> <td style="width: 10%;"></td> <td style="text-align: right;">45%</td> </tr> <tr> <td style="padding-left: 40px;">16 years of age</td> <td></td> <td style="text-align: right;">50%</td> </tr> <tr> <td style="padding-left: 40px;">17 years of age</td> <td></td> <td style="text-align: right;">60%</td> </tr> </tbody> </table>		TOTAL \$	Farm Hand		(a) With less than twelve months experience in the industry	21.58	(b) With twelve months experience in the industry	21.58	(c) General Farm Hand	21.58	(d) Tradesperson	21.58		Percentage of the rate for a Farm Hand with less than twelve months experience		15 years of age		45%	16 years of age		50%	17 years of age		60%
New Year's Day	Labour Day																																		
Australia Day	Foundation Day																																		
Good Friday	Sovereign's Birthday																																		
Easter Monday	Christmas Day																																		
Anzac Day	Boxing Day																																		
	TOTAL \$																																		
Farm Hand																																			
(a) With less than twelve months experience in the industry	21.58																																		
(b) With twelve months experience in the industry	21.58																																		
(c) General Farm Hand	21.58																																		
(d) Tradesperson	21.58																																		
	Percentage of the rate for a Farm Hand with less than twelve months experience																																		
15 years of age		45%																																	
16 years of age		50%																																	
17 years of age		60%																																	

<p>or as a public half holiday under section 7 of the Public and Bank Holidays Act, 1972; and</p> <p>(ii) that proclamation does not apply throughout the State or to the Metropolitan area of the State,</p> <p>that day shall be a public holiday, or as the case may be, a public half holiday for the purpose of this award within the district or locality specified in the proclamation.</p> <p>(c) When any of the days mentioned in paragraph (a) of this subclause falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday.</p>	<table border="0"> <tr> <td>18 years of age</td> <td>70%</td> </tr> <tr> <td>19 years of age</td> <td>80%</td> </tr> <tr> <td>20 years of age</td> <td>90%</td> </tr> </table> <p>(3) Casual Employees:</p> <p>A casual employee shall be paid 20 % in addition to the rates prescribed.</p> <p>(4) Apprentices:</p> <p>Percentage of weekly rate of wage for a Tradesperson</p> <table border="0"> <tr> <td>First year of service</td> <td>47.5%</td> </tr> <tr> <td>Second year of service</td> <td>71.0%</td> </tr> <tr> <td>Third year of service</td> <td>90.3%</td> </tr> </table> <p>Note: Clause 1B(10) provides for minimum rates of pay for adult apprentices aged 21 years or more.</p>	18 years of age	70%	19 years of age	80%	20 years of age	90%	First year of service	47.5%	Second year of service	71.0%	Third year of service	90.3%
18 years of age	70%												
19 years of age	80%												
20 years of age	90%												
First year of service	47.5%												
Second year of service	71.0%												
Third year of service	90.3%												
<p>In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.</p> <p>(2) On any public holiday not prescribed as a holiday under this award, the employer's establishment or place of business may be closed, in which case an employee need not present himself for duty and payment may be deducted, but if work be done ordinary rates of pay shall apply.</p> <p>(3)</p> <p>(a) When an employee is off duty owing to leave without pay or sickness, including accidents on or off duty, except time for which he is entitled to claim sick pay, any holiday falling during such absence shall not be treated as a paid holiday.</p> <p>(b) Any employee absenting himself from work, without reasonable cause, on the ordinary working day preceding or the ordinary working day succeeding a holiday provided for herein shall not be entitled to payment for such holiday.</p>													

<p>(4) Except as hereinafter provided a period of four consecutive weeks leave with payment of ordinary wages as prescribed shall be allowed annually to an employee by the employer after a period of twelve months continuous service with such employer.</p> <p>(5)</p> <p style="padding-left: 2em;">(a) During a period of annual leave an employee shall be paid a loading of 17 1/2% of the rate of wage prescribed in Clause 14. - Wages of this award.</p> <p style="padding-left: 2em;">(b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.</p> <p>(6) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day, being an ordinary working day, for each such holiday observed as aforesaid.</p> <p>(7) Any time in respect of which an employee is absent from work, except time for which he is entitled to claim sick pay, or time spent on holidays, annual leave or long service leave as prescribed by this award, shall not count for the purpose of determining his right to annual leave.</p> <p>(8) In special circumstances and by mutual consent of the employer, the employee, and the Union, annual leave may be taken in not more than two periods.</p> <p>(9)</p> <p style="padding-left: 2em;">(a) If after one month's continuous service in any qualifying twelve monthly period an employee leaves his employment or his employment is terminated by the employer through no fault of the employee, the employee shall be paid one third of a week's pay at his ordinary rate of wage in respect of each completed month of service.</p> <p style="padding-left: 2em;">(b) In addition to any payment to which he may be entitled under paragraph (a) of this subclause, an employee whose employment terminates after he has completed a twelve monthly qualifying period and who</p>	
---	--

<p>has not been allowed the leave prescribed under this award in respect of that qualifying period shall be given payment in lieu of that leave or unless:-</p> <ul style="list-style-type: none"> (i) he has been justifiably dismissed for misconduct; (ii) the misconduct for which he has been dismissed occurred prior to the completion of that qualifying period. <p>(10) The provisions of this clause do not apply to casual employees.</p>	
<p>9. – ABSENCE THROUGH SICKNESS</p> <p>(1)</p> <ul style="list-style-type: none"> (a) An employee who is unable to attend or remain at his place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions. (b) Entitlement to payment shall accrue at the rate of one sixth of a week for each completed month of service with the employer. Provided that absence through sickness through such ill health or injury shall be limited to five days in the first year of service and ten days in each subsequent year of service. (c) If in the first or successive years of service with the employer an employee is absent on the grounds of personal ill health or injury for a period longer than his entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service. <p>(2) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and</p>	<p>9. – TRAINEES</p> <p>(1) Scope</p> <p>Subject to subclause (2), this clause applies to persons:</p> <ul style="list-style-type: none"> (a) who are undertaking a traineeship; (b) who are employed by an employer bound by this award; and (c) whose employment is covered by this award. <p>(2) Training Conditions</p> <ul style="list-style-type: none"> (a) A traineeship will not commence until the relevant training contract: <ul style="list-style-type: none"> (i) has been signed by the employer and the trainee (or the trainee's parent or guardian where applicable); and (ii) lodged for registration with the state training authority. (b) The trainee will attend an approved training course or training programme prescribed in the training plan. (c) The employer will provide a level of supervision and training in accordance with the training plan during the traineeship period. (d) The employer will permit the trainee to attend the training course or programme provided for in the training plan. (e) The overall training programme will be monitored by officers of the state training authority and training records or work books may be utilised as part of this monitoring process. <p>(3) Employment Conditions</p> <ul style="list-style-type: none"> (a) A trainee may be engaged for the nominal term applicable to the traineeship, as detailed in the training contract. A trainee may be subject to a satisfactory probation period as detailed in the training contract.

<p>Assistance Act, 1981 nor to employees whose injury or illness is the result of the employees own misconduct.</p> <p>(3) To be entitled to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of his inability to attend for work, the nature of his illness or injury and the estimated duration of the absence. Provided that such advice, other than in extraordinary circumstances shall be given to the employer within twenty four hours of the commencement of the absence.</p> <p>(4) The provisions of this clause do not apply to an employee who fails to produce a certificate from a medical practitioner dated at the time of the absence or who fails to supply such other proof of the illness or injury as the employer may reasonably require provided that the employee shall not be required to produce a certificate from a medical practitioner with respect to absences of two days or less unless after two such absences in any year of service the employer requests in writing that the next and subsequent absences in that year if any, shall be accompanied by such certificate.</p> <p>(5) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the employee if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during the year at the time of the absence.</p> <p>Provided that an employee shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.</p> <p>(6) (a) Subject to the provisions of this subclause, the provisions of this clause apply to any employee who suffers personal ill health or injury during the time when he is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.</p> <p>(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to his place of residence or a hospital as a result of his personal ill</p>	<p>(b) The parties to a training contract may, by agreement in writing, vary the duration of the traineeship and the extent of approved training, provided that any agreement to vary is approved by the state training authority.</p> <p>(c) An employer must not terminate the employment of a trainee unless:</p> <p>(i) the trainee has consented to the termination; or</p> <p>(ii) approval has been obtained from the relevant state training authority.</p> <p>(d) If the employer terminates the employment of a trainee by consent, the employer must provide written notice to the relevant state training authority.</p> <p>(e) An employer who chooses not to continue the employment of a trainee upon the completion of the traineeship must notify, in writing, the state training authority of its decision.</p> <p>(f) The trainee is permitted to be absent from work without loss of wages to attend training in accordance with the training plan.</p> <p>(g) Where the employment of a trainee by an employer is continued after the completion of the traineeship, the traineeship period will count as service the purposes of this award and any other legislative entitlements.</p> <p>(h) All other terms and conditions of this award, other than those provided for under this clause, will apply to a trainee.</p> <p>(i) A trainee who fails to either complete the traineeship, or who cannot for any reason be placed in employment with the employer on successful completion of the traineeship, will not be entitled to any severance payments payable pursuant to termination, change and redundancy provisions.</p> <p>(j) At the conclusion of the traineeship this clause ceases to apply to the employment of the trainee and the award will apply to the former trainee.</p> <p>(4) Wages</p> <p>The minimum weekly wages payable to trainees are as provided below. These wage rates will only apply to trainees while they are undertaking an approved traineeship which includes approved training.</p> <p>(a) Skill Level A: Where the accredited training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level A.</p> <p style="text-align: center;">HIGHEST YEAR OF SCHOOLING</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">School Leaver</th> <th style="text-align: center;">Year 10</th> <th style="text-align: center;">Year 11</th> <th style="text-align: center;">Year 12</th> </tr> <tr> <th></th> <th style="text-align: center;">\$</th> <th style="text-align: center;">\$</th> <th style="text-align: center;">\$</th> </tr> </thead> <tbody> <tr> <td>School leaver</td> <td style="text-align: center;">284.00</td> <td style="text-align: center;">338.00</td> <td style="text-align: center;">415.00</td> </tr> <tr> <td>Plus 1 year out of school</td> <td style="text-align: center;">338.00</td> <td style="text-align: center;">415.00</td> <td style="text-align: center;">480.00</td> </tr> <tr> <td>Plus 2 years out of school</td> <td style="text-align: center;">415.00</td> <td style="text-align: center;">480.00</td> <td style="text-align: center;">563.00</td> </tr> <tr> <td>Plus 3 years out of</td> <td style="text-align: center;">480.00</td> <td style="text-align: center;">563.00</td> <td style="text-align: center;">643.00</td> </tr> </tbody> </table>	School Leaver	Year 10	Year 11	Year 12		\$	\$	\$	School leaver	284.00	338.00	415.00	Plus 1 year out of school	338.00	415.00	480.00	Plus 2 years out of school	415.00	480.00	563.00	Plus 3 years out of	480.00	563.00	643.00
School Leaver	Year 10	Year 11	Year 12																						
	\$	\$	\$																						
School leaver	284.00	338.00	415.00																						
Plus 1 year out of school	338.00	415.00	480.00																						
Plus 2 years out of school	415.00	480.00	563.00																						
Plus 3 years out of	480.00	563.00	643.00																						

health or injury for a period of seven consecutive days or more and he produces a certificate from a registered medical practitioner that he was so confined.

Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if he is unable to attend for work on the working day next following his annual leave.

- (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time he proceeded on annual leave and shall not be made with respect to fractions of a day.
- (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave entitlement equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 8 - Holidays and Annual Leave of this award.
- (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 8 - Holidays and Annual Leave of this award shall be deemed to have been paid with respect to the replaced annual leave.

(7) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of Clause (2) of the Long Service Leave provisions published in

school			
Plus 4 years out of school	563.00	643.00	
Plus 5 years or more out of school	643.00		

- (b) Skill Level B:
Where the accredited training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level B.

HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
School leaver	284.00	338.00	406.00
Plus 1 year out of school	338.00	406.00	463.00
Plus 2 years out of school	406.00	463.00	546.00
Plus 3 years out of school	463.00	546.00	623.00
Plus 4 years out of school	546.00	623.00	
Plus 5 years or more out of school	623.00		

- (c) Skill Level C:
Where the accredited training course and work performed are for the purpose of generating skills which have been defined for work at Industry/Skill Level C.

HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
School Leaver	284.00	338.00	405.00
Plus 1 year out of school	338.00	405.00	455.00
Plus 2 years out of school	405.00	455.00	511.00
Plus 3 years out of school	455.00	511.00	574.00
Plus 4 years out of school	511.00	574.00	
Plus 5 years or more out of school	574.00		

- (d) Trainees undertaking an AQF IV traineeship must receive the relevant weekly wage rate for AQF III trainees at Skill/Industry Levels A, B and C as applicable with the addition of 3.8% of that wage rate.
- (e) For the purposes of this clause "out of school" refers only to periods out of school beyond year 10 and is deemed to:
 - (i) include any period of schooling beyond year 10 which was not part of nor contributed to a completed year of schooling;
 - (ii) include any period during which a trainee repeats in whole or part a year of schooling beyond year 10;
 - (iii) not include any period during a calendar year in

<p>Volume 65 of the Western Australian Industrial Gazette at pages 1 - 4, the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmitter shall stand to the credit of the employee at the commencement of service with the transmitttee and may be claimed in accordance with the provisions of this clause.</p> <p>(8) The provisions of this clause do not apply to casual employees.</p>	<p>which a year of schooling is completed; and</p> <p>(iv) have effect on an anniversary date being January 1 in each year.</p> <p>(f) Part time and School Based Trainees</p> <p>(i) This subclause shall apply to trainees who undertake a traineeship on a part time basis, or as a School Based trainee, by working less than full time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.</p> <p>(ii) School Based Trainees will receive the relevant wage rate at Skill/Industry Levels A, B and C as applicable, as for School Leavers.</p> <p>(iii) The minimum weekly rate of pay for part time and school based trainees shall be calculated by taking the full time rates expressed above multiplied by 1.25. This minimum weekly rate of pay for part time and school based trainees is then divided by 38 in accordance with section 10 of the <i>Minimum Conditions of Employment Act 1993</i> (WA) to produce a minimum hourly rate of pay.</p> <p>(5) Industry Skill Levels The industry skill levels referred to in subclause (4) are those described in the General Order made by the Commission from time to time setting the minimum rates of pay for apprentices for the purposes of the <i>Minimum Conditions of Employment Act 1993</i> (WA) pursuant to section 50A of the Act.</p>
<p>10. – RECORD OF WAGES</p> <p>(1) The employer shall keep or cause to be kept, a wages record showing the name of each employee, the wages and allowances paid and the deductions made from such wages.</p> <p>(2) The wages record shall be open for inspection at a mutually convenient time, by a duly accredited official of the Union at the employer's property or other convenient place. Provided that only one demand for such inspection shall be made in any one fortnight at the same property.</p> <p>Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer.</p>	<p>19. – SUPERANNUATION</p> <p>(1) The <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth), the <i>Superannuation Guarantee Charge Act 1992</i> (Cth), the <i>Superannuation Industry (Supervision) Act 1993</i> (Cth) and the <i>Superannuation (Resolution of Complaints) Act 1993</i> (Cth) deals with the superannuation rights and obligations of employers and employees.</p> <p>(2) The employer must make superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.</p> <p>(3) The employer must notify the employee of the entitlement to nominate a complying superannuation fund or scheme to which contributions in respect of the employee may be made.</p> <p>(4) The employer must make contributions to a complying fund or scheme nominated by the employer until the employee nominates such a fund or scheme.</p> <p>(5) The employer and the employee are bound by the employee's nomination unless the employer and employee agree to change the complying superannuation fund or scheme to which contributions are to be made.</p> <p>(6) An employer must not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee.</p>
<p>11. – BEREAVEMENT LEAVE</p> <p>An employee shall on the death within Australia of a close relative, be entitled on notice to leave</p>	<p>11. – RECORD OF WAGES</p> <p>The requirements for keeping and enabling access to employment records are provided for in Part II, Division 2F of the <i>Industrial Relations Act 1979</i> (WA).</p>

<p>up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee in two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of his employer.</p>															
<p style="text-align: center;">12. – ACCOMMODATION</p> <p>(1) Where an employee is provided with board and lodging the employer shall be allowed to make a deduction at the rate of \$45.60 per week of seven days.</p> <p>(2) For the purpose of this clause “Board and Lodging” shall mean a reasonable supply and standard of food together with a reasonable standard of accommodation.</p> <p>(3) Should any dispute arise under this clause the matter shall be decided by a Board of Reference.</p>	<p style="text-align: center;">12. – ACCOMMODATION</p> <p>Where an employee is provided with board and lodging the employer shall be allowed to make a deduction at the rate of \$45.60 per week.</p>														
<p style="text-align: center;">13. – PROTECTIVE CLOTHING</p> <p>The employer shall provide, free of charge, all necessary protective clothing including gum boots for use when required. Such clothing shall be issued in good condition and retained by the employee during the period of his employment and it shall be renewed by the employer when required.</p>	<p style="text-align: center;">NO VARIATIONS</p>														
<p style="text-align: center;">14. – WAGES</p> <p>The following shall be the minimum weekly rates of wages payable to employees covered by this award:-</p> <p>(1)</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 80%;"></th> <th style="text-align: right; width: 20%;">TOTAL \$</th> </tr> </thead> <tbody> <tr> <td>Adult Employees:</td> <td></td> </tr> <tr> <td>Farm Hand</td> <td></td> </tr> <tr> <td>(a) With less than twelve months experience in the industry</td> <td style="text-align: right;">819.90</td> </tr> <tr> <td>(b) With twelve months experience in the industry</td> <td style="text-align: right;">819.90</td> </tr> <tr> <td>(c) General Farm Hand</td> <td style="text-align: right;">819.90</td> </tr> <tr> <td>(d) Farm Tradesman (As defined)</td> <td style="text-align: right;">819.90</td> </tr> </tbody> </table> <p>“Farm Tradesman” shall mean a farm hand who has satisfactorily completed the approved apprenticeship in “farming” or who has been issued with an approved trade certificate and provides proof satisfactory to the employer of such qualification or who has by other means achieved a standard of knowledge deemed by his employer as equivalent thereto and is appointed as such in writing by his employer.</p> <p>(2) Junior Employees - other than</p>		TOTAL \$	Adult Employees:		Farm Hand		(a) With less than twelve months experience in the industry	819.90	(b) With twelve months experience in the industry	819.90	(c) General Farm Hand	819.90	(d) Farm Tradesman (As defined)	819.90	<p style="text-align: center;">14. – PERSONAL LEAVE</p> <p>(1)</p> <p>(a) Personal leave is provided for in the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p> <p>(b) If in the first or successive years of service with the employer an employee is absent on the grounds of personal illness or injury for a period longer than the employee’s entitlement to paid personal leave, payment may be adjusted at the end of that year of service, or at the time the employee’s services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid personal leave during that year of service.</p> <p>(2) For absences due to personal illness or injury, an employee shall not be required to provide evidence of the entitlement with respect to absences of two days or less, where such absences do not exceed two absences in any year of service. If an employee is absent for two days or less due to personal illness or injury on two or more occasions, the employer may give the employee written notice that evidence complying with the requirements of the <i>Minimum Conditions of Employment Act 1993</i> (WA) will be required for the next and subsequent absences in that year of service.</p> <p>(3)</p> <p>(a) Subject to the provisions of this subclause, the provisions of this clause apply to any employee who suffers personal illness or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid personal leave in place of paid annual leave.</p> <p>(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was</p>
	TOTAL \$														
Adult Employees:															
Farm Hand															
(a) With less than twelve months experience in the industry	819.90														
(b) With twelve months experience in the industry	819.90														
(c) General Farm Hand	819.90														
(d) Farm Tradesman (As defined)	819.90														

<p>Apprentices:</p> <table border="0"> <tr> <td></td> <td style="text-align: center;">Percentage of the rate for a Farm Hand with less than twelve months experience</td> </tr> <tr> <td>15 years of age</td> <td style="text-align: center;">45%</td> </tr> <tr> <td>16 years of age</td> <td style="text-align: center;">50%</td> </tr> <tr> <td>17 years of age</td> <td style="text-align: center;">55%</td> </tr> <tr> <td>18 years of age</td> <td style="text-align: center;">65%</td> </tr> <tr> <td>19 years of age</td> <td style="text-align: center;">75%</td> </tr> <tr> <td>20 years of age</td> <td style="text-align: center;">90%</td> </tr> </table> <p>(3) Casual Employees:</p> <p>A casual employee shall be paid 20 percentum in addition to the rates prescribed</p> <p>(4) Apprentices:</p> <table border="0"> <tr> <td></td> <td style="text-align: center;">Percentage of weekly rate of wage for a Farm Tradesman</td> </tr> <tr> <td>First year of service</td> <td style="text-align: center;">47.5%</td> </tr> <tr> <td>Second year of service</td> <td style="text-align: center;">71.0%</td> </tr> <tr> <td>Third year of service</td> <td style="text-align: center;">90.3%</td> </tr> </table> <p>The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.</p> <p>These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.</p> <p>Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.</p>		Percentage of the rate for a Farm Hand with less than twelve months experience	15 years of age	45%	16 years of age	50%	17 years of age	55%	18 years of age	65%	19 years of age	75%	20 years of age	90%		Percentage of weekly rate of wage for a Farm Tradesman	First year of service	47.5%	Second year of service	71.0%	Third year of service	90.3%	<p>confined to the employee's place of residence or a hospital as a result of the employee's personal illness or injury for a period of seven consecutive days or more and the employee produces a certificate from a registered medical practitioner that the employee was so confined.</p> <p>(c) Replacement of paid annual leave by paid personal leave shall not exceed the period of paid personal leave to which the employee was entitled at the time the employee proceeded on annual leave and shall not be made with respect to fractions of a day.</p> <p>(d) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 15. - Annual Leave of this award shall be deemed to have been paid with respect to the replaced annual leave.</p> <p>(4) Where a business has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with section 7H of the <i>Long Service Leave Act 1958</i> (WA) the paid personal leave standing to the credit of the employee at the date of transfer from service with the old employer shall stand to the credit of the employee at the commencement of service with the new employer and may be claimed in accordance with the provisions of this clause.</p> <p>(5) The provisions of this clause do not apply to casual employees.</p>
	Percentage of the rate for a Farm Hand with less than twelve months experience																						
15 years of age	45%																						
16 years of age	50%																						
17 years of age	55%																						
18 years of age	65%																						
19 years of age	75%																						
20 years of age	90%																						
	Percentage of weekly rate of wage for a Farm Tradesman																						
First year of service	47.5%																						
Second year of service	71.0%																						
Third year of service	90.3%																						
<p style="text-align: center;">15. – FIRST AID KIT</p> <p>At each place where employees are employed the employer shall supply a suitable first aid kit which shall be accessible to the employees at all times.</p>	<p style="text-align: center;">15. – ANNUAL LEAVE</p> <p>(1) Annual leave is provided for in the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p> <p>(2)</p> <p>(a) During a period of annual leave an employee shall be paid a loading of 17.5% of the rate of wage prescribed in Clause 8. - Wages of this award.</p> <p>(b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.</p>																						

	(3) The provisions of this clause do not apply to casual employees.
<p>16. – REPRESENTATIVE INTERVIEWING EMPLOYEES</p> <p>Consistent with the terms of the Labour Relations Legislation Amendment Act 1997 and S.23(3)(c)(iii) of the Industrial Relations Act a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of an employer unless the employer is the employer, or former employer, of a member of the Union.</p> <p>An accredited representative of the Union shall, with the consent of the employer, be permitted to inspect the working place of employees at a time mutually convenient and interview employees covered by this award.</p>	<p>16. – PUBLIC HOLIDAYS</p> <p>(1)</p> <p>(a) The following days or the days observed in lieu shall be allowed as holidays without deduction of pay, namely:- New Year’s Day Labour Day Australia Day Western Australia Day Good Friday Sovereign’s Birthday Easter Monday Easter Sunday Christmas Day Anzac Day Boxing Day</p> <p>Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.</p> <p>(b) Where a day is proclaimed as a public holiday or public half-holiday under section 7 of the <i>Public and Bank Holidays Act 1972</i> (WA), either throughout the State or within a district or locality as is specified in the proclamation, that day will be a public holiday or a public half-holiday for the purposes of this award within the area specified in the proclamation.</p> <p>(c) When any of the days mentioned in paragraph (a) of this subclause, other than Easter Sunday, falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday.</p> <p>In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.</p> <p>(2) If a public holiday that is prescribed as a holiday under the award falls on a day when an employee is off duty in circumstances that would qualify the employee for paid leave, the employee shall be paid as if required to work on that day in accordance with this clause, without deduction from the employee’s relevant leave accrual, provided that the employee shall not also be paid personal leave in accordance with Clause 14.</p>
<p>17. – LONG SERVICE LEAVE</p> <p>The Long Service Leave Provisions published in Volume 65 of the Western Australian Industrial Gazette at pages 1 - 4 inclusive are hereby incorporated in and shall be deemed to be part of this award.</p>	<p>17. – BEREAVEMENT LEAVE</p> <p>Bereavement leave is provided for in the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p>
<p>18. – LIBERTY TO APPLY</p> <p>Liberty is reserved to the Union to apply to vary Clause 3 - Area and Scope of this award to include the “Dairy Industry”.</p>	<p>18. – FAMILY AND DOMESTIC VIOLENCE LEAVE</p> <p>Family and domestic violence leave is provided for in Division 7 of Part 2-2 of the <i>Fair Work Act 2009</i> (Cth) and the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p>
<p>19. – SUPERANNUATION</p> <p>The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled - Compliance, Nomination and Transition.</p>	<p>19. – LONG SERVICE LEAVE</p> <p>The provisions of the <i>Long Service Leave Act 1958</i> (WA) are hereby incorporated in and shall be deemed to be part of this award.</p>

<p>(1) Employer Contributions:</p> <p>(a) An employer shall contribute 3% of ordinary time earnings per eligible employee into one of the following Approved Superannuation Funds as may be amended from time to time, and includes any superannuation scheme which may be made in succession thereto:</p> <p style="padding-left: 20px;">(i) Federation Life “National Superannuation Plan”; or</p> <p style="padding-left: 20px;">(ii) The Australian Eagle Insurance Company Limited “Australian Farm Superannuation Plan”; or</p> <p style="padding-left: 20px;">(iii) Any other approved occupational superannuation fund to which an employer or employee who is a member of the religious fellowship known as Brethren elects to contribute.</p> <p style="padding-left: 20px;">(iv) An exempted Fund allowed by subclause (4) of this clause.</p> <p>(b) Employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.</p> <p>(c) No contributions shall be made for periods of unpaid leave, or unauthorised absences in excess of 5 ordinary days or for periods of workers' compensation in excess of 52 weeks. No contributions shall be made in respect of annual leave paid out on termination or any other payments on termination.</p> <p>(2) Fund Membership:</p> <p>(a) Contributions in accordance with subclause (1) - Employer Contributions of this clause shall be calculated by the employer on behalf of each</p>	
---	--

employee from the date one month after the employee commences employment, unless the employee fails to return a completed application to join the Fund and the employer has complied with the following:

- (i) The employer shall provide the employee with an application to join the Fund and documentation explaining the Fund prior to the first wage payment.
- (ii) If the employee fails to return to the employer a completed application to join the Fund within two weeks of receipt, the employer shall send to the employee by certified mail, a letter setting out relevant superannuation information, the letter of denial set out in subclause (6) of this clause and an application to join the Fund.
- (iii) Where the employee completes and returns the letter of denial, no contributions need to be made on that employee's behalf.
- (iv) Where the employee completes and returns neither the application to join the Fund nor the letter of denial within one week of postage the employer shall advise either the Union or the Fund Administrator in writing of the employee's failure to return the completed form.
- (v) From two weeks

<p>following the employer's advice pursuant to paragraph (iv) of this subclause should the employee not have returned the completed form the employer shall be under no obligation to make superannuation payments on behalf of that employee.</p> <p>Provided that if at any time an employee returns a signed application form, notwithstanding a previous failure to return such form or the return of a letter of denial, the employer shall make contributions on behalf of that employee from the date of return of the signed application form.</p> <p>(b) Part time and casual employees shall not be entitled to receive the employer contribution mentioned in subclause (1) Employer Contributions of this clause unless they work a minimum of 12 hours per week.</p> <p>(c) Casual employees who are employed for 32 consecutive working days or less shall not be entitled to the benefits of this clause.</p> <p>(3) Definitions:</p> <p>“Approved Fund” shall mean any fund which complies with Australian Government's Operational Standards for Occupational Superannuation and shall be a capital guaranteed fund.</p> <p>“Ordinary time earnings” shall mean the salary, wage or other remuneration regularly received by the employee in respect of the time worked in ordinary hours and shall include shift work penalties, payments which are made for the purpose of District or Location Allowances or any other rate paid for all purposes of the award to which the employee is entitled for ordinary hours</p>	
---	--

of work PROVIDED THAT "ordinary time earnings" shall not include any payment which is for vehicle allowances, fares or travelling time allowances (including payments made for travelling related to distant work), commission or bonus.

(4)

Exemptions:

Exemptions from the requirements of this clause shall apply to an employer who at the date of this Order:

- (a) was contributing to a Superannuation Fund, in accordance with an Order of an industrial tribunal; OR
- (b) was contributing to a Superannuation Fund, in accordance with an Order or Award of an industrial tribunal, for a majority of employees and makes payment for employees covered by this award in accordance with that Order or Award; OR
- (c) subject to notification to the Union, was contributing to a Superannuation Fund for employees covered by this Award where such payments are not made pursuant to an Order of an industrial tribunal.

(5)

Operative Date:

This clause shall operate on and from the 1st day of November, 1989.

(6)

Letter of Denial:

The letter of denial shall be in the following form:

"To (employer)

I have received an application for membership of the non-contributory Superannuation Fund and understand:

- (1) that should I sign such form you will make contributions on my behalf; AND
- (2) that I am not required to make contributions of my own; AND
- (3) that no deductions will be made from my wages for

superannuation without my consent.

However, I do not wish to be a member of the fund or have any contributions made on my behalf.

_____(Signature)
_____(Name)
_____(Address)
_____(Classification)
_____(Date)"

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an employee, on and from 30 June 1998 –

- (a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless –
 - (i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and
 - (ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme;
- (b) The employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the employee;
- (c) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;
- (d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this

<p>subclause shall, subject to the requirements of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the employee to whom such is directed;</p> <p>(e) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;</p> <p>(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by a employee; Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme –</p> <p>(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer; or</p> <p>(h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.</p>	
	<p style="text-align: center;">20. – PARENTAL LEAVE</p> <p>Parental leave is provided for in Division 5 of Part 2-2 of the <i>Fair Work Act 2009 (Cth)</i> and the <i>Minimum Conditions of Employment Act 1993 (WA)</i>.</p>
	<p style="text-align: center;">21. – TERMINATION</p> <p>(1) Termination by employer - Full-time and part-time employment</p> <p>Employers covered by this award must comply with the</p>

	<p>requirements for notice of termination set out in the National Employment Standards of the <i>Fair Work Act 2009</i> (Cth). Refer to sections 117 and 123, and Division 3 of Part 6-3, for further details.</p> <p>Note: Division 3 of Part 6-3 of the <i>Fair Work Act 2009</i> (Cth) requires non-national system employers (including employers in the Western Australian state industrial relations system) to provide notice of termination (or payment in lieu) to employees.</p> <p>Section 117 of the <i>Fair Work Act 2009</i> (Cth) outlines the length of notice (or payment in lieu) an employer must provide to terminate an employee’s employment, as well as other conditions regarding the giving of notice.</p> <p>Section 123 of the <i>Fair Work Act 2009</i> (Cth) outlines which employees are excluded from receiving notice.</p> <p>(2) Termination by employee</p> <p>A full-time or part-time employee must give the employer notice of termination in accordance with the following table.</p> <p>Table 1 – Notice of termination by employee</p> <table border="1" data-bbox="837 862 1508 1086"> <thead> <tr> <th>Employee’s period of continuous service with the employer</th> <th>Minimum period of notice</th> </tr> </thead> <tbody> <tr> <td>Not more than 1 year</td> <td>1 week</td> </tr> <tr> <td>More than 1 year but not more than 3 years</td> <td>2 weeks</td> </tr> <tr> <td>More than 3 years but not more than 5 years</td> <td>3 weeks</td> </tr> <tr> <td>More than 5 years</td> <td>4 weeks</td> </tr> </tbody> </table> <p>(3) Casual employment</p> <p>An employer or employee may terminate a casual employment arrangement with one hour’s notice.</p>	Employee’s period of continuous service with the employer	Minimum period of notice	Not more than 1 year	1 week	More than 1 year but not more than 3 years	2 weeks	More than 3 years but not more than 5 years	3 weeks	More than 5 years	4 weeks
Employee’s period of continuous service with the employer	Minimum period of notice										
Not more than 1 year	1 week										
More than 1 year but not more than 3 years	2 weeks										
More than 3 years but not more than 5 years	3 weeks										
More than 5 years	4 weeks										
	<p style="text-align: center;">22. – FIRST AID KIT</p> <p>At each place where employees are employed the employer shall supply a suitable first aid kit which shall be accessible to the employees at all times.</p>										
	<p style="text-align: center;">23. – RIGHTS OF ENTRY</p> <p>Rights of entry for discussions with employees and to investigate breaches of industrial instruments is provided for in Part II, Division 2G of the <i>Industrial Relations Act 1979</i> (WA).</p>										
	<p style="text-align: center;">24. – RESOLUTION OF DISPUTES</p> <p>(1) The following procedures shall apply in connection with questions, disputes or difficulties arising under this award.</p> <p>(a) The persons directly involved, or representatives of person/s directly involved, shall discuss the question, dispute or difficulty as soon as is practicable.</p> <p>(b)</p> <p style="padding-left: 40px;">(i) If these discussions do not result in a settlement, the question, dispute or difficulty shall be referred to senior management for further discussion.</p> <p style="padding-left: 40px;">(ii) Discussions at this level will take place as soon as practicable.</p> <p>(2) The terms of any agreed settlement should be jointly recorded.</p> <p>(3) Any settlement reached which is contrary to the terms of this award</p>										

	<p>shall not have effect unless and until that conflict is resolved to allow for it.</p> <p>(4) Nothing in this clause shall be read so as to exclude an organisation party to or bound by the award from representing its members.</p> <p>(5) Any question, dispute or difficulty not settled may be referred to the Commission provided that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.</p>
<p>APPENDIX – RESOLUTION OF DISPUTESREQUIREMENT</p> <p>(1) This Appendix is inserted into the award/industrial agreement as a result of legislation which came into effect on 16 January 1996 (Industrial Relations Legislation Amendment and Repeal Act 1995) and further varied by legislation which came into effect on 23 May 1997 (Labour Relations Legislation Amendment Act 1997).</p> <p>(2) Subject to this appendix, and in addition to any current arrangements the following procedures shall apply in connection with questions, disputes or difficulties arising under this award/industrial agreement.</p> <p>(a) The persons directly involved, or representatives of person/s directly involved, shall discuss the question, dispute or difficulty as soon as is practicable.</p> <p>(b)</p> <p>(i) If these discussions do not result in a settlement, the question, dispute or difficulty shall be referred to senior management for further discussion.</p> <p>(ii) Discussions at this level will take place as soon as practicable.</p> <p>(3) The terms of any agreed settlement should be jointly recorded.</p> <p>(4) Any settlement reached which is contrary to the terms of this award/industrial agreement shall not have effect unless and until that conflict is resolved to allow for it.</p> <p>(5) Nothing in this appendix shall be read so as to exclude an organisation party to or bound by the award/industrial agreement from representing its members.</p>	<p>THIS APPENDIX IS NOW CLAUSE 24</p>

<p>(6) Any question, dispute or difficulty not settled may be referred to the Western Australian Industrial Relations Commission provided that with effect from 22 November 1997 it is required that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.</p>	
<p>SCHEDULE A. – RESPONDENTS</p> <p>David Blair, Doodlakine Garth Butcher, Bedfordale Noel Fallow, Morawa Murray Field, Esperance John Newing, Tambellup Norman Payne, Morawa Peter Wahlsten, Walgoolan.</p>	<p>SCHEDULE A. - RESPONDENTS</p> <p>David Blair, Doodlakine Garth Butcher, Bedfordale Noel Fallow, Morawa Murray Field, Esperance John Newing, Tambellup Peter Wahlsten, Walgoolan</p>
<p>SCHEDULE B. – PARTIES TO THE AWARD</p> <p>Union Party to the Award</p> <p>The Australian Workers' Union, West Australian Branch, Industrial Union of Workers</p> <p>DATED at Perth this 20th day of March, 1985.</p>	<p>SCHEDULE B. - PARTIES TO THE AWARD</p> <p>Union Party to the Award</p> <p>The Australian Workers' Union, West Australian Branch, Industrial Union of Workers</p>
<p>APPENDIX - S.49B - INSPECTION OF RECORDS REQUIREMENTS</p> <p>(1) Where this award, order or industrial agreement empowers a representative of an organisation of employees party to this award, order or industrial agreement to inspect the time and wages records of an employee or former employee, that power shall be exercised subject to the Industrial Relations (General) Regulations 1997 (as may be amended from time to time) and the following:</p> <p>(a) The employer may refuse the representative access to the records if: -</p> <p>(i) the employer is of the opinion that access to the records by the representative of the organisation would infringe the privacy of persons who are not members of the organisation; and</p> <p>(ii) the employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative.</p>	<p>APPENDIX DELETED</p>

<p>(b) The power of inspection may only be exercised by a representative of an organisation of employees authorised for the purpose in accordance with the rules of the organisation.</p> <p>(c) Before exercising a power of inspection, the representative shall give reasonable notice of not less than 24 hours to an employer.</p> <p>(16) Any employer or organisation bound by or party to this award/order/industrial agreement may apply to the Western Australian Industrial Relations Commission at any time in relation to this clause.</p>	
---	--

2023 WAIRC 00275

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

TUESDAY, 16 MAY 2023

FILE NO/S

APPL 58 OF 2022

CITATION NO.

2023 WAIRC 00275

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

Dr T Dymond on behalf of UnionsWA

Ms J Corkhill of counsel on behalf of the Pastoralists and Graziers Association of Western Australia and the Western Australian Farmers Federation (Inc)

Order

HAVING heard from 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, Dr T Dymond on behalf of UnionsWA and Ms J Corkhill of counsel on behalf of the Pastoralists and Graziers Association of Western Australia and the Western Australian Farmers Federation (Inc), the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the Pastoralists and Graziers Association of Western Australia and the Western Australian Farmers Federation (Inc) each be permitted to intervene in these proceedings.
2. THAT the *Farm Employees' Award 1985* be varied in accordance with the attached Schedule, and that the variations in the attached Schedule shall have effect from 1 July 2023.
3. THAT the proceedings otherwise be adjourned to a date to be fixed after the determination of CICS 18 of 2022 to deal with:

- (a) variations to clause 5 'Hours of Work' dealing with minimum hours on shift for part-time employees, and exceptions to such minimum hours for employees who perform work of dairy operators, if applicable;
- (b) transitional provisions for implementation of annual leave loading in the dairy industry, if applicable;
- (c) transitional provisions for implementation of engagement requirements for part-time employees in the dairy industry, if applicable; and
- (d) the inclusion of classifications for employees who perform work of dairy operators, if applicable.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE

Current Award	Variations
1. – TITLE	1. – TITLE
This award shall be known as the "Farm Employees" Award, 1985 and replaces Award No. 6 of 1946 as varied, consolidated and varied.	This award shall be known as the Farm Employees' Award.
1B. – MINIMUM ADULT AWARD WAGE	NO VARIATIONS
(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.	
(2) The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is \$819.90 per week. The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide \$819.90 by 38 and multiply by the number of ordinary hours prescribed for a full-time employee under the award. The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2022.	
(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case decisions.	
(4) Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.	
(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the <i>Minimum Conditions of Employment Act 1993</i> .	
(6) The minimum adult award wage shall	

not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

- (7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.
- (8) Subject to this clause the minimum adult award wage shall –
- (a) Apply to all work in ordinary hours.
- (b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- (9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2022 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

- (10) Adult Apprentices
- (a) Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a fulltime apprentice aged 21 years or more working under an award that provides for a 38 hour week is \$696.50 per week.
- (b) The minimum adult

<p>apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide \$696.50 by 38 and multiply by the number of ordinary hours prescribed for a full-time apprentice under the award.</p> <p>(c) The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2022.</p> <p>(d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.</p> <p>(e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.</p> <p>(f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.</p>	
<p style="text-align: center;">2. – ARRANGEMENT</p> <p>1. Title 1B. Minimum Adult Award Wage 2. Arrangement 2A. State Wage Principles - September 1989 3. Area and Scope 4. Term 5. Contract of Service 6. Apprentices 7. Hours 8. Holidays and Annual Leave 9. Absence Through Sickness 10. Record of Wages 11. Bereavement Leave 12. Accommodation 13. Protective Clothing 14. Wages 15. First Aid Kit 16. Representative Interviewing Employees 17. Long Service Leave 18. Liberty to Apply 19. Superannuation Appendix - Resolution of Disputes Requirement Schedule A. - Respondents</p>	<p style="text-align: center;">2. – ARRANGEMENT</p> <p>GENERAL</p> <p>1. Title 1B. Minimum Adult Award Wage 2. Arrangement 3. Area and Scope 4. Definitions 5. Employment Relationship 6. Apprentices</p> <p>HOURS OF WORK</p> <p>7. Hours</p> <p>WAGES AND ALLOWANCES</p> <p>8. Wages 9. Trainees 10. Superannuation 11. Record of Wages 12. Accommodation 13. Protective Clothing</p> <p>LEAVE</p> <p>14. Personal Leave 15. Annual Leave 16. Public Holidays</p>

<p>Schedule B. - Parties to the Award Appendix - S.49B - Inspection Of Records Requirements</p>	<p>17. Bereavement Leave 18. Family and Domestic Violence Leave 19. Long Service Leave 20. Parental Leave</p> <p>TERMINATION OF EMPLOYMENT 21. Termination</p> <p>OTHER 22. First Aid Kit 23. Rights of Entry 24. Dispute Resolution</p> <p>Schedule A. Respondents Schedule B. Parties to the Award</p>
<p>2A. – STATE WAGE PRINCIPLES - SEPTEMBER 1989</p> <p>It is a term of this award that the union undertakes, for the duration of the Principles determined by the Commission in Court Session in Application No. 1940 of 1989 not to pursue any extra claims, award or overaward except when consistent with the State Wage Principles.</p>	<p>CLAUSE DELETED</p>
<p>3. – AREA AND SCOPE</p> <p>This award shall apply throughout the State of Western Australia to employees employed:-</p> <p>(a) On farms in connection with the sowing, raising, harvesting and/or treatment of grain, fodder or other farm produce.</p> <p>(b) On farms or properties in connection with the breeding, rearing or grazing of horses, cattle, sheep, pigs or deer; or</p> <p>(c) In clearing, fencing, well sinking, dam sinking or trenching on such farms or properties except employees who are bound by the award of the Australian Conciliation and Arbitration Commission and known as the “Pastoral Industry Award, 1965” as varied or replaced from time to time and the award of the Western Australian Industrial Commission, known as the “State Research Stations, Agricultural Schools and College Workers” Award No 23 of 1971 as varied, and as varied or replaced from time to time. Provided that this award shall not apply to the land and premises occupied by:-</p> <p>(1) Any institutions declared by proclamation under the “<i>Aboriginal Affairs Planning Authority, Act, 1972</i>”;</p> <p>Or</p> <p>(2) Any of the following institutions:-</p> <p>Parkerville Children’s Home Incorporated; Tom Allan Memorial Home for Boys, Weeribee; St Joseph’s Farm and Trades School, Bindoon;</p>	<p>NO VARIATIONS</p>

Christian Brothers' Agricultural School, Tardun.	
<p style="text-align: center;">4. – TERM</p> <p>The term of this award shall be for one year from the beginning of the first pay period commencing on or after the date hereof.</p>	<p style="text-align: center;">4. – DEFINITIONS</p> <p>(a) “Apprentice” means an apprentice under the <i>Vocational Education and Training Act 1996</i> (WA), or any successor legislation.</p> <p>(b) “Appropriate state legislation” means the <i>Vocational Education and Training Act 1996</i> (WA) or its replacement.</p> <p>(c) “Approved training” means training which is specified in the training plan which is part of the training agreement registered with the state training authority. It includes training undertaken both on and off the job, in a traineeship and will involve formal instruction both theoretical and practical, and supervised practice in accordance with a traineeship scheme approved and accredited by the state training authority.</p> <p>(d) “Board and lodging” means a reasonable supply and standard of food together with a reasonable standard of accommodation.</p> <p>(e) “Commission” means the Western Australian Industrial Relations Commission.</p> <p>(f) “Complying superannuation fund or scheme” means a superannuation fund or scheme:</p> <p style="padding-left: 20px;">(a) that is a complying superannuation fund or scheme within the meaning of the <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth), and</p> <p style="padding-left: 20px;">(b) to which, under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme.</p> <p>(g) “Tradesperson” shall mean a person who has satisfactorily completed the approved apprenticeship in a qualification relevant to agriculture or who has been issued with an approved trade certificate and provides proof satisfactory to the employer of such qualification or who has by other means achieved a standard of knowledge deemed by their employer as equivalent thereto and is appointed as such in writing by the employer.</p> <p>(h) “Trainee” means an employee who is undertaking a traineeship.</p> <p>(i) “Traineeship” means a structured employment-based training program approved by the state training authority that leads to the trainee gaining a nationally recognised qualification. Traineeships may be full time or part time (including school based arrangements).</p> <p>(j) “Training contract” means a legally binding agreement between an employer, an apprentice/trainee and their legal guardian, where required, to undertake a traineeship.</p> <p>(k) “Training plan” outlines the training delivery and assessment strategy to be undertaken throughout the training contract. It is developed by the nominated registered training organisation in negotiation with the employer and trainee.</p> <p>(l) “Union” means The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers.</p>
<p style="text-align: center;">5. – CONTRACT OF SERVICE</p> <p>(a) An employer shall have the option of engaging an employee other than an apprentice either under terms of weekly hiring or as a casual employee. An employee not specifically engaged as a</p>	<p style="text-align: center;">5. – EMPLOYMENT RELATIONSHIP</p> <p>(1) Employees under this award will be employed in one of the following categories:</p> <p style="padding-left: 20px;">(a) full-time;</p>

<p>casual employee, shall be deemed to be employed on terms of weekly hiring. A casual employee shall mean an employee engaged and paid as such.</p> <p>(b) If the engagement is on terms of weekly hiring, it shall be terminated only by a week's notice or by payment or forfeiture of one week's pay in lieu of notice by either side. Provided that this clause shall not affect the right of the employer to dismiss an employee without notice for incompetence or misconduct and in such cases wages shall be paid up to the time of dismissal</p>	<p>(b) part-time; or</p> <p>(c) casual.</p> <p>(2) At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, part-time or casual.</p> <p>(3) A full-time employee is an employee who is engaged to work an average of 38 hours per week over a 4 week period.</p> <p>(4) A full-time employee must be provided with a written statement setting out their classification, applicable rate of pay and terms of engagement.</p> <p>(5) A part-time employee is an employee who:</p> <p>(a) is engaged to work less than an average of 38 hours per week over a 4 week period;</p> <p>(b) has reasonably predictable hours of work; and</p> <p>(c) receives on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.</p> <p>(6) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least:</p> <p>(a) the hours worked each day;</p> <p>(b) which days of the week the employee will work; and</p> <p>(c) the actual starting and finishing times each day.</p> <p>(7) Changes in part-time hours under subclause (6) may only be made by agreement in writing between the employer and employee. Any agreed variation to the regular pattern of work will be recorded in writing.</p> <p>(8) A part-time employee must be paid for ordinary hours worked at the ordinary hourly rate prescribed for the class of work performed.</p>
<p>6. – APPRENTICES</p> <p>(1) Apprentices may be taken to the trade of “Farm Tradesman” in the ratio of one apprentice for every two or fraction of two (the fraction not being less than one) “Farm Tradesmen” and shall not be taken in excess of that ratio unless:</p> <p>(i) the Union so agrees</p> <p>Or</p> <p>(ii) the Commission so determines</p> <p>(2) Where an employer or manager usually and customarily works at the trade he may be counted as a “Farm Tradesman” for the purposes of subclause (1) of this clause.</p>	<p>6. – APPRENTICES</p> <p>(1) Apprentices may be engaged in the ratio of one apprentice for every two or fraction of two (the fraction not being less than one) tradespersons and shall not be engaged in excess of that ratio unless:</p> <p>(i) the Union so agrees</p> <p>Or</p> <p>(ii) the Commission so determines.</p> <p>(2) Where an employer or manager usually and customarily works at the trade they may be counted as a tradesperson for the purposes of subclause (1) of this clause.</p>
<p>7. – HOURS</p> <p>The hours of work shall be by agreement between the employer and the employee provided that subject to necessary attention to stock, all</p>	<p>7. – HOURS</p> <p>The hours of work will be by agreement between the employer and the employee provided that:</p>

<p>employees shall be allowed one full day off each week.</p>	<p>(a) such agreement complies with Part 2A of the <i>Minimum Conditions of Employment Act 1993</i> (WA); and</p> <p>(b) subject to necessary attention to stock, all employees must be allowed one full day off each week.</p>																																										
<p>8. – HOLIDAYS AND ANNUAL LEAVE</p> <p>(1)</p> <p>(a) The following days or the days observed in lieu shall be allowed as holidays without deduction of pay, namely:-</p> <table border="0" data-bbox="327 555 718 694"> <tr> <td>New Year's Day</td> <td>Labour Day</td> </tr> <tr> <td>Australia Day</td> <td>Foundation Day</td> </tr> <tr> <td>Good Friday</td> <td>Sovereign's Birthday</td> </tr> <tr> <td>Easter Monday</td> <td>Christmas Day</td> </tr> <tr> <td>Anzac Day</td> <td>Boxing Day</td> </tr> </table> <p>Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.</p> <p>(b) Where</p> <p>(i) a day is proclaimed as a public holiday or as a public half holiday under section 7 of the Public and Bank Holidays Act, 1972; and</p> <p>(ii) that proclamation does not apply throughout the State or to the Metropolitan area of the State,</p> <p>that day shall be a public holiday, or as the case may be, a public half holiday for the purpose of this award within the district or locality specified in the proclamation.</p> <p>(c) When any of the days mentioned in paragraph (a) of this subclause falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday.</p> <p>In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.</p>	New Year's Day	Labour Day	Australia Day	Foundation Day	Good Friday	Sovereign's Birthday	Easter Monday	Christmas Day	Anzac Day	Boxing Day	<p>8. – WAGES</p> <p>The following shall be the minimum hourly rates of wages payable to employees covered by this award:-</p> <p>(1) Adult Employees:</p> <table border="0" data-bbox="853 526 1492 750"> <thead> <tr> <th></th> <th style="text-align: right;">TOTAL \$</th> </tr> </thead> <tbody> <tr> <td>Farm Hand</td> <td></td> </tr> <tr> <td>(a) With less than twelve months experience in the industry</td> <td style="text-align: right;">21.58</td> </tr> <tr> <td>(b) With twelve months experience in the industry</td> <td style="text-align: right;">21.58</td> </tr> <tr> <td>(c) General Farm Hand</td> <td style="text-align: right;">21.58</td> </tr> <tr> <td>(d) Tradesperson</td> <td style="text-align: right;">21.58</td> </tr> </tbody> </table> <p>(2) Junior Employees - other than Apprentices:</p> <table border="0" data-bbox="853 828 1492 1052"> <thead> <tr> <th></th> <th style="text-align: right;">Percentage of the rate for a Farm Hand with less than twelve months experience</th> </tr> </thead> <tbody> <tr> <td>15 years of age</td> <td style="text-align: right;">45%</td> </tr> <tr> <td>16 years of age</td> <td style="text-align: right;">50%</td> </tr> <tr> <td>17 years of age</td> <td style="text-align: right;">60%</td> </tr> <tr> <td>18 years of age</td> <td style="text-align: right;">70%</td> </tr> <tr> <td>19 years of age</td> <td style="text-align: right;">80%</td> </tr> <tr> <td>20 years of age</td> <td style="text-align: right;">90%</td> </tr> </tbody> </table> <p>(3) Casual Employees:</p> <p>A casual employee shall be paid 20 % in addition to the rates prescribed.</p> <p>(4) Apprentices:</p> <p>Percentage of weekly rate of wage for a Tradesperson</p> <table border="0" data-bbox="837 1321 1197 1411"> <tr> <td>First year of service</td> <td style="text-align: right;">47.5%</td> </tr> <tr> <td>Second year of service</td> <td style="text-align: right;">71.0%</td> </tr> <tr> <td>Third year of service</td> <td style="text-align: right;">90.3%</td> </tr> </table> <p>Note: Clause 1B(10) provides for minimum rates of pay for adult apprentices aged 21 years or more.</p>		TOTAL \$	Farm Hand		(a) With less than twelve months experience in the industry	21.58	(b) With twelve months experience in the industry	21.58	(c) General Farm Hand	21.58	(d) Tradesperson	21.58		Percentage of the rate for a Farm Hand with less than twelve months experience	15 years of age	45%	16 years of age	50%	17 years of age	60%	18 years of age	70%	19 years of age	80%	20 years of age	90%	First year of service	47.5%	Second year of service	71.0%	Third year of service	90.3%
New Year's Day	Labour Day																																										
Australia Day	Foundation Day																																										
Good Friday	Sovereign's Birthday																																										
Easter Monday	Christmas Day																																										
Anzac Day	Boxing Day																																										
	TOTAL \$																																										
Farm Hand																																											
(a) With less than twelve months experience in the industry	21.58																																										
(b) With twelve months experience in the industry	21.58																																										
(c) General Farm Hand	21.58																																										
(d) Tradesperson	21.58																																										
	Percentage of the rate for a Farm Hand with less than twelve months experience																																										
15 years of age	45%																																										
16 years of age	50%																																										
17 years of age	60%																																										
18 years of age	70%																																										
19 years of age	80%																																										
20 years of age	90%																																										
First year of service	47.5%																																										
Second year of service	71.0%																																										
Third year of service	90.3%																																										

<p>(2) On any public holiday not prescribed as a holiday under this award, the employer's establishment or place of business may be closed, in which case an employee need not present himself for duty and payment may be deducted, but if work be done ordinary rates of pay shall apply.</p> <p>(3)</p> <p>(a) When an employee is off duty owing to leave without pay or sickness, including accidents on or off duty, except time for which he is entitled to claim sick pay, any holiday falling during such absence shall not be treated as a paid holiday.</p> <p>(b) Any employee absenting himself from work, without reasonable cause, on the ordinary working day preceding or the ordinary working day succeeding a holiday provided for herein shall not be entitled to payment for such holiday.</p> <p>(4) Except as hereinafter provided a period of four consecutive weeks leave with payment of ordinary wages as prescribed shall be allowed annually to an employee by the employer after a period of twelve months continuous service with such employer.</p> <p>(5)</p> <p>(a) During a period of annual leave an employee shall be paid a loading of 17 1/2% of the rate of wage prescribed in Clause 14. - Wages of this award.</p> <p>(b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.</p> <p>(6) If any award holiday falls within an employee's period of annual leave and is observed on a day which in the case of that employee would have been an ordinary working day, there shall be added to that period one day, being an ordinary working day, for each such holiday observed as aforesaid.</p> <p>(7) Any time in respect of which an employee is absent from work, except time for which he is entitled to claim sick pay, or time spent on holidays, annual leave or long service leave as prescribed by this award, shall not count for the purpose of determining his right to annual leave.</p>	
---	--

<p>(8) In special circumstances and by mutual consent of the employer, the employee, and the Union, annual leave may be taken in not more than two periods.</p> <p>(9)</p> <p>(a) If after one month's continuous service in any qualifying twelve monthly period an employee leaves his employment or his employment is terminated by the employer through no fault of the employee, the employee shall be paid one third of a week's pay at his ordinary rate of wage in respect of each completed month of service.</p> <p>(b) In addition to any payment to which he may be entitled under paragraph (a) of this subclause, an employee whose employment terminates after he has completed a twelve monthly qualifying period and who has not been allowed the leave prescribed under this award in respect of that qualifying period shall be given payment in lieu of that leave or unless:-</p> <p>(i) he has been justifiably dismissed for misconduct;</p> <p>(ii) the misconduct for which he has been dismissed occurred prior to the completion of that qualifying period.</p> <p>(10) The provisions of this clause do not apply to casual employees.</p>	
<p>9. – ABSENCE THROUGH SICKNESS</p> <p>(1)</p> <p>(a) An employee who is unable to attend or remain at his place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.</p> <p>(b) Entitlement to payment shall accrue at the rate of one sixth of a week for each completed month of service with the employer. Provided that absence through sickness</p>	<p>9. – TRAINEES</p> <p>(1) Scope</p> <p>Subject to subclause (2), this clause applies to persons:</p> <p>(a) who are undertaking a traineeship;</p> <p>(b) who are employed by an employer bound by this award; and</p> <p>(c) whose employment is covered by this award.</p> <p>(2) Training Conditions</p> <p>(a) A traineeship will not commence until the relevant training contract:</p> <p>(i) has been signed by the employer and the trainee</p>

<p>through such ill health or injury shall be limited to five days in the first year of service and ten days in each subsequent year of service.</p> <p>(c) If in the first or successive years of service with the employer an employee is absent on the grounds of personal ill health or injury for a period longer than his entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.</p>	<p>(or the trainee's parent or guardian where applicable); and</p> <p>(ii) lodged for registration with the state training authority.</p> <p>(b) The trainee will attend an approved training course or training programme prescribed in the training plan.</p> <p>(c) The employer will provide a level of supervision and training in accordance with the training plan during the traineeship period.</p> <p>(d) The employer will permit the trainee to attend the training course or programme provided for in the training plan.</p> <p>(e) The overall training programme will be monitored by officers of the state training authority and training records or work books may be utilised as part of this monitoring process.</p>
<p>(2) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Assistance Act, 1981 nor to employees whose injury or illness is the result of the employees own misconduct.</p>	<p>(3) Employment Conditions</p>
<p>(3) To be entitled to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of his inability to attend for work, the nature of his illness or injury and the estimated duration of the absence. Provided that such advice, other than in extraordinary circumstances shall be given to the employer within twenty four hours of the commencement of the absence.</p>	<p>(a) A trainee may be engaged for the nominal term applicable to the traineeship, as detailed in the training contract. A trainee may be subject to a satisfactory probation period as detailed in the training contract.</p> <p>(b) The parties to a training contract may, by agreement in writing, vary the duration of the traineeship and the extent of approved training, provided that any agreement to vary is approved by the state training authority.</p> <p>(c) An employer must not terminate the employment of a trainee unless:</p>
<p>(4) The provisions of this clause do not apply to an employee who fails to produce a certificate from a medical practitioner dated at the time of the absence or who fails to supply such other proof of the illness or injury as the employer may reasonably require provided that the employee shall not be required to produce a certificate from a medical practitioner with respect to absences of two days or less unless after two such absences in any year of service the employer requests in writing that the next and subsequent absences in that year if any, shall be accompanied by such certificate.</p>	<p>(i) the trainee has consented to the termination; or</p> <p>(ii) approval has been obtained from the relevant state training authority.</p> <p>(d) If the employer terminates the employment of a trainee by consent, the employer must provide written notice to the relevant state training authority.</p>
<p>(5) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the employee if the absence by reason of personal ill health or injury exceeds the period for which</p>	<p>(e) An employer who chooses not to continue the employment of a trainee upon the completion of the traineeship must notify, in writing, the state training authority of its decision.</p> <p>(f) The trainee is permitted to be absent from work without loss of wages to attend training in accordance with the training plan.</p> <p>(g) Where the employment of a trainee by an employer is continued after the completion of the traineeship, the traineeship period will count as service the purposes of this award and any other legislative entitlements.</p> <p>(h) All other terms and conditions of this award, other than those provided for under this clause, will apply to a trainee.</p> <p>(i) A trainee who fails to either complete the traineeship, or who cannot for any reason be placed in employment with the employer on successful completion of the traineeship, will not be entitled to any severance payments payable pursuant to termination, change and redundancy provisions.</p>

entitlement has accrued during the year at the time of the absence.

Provided that an employee shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.

(6)

(a) Subject to the provisions of this subclause, the provisions of this clause apply to any employee who suffers personal ill health or injury during the time when he is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to his place of residence or a hospital as a result of his personal ill health or injury for a period of seven consecutive days or more and he produces a certificate from a registered medical practitioner that he was so confined.

Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if he is unable to attend for work on the working day next following his annual leave.

(c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time he proceeded on annual leave and shall not be made with respect to fractions of a day.

(d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave entitlement equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee

(j) At the conclusion of the traineeship this clause ceases to apply to the employment of the trainee and the award will apply to the former trainee.

(4) Wages

The minimum weekly wages payable to trainees are as provided below. These wage rates will only apply to trainees while they are undertaking an approved traineeship which includes approved training.

(a) Skill Level A:
Where the accredited training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level A.

HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
School leaver	284.00	338.00	415.00
Plus 1 year out of school	338.00	415.00	480.00
Plus 2 years out of school	415.00	480.00	563.00
Plus 3 years out of school	480.00	563.00	643.00
Plus 4 years out of school	563.00	643.00	
Plus 5 years or more out of school	643.00		

(b) Skill Level B:
Where the accredited training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level B.

HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
School leaver	284.00	338.00	406.00
Plus 1 year out of school	338.00	406.00	463.00
Plus 2 years out of school	406.00	463.00	546.00
Plus 3 years out of school	463.00	546.00	623.00
Plus 4 years out of school	546.00	623.00	
Plus 5 years or more out of school	623.00		

(c) Skill Level C:
Where the accredited training course and work performed are for the purpose of generating skills which have been defined for work at Industry/Skill Level C.

HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
School Leaver	284.00	338.00	405.00

<p>or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 8 - Holidays and Annual Leave of this award.</p>	<table border="1"> <tr> <td>Plus 1 year out of school</td> <td>338.00</td> <td>405.00</td> <td>455.00</td> </tr> <tr> <td>Plus 2 years out of school</td> <td>405.00</td> <td>455.00</td> <td>511.00</td> </tr> <tr> <td>Plus 3 years out of school</td> <td>455.00</td> <td>511.00</td> <td>574.00</td> </tr> <tr> <td>Plus 4 years out of school</td> <td>511.00</td> <td>574.00</td> <td></td> </tr> <tr> <td>Plus 5 years or more out of school</td> <td>574.00</td> <td></td> <td></td> </tr> </table>	Plus 1 year out of school	338.00	405.00	455.00	Plus 2 years out of school	405.00	455.00	511.00	Plus 3 years out of school	455.00	511.00	574.00	Plus 4 years out of school	511.00	574.00		Plus 5 years or more out of school	574.00		
Plus 1 year out of school	338.00	405.00	455.00																		
Plus 2 years out of school	405.00	455.00	511.00																		
Plus 3 years out of school	455.00	511.00	574.00																		
Plus 4 years out of school	511.00	574.00																			
Plus 5 years or more out of school	574.00																				
<p>(e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 8 - Holidays and Annual Leave of this award shall be deemed to have been paid with respect to the replaced annual leave.</p>	<p>(d) Trainees undertaking an AQF IV traineeship must receive the relevant weekly wage rate for AQF III trainees at Skill/Industry Levels A, B and C as applicable with the addition of 3.8% of that wage rate.</p> <p>(e) For the purposes of this clause "out of school" refers only to periods out of school beyond year 10 and is deemed to:</p>																				
<p>(7) Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of Clause (2) of the Long Service Leave provisions published in Volume 65 of the Western Australian Industrial Gazette at pages 1 - 4, the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmitter shall stand to the credit of the employee at the commencement of service with the transmittee and may be claimed in accordance with the provisions of this clause.</p>	<p>(i) include any period of schooling beyond year 10 which was not part of nor contributed to a completed year of schooling;</p> <p>(ii) include any period during which a trainee repeats in whole or part a year of schooling beyond year 10;</p> <p>(iii) not include any period during a calendar year in which a year of schooling is completed; and</p> <p>(iv) have effect on an anniversary date being January 1 in each year.</p>																				
<p>(8) The provisions of this clause do not apply to casual employees.</p>	<p>(f) Part time and School Based Trainees</p> <p>(i) This subclause shall apply to trainees who undertake a traineeship on a part time basis, or as a School Based trainee, by working less than full time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.</p> <p>(ii) School Based Trainees will receive the relevant wage rate at Skill/Industry Levels A, B and C as applicable, as for School Leavers.</p> <p>(iii) The minimum weekly rate of pay for part time and school based trainees shall be calculated by taking the full time rates expressed above multiplied by 1.25. This minimum weekly rate of pay for part time and school based trainees is then divided by 38 in accordance with section 10 of the <i>Minimum Conditions of Employment Act 1993 (WA)</i> to produce a minimum hourly rate of pay.</p> <p>(5) Industry Skill Levels The industry skill levels referred to in subclause (4) are those described in the General Order made by the Commission from time to time setting the minimum rates of pay for apprentices for the purposes of the <i>Minimum Conditions of Employment Act 1993 (WA)</i> pursuant to section 50A of the Act.</p>																				
<p>10. – RECORD OF WAGES</p>	<p>10. – SUPERANNUATION</p>																				
<p>(1) The employer shall keep or cause to be kept, a wages record showing the name of each employee, the wages and allowances paid and the deductions</p>	<p>(1) The <i>Superannuation Guarantee (Administration) Act 1992 (Cth)</i>, the <i>Superannuation Guarantee Charge Act 1992 (Cth)</i>, the <i>Superannuation Industry (Supervision) Act 1993 (Cth)</i> and the <i>Superannuation (Resolution of Complaints) Act 1993 (Cth)</i> deals</p>																				

<p>made from such wages.</p> <p>(2) The wages record shall be open for inspection at a mutually convenient time, by a duly accredited official of the Union at the employer's property or other convenient place. Provided that only one demand for such inspection shall be made in any one fortnight at the same property.</p> <p>Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer.</p>	<p>with the superannuation rights and obligations of employers and employees.</p> <p>(2) The employer must make superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.</p> <p>(3) The employer must notify the employee of the entitlement to nominate a complying superannuation fund or scheme to which contributions in respect of the employee may be made.</p> <p>(4) The employer must make contributions to a complying fund or scheme nominated by the employer until the employee nominates such a fund or scheme.</p> <p>(5) The employer and the employee are bound by the employee's nomination unless the employer and employee agree to change the complying superannuation fund or scheme to which contributions are to be made.</p> <p>(6) An employer must not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by an employee.</p>
<p>11. – BEREAVEMENT LEAVE</p> <p>An employee shall on the death within Australia of a close relative, be entitled on notice to leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee in two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of his employer.</p>	<p>11. – RECORD OF WAGES</p> <p>The requirements for keeping and enabling access to employment records are provided for in Part II, Division 2F of the <i>Industrial Relations Act 1979</i> (WA).</p>
<p>12. – ACCOMMODATION</p> <p>(1) Where an employee is provided with board and lodging the employer shall be allowed to make a deduction at the rate of \$45.60 per week of seven days.</p> <p>(2) For the purpose of this clause "Board and Lodging" shall mean a reasonable supply and standard of food together with a reasonable standard of accommodation.</p> <p>(3) Should any dispute arise under this clause the matter shall be decided by a Board of Reference.</p>	<p>12. – ACCOMMODATION</p> <p>Where an employee is provided with board and lodging the employer shall be allowed to make a deduction at the rate of \$45.60 per week.</p>
<p>13. – PROTECTIVE CLOTHING</p> <p>The employer shall provide, free of charge, all necessary protective clothing including gum boots for use when required. Such clothing shall be issued in good condition and retained by the employee during the period of his employment and it shall be renewed by the employer when required.</p>	<p>NO VARIATIONS</p>
<p>14. – WAGES</p> <p>The following shall be the minimum weekly rates of wages payable to employees covered by this award:-</p> <p>(1)</p>	<p>14. – PERSONAL LEAVE</p> <p>(1)</p> <p>(a) Personal leave is provided for in the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p> <p>(b) If in the first or successive years of service with the employer an employee is absent on the grounds of personal</p>

		TOTAL \$	
<p>Adult Employees: Farm Hand</p>			<p>illness or injury for a period longer than the employee's entitlement to paid personal leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid personal leave during that year of service.</p>
(a)	With less than twelve months experience in the industry	819.90	
(b)	With twelve months experience in the industry	819.90	
(c)	General Farm Hand	819.90	
(d)	Farm Tradesman (As defined)	819.90	
<p>"Farm Tradesman" shall mean a farm hand who has satisfactorily completed the approved apprenticeship in "farming" or who has been issued with an approved trade certificate and provides proof satisfactory to the employer of such qualification or who has by other means achieved a standard of knowledge deemed by his employer as equivalent thereto and is appointed as such in writing by his employer.</p>			<p>(2) For absences due to personal illness or injury, an employee shall not be required to provide evidence of the entitlement with respect to absences of two days or less, where such absences do not exceed two absences in any year of service. If an employee is absent for two days or less due to personal illness or injury on two or more occasions, the employer may give the employee written notice that evidence complying with the requirements of the <i>Minimum Conditions of Employment Act 1993</i> (WA) will be required for the next and subsequent absences in that year of service.</p> <p>(3)</p> <p>(a) Subject to the provisions of this subclause, the provisions of this clause apply to any employee who suffers personal illness or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid personal leave in place of paid annual leave.</p> <p>(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to the employee's place of residence or a hospital as a result of the employee's personal illness or injury for a period of seven consecutive days or more and the employee produces a certificate from a registered medical practitioner that the employee was so confined.</p> <p>(c) Replacement of paid annual leave by paid personal leave shall not exceed the period of paid personal leave to which the employee was entitled at the time the employee proceeded on annual leave and shall not be made with respect to fractions of a day.</p> <p>(d) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 15. - Annual Leave of this award shall be deemed to have been paid with respect to the replaced annual leave.</p> <p>(4) Where a business has been transferred from one employer to another and the employee's service has been deemed continuous in accordance with section 7H of the <i>Long Service Leave Act 1958</i> (WA) the paid personal leave standing to the credit of the employee at the date of transfer from service with the old employer shall stand to the credit of the employee at the commencement of service with the new employer and may be claimed in accordance with the provisions of this clause.</p> <p>(5) The provisions of this clause do not apply to casual employees.</p>
(2)	Junior Employees - other than Apprentices:		
	Percentage of the rate for a Farm Hand with less than twelve months experience		
	15 years of age	45%	
	16 years of age	50%	
	17 years of age	55%	
	18 years of age	65%	
	19 years of age	75%	
	20 years of age	90%	
(3)	Casual Employees:		
	A casual employee shall be paid 20 per centum in addition to the rates prescribed		
(4)	Apprentices:		
	Percentage of weekly rate of wage for a Farm Tradesman		
	First year of service	47.5%	
	Second year of service	71.0%	
	Third year of service	90.3%	
<p>The rates of pay in this award include arbitrated</p>			

<p>safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.</p> <p>These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.</p> <p>Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.</p>	
<p style="text-align: center;">15. – FIRST AID KIT</p> <p>At each place where employees are employed the employer shall supply a suitable first aid kit which shall be accessible to the employees at all times.</p>	<p style="text-align: center;">15. – ANNUAL LEAVE</p> <p>(1) Annual leave is provided for in the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p> <p>(2)</p> <p style="padding-left: 20px;">(a) During a period of annual leave an employee shall be paid a loading of 17.5% of the rate of wage prescribed in Clause 8. - Wages of this award.</p> <p style="padding-left: 20px;">(b) The loading prescribed by this subclause shall not apply to proportionate leave on termination.</p> <p>(3) The provisions of this clause do not apply to casual employees.</p>
<p style="text-align: center;">16. – REPRESENTATIVE INTERVIEWING EMPLOYEES</p> <p>Consistent with the terms of the Labour Relations Legislation Amendment Act 1997 and S.23(3)(c)(iii) of the Industrial Relations Act a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of an employer unless the employer is the employer, or former employer, of a member of the Union.</p> <p>An accredited representative of the Union shall, with the consent of the employer, be permitted to inspect the working place of employees at a time mutually convenient and interview employees covered by this award.</p>	<p style="text-align: center;">16. – PUBLIC HOLIDAYS</p> <p>(1)</p> <p style="padding-left: 20px;">(a) The following days or the days observed in lieu shall be allowed as holidays without deduction of pay, namely:- New Year's Day Labour Day Australia Day Western Australia Day Good Friday Sovereign's Birthday Easter Monday Easter Sunday Christmas Day Anzac Day Boxing Day</p> <p style="padding-left: 20px;">Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.</p> <p style="padding-left: 20px;">(b) Where a day is proclaimed as a public holiday or public half-holiday under section 7 of the <i>Public and Bank Holidays Act 1972</i> (WA), either throughout the State or within a district or locality as is specified in the proclamation, that day will be a public holiday or a public half-holiday for the purposes of this award within the area specified in the proclamation.</p> <p style="padding-left: 20px;">(c) When any of the days mentioned in paragraph (a) of this subclause, other than Easter Sunday, falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday.</p> <p style="text-align: right;">In each case the substituted day shall be a holiday without</p>

	<p>deduction of pay and the day for which it is substituted shall not be a holiday.</p> <p>(2) If a public holiday that is prescribed as a holiday under the award falls on a day when an employee is off duty in circumstances that would qualify the employee for paid leave, the employee shall be paid as if required to work on that day in accordance with this clause, without deduction from the employee's relevant leave accrual, provided that the employee shall not also be paid personal leave in accordance with Clause 14.</p>
<p>17. – LONG SERVICE LEAVE</p> <p>The Long Service Leave Provisions published in Volume 65 of the Western Australian Industrial Gazette at pages 1 - 4 inclusive are hereby incorporated in and shall be deemed to be part of this award.</p>	<p>17. – BEREAVEMENT LEAVE</p> <p>Bereavement leave is provided for in the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p>
<p>18. – LIBERTY TO APPLY</p> <p>Liberty is reserved to the Union to apply to vary Clause 3 - Area and Scope of this award to include the "Dairy Industry".</p>	<p>18. – FAMILY AND DOMESTIC VIOLENCE LEAVE</p> <p>Family and domestic violence leave is provided for in Division 7 of Part 2-2 of the <i>Fair Work Act 2009</i> (Cth) and the <i>Minimum Conditions of Employment Act 1993</i> (WA).</p>
<p>19. – SUPERANNUATION</p> <p>The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled - Compliance, Nomination and Transition.</p> <p>(1) Employer Contributions:</p> <p>(a) An employer shall contribute 3% of ordinary time earnings per eligible employee into one of the following Approved Superannuation Funds as may be amended from time to time, and includes any superannuation scheme which may be made in succession thereto:</p> <p>(i) Federation Life "National Superannuation Plan"; or</p> <p>(ii) The Australian Eagle Insurance Company Limited "Australian Farm Superannuation Plan"; or</p> <p>(iii) Any other approved occupational superannuation fund to which an employer or employee who is a member of the religious fellowship known as Brethren elects to contribute.</p> <p>(iv) An exempted Fund allowed by subclause (4) of this</p>	<p>19. – LONG SERVICE LEAVE</p> <p>The provisions of the <i>Long Service Leave Act 1958</i> (WA) are hereby incorporated in and shall be deemed to be part of this award.</p>

<p style="text-align: center;">clause.</p> <p>(b) Employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.</p> <p>(c) No contributions shall be made for periods of unpaid leave, or unauthorised absences in excess of 5 ordinary days or for periods of workers' compensation in excess of 52 weeks. No contributions shall be made in respect of annual leave paid out on termination or any other payments on termination.</p> <p>(2) Fund Membership:</p> <p>(a) Contributions in accordance with subclause (1) - Employer Contributions of this clause shall be calculated by the employer on behalf of each employee from the date one month after the employee commences employment, unless the employee fails to return a completed application to join the Fund and the employer has complied with the following:</p> <p>(i) The employer shall provide the employee with an application to join the Fund and documentation explaining the Fund prior to the first wage payment.</p> <p>(ii) If the employee fails to return to the employer a completed application to join the Fund within two weeks of receipt, the employer shall send to the employee by certified mail, a letter setting out relevant superannuation information, the letter of denial set out in subclause (6) of this clause and an application to join the Fund.</p>	
---	--

<p>(iii) Where the employee completes and returns the letter of denial, no contributions need to be made on that employee's behalf.</p> <p>(iv) Where the employee completes and returns neither the application to join the Fund nor the letter of denial within one week of postage the employer shall advise either the Union or the Fund Administrator in writing of the employee's failure to return the completed form.</p> <p>(v) From two weeks following the employer's advice pursuant to paragraph (iv) of this subclause should the employee not have returned the completed form the employer shall be under no obligation to make superannuation payments on behalf of that employee.</p> <p>Provided that if at any time an employee returns a signed application form, notwithstanding a previous failure to return such form or the return of a letter of denial, the employer shall make contributions on behalf of that employee from the date of return of the signed application form.</p>	
<p>(b) Part time and casual employees shall not be entitled to receive the employer contribution mentioned in subclause (1) Employer Contributions of</p>	

<p> this clause unless they work a minimum of 12 hours per week. </p> <p> (c) Casual employees who are employed for 32 consecutive working days or less shall not be entitled to the benefits of this clause. </p> <p> (3) Definitions: </p> <p> “Approved Fund” shall mean any fund which complies with Australian Government's Operational Standards for Occupational Superannuation and shall be a capital guaranteed fund. </p> <p> “Ordinary time earnings” shall mean the salary, wage or other remuneration regularly received by the employee in respect of the time worked in ordinary hours and shall include shift work penalties, payments which are made for the purpose of District or Location Allowances or any other rate paid for all purposes of the award to which the employee is entitled for ordinary hours of work PROVIDED THAT “ordinary time earnings” shall not include any payment which is for vehicle allowances, fares or travelling time allowances (including payments made for travelling related to distant work), commission or bonus. </p> <p> (4) Exemptions: </p> <p> Exemptions from the requirements of this clause shall apply to an employer who at the date of this Order: </p> <p> (a) was contributing to a Superannuation Fund, in accordance with an Order of an industrial tribunal; OR </p> <p> (b) was contributing to a Superannuation Fund, in accordance with an Order or Award of an industrial tribunal, for a majority of employees and makes payment for employees covered by this award in accordance with that Order or Award; OR </p> <p> (c) subject to notification to the Union, was contributing to a Superannuation Fund for employees covered by this Award where such payments are not made pursuant to an Order of an industrial tribunal. </p>	
---	--

<p>(5) Operative Date:</p> <p style="padding-left: 40px;">This clause shall operate on and from the 1st day of November, 1989.</p> <p>(6) Letter of Denial:</p> <p style="padding-left: 40px;">The letter of denial shall be in the following form:</p> <p style="padding-left: 40px;">“To (employer)</p> <p style="padding-left: 40px;">I have received an application for membership of the non-contributory Superannuation Fund and understand:</p> <ul style="list-style-type: none"> (1) that should I sign such form you will make contributions on my behalf; AND (2) that I am not required to make contributions of my own; AND (3) that no deductions will be made from my wages for superannuation without my consent. <p style="padding-left: 40px;">However, I do not wish to be a member of the fund or have any contributions made on my behalf.</p> <p style="padding-left: 40px;">_____ (Signature) _____ (Name) _____ (Address) _____ (Classification) _____ (Date)”</p> <p>Compliance, Nomination and Transition</p> <p style="padding-left: 40px;">Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an employee, on and from 30 June 1998 –</p> <ul style="list-style-type: none"> (a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless – <ul style="list-style-type: none"> (i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and 	
---	--

<p>(ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme;</p> <p>(b) The employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the employee;</p> <p>(c) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;</p> <p>(d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirements of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the employee to whom such is directed;</p> <p>(e) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;</p> <p>(f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by a employee; Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme –</p> <p>(g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make</p>	
--	--

<p>(h) contributions to that fund or scheme, or one of those funds or schemes nominated by the employer; or</p> <p>if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.</p>											
	<p>20. – PARENTAL LEAVE</p> <p>Parental leave is provided for in Division 5 of Part 2-2 of the <i>Fair Work Act 2009 (Cth)</i> and the <i>Minimum Conditions of Employment Act 1993 (WA)</i>.</p>										
	<p>21. – TERMINATION</p> <p>(1) Termination by employer - Full-time and part-time employment</p> <p>Employers covered by this award must comply with the requirements for notice of termination set out in the National Employment Standards of the <i>Fair Work Act 2009 (Cth)</i>. Refer to sections 117 and 123, and Division 3 of Part 6-3, for further details.</p> <p>Note: Division 3 of Part 6-3 of the <i>Fair Work Act 2009 (Cth)</i> requires non-national system employers (including employers in the Western Australian state industrial relations system) to provide notice of termination (or payment in lieu) to employees.</p> <p>Section 117 of the <i>Fair Work Act 2009 (Cth)</i> outlines the length of notice (or payment in lieu) an employer must provide to terminate an employee’s employment, as well as other conditions regarding the giving of notice.</p> <p>Section 123 of the <i>Fair Work Act 2009 (Cth)</i> outlines which employees are excluded from receiving notice.</p> <p>(2) Termination by employee</p> <p>A full-time or part-time employee must give the employer notice of termination in accordance with the following table.</p> <p>Table 1 – Notice of termination by employee</p> <table border="1" data-bbox="687 1632 1358 1861"> <thead> <tr> <th>Employee’s period of continuous service with the employer</th> <th>Minimum period of notice</th> </tr> </thead> <tbody> <tr> <td>Not more than 1 year</td> <td>1 week</td> </tr> <tr> <td>More than 1 year but not more than 3 years</td> <td>2 weeks</td> </tr> <tr> <td>More than 3 years but not more than 5 years</td> <td>3 weeks</td> </tr> <tr> <td>More than 5 years</td> <td>4 weeks</td> </tr> </tbody> </table> <p>(3) Casual employment</p> <p>An employer or employee may terminate a casual employment arrangement with one hour’s notice.</p>	Employee’s period of continuous service with the employer	Minimum period of notice	Not more than 1 year	1 week	More than 1 year but not more than 3 years	2 weeks	More than 3 years but not more than 5 years	3 weeks	More than 5 years	4 weeks
Employee’s period of continuous service with the employer	Minimum period of notice										
Not more than 1 year	1 week										
More than 1 year but not more than 3 years	2 weeks										
More than 3 years but not more than 5 years	3 weeks										
More than 5 years	4 weeks										
	<p>22. – FIRST AID KIT</p>										

	At each place where employees are employed the employer shall supply a suitable first aid kit which shall be accessible to the employees at all times.
	<p style="text-align: center;">23. – RIGHTS OF ENTRY</p> <p>Rights of entry for discussions with employees and to investigate breaches of industrial instruments is provided for in Part II, Division 2G of the <i>Industrial Relations Act 1979 (WA)</i>.</p>
	<p style="text-align: center;">24. – RESOLUTION OF DISPUTES</p> <p>(1) The following procedures shall apply in connection with questions, disputes or difficulties arising under this award.</p> <p style="padding-left: 40px;">(a) The persons directly involved, or representatives of person/s directly involved, shall discuss the question, dispute or difficulty as soon as is practicable.</p> <p style="padding-left: 40px;">(b)</p> <p style="padding-left: 80px;">(i) If these discussions do not result in a settlement, the question, dispute or difficulty shall be referred to senior management for further discussion.</p> <p style="padding-left: 80px;">(ii) Discussions at this level will take place as soon as practicable.</p> <p>(2) The terms of any agreed settlement should be jointly recorded.</p> <p>(3) Any settlement reached which is contrary to the terms of this award shall not have effect unless and until that conflict is resolved to allow for it.</p> <p>(4) Nothing in this clause shall be read so as to exclude an organisation party to or bound by the award from representing its members.</p> <p>(5) Any question, dispute or difficulty not settled may be referred to the Commission provided that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.</p>
<p style="text-align: center;">APPENDIX – RESOLUTION OF DISPUTESREQUIREMENT</p> <p>(1) This Appendix is inserted into the award/industrial agreement as a result of legislation which came into effect on 16 January 1996 (Industrial Relations Legislation Amendment and Repeal Act 1995) and further varied by legislation which came into effect on 23 May 1997 (Labour Relations Legislation Amendment Act 1997).</p> <p>(2) Subject to this appendix, and in addition to any current arrangements the following procedures shall apply in connection with questions, disputes or difficulties arising under this award/industrial agreement.</p> <p style="padding-left: 40px;">(a) The persons directly involved, or representatives of person/s directly involved, shall discuss the question, dispute or difficulty as soon as is practicable.</p> <p style="padding-left: 40px;">(b)</p> <p style="padding-left: 80px;">(i) If these discussions</p>	THIS APPENDIX IS NOW CLAUSE 24

<p>do not result in a settlement, the question, dispute or difficulty shall be referred to senior management for further discussion.</p> <p>(ii) Discussions at this level will take place as soon as practicable.</p> <p>(3) The terms of any agreed settlement should be jointly recorded.</p> <p>(4) Any settlement reached which is contrary to the terms of this award/industrial agreement shall not have effect unless and until that conflict is resolved to allow for it.</p> <p>(5) Nothing in this appendix shall be read so as to exclude an organisation party to or bound by the award/industrial agreement from representing its members.</p> <p>(6) Any question, dispute or difficulty not settled may be referred to the Western Australian Industrial Relations Commission provided that with effect from 22 November 1997 it is required that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.</p>	
<p>SCHEDULE A. – RESPONDENTS</p> <p>David Blair, Doodlakine Garth Butcher, Bedforddale Noel Fallow, Morawa Murray Field, Esperance John Newing, Tambellup Norman Payne, Morawa Peter Wahlsten, Walgoolan.</p>	<p>SCHEDULE A. - RESPONDENTS</p> <p>David Blair, Doodlakine Garth Butcher, Bedforddale Noel Fallow, Morawa Murray Field, Esperance John Newing, Tambellup Peter Wahlsten, Walgoolan</p>
<p>SCHEDULE B. – PARTIES TO THE AWARD</p> <p>Union Party to the Award</p> <p>The Australian Workers' Union, West Australian Branch, Industrial Union of Workers</p> <p>DATED at Perth this 20th day of March, 1985.</p>	<p>SCHEDULE B. - PARTIES TO THE AWARD</p> <p>Union Party to the Award</p> <p>The Australian Workers' Union, West Australian Branch, Industrial Union of Workers</p>
<p>APPENDIX - S.49B - INSPECTION OF RECORDS REQUIREMENTS</p> <p>(1) Where this award, order or industrial agreement empowers a representative of an organisation of employees party to this award, order or industrial agreement to inspect the time and wages records of an employee or former employee, that power shall be exercised subject to the Industrial Relations (General) Regulations 1997</p>	<p>APPENDIX DELETED</p>

<p>(as may be amended from time to time) and the following:</p> <p>(a) The employer may refuse the representative access to the records if: -</p> <p style="padding-left: 40px;">(i) the employer is of the opinion that access to the records by the representative of the organisation would infringe the privacy of persons who are not members of the organisation; and</p> <p style="padding-left: 40px;">(ii) the employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative.</p> <p>(b) The power of inspection may only be exercised by a representative of an organisation of employees authorised for the purpose in accordance with the rules of the organisation.</p> <p>(c) Before exercising a power of inspection, the representative shall give reasonable notice of not less than 24 hours to an employer.</p> <p>(16) Any employer or organisation bound by or party to this award/order/industrial agreement may apply to the Western Australian Industrial Relations Commission at any time in relation to this clause.</p>	
--	--

NOTICES—Application for General Order—

2023 WAIRC 00325

NOTICE

CICS 2 of 2023

REVIEW OF LOCATION ALLOWANCE GENERAL ORDER 2 OF 2022 PURSUANT TO SECTION 50 OF THE INDUSTRIAL RELATIONS ACT 1979

Notice is given of an application on the motion of the Western Australian Industrial Relations Commission to review the Location Allowance General Order with a view to rescinding Location Allowance General Order 2 of 2022 and issuing a new Location Allowance General Order pursuant to section 50 of the *Industrial Relations Act 1979*.

A copy of the draft schedules, including a list of all awards to which the proposed revised General Order will have application and the proposed rates, may be inspected by appointment at Level 17, 111 St Georges Terrace, Perth by any interested person without charge.

This matter will be heard by the Commission in Court Session:

On: Monday, 12 June 2023
 At: 2:15 PM
 At: Western Australian Industrial Relations Commission Level 18, 111 St
 Georges Terrace, Perth WA 6000

Any person wishing to appear at this hearing should provide notice to the Registrar by no later than Monday, 5 June 2023. For further information, please contact the Associate to Senior Commissioner Cosentino by email at melissa.crosthwaite@wairc.wa.gov.au.

[L.S.]

(Sgd.) S KEMP,
 Deputy Registrar.
 31 May 2023

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2023 WAIRC 00282

CONTRACTUAL BENEFIT CLAIM WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2023 WAIRC 00282
CORAM : COMMISSIONER T KUCERA
HEARD : ON THE PAPERS
DELIVERED : FRIDAY, 19 MAY 2023
FILE NO. : B 106 OF 2022
BETWEEN : INGER ISAKSEN
 Applicant
 AND
 SOUTH WEST TRANSIT GROUP PTY LTD AS TRUSTEE FOR THE SOUTH WEST
 TRANSIT GROUP UNIT TRUST
 Respondent

CatchWords : Industrial law (WA) – Denied contractual benefits claim – Withdrawal or discontinuance of application – Application discontinued before matter was set down for hearing – Commission functus officio – Application for costs – Commission’s powers to award costs – Whether there were “exceptional circumstances” where a costs order would be appropriate – No jurisdiction to award costs – Order for costs not justified – Costs not awarded

Legislation : *Industrial Relations Act 1979* s 29(1)(d), s 27(1)(c)
Industrial Relations Commission Regulations 2005 r 16

Result : Application dismissed

Representation:

Applicant : Mr C Fogliani, of counsel

Respondent : Mr P King, of counsel

Case(s) referred to in reasons:

Adrian Manescu v Baker Hughes Australia Pty Limited [2021] WAIRC 00558
Australian Leisure and Hospitality Group Pty Ltd v Director of Liquor Licensing [2012] WASC 463
Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands (1992) 73 WAIG 26
Heidt v Chrysler Australia Ltd (1976) 26 FLR 257
Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union and Others (1990) 70 WAIG 2083
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34
Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 75 WAIG 9

Case(s) also cited:

Peter John Morris v Lift Equipment Pty Ltd (ACN 125 331848) [2013] WAIRC 00357

Decision

- 1 On 19 September 2022, Inger Isaksen (**applicant**) made an application to the Commission under s 29(1)(d) of the *Industrial Relations Act 1979 (IR Act)*, alleging she was denied a benefit to which she was entitled, under her contract of employment (**contractual benefit claim**). The application was given the file number B 106 of 2022.
- 2 On 2 March 2023, before the contractual benefit claim was listed for hearing, the applicant filed a prescribed Form 1A (**Notice of Discontinuance**). Following this, her employer made an application for costs.
- 3 For the reasons set out, I have determined there is no basis to make an order for costs.

Discontinuing applications

- 4 Regulation 16 of the *Industrial Relations Commission Regulations 2005 (IR Regulations)* relevantly describes how proceedings before the Commission are to be withdrawn or discontinued as follows:

16. Withdrawal of discontinuance of application

- (1) Subject to subregulation (4) an applicant may withdraw or wholly discontinue an application against any respondent or withdraw any part of the claim contained in the application at any time before it has been set down for hearing by filing a notice in the approved form in the office of the Registrar or by giving advice in writing to the Commission and to every respondent affected by it.
- (2) Subject to subregulation (4), the filing of a notice in accordance with subregulation (1) withdraws or discontinues the application or part of the claim, as the case may be, and the Registrar is to advise the parties accordingly after the notice has been filed.
- ...
- (4) Where a counter-proposal has been filed in response to an application the application may only be withdrawn under subregulation (1) with the consent of the respondent making the counter-proposal in the approved form.
- ...

Issues to be determined

- 5 The question that first arises for consideration in this matter is whether it is necessary for the applicant to obtain the respondent's consent to withdraw her application. If not, the Commission will not be able to make an order for costs because it would be "*functus officio*". This means there would be no application before the Commission to enliven its jurisdiction to make an order for costs.
- 6 If sub-regulation 16(4) requires the respondent's consent, the question that next arises is whether the respondent should be entitled to an order for its costs.

Background to the costs application

- 7 When the applicant filed her contractual benefit claim, it was initially issued against the entity she thought was her employer: Australian Transit Group trading as South West Coach Lines Pty Ltd.
- 8 At the same time the applicant made her application, Peter Watkins (**Watkins**) in application B 105 of 2022 filed a similar and related claim against the Australian Transit Group trading as BusWest.
- 9 Both Watkins and the applicant were being assisted in their applications by Glenn Ferguson from Transport Edge Inc. I will collectively refer to these two applications as the claims. It is also helpful to refer collectively to Watkins and the applicant together, as the applicants.
- 10 In the claims, the applicants both alleged they had been denied benefits to which they are entitled, under terms varied or implied into their contracts of employment. Their employers are related businesses providing school bus services out of depots in Bunbury and Busselton in Western Australia's South West (**South West**).
- 11 On 7 October 2022, the Australian Public Transport Industrial Association (**APTIA**) filed responses to the claims (**responses**).
- 12 In the responses, APTIA not only denied the named respondents to the claims (**respondents**) were the correct employers, but it also denied the material allegations that were being made against them.
- 13 I convened two conciliation conferences in relation to the claims, the first of which was held on 7 November 2022. With the consent of the parties, I listed the claims together.
- 14 Mr Ferguson appeared for the applicants in the first conciliation conference. Mr Ian McDonald from APTIA appeared for the respondents.
- 15 A second conciliation conference was held on 12 December 2022 and for this conference, the applicants were represented by legal counsel, Cory Fogliani. During the conciliation conference, Mr Fogliani foreshadowed his intention to file amended claims on the applicants' behalf.
- 16 Although the claims were not able to be resolved by conciliation, the parties did reach agreement on a set of programming orders that I issued 20 December 2022 (**consent orders**), as follows:

1. THAT the applicants are to file their amended applications by 9 January 2023.

2. THAT the respondents are to file responses to the amended applications by 16 January 2023.
 3. THAT informal discovery is to be provided by 25 January 2023
 4. THAT the parties are to confer on and file an agreed statement of facts by 3 February 2023.
 5. THAT the matter is to be listed for a programming conference on a date to be fixed not before 3 February 2023
 6. THAT there be liberty to apply.
- 17 On 10 January 2023 the parties agreed to extend the dates by which they were required to complete the various steps under the consent orders. The dates were respectively extended to 13 January 2023, 20 January 2023, 3 February 2023 and 10 February 2023.
- 18 Pursuant to the consent orders, the applicants filed amended applications on 13 January 2023. The applicant changed the name of the respondent in her amended application to the South West Transit Group Pty Ltd as trustee for the South West Transit Group Unit Trust, trading as South West Coach Lines (**SWCL**).
- 19 On 20 January 2023, APTIA filed responses to the amended applications (**amended responses**). In its amended responses, APTIA asserted the claims were frivolous and vexatious with no chance of success.
- 20 APTIA also foreshadowed that it would seek an order for costs against the applicant relying upon the principles in *Adrian Manescu v Baker Hughes Australia Pty Limited* [2021] WAIRC 00558 (*Manescu*).
- 21 On 2 March 2023, after the date on which the parties had agreed to complete informal discovery and file a statement of agreed facts, the applicant filed a Notice of Discontinuance.
- 22 In her Notice of Discontinuance, the applicant advised she was seeking permission to discontinue her claim as result of new information SWCL had provided by way of informal discovery and received in discussions to finalise a statement of agreed facts.
- 23 Upon receiving the Notice of Discontinuance and as foreshadowed, APTIA made an application for costs. I then directed the parties to file outlines of submissions on this issue and advised that I would hear the application for costs on the papers.

The applicant's contractual benefit claim

- 24 To put this matter in context, it is useful to summarise the allegations raised in the applicant's claim.
- 25 The applicant is a bus driver who is employed by SWCL on a casual basis and is based at SWCL's Busselton depot. She is paid \$38.73 per hour under a written contract of employment (**employment contract**).
- 26 SWCL is a private bus company that provides school bus services on different routes in the South West, one of which includes the Margaret River Burnside Route (**MR Burnside Route**). The school bus services are provided under a contract with the Public Transport Authority (**PTA**).
- 27 The contract that applies on the MR Burnside Route is covered by what is known as an "Evergreen Contract" (**Evergreen contract**). The applicant alleged SWCL was a party to the Evergreen contract that applied on the MR Burnside Route.
- 28 Under the Evergreen contract, the PTA pays the respondent service fees which include a component to ensure bus drivers are paid a specified "grossed up" hourly rate of pay for each hour worked.
- 29 An information bulletin issued the PTA entitled *Evergreen Contract Model Payments Elements*, states the "grossed up" hourly rate that should apply to the MR Burnside Route is \$43.31 per hour (**pass-through rate**).
- 30 As a mechanism to ensure bus drivers receive the higher pass-through rate, the Evergreen contract at Clause 9.12 (Pass-through of wages) contains a prohibition against a contractor receiving a windfall from the additional money the PTA pays in service fees under the Evergreen contract.
- 31 The applicant drives school buses on the MR Burnside Route. After discovering the difference between the hourly rate of pay under her written employment contract and the pass-through rate, the applicant made the contractual benefit claim.
- 32 The applicant alleged in her amended claim that although her employment contract contains written terms as to pay rates, the higher rate is, as a matter of law, implied in her employment contract. The applicant claimed the terms in her employment contract which provided for a lower rate of pay, have as matter of law, either been varied by the parties conduct or in the alternative, are void, by reason of illegality or on public interest grounds.
- 33 The applicant claimed that as result, the pass through rate applies because her employment contract was varied by the parties conduct or it is an implied term, overriding those terms that are void. The applicant alleged the voided term in her employment contract is her lower hourly rate.
- 34 The applicant claimed the contractual benefit to which she was entitled and should have been paid, is the higher pass-through rate for each of the hours she worked on the MR Burnside Route.

New information

- 35 In the documents exchanged between the parties by way of informal discovery and for the purposes of preparing and filing a Statement of Agreed Facts, it emerged the Evergreen contract for the MR Burnside Route is not between the PTA and SWCL, but with a different, albeit related entity, the Australian Transit Group Pty Ltd (**ATG**).
- 36 Having learned SWCL is not a party to the Evergreen contract as alleged, and although the applicant believed her employer was covered by an Evergreen contract because she was performing work as a bus driver on the MR Burnside Route, the applicant determined she could no longer proceed with the claim.

The applicant's submissions

- 37 The applicant submits she did not need SWCL's consent to discontinue her contractual benefit claim. She was entitled to do so because the respondent had not, as required by sub-regulation 16(4), filed a counter proposal.
- 38 The applicant submitted that if she is right on this point, the Commission would not be able to make an order for costs because it is "*functus officio*".
- 39 In the alternative, the applicant submitted that if SWCL's consent is required, her case was not a matter where the Commission should depart from its usual "no costs" approach.

APTIA's submissions

- 40 The submissions APTIA filed did not address the issue of whether the applicant was required to seek the respondent's consent under sub-regulation 16(4) to discontinue her contractual benefit claim.
- 41 The APTIA submissions did not directly address the principles from *Manescu* that the Commission should follow when deciding whether to make an order for costs.
- 42 Rather APTIA submitted it was entitled to an order for costs by reference to the history of the matter and that it had placed the applicant on notice it would be pursuing an order for costs.

Consideration – is the Commission functus officio?

- 43 I agree with the applicant's submissions the Commission became "*functus officio*" after the Notice of Discontinuance was served on SWCL". Regulation 16(4) did not come into play because SWCL did not file a "counter proposal".
- 44 I am "*functus officio*" when I have completed all of the judicial functions in the case before me: Brinsden J at (2085) in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union and Others* (1990) 70 WAIG 2083. If sub-regulation 16(4) did not come into effect, then all of the judicial functions in the application will be completed upon filing of the notice of discontinuance and the Commission will be "*functus officio*".
- 45 Although the term "counter proposal" is not defined in either the IR Act or IR Regulations, I accept the filing of a counter proposal would involve something additional or more than a mere response to the allegations set out in her denied contractual benefits claim.
- 46 Unless the contrary intention is indicated, the words used in a statute should be construed in its ordinary and natural sense: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34. As Hall J stated in *Australian Leisure and Hospitality Group Pty Ltd v Director of Liquor Licensing* [2012] WASC 463 at [22]:
- If it is intended that a word in a statute will be used in a specific way that may not accord with ordinary usage such an intention is generally reflected in a definition in the statute. Absent such a definition, the ordinary meaning should prevail unless there is something in context to suggest that another meaning is intended.
- 47 When this principle of statutory interpretation is applied in the present case (and as the applicant submitted), unless there is something in the context that suggests otherwise, the words counter proposal should be afforded their ordinary meaning.
- 48 When reviewing the context in which the term counter proposal is used in the IR Regulations the applicant looked at how the term was used in sub-regulation 22(1), regulations 31 and 48. I accept the submission that a counter claim would involve the making of an independent claim that is separate to the applicant's originating claim against respondent.
- 49 It makes sense that a counter proposal in the context of a specialist industrial tribunal, with a broad jurisdiction to deal with industrial matters, that has award making powers and dispute resolution functions, including the power to arbitrate in disputes over good faith bargaining and the terms and content of industrial agreements, is something more or different than putting on a response to allegations.
- 50 A counter proposal could by way example, be the provision an alternative clause or clauses within an award or industrial agreement. It may involve providing an alternative set of demands from an employer, put up in response to a union's log of claims. When viewed in this context, the intended meaning of the term counter proposal is obvious.
- 51 I also conclude the respondent's foreshadowed application for costs, which appears in part 3.1(5) of its Form 3A Amended response is not a counter-claim. It is not separate to or independent of SWCL's response to the applicant's contractual benefit claim. It is not a proposal in the form of an alternative industrial condition or arrangement, of the character routinely considered by this Commission.
- 52 Accordingly, I have concluded the applicant's contractual benefit claim, which was not listed for a substantive hearing and was withdrawn at a very early stage in the proceedings, was able to be discontinued without the need for applicant to obtain SWCL's consent.

The Commission's powers to award costs

- 53 Even if I was not "*functus officio*" after the filing of the Notice of Discontinuance, I would have declined to make an order for costs. That is because this is not a matter which falls into the exceptional category of cases in which an order for costs is justified.
- 54 Section 27(1)(c) of the *Industrial Relations Act 1979 (the Act)* gives the Commission the power to order any party to a matter to pay to any other party its costs and expenses, including witness expenses, but no costs are allowed for the services of any legal practitioner or agent.
- 55 The test to be applied in awarding costs under s 27(1)(c) of the Act is set out in *Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26 where the Full Bench held that '[t]he general policy in industrial jurisdictions is that costs ought not to be awarded, except in extreme cases' (27). It is trite there is a very high bar that needs to be cleared to meet this test.

- 56 It is also the case that costs may be awarded against a party where an application has no merit and is 'manifestly groundless' or 'so manifestly faulty that it does not admit of argument' (see *Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries* (1994) 75 WAIG 9 at (11) (*TWU v Tip Top*)).
- 57 The respondent sought to rely on *Manescu*. However, *Manescu* dealt with the powers of a Full Bench to award costs following an appeal of a decision from an Industrial Magistrate, rather than following the withdrawal of an application prior to hearing before a single Commissioner in a denied contractual benefits claim.
- 58 Although *Manescu* is distinguishable to the extent that it dealt with the specific powers of a Full Bench under the IR Act to issue orders for costs, it is relevant authority in as much as it adopted and applied the same policy considerations as those in *TWU v Tip Top Bakeries* on the awarding of costs under s 27(1)(c).
- 59 The point *Manescu* ultimately affirms is that costs, will only be awarded by industrial tribunals, even at the appellate level, in exceptional circumstances.

Costs order is not justified

- 60 The present case needs to be viewed from the perspective that it was programmed by consent, alongside a similar and related claim that is continuing.
- 61 There is a connection between the applicants' employers. SWCL is a closely related entity to ATG. Any mistake the applicant may have made regarding the identity of employer and whether it was covered by an Evergreen contract and the like, is completely understandable.
- 62 There was also a significant amount of duplication in the responses and the statements of agreed facts the parties filed pursuant to the consent orders. The level of inconvenience experienced by SWCL is somewhat overstated.
- 63 There is nothing exceptional in the applicant deciding to discontinue her application, at an early stage, after she had the benefit of discovery and the provision of further information from her employer.
- 64 It is also relevant the applicant discontinued her contractual benefit claim well ahead of the matter being listed for a substantive hearing and before the parties had committed substantial resources, which stands in contrast to cases where such resources are expended and committed in the final hearing of a case (see for example *Peter John Morris v Lift Equipment Pty Ltd (ACN 125 331848)* [2013] WAIRC 00357 at [5] and [9]).
- 65 In *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, in the context of an Act which stated that "a party shall not be ordered to pay any costs incurred by any other party to that proceeding except where the party against whom the order is made instituted the proceedings vexatiously or without reasonable cause", Northrop J at (274) held that "the test is not subjective to the party instituting the proceedings".
- 66 Although SWCL and APTIA may have formed a strong view about the merits of applicant's claim and her conduct in pursuing the proceedings, when considered objectively, her case is not one which falls into the category of a matter that is frivolous, vexatious, or made without reasonable cause.

Conclusion

- 67 For all the reasons set out in the preceding paragraphs I have concluded my jurisdiction to make an order for costs against the applicant is not enlivened.
- 68 In addition, even if I had the power to make such an order, I do not consider an order for costs would be justified in the circumstances.
- 69 To the extent I have the power to do so, orders that this application be dismissed will now issue.

2023 WAIRC 00283

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

INGER ISAKSEN

APPLICANT

-v-

SOUTH WEST TRANSIT GROUP PTY LTD AS TRUSTEE FOR THE SOUTH WEST TRANSIT GROUP UNIT TRUST

RESPONDENT

CORAM

COMMISSIONER T KUCERA

DATE

FRIDAY, 19 MAY 2023

FILE NO/S

B 106 OF 2022

CITATION NO.

2023 WAIRC 00283

Result	Applications dismissed
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Mr I MacDonald as agent and Mr P King of counsel.

Order

HAVING heard on the papers from Mr C Fogliani of counsel on behalf of the applicant and Mr I MacDonald as agent and Mr P King of counsel on behalf of the respondent, the Commission pursuant to its powers conferred under the *Industrial Relations Act 1979* (WA) and to the extent it has powers to do so hereby orders –

1. THAT the application by the respondent for costs be and is hereby dismissed;
2. THAT the application B 106/2022 be and is hereby dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2023 WAIRC 00277

CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00277
CORAM	:	COMMISSIONER T KUCERA
HEARD	:	THURSDAY, 13 APRIL 2023
DELIVERED	:	FRIDAY, 19 MAY 2023
FILE NO.	:	B 105 OF 2022
BETWEEN	:	PETER WATKINS
		Applicant
		AND
		ATG BUNBURY PTY LTD AS TRUSTEE FOR ATG BUNBURY UNIT TRUST
		Respondent

CatchWords	:	Industrial law (WA) – Denied contractual benefits claim – Jurisdictional object – Evergreen contracts – Excluded and non-excluded claims – The Commission’s jurisdiction in denied contractual benefits claims involving national system employees – Unfair contracts jurisdiction in other States – Statutory interpretation – Excluded and non-excluded claims – Relevancy of evidence – Jurisdiction found
Legislation	:	<i>Fair Work Act 2009</i> (Cth) s 26(1), s 26(2)(e), s 27(2)(o), s 27(1)(d)(iii) <i>Industrial Relations Act 1979</i> (WA) s 23 (1), s 29(1)(d), s 29(1)(b)(iii) <i>Industrial Relations Act 1996</i> (NSW) ss 105-109
Result	:	Matter to be listed for hearing
Representation:		
Applicant	:	Mr C Fogliani, of counsel
Respondent	:	Mr P King, of counsel

Case(s) referred to in reasons:

Byrne v Australian Airlines [1995] 185 CLR 410

Brett King v Griffin Coal Mining Pty Ltd (2017) 97 WAIG 527

Christos Triantopoulos v Shell Company of Australia Ltd (2011) 91 WAIG 67

City of Enfield v Development and Assessment Commission and Anor [2000] HCA 5

Saldanha v Fujitsu Australia Pty Ltd (2008) 89 WAIG 76

Mathews v Cool or Cosy Pty Ltd (2004) 84 WAIG 2152

Nolan Paul Grobler v Mr Andre Stasikowski Stass Environmental (ABN 73 976 537 552) [2017] WAIRC 00115

Case(s) also cited:

Hobart International Airport Pty Ltd v Clarence City Council [2022] HCA 5

Decision

- 1 Peter Watkins (**applicant**) is a bus driver who is employed on a casual basis. He is paid \$34.61 per hour under a written contract of employment (**employment contract**).
- 2 The applicant is employed by ATG Bunbury Pty Ltd as trustee for the ATG Bunbury Unit Trust (**respondent**). The respondent is a private bus company providing school bus services under various contracts with the Public Transport Authority (**PTA**), in the South West of Western Australia.
- 3 One of the contracts between the PTA and the respondent is for the provision school bus services on the Bunbury Stratham Capel Route (**BSC Route**). The contract that applies to this route is known as an “Evergreen Contract” (**Evergreen contract**).
- 4 Under the Evergreen contract, the PTA pays the respondent service fees which include a component to ensure bus drivers are paid a specified “grossed up” hourly rate of pay for each hour worked.
- 5 An information bulletin issued the PTA entitled *Evergreen Contract Model Payments Elements*, states the “grossed up” hourly rate that should apply to the MR Burnside Route is \$43.31 per hour (**pass-through rate**).
- 6 As a mechanism to ensure bus drivers receive the higher pass-through rate, the Evergreen contract at Clause 9.12 (Pass-through of wages) contains a prohibition against a contractor receiving a windfall from the additional money the PTA pays in service fees under the Evergreen contract.
- 7 The applicant drives school buses on the BSC Route. The respondent assigned these duties to the applicant in or around July 2018. After discovering the difference between the hourly rate of pay in his written employment contract and the higher pass-through rate, the applicant filed a denied contractual benefits claim (**claim**).
- 8 The respondent disputes the claim. It says that because the respondent is a national system employer, the Commission, does not have the jurisdiction to hear the claim.
- 9 For the reasons set out, I have determined the Commission does have the jurisdiction to deal with this matter.

Original application

- 10 The applicant first raised his claim in a Form 3 application he filed on 19 September 2022. The Australian Transit Group trading as Bus West, was named as the employer respondent to the claim.
- 11 At the same time the applicant filed his claim, Inger Isaksen (**Isaksen**) in B106 of 2022, filed a very similar and related application against the entity she thought was her employer, the Australian Transit Group trading as South West Coach Lines Pty Ltd.
- 12 Both Isaksen and the applicant were being assisted in their applications by Glenn Ferguson from Transport Edge Inc. It is helpful to refer collectively to these two applications as the claims (**claims**) and to the applicant and Isaksen as the applicants (**applicants**).
- 13 On 7 October 2022, the Australian Public Transport Industrial Association (**APTIA**) filed responses to the claims (**responses**).
- 14 In the responses, APTIA not only denied the entities named as the respondents to the claims (**respondents**) were the correct employers, but it also raised jurisdictional objections to the claims.
- 15 I convened two conciliation conferences in relation to the claims, the first of which was held on 7 November 2022. With the consent of the parties, I listed the claims together.
- 16 Mr Ferguson appeared for the applicants in the first conciliation conference. Mr Ian McDonald from APTIA appeared for the respondents.
- 17 At the second conciliation conference held on 12 December 2022, the applicants were represented by legal counsel, Cory Fogliani. During this conference, Mr Fogliani foreshadowed his intention to file amended claims on the applicants’ behalf.
- 18 Although the claims were not able to be resolved by conciliation, the parties did reach agreement on a set of programming orders that I issued 20 December 2022 (**consent orders**), as follows:
 1. THAT the applicants are to file their amended applications by 9 January 2023.
 2. THAT the respondents are to file responses to the amended applications by 16 January 2023.
 3. THAT informal discovery is to be provided by 25 January 2023
 4. THAT the parties are to confer on and file an agreed statement of facts by 3 February 2023.
 5. THAT the matter is to be listed for a programming conference on a date to be fixed not before 3 February 2023.
 6. THAT there be liberty to apply.
- 19 On 10 January 2023 the parties agreed to extend the dates by which they were required to complete the various steps under the consent orders. The dates were respectively extended to 13 January, 20 January, 3 February, and 10 February 2023.
- 20 Pursuant to the consent orders, the applicants filed amended applications on 13 January 2023 (**amended applications**).

The amended responses

- 21 On 20 January 2023 APTIA filed amended responses, which maintained very similar jurisdictional objections to the original claims.

- 22 The jurisdictional objections APTIA raised in its response to the applicant's amended claim can be summarised as follows:
- (a) The Australian Transit Group Pty Ltd as trustee for the Australian Transit Unit Trust (**ATG**) did not employ the Applicant. The proceedings cannot proceed until the Commission determines the correct respondent.
 - (b) ATG is a constitutional corporation, which is a national system employer as defined in section 14 of the *Fair Work Act 2009* (Cth) (**FW Act**). Section 26 of the FW Act places limits on the Commission's jurisdiction to deal with industrial disputes involving national system employers and employees.
 - (c) By his claim, the applicant is not seeking to enforce a contractual benefit that arises under a contract of employment between the applicant and the respondent. Rather the applicant is seeking to enforce the terms of a contract between the PTA and ATG, to which the applicant is not a party. This is not a matter under section 27 (o) of the FW Act, in respect of which the Commission has jurisdiction.
 - (d) The applicant's claim the respondent has engaged in an unlawful act involving a breach of a contract it has with the PTA and/or that it has acted against the public interest by withholding public funds from the applicant are not matters the Commission may hear under s 27(o) of the FW Act.

Programming of the jurisdictional objection

- 23 On 31 January 2023, I asked my associate to send an email to the parties identifying the jurisdictional objections to be decided. His email provided some suggestions I had recommended on programming orders for the determination of the jurisdictional issues.
- 24 His email drew the parties' attention to s 27(2)(o) of the FW Act which appeared to suggest the WAIRC had the jurisdiction to entertain these claims.
- 25 It also drew the parties' attention to relevant authorities on the WAIRC's jurisdiction in matters under s 29(1)(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**) namely *Christos Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67 (*Triantopoulos*) and *Nolan Paul Grobler v Mr Andre Stasikowski Stass Environmental* (ABN 73 976 537 552) [2017] WAIRC 00115 (*Grobler*).
- 26 The parties were asked to review the relevant statutory provisions and the authorities referred to and to consider what programming orders should issue.
- 27 Following this, the parties provided a Minute of Proposed Orders (**minute**) signed by the representatives for the parties.
- 28 The minute identified the correct respondent to the applicant's claim. To this end on 9 February 2023, I issued by consent [2023] WAIRC 00065 which resulted ATG Bunbury Pty Ltd as trustee for the ATG Bunbury Unit Trust being substituted as the respondent to the applicant's claim.

Jurisdictional issues raised

- 29 On 9 February 2023, I also issued [2023] WAIRC 00067 which defined the jurisdictional objection to be decided in both claims as follows:
1. Whether the applicant has identified the correct respondent entity as his employer; and
 2. Whether the Commissions' jurisdiction to determine this matter is negated by section 26(3) of the FW Act.
- 30 I then issued orders for the respondents and the applicants to file submissions on the two jurisdictional issues referred to in the minute.
- 31 On 2 March 2023, Isaksen discontinued her claim. I was then only required to hear the jurisdictional objections in the applicant's claim. To this end, I listed the applicant's claim for a short hearing on the jurisdictional objection, which was convened on 13 April 2023.

Application of the Fair Work Act 2009

- 32 The FW Act by operation of s 26(1), applies to industrial and employment disputes between national system employers and employees, to the exclusion of all State and Territory industrial laws.
- 33 Section 26(2)(e) makes it clear that one of the specific State and Territory industrial laws excluded by the FW Act is:
- (e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
- 34 There are however some State and Territory industrial laws that are not excluded by the FW Act. To this extent s 27(1) relevantly states:
- 27(1)** Section 26 does not apply to a law of a State or Territory so far as:
-
- (c) the law deals with any non-excluded matters;
-
- 35 Section 27(2) of the FW Act then defines what a "non-excluded matter" means.
- 36 Subsection 27(2)(o) relevantly provides that a non-excluded matter includes:
- 27(2)** The **non-excluded matters** are as follows:
-

- (o) claims for the enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies;

....

37 The intended purpose of these provisions, subject to some exceptions, is to ensure the FW Act pretty much applies exclusively to any industrial and employment disputes between national system employers and employees.

Agreed facts

- 38 In the present case, the parties agree the applicant is a national system employee who works for a national system employer.
- 39 The parties also agree the respondent is party to the Evergreen contract with the PTA, that applies on the BSC Route. It is agreed the applicant is not a party to the Evergreen contract.
- 40 It is also agreed the respondent employed the applicant on a casual basis as a bus driver and that he works on the BSC Route.
- 41 The parties in the Statement of Agreed Facts set out the rates of pay the respondent pays to the applicant. These rates are less than the pass-through rates contained in the PTA's *Evergreen Contract Model Payments Elements* document, that was attached to the Statement of Agreed Facts as Agreed Document 5.

The respondent's submissions on jurisdiction

- 42 The representatives for the respondent, Mr McDonald and Peter King of counsel, filed two outlines of submissions in which they pressed the respondent's argument on the jurisdictional objection.
- 43 Mr King also sought to advance the respondent's argument by way of oral submissions at the hearing on 13 April 2023.
- 44 In summary, the respondent argued the applicant's claim is not about a breach of existing entitlements under his employment contract. Rather, the respondent submitted the applicant is attempting to set aside, vary or amend his contract to incorporate the higher rates from the contract between the PTA and the respondent, to which he is not a party.
- 45 This, the respondent argued, would require the Commission to make findings the applicant's contract is unfair or illegal, which the respondent submitted would be in the nature of an "unfair contracts" claim that is excluded by s 26(2)(e) the FW Act.
- 46 Alternatively, the respondent says the Applicant is attempting to enforce an entitlement to higher rates of pay that arise under the Evergreen contract, which is not an employment contract or an instrument to which the applicant is a party.
- 47 The respondent argued, enforcing the Evergreen contract, which is how the respondent has characterised the applicant's claim in part 2.2.1 and 2.2.2 of his amended application, is not a matter the Commission can entertain. The respondent says that this is because it is not a claim for the enforcement of a contract of employment within the meaning of s 27(2)(o) of the FW Act.
- 48 The respondent argued that because the "source" of the applicant's rights as this term was used in *Grobler* at [46], is not the applicant's employment contract, but something outside it, the Commission does not have the jurisdiction to deal with the matter. The respondent argued this claim would need to be referred elsewhere.
- 49 Such a case would require the applicant to prove his claim falls into an exception to the rule of privity as in *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5, thereby allowing him to enforce the Evergreen contract to his benefit, against the respondent.
- 50 The respondent argued that either case, would involve claims that are excluded by ss 26(2)(e) and 27(2)(o) of the FW Act.
- 51 In support of its submissions the respondent filed a short witness statement from Ben Doolan who is the respondent's Managing Director (**Doolan's statement**).
- 52 The respondent argued it was necessary to receive Doolan's statement into evidence because the decision in *City of Enfield v Development and Assessment Commission and Anor* [2000] HCA 5 requires the Commission make findings of jurisdictional fact about whether the applicant's claim relates to a "non-excluded claim".
- 53 In relation to this, Mr King argued Doolan's statement was relevant to deciding whether the applicant was attempting to enforce something other than an employment contract or whether the claim was in the nature of an unfair contracts claim.

The applicant's submissions on jurisdiction

- 54 The applicant argued it is settled law, that a denied contractual benefits claim under the IR Act is in practicality, a claim for the enforcement of an employment contract, for which an order for damages to remedy the denial of the contractual benefit may be made.
- 55 As the applicant's claim is being made under a State or Territory law that deals with "claims for the enforcement of contracts of employment". The Commission's jurisdiction to hear and determine a denied contractual benefits claim, is as a result, not excluded by the exception under s 26(2)(e) of the FW Act because of the operation of ss 27(1)(d)(iii) and 27(2)(o).
- 56 The applicant argued the jurisdictional objection raised by the respondent is not novel or unique and has been rejected on many occasions, including the cases the parties were referred to in *Triantopoulos* and *Grobler*.
- 57 The applicant argued its case did not involve an argument the applicant's contract of employment should be set aside or varied because it is unfair. The applicant also argued that it was not seeking to enforce the Evergreen contract between the respondent and the PTA either.
- 58 Rather the issue to be decided in the applicant's claim is whether he is entitled to a contractual benefit in his employment contract with the respondent, to the minimum rates in the Evergreen contract, when he drives buses on the BSC Route.
- 59 The applicant submitted the determination of this issue is something the Commission, in a denied contractual benefit claim has the jurisdiction to hear and decide.

60 The applicant objected to Doolan’s statement being admitted into evidence as it is not relevant to the jurisdictional objection. The applicant argued Doolan’s statement goes to the issue of identifying the terms of the employment contract between the parties.

61 The Applicant submitted the point at which Doolan’s statement should be received into evidence is at the substantive hearing of the contractual benefits claim.

The Commission’s jurisdiction in denied contractual benefits claim involving national system employees

62 In Western Australia the right of an employee to bring denied contractual benefit claim arises under ss 23(1) and 29(1)(b)(ii) of the IR Act: *Matthews v Cool or Cosy Pty Ltd* (2004) 84 WAIG 2152 (*Cool or Cosy*).

63 The Commission under s 23(1) of the IR Act has the power to enquire into and deal with any industrial matter within its jurisdiction.

64 An “industrial matter” is defined broadly under s 7 of the IR Act and is sufficiently wide to include disputes over the identification of terms in an employment contract: *Saldanha v Fujitsu Australia Pty Ltd* (2008) 89 WAIG 76 (*Saldanha*).

65 The specific provision giving rise to an employee’s right to make a denied contractual benefits claim against an employer in respect of an employment contract, to which the employee is a party, is under s 29(1)(b)(ii) of the IR Act.

66 The Commission in a number of authorities that include in *Triantopoulos* and *Grobler* has decided that together ss 23 (1) and 29(1)(b)(ii) of the IR Act are provisions of a State or Territory Law that deal with “claims of enforcement of contracts of employment”.

67 To this end then Chief Commissioner Scott in *Triantopoulos* at [58] usefully summarised and characterised the function of the Commission in a denied contractual benefits claim as follows:

1. The Commission’s jurisdiction is to deal with an industrial matter which includes the power to compel by order the performance of a benefit under a contract of employment (*Cool or Cosy* at [73])
2. The Commission has power by the combined effects of s 23(1) and s 29(1)(b)(ii) ... to enforce the payment of entitlements (*Cool or Cosy*, per Heenan J [64] and “... is empowered to make a monetary order, in the nature of damages to deal with the industrial matter before it ... for breach of the employment contract [73]. This is “... to give effect to common law entitlements on application by an employee under s 29(1)(b)(ii).”
3. The benefit claimed is contractual and exists independent of the provisions of the IR Act (*Cool or Cosy* per Heenan J [60]).
4. It is an enforcement of legal rights involving the exercise of judicial power (*Saldanha* per Ritter AP [122]).
5. A claim under s 29(1)(b)(ii) would be determined upon common law principles (*Saldanha* per Ritter AP [73]), the process being the same as that for the enforcement in courts of appropriate jurisdiction – the Commission must decide:
 - a. What the terms of the contract were;
 - b. Whether or not they have been complied with

and in doing so the Commission is exercising a judicial function (*Saldanha* per Ritter AP [80 – 81])

68 Scott CC in *Triantopoulos* identified the task of the Commission in a denied contractual benefit claim is to identify the terms of the contract using common law principles, whether those terms are express, incorporated or implied.

69 The Commission’s task then turns to whether an employer has breached one or any of those terms and to exercise a discretion as to what if any relief should issue.

No unfair contracts jurisdiction in WA

70 Western Australia does not have and has never had, a statutory “unfair contracts jurisdiction”.

71 When exercising jurisdiction in a denied contractual benefits claim, the Commission is not permitted to and does not, have any powers to amend, vary or set aside an employment contract on the grounds it is unfair to an employee.

72 This is a feature of what is known as an “*unfair contracts jurisdiction*” of the type that exists in NSW under Part 9 ss 105 – 109 (Unfair Contracts) of the *Industrial Relations Act 1996* (NSW). It is helpful to note the unfair contracts jurisdiction in NSW is a creature of statute.

73 These observations are important, as s 26(2)(e) of the FW Act is directed at preventing state courts and industrial tribunals from exercising jurisdiction in disputes involving national system employees and employers, under state laws or statutes that provide for the exercise of an unfair contracts jurisdiction.

Consideration – Is the applicant’s claim excluded by s 26(2)(e) of the FWC Act?

74 Having reviewed the applicant’s amended claim, the Statement of Agreed Facts, the attachments to these documents, the parties submissions, and noting the relevant case law including *Triantopoulos* and *Grobler*, I have determined the Commission has jurisdiction to hear this claim.

75 The applicant’s claim is being made under ss 23(1) and 29(1)(b)(ii) of the IR Act which is a State or Territory industrial law that deals with “claims of enforcement of contracts of employment”.

76 This matter is not excluded by operation s 26(2)(e) of the FW Act because there is no unfair contracts law or jurisdiction in WA of the type that s 26(2)(e) is intended to exclude.

77 Put another way, the focus of the inquiry as to whether a claim is permitted despite s 26(2)(e) of the FW Act, is directed at whether the state industrial law under which the claim is brought is excluded by the FW Act rather than the content of the claim itself.

Is the applicant's claim excluded by s 27(2)(o) of the FW Act?

78 The respondent's argument the Commission does not have jurisdiction under s 27(2)(o) of the FW Act, because the applicant's claim involves the enforcement of something other than a contract of employment, also misses the point of the jurisdictional objection to be decided.

79 There are two problems with the respondent's characterisation of its jurisdictional objection and its submissions on this point.

80 Firstly, the applicant both in his amended claim and by his counsel's submissions has made it clear that he is not seeking to enforce the Evergreen contract.

81 Secondly, s 27(2)(o) of the FW Act like s 26(2)(e) is directed at whether the law under which the claim is being made is excluded, not the content of the claim itself.

82 The identification of the contract upon which the applicant relies, is one of the elements the applicant will have to establish at a substantive hearing of his claim. The respondent says that the applicant must prove this element as a jurisdictional fact as in *Enfield* at [28], however as the relevant case law has demonstrated, this is something that would happen at the substantive hearing.

83 Section 27(2)(o) of the FW Act does not require the Commission to inquire into and make findings on whether a claim under a law for the enforcement of a contract of employment is in substance a claim for something else.

84 It requires the Commission to look at the law under which the claim is being made and to decide whether the exercise of its jurisdiction under that law is ousted by operation of s 26 of the FW Act see *Triantopoulos* at [29].

Was Doolan's witness statement relevant?

85 Noting the conclusions I have reached in relation to the Commission's jurisdiction to hear this claim, it follows Mr Doolan's statement is not relevant to the jurisdictional objection the Commission was asked to decide. For this reason, it was not appropriate for it to be admitted into evidence at the jurisdictional hearing.

86 By his amended claim, the applicant alleges his employment contract was varied by the parties' conduct, or the terms in the Evergreen contract between the respondent and the PTA are implied into his contract of employment.

87 It is trite that terms in an employment contract can be varied and may be express, incorporated or implied. There are various principles under the common law regarding the identification of implied terms, including *Byrne v Australian Airlines* [1995] 185 CLR 410. To succeed in his claim the applicant will have to show how these principles, when applied, give rise to a contractual benefit to which he is entitled under his employment contract.

88 The task of the Commission in this case is as it was in *Brett King v Griffin Coal Mining Pty Ltd* (2017) 97 WAIG 527, is to establish whether terms are incorporated or implied and if so, whether those terms have been breached.

89 Mr Doolan's statement is relevant to determining the terms of the employment contract between the applicant and respondent. It is my view that Mr Doolan's statement can be revisited at the substantive hearing of this matter.

Conclusion

90 For all of the reasons set out in the preceding paragraphs, I have determined the Commission has jurisdiction to hear this claim.

91 Orders will now issue for the parties to confer and provide a draft minute of proposed programming orders, so the applicant's claim can be listed for hearing.

2023 WAIRC 00301

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER WATKINS

APPLICANT

-v-

ATG BUNBURY PTY LTD AS TRUSTEE FOR ATG BUNBURY UNIT TRUST

RESPONDENT

CORAM

COMMISSIONER T KUCERA

DATE

FRIDAY, 26 MAY 2023

FILE NO.

B 105 OF 2022

CITATION NO.

2023 WAIRC 00301

Result	Directions issued
Representation	
Applicant	Mr C Fogliani, of counsel
Respondent	Mr P King, of counsel

Direction

WHEREAS the parties have conferred and provided the Commission with a minute of proposed programming directions; NOW THEREFORE the Commission pursuant to the powers conferred upon it under the Industrial Relations Act 1979 (WA), and by consent, hereby DIRECTS –

1. THAT the applicant's denied contract benefits application be listed for a hearing of two days duration on a date not before 12 August 2023.
2. THAT on or before 26 June 2023, the applicant is to file:
 - (a) any documents he intends to rely upon in support of the denied contractual benefits application; and
 - (b) an outline of evidence for each witness the applicant intends to call to give evidence, such outline of evidence to comply with practice note 9 of 2021.
3. THAT on or before 26 July 2023, the Respondent is to file:
 - (a) any documents it intends to rely upon in response to the denied contractual benefits application; and
 - (b) an outline of evidence for each witness the respondent intends to call to give evidence, such outline of evidence to comply with practice note 9 of 2021.
4. THAT on or before 4 August 2023, the applicant is to file a written outline of submissions in support of the denied contractual benefits application.
5. THAT on or before 12 August 2023, the respondent is to file a written outline of submissions in response to the denied contractual benefits application.
6. THAT witness will give their evidence in chief orally.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2023 WAIRC 00281

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PETER WATKINS

PARTIES

APPLICANT

-v-

ATG BUNBURY PTY LTD AS TRUSTEE FOR ATG BUNBURY UNIT TRUST

RESPONDENT

CORAM	COMMISSIONER T KUCERA
DATE	FRIDAY, 19 MAY 2023
FILE NO/S	B 105 OF 2022
CITATION NO.	2023 WAIRC 00281

Result	Orders issued
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Mr P King of counsel

Order

HAVING heard from Mr C Fogliani of counsel on behalf of the applicant and Mr P King of counsel on behalf of the respondent, the Commission pursuant to its powers under the *Industrial Relations Act 1979 (WA)* hereby orders –

1. THAT the parties confer and provide a draft minute of proposed programming orders by close of business Friday 26 May 2023 so the matter can be set down for hearing.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2023 WAIRC 00286

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2023 WAIRC 00286
CORAM : SENIOR COMMISSIONER R COSENTINO
HEARD : ON THE PAPERS
DELIVERED : MONDAY, 22 MAY 2023
FILE NO. : B 4 OF 2023
BETWEEN : RHYS SCHOEN
 Applicant
 AND
 PAULL & WARNER RESOURCES PTY LTD
 Respondent

CatchWords : Industrial Law (WA) – Contractual Benefit Claim – Applicant failed to attend several conciliation conference listings and directions hearing – s 27(1)(a) – Applicant failed to diligently prosecute his claim – Further proceedings not in public interest – Application dismissed
Legislation : *Industrial Relations Act 1979* (WA)
Result : Application dismissed
Representation: (on the papers)

Case(s) referred to in reasons:

Pietracatella v W.A. Italian Club (Inc) [2001] WAIRC 03509; (2001) 81 WAIG 2532
Kangatheran v Boans Limited (1987) 67 WAIG 1112

Reasons for Decision

- 1 The applicant in these proceedings, Mr Rhys Schoen, failed to attend two conciliation conferences, failed to attend a directions hearing and has not responded to various emails and letters sent to him by the Commission. Mr Schoen appeared disinterested in the proceedings and demonstrated an unwillingness to diligently prosecute his claim. His conduct was inhibiting the timely resolution of his claim, and the ability of the Commission to exercise its functions. For these reasons, I made an order requiring him to show cause why his claim should not be dismissed.
- 2 Under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), at any stage in the proceedings, the Commission may dismiss a matter if it is satisfied, amongst other things, that further proceedings are not necessary or desirable in the public interest. Applicants who invoke the Commission's jurisdiction have a duty to prosecute their claims 'assiduously': *Kangatheran v Boans Limited* (1987) 67 WAIG 1112 at 1113. An applicant's failure to act reasonably in prosecuting their claim can mean that the proceedings are not in the public interest: *Pietracatella v W.A. Italian Club (Inc)* [2001] WAIRC 03509; (2001) 81 WAIG 2532.
- 3 The relevant procedural history is set out below.
- 4 On 14 February 2023 Mr Schoen filed his application in the Commission, claiming the respondent, his ex-employer, had denied him a benefit due under his employment contract.
- 5 On 17 February 2023 the Commission wrote to the parties advising that Mr Schoen's claim had been tentatively listed for a conciliation conference on Monday, 13 March 2023. The Commission advised the parties that if they had any issue with the listing date, they should advise the Commission by no later than 24 February 2023.
- 6 Having had no response from the parties indicating that there was any issue with the tentative conference date, on 27 February 2023, the Commission sent the parties a notice confirming the conciliation conference listing for Monday, 13 March 2023.
- 7 On Friday 10 March 2023 Mr Schoen emailed the Commission stating that due to work commitments, he was unavailable to attend the conciliation conference listed for Monday 13 March 2023. He requested the conference be postponed until his return to Perth after 30 March 2023.
- 8 On 10 March 2023, the Commission vacated the conference listed for Monday 13 March 2023 and sought the parties' unavailable dates for an adjourned conciliation conference in April 2023. Mr Schoen responded to that email on the same day, advising he was available from the 1st to the 24th of April.

- 9 The Commission therefore listed the adjourned conference for Tuesday 4 April 2023 and emailed the parties on 13 March 2023 confirming this new listing.
- 10 On 31 March 2023 Mr Schoen wrote to the Commission advising that he was unable to attend the conference listed for Tuesday 4 April 2023 due to work commitments. He noted that taking time off work will leave him financially disadvantaged because his wages exceed the amount sought in these proceedings. In his email, he stated:
- ...
- If you are unable to defer/postpone the hearing until I can provide more solid timeframe for availability, then I will have to reluctantly withdraw my claim/complaint.
- 11 My chambers responded to Mr Schoen's email on 31 March 2023, including the following:
- Under s 22B of the *Industrial Relations Act 1979* (WA) (IR Act), the Commission must act with as much speed as the requirements of the IR Act and properly consider the matter before it permits.
- If your email below is an application asking the Commission to defer dealing with your application indefinitely and without a new date for conciliation being set, that application is refused on the basis that it is inconsistent with the requirements of s 22B.
- The Senior Commissioner is prepared to consider an application to reschedule the conciliation conference to a date no later than 24 April 2023, subject to anything the respondent has to say about any such application if it is made.
- As such, please confirm whether you are applying to adjourn the conference to a later date, on or before 24 April 2023, at your earliest convenience.
- 12 Mr Schoen did not respond to this correspondence. He did not attend the conciliation conference on Tuesday, 4 April 2023.
- 13 On 4 April 2023, the Commission wrote to the parties noting that the Commission was obliged to endeavor to resolve matters referred to it by conciliation. Given the nonattendance at the conference listed on Tuesday 4 April 2023 I directed that, by 6 April 2023, both parties:
- provide an explanation for their failure to attend the conciliation conference of 4 April 2023; and
 - indicate whether the party is prepared to participate in a conciliation conference or not. If not, why not;
 - what if any arrangements are requested to optimise the prospects of conciliation resolving the matter?
- 14 Mr Schoen did not respond to this correspondence, contravening my direction.
- 15 The Commission therefore listed the matter for a directions hearing on Wednesday, 26 April 2023. Mr Schoen was sent notice of the directions hearing by email on 17 April 2023 to the email address for service specified in his application form, being the same address used by him to write to the Commission on 31 March 2023.
- 16 Mr Schoen did not attend the directions hearing. During the directions hearing, my associate was able to contact Mr Schoen by telephone. I granted him leave to participate in the directions hearing by telephone. During the directions hearing, Mr Schoen told the Commission he was inclined not to attend the Commission if it meant taking time off work because his financial loss from not attending work would exceed the amount he is claiming in these proceedings. However, he also said that he remained willing to attend a conciliation conference to endeavour to resolve his claim.
- 17 Because the respondent also advised the Commission that it remained willing to participate in conciliation, I adjourned the directions hearing to a conciliation conference.
- 18 After the directions hearing my chambers wrote to Mr Schoen seeking his availability for the purpose of listing a conciliation conference. By return email, Mr Schoen advised that he was available from 11 to 31 May 2023. A conference was therefore listed for Monday 15 May 2023.
- 19 Notice of the conciliation conference was sent to Mr Schoen by email on 26 April 2023.
- 20 Mr Schoen failed to attend the conciliation conference on Monday 15 May 2023. He did not contact the Commission either before, during or after the conference to provide notice of, or an explanation for, his nonattendance.
- 21 At that conciliation conference, the respondent applied to have the matter dismissed. I made orders providing Mr Schoen until 19 May 2023 to file any submissions and documents to show cause why his application should not be dismissed, and ordering that the application for dismissal be dealt with on the papers: [2023] WAIRC 00273.
- 22 A copy of the orders was sent to Mr Schoen by email on 15 May 2023.
- 23 Mr Schoen did not file anything. He has made no contact with the Commission.
- 24 It is not only in the parties' interests, but also in the interests of the public that matters before the Commission be resolved as efficiently as the justice of the case requires. Where a party fails to participate proactively in achieving this goal, their conduct has an effect on the Commission's publicly funded resources as well as on the other parties to matters before the Commission, who are effectively competing for those resources. It is not in the public interest to tolerate inefficiencies in the use of the Commission's resources. Such inefficiencies are liable to erode public confidence in the Commission.
- 25 Mr Schoen has not participated in proactively prosecuting his claim. He has simply sat back and allowed the waste of public resources and inconvenience to the respondent in attempts to bring the matter to a resolution. There is a real risk that allowing the claim to remain on foot will result in further waste and unfairness to the respondent, so that further proceedings in this matter is not desirable in the public interest.
- 26 I dismiss the claim.
-

2023 WAIRC 00306

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RHYS SCHOEN

APPLICANT

-v-

PAULL & WARNER RESOURCES PTY LTD

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 31 MAY 2023

FILE NO/S

B 4 OF 2023

CITATION NO.

2023 WAIRC 00306

Result	Application dismissed
Representation	(on the papers)

Order

WHEREAS orders issued on 15 May 2023 ([2023] WAIRC 00273) for the applicant to file any written outline of submissions and documents relied upon by him to show cause why his application should not be dismissed under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) and for the application under s 27(1)(a) to be determined on the papers thereafter;

AND WHEREAS the applicant did not file any written outline of submissions or correspondence;

AND WHEREAS, I, the undersigned, issued reasons for my decision on 22 May 2023 ([2023] WAIRC 00285) dismissing the application under s 27(1)(a) of the Act;

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

THAT the application be and is hereby dismissed.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2023 WAIRC 00273

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RHYS SCHOEN

APPLICANT

-v-

PAULL & WARNER RESOURCES PTY LTD

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

MONDAY, 15 MAY 2023

FILE NO/S

B 4 OF 2023

CITATION NO.

2023 WAIRC 00273

Result	Order issued
Representation	(on the papers)
Applicant	No appearance
Respondent	Mr N Groen

Order

WHEREAS in endeavouring to resolve this matter by conciliation, the Commission listed the matter for a conciliation conference on 13 March 2023;

AND WHEREAS on 10 March 2023, the applicant advised the Commission he was unable to attend the conciliation conference listed for 13 March 2023, and so the Commission vacated the conference, relisting it on 4 April 2023 to accommodate the applicant's availability;

AND WHEREAS the applicant failed to attend the conciliation conference on 4 April 2023;

AND WHEREAS the Commission wrote to the applicant on 4 April 2023 requesting an explanation for his non-attendance at conciliation and seeking his views as to whether conciliation should occur;

AND WHEREAS the applicant did not respond to the Commission's correspondence;

AND WHEREAS at a directions hearing held on 26 April 2023, the applicant advised the Commission that he was willing to attend a re-convened conciliation conference;

AND WHEREAS a conciliation conference was listed for 15 May 2023, accommodating the applicant's availability, and notice of the conference listing was provided to the applicant by email to the email address supplied on the applicant's Form 3 - Contractual Benefit Claim on 26 April 2023;

AND WHEREAS the applicant failed to attend the conciliation conference listed for 15 May 2023 and failed to advise the Commission of his non-attendance or reason for his non-attendance;

AND WHEREAS the Commission is satisfied that:

- (a) the resolution of the matter will not be assisted by conciliation, and
- (b) the applicant's failure to diligently prosecute the matter indicates that further proceedings may not be necessary or desirable in the public interest;

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

1. THAT the applicant file any written outline of submissions and documents relied upon by him to show cause why his application should not be dismissed under s 27(1)(a) of the Act by no later than 19 May 2023.
2. THAT unless otherwise ordered, the Commission will determine whether to dismiss the application under s 27(1)(a) of the Act on the papers after 19 May 2023.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

CONFERENCE—Matters referred—

2023 WAIRC 00287

DISPUTE RE TERMINATION OF EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00287
CORAM	:	COMMISSIONER C TSANG
HEARD	:	WEDNESDAY, 14 SEPTEMBER 2022, THURSDAY, 15 SEPTEMBER 2022
DELIVERED	:	MONDAY, 22 MAY 2023
FILE NO	:	CR 33 OF 2021
BETWEEN	:	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INC.) Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Industrial Law (WA) - Unfair dismissal - Inadequate supervision of student resulting in injury - Physical contact with student not justifiable by Regulation 38 of the <i>School Education Regulations 2000</i> (WA) - Procedural fairness - Dismissal not harsh, oppressive or unfair
Legislation	:	<i>Industrial Relations Act 1979</i> (WA), s 44 <i>Public Sector Management Act 1994</i> (WA), s 7, s 8, s 9, s 21, s 22A, s80(c), s 80(d), s 81 <i>School Education Act 1999</i> (WA), s 64(1)(a), s 64(1)(b), s 64(1)(e) <i>School Education Regulations 2000</i> (WA), r 38(c)(i)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr D Rafferty (of counsel)
Respondent	:	Mr R Andretich (of counsel)

Cases referred to in reasons:

Ash v Chabad Institutions of Victoria Limited [2020] FWC 1744
Ayling v Director-General, Department of Education and Training [2009] WAIRC 00413; (2009) 89 WAIG 824
Balfour v Attorney-General [1991] 1 NZLR 519
Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224
Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635
Connor v Grundy Television Pty Ltd [2005] VSC 466
Director General, Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Greyhound Racing NSW v Cessnock & District Agricultural Association Inc [2006] NSWCA 333
Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438
Isbester v Knox City Council [2015] HCA 20; (2015) 255 CLR 135
James v St Thomas Aquinas College Limited T/A St Thomas Aquinas College [2016] FWC 6360
Landwehr v Director General, Department of Education [2017] WAIRC 00233; (2017) 97 WAIG 542
Landwehr v Director General, Department of Education [2017] WAIRC 00866; (2017) 97 WAIG 1617
Landwehr v Director General, Department of Education [2018] WAIRC 00105; (2018) 98 WAIG 325
Landwehr v Director General, Department of Education [2018] WAIRC 00320; (2018) 98 WAIG 327
McGovern v Ku-Ring-Gai Council [2008] NSWCA 209; (2008) 251 ALR 558
Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203
Minister for Immigration and Multicultural Affairs v Legeng (2001) 205 CLR 507
Minister for Immigration & Multicultural Affairs v SZFDE [2006] FCAFC 142
Parnell v The Roman Catholic Archbishop of Perth [2021] WAIRC 00102; (2021) 101 WAIG 186
Puccio v Catholic Education Office (1996) 68 IR 407
Quigley (A Practitioner) v The Legal Practitioners Complaints Committee [2003] WASCA 228
Re Refugee Review Tribunal; Ex parte H [2001] HCA 28; (2001) 179 ALR 425
Sangwin v Imogen Pty Ltd [1996] IRCA 100
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Inghams Enterprises Pty Ltd [2005] WAIRC 02347; (2005) 85 WAIG 3385
The State School Teachers' Union of WA (Incorporated) v The Director General, Department of Education [2012] WAIRC 00127; (2012) 92 WAIG 362
Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385
Webb v The Queen (1994) 181 CLR 41
West Australian Branch, Australasian Meat Industry Employees' Union v Geraldton Meat Exports Pty Ltd [2001] WAIRC 03573; (2001) 81 WAIG 2523

*Reasons for Decision***The application**

- 1 This is an application to determine whether the respondent's dismissal of the applicant's (**Union's**) member Barry Landwehr (**Mr Landwehr**) on 7 October 2021 was harsh, oppressive or unfair.
- 2 If Mr Landwehr's dismissal was unfair, the Commission is asked to determine whether any of the following orders should issue:
 - (a) The respondent to reinstate Mr Landwehr to his former position on conditions at least as favourable as the conditions on which he was employed immediately before the dismissal (**Order 1**).
 - (b) Further and in the alternative, the respondent to re-employ Mr Landwehr in another available and suitable position (**Order 2**).
 - (c) In addition to Order 1 or Order 2:
 - (i) the respondent to maintain continuity of Mr Landwehr's employment;
 - (ii) the respondent to pay to Mr Landwehr the remuneration lost or likely to have been lost because of the dismissal, less any income earned post-dismissal.
 - (d) Further and in the alternative, the respondent to pay to Mr Landwehr an amount of compensation for loss or injury caused by the dismissal, less any income earned post-dismissal.

Framework

- 3 The Union's application is made under s 44 of the *Industrial Relations Act 1979* (WA).
- 4 The Union submits the matter is to be determined in accordance with the principles in *Minister for Health v Drake-Brockman*

- [2012] WAIRC 00150; (2012) 92 WAIG 203 (*Drake-Brockman*) [46]-[67] with the ultimate question being whether the right of the respondent to dismiss has been exercised so harshly or oppressively as to amount to an abuse of that right.
- 5 As the matter involves allegations of misconduct, the Union accepts the *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 (*Bi-Lo*) test applies.
 - 6 Under *Bi-Lo* actual guilt of the misconduct alleged need not be proven by the respondent: *Drake-Brockman* [66]. The evidentiary onus entails the respondent demonstrating reasonable grounds for belief, based on available information at the time, after a proper inquiry, that Mr Landwehr committed the alleged misconduct. Further, that considering any mitigating circumstances related to the misconduct or Mr Landwehr's work record, the misconduct justified dismissal: *Drake-Brockman* [66].
 - 7 The parties agreed the matter was to be heard and determined based on the evidence in the statement of agreed facts and documents, as well as the parties' written and oral submissions.
 - 8 Therefore, I must decide whether on the evidence, following a proper inquiry, the respondent had reasonable grounds for holding a genuine belief that the misconduct occurred, and whether the dismissal was harsh, oppressive or unfair in the circumstances: *Drake-Brockman* [69].
 - 9 Further, whether Mr Landwehr received 'less than a fair deal' and whether there has been 'a fair go all around': *Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 (*Undercliffe*).
 - 10 In these reasons for decision, the names of students are replaced by their initials.

Background

- 11 The parties filed a statement of agreed facts which states:
 - (a) Mr Landwehr was employed as a Design & Technology Teacher (**D&T Teacher**).
 - (b) From July 2006 to 10 May 2016, Mr Landwehr taught at Harvey Agricultural College.
 - (c) On 10 May 2016, Mr Landwehr was summarily dismissed for making physical contact with a student on 13 August 2015 in response to a compressed air hose nozzle being directed at his buttocks and releasing compressed air (**compressed air incident**).
 - (d) The compressed air incident was investigated by a team of investigators from the respondent's Standards and Integrity Directorate (**SID**), which included Debbie Pelham, Senior Investigator, SID (**Ms Pelham**).
 - (e) Mr Landwehr commenced unfair dismissal proceedings in the Commission. By a decision delivered on 29 May 2018, the dismissal was deemed unfair and the Commission ordered Mr Landwehr's reinstatement, his service deemed continuous, and payment for lost remuneration adjusted for income earned since the dismissal: *Landwehr v Director General, Department of Education* [2017] WAIRC 00233; (2017) 97 WAIG 542 (*Landwehr No. 1*), *Landwehr v Director General, Department of Education* [2017] WAIRC 00866; (2017) 97 WAIG 1617 (*Landwehr No. 2*), *Landwehr v Director General, Department of Education* [2018] WAIRC 00105; (2018) 98 WAIG 325, *Landwehr v Director General, Department of Education* [2018] WAIRC 00320; (2018) 98 WAIG 327 (*Landwehr No. 4*).
 - (f) In June 2018, Mr Landwehr was reinstated. From June 2018 to December 2019, he taught at Belmont City College and Roleystone Community College.
 - (g) From 30 January 2020 until his dismissal on 7 October 2021, Mr Landwehr taught at Ellenbrook Secondary College (**School**).
 - (h) On 7 October 2021, Mr Landwehr was summarily dismissed for serious misconduct under clause 11(4) of the *Teachers (Public Sector Primary and Secondary Education) Award 1993 (Award)* for:
 - (i) negligence or carelessness amounting to a breach of discipline pursuant to s 80(d) of the Public Sector Management Act 1994 (WA) (**PSM Act**) for an incident on 24 June 2020 involving a Year 10 student injuring his thumb and requiring reconstructive surgery (**Allegation 1**); and
 - (ii) misconduct amounting to a breach of discipline pursuant to s 80(c) of the PSM Act for an incident on 25 September 2020 involving physical contact with a Year 11 student in breach of Regulation 38 of the *School Education Regulations 2000 (WA) (Regulation 38) (Allegation 3)*.
 - (i) The following instruments and policies applied to Mr Landwehr's employment:
 - (i) 'Code of Conduct 2011' (**Code of Conduct**).
 - (ii) 'Duty of Care for Public School Students Policy' (**Policy**).
 - (iii) 'Physical Contact with Students' Guidelines (**Guidelines**).
 - (iv) Regulation 38.
 - (j) The following instruments and policies applied to the respondent:
 - (i) 'Discipline Standard (Public Sector Standards in Human Resource Management)' (**Discipline Standard**).
 - (ii) Commissioner's Instruction 3 'Discipline – General' (**Commissioner's Instruction**).
 - (iii) 'A Guide to the Discipline Process – Public Sector Management Act 1994'.

Union's contentions

12 The Union contends that:

- (a) Mr Landwehr was not guilty of Allegation 1, and even if found guilty, a single act of negligence or carelessness does not justify dismissal in the circumstances;
- (b) Mr Landwehr was not guilty of Allegation 3, and even if found guilty, the act of misconduct does not justify dismissal in the circumstances; and
- (c) the investigation and dismissal were affected by perceived bias, due to Ms Pelham's involvement and conduct, rendering the investigation and dismissal void for non-compliance with the Commissioner's Instruction and s 22A of the PSM Act.

Allegation 1

13 By letter dated 22 February 2021, Nick Wells, A/Director, SID (**Mr Wells**), wrote to Mr Landwehr notifying him of a number of allegations of misconduct (**Allegations Letter**).

14 The Allegations Letter set out Allegation 1 as follows:

On 24 June 2020, at Ellenbrook Secondary College, you were negligent or careless in the performance of your functions, amounting to a breach of discipline pursuant to section 80(d) of the *Public Sector Management Act 1994*.

Particulars

- a. You were employed as a teacher at Ellenbrook Secondary College.
- b. On 24 June 2020, you showed [Student SS], Year 10 Student, Ellenbrook Secondary College, how to measure and cut wood using a cut off saw (wood) during class and then left him unsupervised.
- c. [Student SS] used the cut off saw to cut a piece of wood, however, he had not removed a metal ruler from the wood.
- d. [Student SS's] thumb was injured by the broken ruler/saw and his thumb required reconstructive surgery, including removal of a bone fragment.
- e. As per the Ellenbrook Secondary College, 'Power Tool & Machine Usage 2019' document (attached), you were required to supervise [Student SS] while he used the cut off saw (wood), however, you failed to do so.
- f. Had you appropriately supervised [Student SS], the incident could have been avoided.
- g. Your actions were not in accordance with the Department of Education's *Duty of Care for Public School Students* policy which states in part:

1. POLICY STATEMENT

All Department of Education (the Department) employees have a duty of care to protect students from risk of harm that can reasonably be foreseen when students are involved in school activities, whether on or off the Department site.

- h. Your actions were negligent or careless and were not compliant with the *School Education Act 1999*, which states in part:

64. Teacher's functions

- (1) The functions of a teacher in a government school are –
 - (a) to foster and facilitate learning in students; and
 - (b) to give competent instruction to students in accordance with –
 - (i) the curriculum; and
 - (ii) standards determined by the chief executive officer; and
 - (iii) the school's plan referred to in section 63(1)(e), and to undertake the preparation necessary to do so.

15 The Allegations Letter notifies Mr Landwehr that Allegation 1 would be treated as a disciplinary matter pursuant to s 81 of the PSM Act, and that Ms Pelham had been appointed to investigate the matter.

16 The Allegations Letter invites Mr Landwehr to respond in writing, or to contact Ms Pelham to respond in person.

17 On 15 March 2021, Mr Landwehr responds to the Allegations Letter in writing (**First Response**) on the following terms:

- (a) At the start of the semester, he gave the students two periods of induction which covered safely operating machinery, during which he stated that a student needs to seek his permission to use a machine before doing so.
- (b) He regularly uses his life experience as a second year apprentice where he crushed his hand, to encourage students to ask for help.
- (c) Before students use a new tool, he always gives them a demonstration on how to use it. If a redemonstration is required, this is followed up, and in following lessons he goes over the tool usage procedures.
- (d) He gave the class a demonstration on how to use the compound mitre saw at the start of the year and explained how to use it as a drop saw. He explained how to use the machine in several more lessons.
- (e) The student had used the machine previously.
- (f) He demonstrated how to use the machine for the step ladder project, by:

- (i) measuring on a long piece with a tape measure on the bench;
 - (ii) taking the material to the saw;
 - (iii) cutting the material to length;
 - (iv) using the cut piece as a template for the second piece to be cut; and
 - (v) cutting the second piece.
- (g) In relation to the student, he:
- (i) helped the student cut the first piece;
 - (ii) supervised the student cutting the second piece;
 - (iii) told the student to stop and turned around to help another student;
 - (iv) heard a bang, turned around and saw the student holding his finger;
 - (v) wrapped the student's finger in a paper towel and sent the student to the first aid officer;
 - (vi) afterwards, found a piece of material left on the saw only cut halfway through, and a metal rule cut in half on an angle with sharp edges under the table; and
 - (vii) reported the incident to Isabelle Cox and Ruth Botica, completed the Accident/Incident Report for Students and Visitors and followed up with the School Officer, Ms Cox to see how the student was going and continued to do so for several days.
- (h) He denies the student was left unsupervised, and states the student failed to follow his instruction 'and without my knowledge continued working.'
- (i) He denies having seen, or knowing the existence of, the Power tool and machine usage 2019 document. 'Had it been made aware to me, I would have followed the document.'
- (j) States that he was never given an induction or informed about the requirements surrounding machinery and the workshops despite his numerous questions regarding safety procedures at the workshop.
- (k) States:
- I am deeply distressed by this incident and that a student under my care had been injured. I believe I did my best, based on the experience that I have and the workload of supervising other students at the time. In hindsight, I would make sure that all machines were switched off and students were no where near them prior to supervising other students. I do not believe I failed in my duty of care of students.
- 18 By letter dated about 6 August 2021, the respondent notifies Mr Landwehr that the investigation has been completed, Allegation 1 has been substantiated, and the proposed action is dismissal (**Proposed Outcome Letter**).
- 19 The Proposed Outcome Letter states:
- To assist you in preparing any response you might wish to make, and to aid your understanding of the investigation, the report is now supplied to you. You should not make use of the report for any purpose that is not directly related to the proper conduct of the investigation or any subsequent appeal process.
- ...
- In your response you deny that you acted contrary to Departmental policies and maintain that there were circumstances to mitigate your actions, however, the evidence provided by the witnesses is consistent and supports that you acted as alleged. You are required to perform your functions as a teacher and ensure student safety when students use machinery, as described in allegation 1.
- ...
- In relation to allegation 1, the incident with [Student SS] could have been avoided had you followed the Ellenbrook Secondary College, 'Power Tool & Machine Usage 2019' document and supervised students using the saw. Furthermore, the investigation identified that you did not provide competent instruction to [Student SS] on how to cut the wood and you left the metal ruler at the saw, these actions leading to [Student SS] being injured.
- 20 The Proposed Outcome Letter invites Mr Landwehr to respond in writing, or to contact Ms Pelham to respond in person.
- 21 By letter dated about 20 August 2021, Mr Landwehr responds to the Proposed Outcome Letter (**Second Response**) as follows:
- Terminating my employment is I believe unfair. This was a horrible accident that occurred and I am remorseful to this day. When this accident did occur, I did not know that [Student SS] had the metal rule anywhere near the wood and I maintain that [Student SS] cut the wood whilst I was providing supervision to another student in the room. I clearly told [Student SS] to stop and he obviously did not.
- Regardless, this action occurred whilst I was in charge of the workshop, and I am ultimately responsible for failing to prevent this accident from occurring. I should have implemented a different approach to make sure that [Student SS] was adequately supervised and away from the machine prior to leaving to attend to other students. I have over 15 years of experience in teaching, and this is the first major accident that has occurred under my supervision. After the incident occurred, I immediately made sure [Student SS] was looked after and followed up with him after the incident occurred. I have undertaken significant reflection after this incident, and I believe it has made me a better teacher. I have always been very safety conscious especially since my accident when I was a second year apprentice. (Crushed left small finger due to a semi trailer axle falling out of a metal lathe onto it). Accidents are always going to happen, though trying to reduce the

seriousness and number is all that we should be aiming for. When the school this year wanted a Safety Officer I applied and won the position because I believe this is an important position and is very closely linked to the dangers of teaching VET and D&T. I ask that the punishment of termination is withdrawn in this instance.

22 By letter dated about 7 October 2021, the respondent notifies Mr Landwehr of her finding that he has committed a breach of discipline in relation to Allegation 1, she no longer has trust or confidence in him to perform his teaching duties to the required standard, his actions are inconsistent with the Department of Education's (**Department's**) values and standards, and accordingly he will be summarily dismissed for serious misconduct pursuant to clause 11(4) of the Award (**Dismissal Letter**).

23 The Dismissal Letter states:

I have considered your response dated 20 August 2021, however, I maintain my findings and that these actions are appropriate and relative to the findings.

In your submission, you accepted some responsibility in relation to allegation 1, where [Student SS's] finger was injured; however, you have failed to demonstrate an acknowledgement or realisation that it was your negligent and/or careless actions that enabled the incident to occur.

You were required to perform your functions as a teacher and ensure student safety when using machinery. You owed a duty of care to protect students from harm that could be reasonably foreseen.

Union's contentions

24 The parties agree that a compound mitre saw and a cut off saw are different pieces of machinery, and the student was using a compound mitre saw.

25 The Union contends that the 2019 Power Tool & Machine Usage Document (**2019 Machine Usage Chart**) applies to a cut off saw (and required direct teacher supervision of a Year 10 student using a cut off saw) but does not mention a compound mitre saw. Therefore, the applicable supervision and usage requirements correspond to those at Mr Landwehr's prior schools and the generally accepted Department supervision and usage standards, which stipulate that a Year 10 student may use a compound mitre saw without teacher supervision.

26 As such, the Union contends that Allegation 1, and the manner in which the investigation was conducted in respect of Allegation 1, is misconceived. Further, there could be no proper basis for finding that permitting a Year 10 student to use the compound mitre saw unsupervised was negligent or careless. Instead, the incident was an accident resulting from the student using the saw, and using the ruler at the saw, despite being told not to.

27 The Union contends that in any event, dismissal for Allegation 1 is unjustifiable considering:

- (a) The School's introduction of the 2020 Power Tool & Machine Usage Document (**2020 Machine Usage Chart**) applicable to compound mitre saws, and the placement of stickers on machinery indicating usage and supervision requirements, which would not be necessary if the cause of the incident was Mr Landwehr's negligence or carelessness.
- (b) The Department's review and consultation process with all public high schools about machinery and power tool supervision and usage requirements, which included the common understanding that a Year 10 student could use a compound mitre saw unsupervised. This process led to all public high schools being directed to conduct observations and assessments of all D&T students using machinery in accordance with Safe Work Procedures and achieving a score of 100% on a safety questionnaire, which would not be required if Mr Landwehr's negligence or carelessness caused the incident.
- (c) Mr Landwehr's continuation of teaching at the School for almost a year and a half without further incident.

Respondent's contentions

28 The respondent contends that there is no material difference between a cut off saw and a compound mitre saw, and that Mr Landwehr was, or should have been, aware of the 2019 Machine Usage Chart.

29 Further, even without the existence of the 2019 Machine Usage Chart, it was reasonable to expect Mr Landwehr to know to supervise Year 10 students when using a radial power saw.

30 The respondent contends that there was sufficient evidence to support the finding that Mr Landwehr did not properly supervise the student.

31 Further, Mr Landwehr's statement in the Second Response, claiming he told the student 'to stop and he obviously did not' is implausible given his assertion that he was unaware of the requirement for supervised use of the saw.

The evidence

32 Student SS was interviewed by Ms Pelham and Amanda Cann, Senior Investigator, SID (**Ms Cann**) on 21 October 2020. He stated:

- (a) His left thumb was injured when he was using the mitre saw. The doctor said the blade probably moved a few inches inside of his thumb.
- (b) On the day, the mitre saw and the bandsaw were in use.
- (c) He was to use the mitre saw to cut a piece of wood, at an angle, for the second leg for a step stool. He had used the saw to cut wood at an angle two times prior to the incident.
- (d) Mr Landwehr showed him how to use the mitre saw to cut the wood for the first leg of the step stool.

- (e) Mr Landwehr said to him, 'You can take the ruler and the wood to the mitre saw'. Mr Landwehr said, 'You measure the wood first and then you cut it.'
 - (f) Mr Landwehr showed him how to measure the wood with the ruler at the saw, by putting the ruler on the wood, making sure it is flush with the end, and then using a pencil to mark 180 mm. Mr Landwehr asked him to press the buttons on the saw that set the blade spinning, which he did, whilst Mr Landwehr cut the wood.
 - (g) Mr Landwehr told him he could continue cutting some more wood.
 - (h) To make the second cut, he understood he was to get the ruler, mark 180 with a pencil, put the ruler down, press the round button to freely move the blade and make sure it is not touching the wood before it starts, then bring the blade to the wood and cut the wood.
 - (i) For both the first and second cuts, Student AB was holding one end of each piece of wood.
 - (j) At the time of the second cut, Mr Landwehr was at the back of the room helping some other students.
 - (k) Two seconds into the cutting, he saw the ruler and tried to grab it, the ruler got stuck in the blade and made a loud bang, the machine jumped, and the blade stopped.
 - (l) The ruler snapped in half, with one end ending up 10 m behind the glass, and the other half 'was just there on the side.'
 - (m) He started screaming, because one bit of his nail was hanging off with his skin attached. He went to the sink, about 5 m from the saw, to get paper towel to cover his thumb.
 - (n) Mr Landwehr went to inspect the machine, then came to see him, and asked, 'What have you done?', and got more paper towels. He asked Mr Landwehr if he could go to the nurse and Mr Landwehr said he could.
 - (o) He asked Student AB to accompany him to the nurse.
 - (p) The nurse bandaged his thumb and telephoned his mum, who took him to the hospital where he had surgery on his thumb.
 - (q) He was not required to inform Mr Landwehr prior to using the saw.
 - (r) When the first few people use the saw Mr Landwehr stands by them but not when the second part of the class use the saw.
 - (s) He used the mitre saw 10 times prior to the incident, seven times without supervision.
 - (t) He thinks his injury could have been prevented if he was more careful with the ruler. He thinks it would have made a difference if Mr Landwehr was supervising him at the time, because Mr Landwehr would have seen the ruler.
- 33 Student AB was interviewed by Ms Pelham and Ms Cann on 21 October 2020. He stated:
- (a) He was Student SS's partner. They were up to the last piece of wood that needed cutting. This was the fourth piece. He was holding the wood steady for Student SS to cut it.
 - (b) Mr Landwehr came over once during the cutting and told Student SS to put his safety glasses on.
 - (c) Mr Landwehr told Student SS to not have the ruler in the way before cutting.
 - (d) He understands the ruler was meant to be out of the way, but Student SS had the ruler in front of the wood, and when he went to cut the wood, he cut the ruler as well. There was a bang when Student SS cut his nail. He thinks the bang was from the metal from the ruler.
 - (e) Either Mr Landwehr came over to Student SS, or Student SS went over to Mr Landwehr.
 - (f) Shortly after, he accompanied Student SS to the service area to have his thumb checked, and left Student SS there.
 - (g) He thought it was a bandsaw. He has used the bandsaw before without supervision.
 - (h) He has used the bandsaw when Mr Landwehr has been there. Mr Landwehr 'just helped me out doing it.'
 - (i) Student SS was supposed to measure first, then take the wood over to the machine to cut it. Student SS measured one piece of wood at the machine and cut it. Then measured another piece of wood at the machine, then cut it.
 - (j) He does not think they are allowed to use the machines on their own, but he did, around 70-80% of the time.
- 34 Student BD was interviewed by Ms Pelham and Mattison Staples, Principal Investigator, SID (**Mr Staples**) on 31 March 2021. He stated:
- (a) There is one drop saw in the room, which Student SS was using when he was injured.
 - (b) He heard a loud bang, saw Student SS move away from the saw, saw Student SS's blood dripping on the ground, and saw Mr Landwehr come over. Mr Landwehr was about 6-7 m from Student SS at the time.
 - (c) After the event, he saw a 30 cm metal ruler chopped in half.
 - (d) He was sitting at one of the two tables closest to the drop saw, about 3-4 m away.
 - (e) He had used the drop saw once that day, about 5-10 minutes prior to Student SS using it. At least three other students had used the drop saw that day. 'Everyone knew they were allowed to just go to it, use it, cut it, just go back.'
 - (f) He had used the drop saw 4-5 times previously. The first time, Mr Landwehr was watching him use it. The other times, he used it by himself.
 - (g) Most students would have used the drop saw at least once without supervision.

- (h) Earlier in the year, Mr Landwehr had demonstrated to the whole class how to use the drop saw. 'The first time you used the drop saw, you would tell Mr Landwehr you were about to use it. After that, you do not need to tell Mr Landwehr, and can use it yourself.'
 - (i) There was no machine in the room where Mr Landwehr said they could only use it under supervision.
 - (j) About 15-20 minutes after the incident, Mr Landwehr told the class to make sure to not bring rulers to machines. This was not something Mr Landwehr had ever explicitly told them before.
 - (k) He had previously seen the 2019 Machine Usage Chart on a window but does not recall seeing it in Mr Landwehr's classroom.
 - (l) When Student SS returned, Mr Landwehr did not give Student SS detention or any punishment. Mr Landwehr told Student SS to not bring a metal ruler to the machine.
- 35 Isabelle Cox, School Officer (**Ms Cox**), was interviewed by Ms Pelham on 4 May 2021. She stated:
- (a) She was taking care of first aid with Ruth Botica, when a student presented with a hurt thumb.
 - (b) At the time, it looked like a bandsaw had cut through the middle of his thumbnail. She bandaged up the thumb, and telephoned the student's mum, asked the mum to come and take her son to hospital and to bring painkillers as the student was in quite a lot of pain.
 - (c) Mr Landwehr came to the office later that afternoon and enquired about the welfare of the student.
 - (d) Mr Landwehr stated that he 'can't keep his eye on 20 students at the same time', he was busy with another student and then the accident happened, 'one minute he looked away and the next minute it happened.'
 - (e) Mr Landwehr stated that a metal rule had been used perpendicular to the saw, which then split, and that is what cut the student's thumb.
- 36 Ruth Botica, School Officer (**Ms Botica**), was interviewed by Ms Pelham and Mr Staples on 31 March 2021. She stated:
- (a) Student SS arrived in the first aid area with another student. She and Ms Cox dealt with the situation together. The student did not appear to be in a lot of pain, which she puts down to shock. She and Ms Cox stayed with the student the whole time, and Ms Cox taped his hand.
 - (b) Ms Cox telephoned the parent, said that we thought the student was probably in shock, said that he needs to be taken to the hospital, and thought the parent should bring pain medication (as they cannot issue any pain medication).
 - (c) She sat with Student SS, who was quite calm, and the parent came within 20-30 minutes.
 - (d) Student SS told her that he was using the saw, he pushed the wood forward, and the wood flung out. He mentioned a ruler.
 - (e) Student SS was using a drop saw. She has observed Maikel Nielsen's class, and the students line up, 1 m apart, he gives them the nod, and they proceed to use the saw.
 - (f) Later in the day, Mr Landwehr came to ask about the student. He made a comment that, 'You know, he wasn't supposed to be doing what he did', which she took to mean that the student used the saw when he was not supposed to.
 - (g) She knows that Student SS completed the SOP training, which is a handwritten tick list before he can use and operate a machine, because she placed the completed document on his file.
- 37 Maikel Nielsen, D&T Teacher (**Mr Nielsen**), was interviewed by Ms Pelham and Mr Staples on 31 March 2021. He stated:
- (a) He has been at the School for 10 years.
 - (b) The incident coincided with the head of OH&S visiting, who informed him there had been a spate of accidents in the first six months across the metro schools, so they were looking at whether that had to do with Coronavirus and the build-up of tensions. At the time, he was talking to OH&S and also WorkSafe who came out.
 - (c) He is aware of the machine used because the next day, he retrieved the ruler, which was a 1 m ruler, and whilst the School has a few of them, that was the only one in the classroom. The ruler was cut up and a third of it was missing. He showed the two sections of ruler to OH&S.
 - (d) Sometime after the incident, Mr Landwehr demonstrated to a group of D&T Teachers what happened. Mr Landwehr was at the front of the room and said the student put a steel rule down on the material he was cutting on the drop saw, and that is what caused the kickback.
 - (e) His process is to do all marking and measuring on the benches, with no metal allowed to go over to the mitre saw.
 - (f) The mitre saw has a dozen wooden templates that are used, but marking and measuring gets done on the benches. The only metal implements at the mitre saw would be a G-clamp holding a jig.
 - (g) There is a scope and sequence chart in every classroom, pinned up, usually on the walls or the windows. There's usually two, and they have been there for as long as he has been there.
 - (h) The scope and sequence chart lists the types of machinery, and what machines each year group is allowed to use. It is colour coded. The Year 10 students are allowed to use the drop saw or the mitre saw but they have to be supervised.
 - (i) If it is yellow, it is direct supervision. Next term he has a Year 10 class who are starting a stool, so when they are using the drop saw, he will stand at the machine and have a queue of students, as they are not allowed to use the machine without direct supervision.

- (j) If it is green, like the upper school, he only needs to be in line of sight in the room.
 - (k) He does not accept that a D&T Teacher would not know that a student was meant to be supervised on the mitre saw. The teacher is a professional, paid to know these things, it 'comes with the territory'; 'you're not going to have a brain surgeon rock up to surgery and not know how to operate, it's just one of those things.'
 - (l) There are three types of meetings: main staff meetings, area faculty meetings, and contextual meetings with just the D&T Teachers.
 - (m) The 2019 Machine Usage Chart is the scope and sequence chart, and the cut off saw is a reference to the mitre saw, and for Year 10 students it is supervision yellow, which means a student cannot use the saw without supervision.
- 38 Shaloni Naik, Acting Head of Learning Area – Technologies, was interviewed by Ms Pelham and Andy Doreen, Senior Investigator, SID on 11 November 2020 and re-interviewed by Ms Pelham and Mr Staples on 31 March 2021. She stated:
- (a) She now holds a different role but held the role of Acting Head of Learning Area for Term 1 and Term 2 of 2020.
 - (b) She heard about the incident with Student SS on the day of the incident, when Mr Landwehr walked into the staff office during recess and said, 'I've had a small accident.' She followed him as he walked out and asked him what happened. He headed towards the front admin office. Shortly after the bell went, so she went to her classroom.
 - (c) Every Tuesday afternoon, the whole D&T team have occupational health and safety training, where all the teachers go to the D&T rooms and walk around each machine and utilise certain documents. On the next Tuesday after the incident, she asked Mr Landwehr to model what happened.
 - (d) Mr Landwehr demonstrated the student having a piece of wood, a thick piece of pine. The student was supposed to pull the saw down to cut the wood. The student had a big metal ruler on the wood. The student pulled the saw down on top of the ruler, the ruler split in half, and one piece of the ruler went flying across the room.
 - (e) During the re-enactment, Mr Landwehr showed the teachers the ruler, broken in half.
 - (f) During the re-enactment, Mr Landwehr was asked to stand in the position he was standing at the time of the incident. Mr Landwehr stood on the side of the machine, near the student using it. Mr Landwehr said, 'I was standing here at the machine.'
 - (g) During the re-enactment, Mr Landwehr demonstrated on the drop saw. She knows it was a mitre saw because she bought the replacement machine, and she knows it was a drop saw from the re-enactment.
 - (h) The supervision colour codes were in the room, stuck up, on the door. The room where the incident occurred has two doors, and the A3 poster was on both doors.
 - (i) After the incident, she placed supervision colour coded stickers on all the machines.
 - (j) Every Wednesday, they held a learning area meeting, where they discussed equipment, safety, best practice and what the teacher in charge may demonstrate. The purpose is to collaborate and share best practice on a regular basis.
 - (k) During a learning area meeting in Term 1 week 2, 2020, she presented a PowerPoint presentation, which included slide 4, which outlines what was planned for that week's OSH training. Slide 4 states:

This week we will be going through each workshop and looking at the machine usage chart.
 - (l) The 'machine usage chart' in the slide refers to the 2019 Machine Usage Chart.
 - (m) The 2019 Machine Usage Chart was discussed at the D&T OSH training sessions, which is something she initiated as the head of department. OSH training is held every Tuesday, for half an hour. All the D&T Teachers attend. The D&T Technician, who fixes the machines in the workshops, also attends. They walk through all the rooms, and the teachers share the best way to teach each tool to the students.
 - (n) She knows Mr Landwehr was at the meeting because she remembers presenting in the classroom and remembers where he was seated during the presentation.
 - (o) An A3 colour and laminated copy of the 2019 Machine Usage Chart is on every door.
 - (p) Mr Landwehr is aware of the 2019 Machine Usage Chart, 'Because we went through it in the meeting, we've gone through it in the learning area meeting, we've gone through it in the OSH training meeting, and he's seen it.' 'And it's on every door.'
 - (q) Mr Landwehr should have been aware of the 2019 Machine Usage Chart because there's a machine workshop area where teachers do their wood preparation and students are not allowed to enter. 'It's all over the doors anyway. So if you were a teacher and just been employed on your first day, and you're cutting your wood, you'd be looking at it anyway because, that's your job.'
 - (r) At an OSH training session in Term 1 week 2, 2020, Mr Nielsen, the teacher in charge of D&T, referred to the 2019 Machine Usage Chart and explained to the D&T Teachers what the supervision requirements were for each machine.
 - (s) A version of the 2019 Machine Usage Chart has existed for 7-10 years, since the old head of department created it.
 - (t) If Mr Landwehr said he was not aware he was required to supervise Student SS in the use of the saw, she would say that is 100% inaccurate.
 - (u) If Mr Landwehr said he knew he was meant to supervise Student SS, but the student 'just went and did it anyway', she would say that is 100% understandable as 'kids do that.'

Consideration

- 39 The Investigation Report dated 30 July 2021 runs to 24 pages and attaches Attachments A-L (**Report**). Whilst these proceedings relate to Allegation 1 and Allegation 3, the Report addresses six allegations of breaches of discipline. The Report makes provision for three signatories, Ms Pelham, Paul Milward, Principal Investigator, SID (**Mr Milward**), and Mr Wells.
- 40 The statement of agreed facts states that the saw that was involved in Allegation 1 was a compound mitre saw, and a 'compound mitre saw and a cut-off saw are different kinds of machinery.' The Union contends that the saw that was used by Student SS at the time is a material and significant matter. However, the Report states:
- Note: Throughout this investigation report, unless otherwise stated, the term 'saw' refers to a cut off saw (wood)/mitre saw/drop saw, being the one same piece of machinery in Mr Landwehr's classroom.
- 41 The Union contends that this statement undermines the entire foundation of Allegation 1.
- 42 I disagree. The evidence was that:
- (a) Mr Landwehr stated in the First Response that the saw was a compound mitre saw, which he had demonstrated to the students 'how to use it as a drop saw.'
 - (b) Student SS referred to the saw as a mitre saw, the one with the 'big round blade'. He stated that on the day, the mitre saw and the bandsaw were in use.
 - (c) Student BD referred to the saw as a drop saw. He stated there are different machines in the room, but only one drop saw.
 - (d) Ms Botica referred to the saw as a drop saw.
 - (e) Mr Nielsen referred to the saw as a drop saw and as a mitre saw. He confirmed that the reference to 'Cut off Saw (wood)' on the 2019 Machine Usage Chart is a reference to the mitre saw.
 - (f) Ms Naik referred to the saw as a drop saw wood and a mitre drop saw. She stated she did not know what difference adding the word 'compound' to a mitre saw made. She stated she knew it was a mitre saw because she purchased the replacement saw, and knew it was a drop saw because she observed Mr Landwehr's re-enactment of the incident on the drop saw. On 11 November 2020, she sent Ms Pelham an email with the note, 'Attached is an image showing the machine being the compound mitre saw.'
- 43 Given the evidence of the witnesses that there was only one drop saw in the room which was the machine in use at the time, also known as the mitre saw, and the evidence of Mr Nielsen that the mitre saw was the same as the 'Cut off Saw (wood)' on the 2019 Machine Usage Chart, I find that it was reasonable for the Report to use the term 'saw' as referring to the saw that was used by Student SS on the day.
- 44 The Union contends that in the second interview of Ms Naik, Ms Pelham engaged in suggestibility and leading questioning in showing Ms Naik the 2019 Machine Usage Chart and asking Ms Naik to agree that she had stated at the first interview that the saw in use was the 'Cut off Saw (wood)'. I agree that Ms Naik did not state in the first interview that the saw in use was the 'Cut off Saw (wood)'. In the first interview, Ms Naik stated that the saw in use was a drop saw wood or a mitre drop saw. However, I do not consider anything turns on this because I have found it was reasonable for the Report to use the term 'saw' as referring to the saw used by Student SS on the day due to the evidence of the individuals interviewed, and in particular Mr Nielsen's evidence that the saw in use was the mitre saw and the reference to 'Cut off Saw (wood)' on the 2019 Machine Usage Chart is a reference to the mitre saw.
- 45 The Union contends that pages 18-20 of the Report proceeds on the misconceived premise that the 2019 Machine Usage Chart applies to a compound mitre saw when the 2019 Machine Usage Chart does not. The Union contends that because the 2019 Machine Usage Chart does not reference a compound mitre saw, that it did not apply to Allegation 1, such that Mr Landwehr could not be found to have been negligent or careless by not complying with the 2019 Machine Usage Chart.
- 46 The 2019 Machine Usage Chart:
- (a) Does not refer to a compound mitre saw.
 - (b) Refers to the following saws: Scroll Saw, Jig Saw, Circular Saw (Hand), Cut off Saw (wood), Drop Saw (metal), Bandsaw, Radial Arm Saw, Cold Saw, Horizontal Bandsaw, Panel Saw, Bricksaw.
 - (c) Outlines the same supervision requirements for a Year 10 student using the Cut off Saw (wood) and the Radial Arm Saw, namely, 'Sup' colour coded yellow denoting, 'Under direct teacher supervision, ie teacher standing next to machine.'
- 47 The respondent contends that there is no material difference between the Cut off Saw (wood) and the compound mitre saw. In any event, the 2019 Machine Usage Chart only references two powered radial saws in the classroom (namely, the Cut off Saw (wood) and the Radial Arm Saw), and both require the machine to be used under direct supervision.
- 48 The evidence was that there was only one drop saw in the room, which was the machine in use at the time, and also known as the mitre saw. The evidence was that the mitre saw was the machine 'with the big round blade.' The evidence of Mr Nielsen was that the reference to 'Cut off Saw (wood)' on the 2019 Machine Usage Chart was a reference to the mitre saw.
- 49 In the First Response, Mr Landwehr does not contest the 2019 Machine Usage Chart's applicability to a compound mitre saw. Instead, he states he was unaware the 2019 Machine Usage Chart existed and states, 'Had it been made aware to me, I would have followed the document.' A reasonable inference is that Mr Landwehr did not supervise Student SS in accordance with 2019 Machine Usage Chart because he was unaware it existed before the incident, not that he did not supervise Student SS because the 2019 Machine Usage Chart does not refer to a compound mitre saw.
- 50 For the preceding reasons, I find that the reference to 'Cut off Saw (wood)' on the 2019 Machine Usage Chart refers to the saw that was in use at the time of the incident and therefore that the 2019 Machine Usage Chart applies to Allegation 1 and it was

reasonable for the respondent to proceed on this basis.

- 51 In the First Response, Mr Landwehr claims to be unaware of the 2019 Machine Usage Chart's existence. The Union contends that Mr Nielsen did not give evidence of Mr Landwehr's knowledge of the 2019 Machine Usage Chart, and that Ms Naik's evidence did not indicate that the 2019 Machine Usage Chart was discussed in a manner to convey its applicability to a compound mitre saw. Furthermore, the Union contends that since the Report does not cite the minutes of the meeting where the 2019 Machine Usage Chart was discussed, as Ms Naik had mentioned in her second interview, the inference should be that Mr Landwehr did not attend the meeting. Alternatively, Ms Naik's evidence of Mr Landwehr's attendance is unreliable.
- 52 I agree with the Union's contention about the evidence of Mr Nielsen (whose evidence was about a D&T Teacher at the School, and not Mr Landwehr in particular) and Ms Naik. However, I do not find Mr Landwehr's contention to be sustainable due to the evidence of Ms Naik and Mr Nielsen.
- 53 Ms Naik's evidence was that:
- (a) A version of the 2019 Machine Usage Chart had been in existence since the old head of department created it 7-10 years ago.
 - (b) The 2019 Machine Usage Chart was printed in colour, in A3, laminated, and attached to every door.
 - (c) A teacher would know about the 2019 Machine Usage Chart from accessing the machine workshop area to prepare wood for their class.
 - (d) A teacher would be looking at the 2019 Machine Usage Chart on their first day because 'that's your job.'
 - (e) Ms Naik gave a slide presentation at the 2020 Term 1, week 2 Learning Area meeting which referred to going through each workshop and the 2019 Machine Usage Chart in that week's D&T OSH Training. She remembers presenting in the classroom and she remembers where Mr Landwehr was sitting at the time.
 - (f) During the weekly Tuesday D&T OSH Training sessions, Mr Nielsen, the teacher in charge of D&T, referred to the 2019 Machine Usage Chart and explained to the teachers the best practice of demonstrating each machine and ensuring students do not stand within the yellow line marking around each machine.
- 54 This is supported by Mr Nielsen's evidence that:
- (a) A version of the 2019 Machine Usage Chart had been in existence for years.
 - (b) The 2019 Machine Usage Chart was displayed in every classroom, typically with two copies, either on a wall or window.
 - (c) A teacher would be aware of the 2019 Machine Usage Chart because they are a professional, 'paid to know these things', 'it comes with the territory.'
 - (d) The requirement for a teacher to supervise a Year 10 student using a mitre saw was discussed during tool shop contextual meetings of the D&T Teachers.
- 55 Given Ms Naik's and Mr Nielsen's evidence, I find Mr Landwehr's claim that he was unaware of the existence of the 2019 Machine Usage Chart to be unsustainable. Therefore, I find it was reasonable for the Report to include the following analysis:

Contrary to Mr Landwehr's claim, the witnesses provided clear evidence that Mr Landwehr was provided with the information that outlined the ESC student supervision requirements for machinery, and he was responsible for understanding the requirements. The evidence shows that prior to the incident:

- Mr Landwehr attended a Design and Technology teacher meeting during which the document titled 'Ellenbrook Secondary College - Power Tool and Machine Usage 2019' (Attachment A) was discussed – as stated by Ms Naik.
- Design and Technology teachers at ESC are required to supervise Year 10 students when using the saw, as per the 'Ellenbrook Secondary College - Power Tool and Machine Usage 2019' (Attachment A) – as stated by Ms Naik and Mr Nielsen.
- Design and Technology teachers were expected to understand the student supervision requirements when using machinery – as stated by Ms Naik and Mr Nielsen.
- The 'Ellenbrook Secondary College - Power Tool and Machine Usage 2019' document (Attachment A) and was displayed in Mr Landwehr's classroom, in A3 size and in colour – as stated by Ms Naik, Mr Nielsen and [Student BR] (being a student).

Based on the above evidence, Mr Landwehr was provided with sufficient information to be well aware of the 'Ellenbrook Secondary College - Power Tool and Machine Usage 2019' (Attachment A). Were Mr Landwehr not cognisant of this document, it is reasonable to establish that part of his role as a Design and Technology teacher was to make himself aware of the requirements. In not being cognisant of the document, or ensuring that he understood the teacher supervision requirements for machinery, Mr Landwehr was wilfully negligent.

Union's contentions regarding conflict of evidence

- 56 The Union contends that the analysis on page 18 of the Report, indicating that Mr Landwehr gave incompetent instructions to Student SS and left him at the saw with a metal ruler, is not supported by all the evidence. The Union contends that the conflict over whether Mr Landwehr demonstrated to Student SS how to measure at the saw with a ruler should not be resolved against Mr Landwehr. Additionally, the Union contends that the conflict over whether Mr Landwehr told Student SS he could continue cutting after leaving to assist another student should not be resolved against Mr Landwehr.

57 I disagree with the contention that the analysis in the Report was not open on all of the evidence for the reasons that follow.

Conflict of evidence regarding the ruler

58 Student SS's evidence was that:

- (a) Mr Landwehr said to him, 'You can take the ruler and the wood to the mitre saw.'
- (b) Mr Landwehr showed him how to measure the wood with the ruler at the saw, by putting the ruler on the wood, making sure it is flush with the end, and then using a pencil to mark 180 mm. Mr Landwehr asked him to press the buttons on the saw that set the blade spinning, which he did, whilst Mr Landwehr cut the wood.

59 This is supported by Student AB's evidence that:

- (a) Mr Landwehr came over once when Student SS was cutting wood at the saw.
- (b) Student SS was not wearing safety glasses and Mr Landwehr told him to put safety glasses on.
- (c) Mr Landwehr said to Student SS, 'Don't have the ruler in the way like before you cut.'

60 The evidence of Student SS and Student AB was that Mr Landwehr was aware that Student SS had a metal ruler at the saw.

61 This is supported by the note made by Barbara Woulfe, Head of Learning Area – Technologies, dated 5 August 2020 of her discussion with Student SS. The note states, 'Measure wood length [on] machine. Told by teacher to do it. Used metal ruler.'

62 This is also supported by the handwritten note of Peter Havel, Principal, dated 5 August 2020 2.35pm, signed by Mr Havel and Mr Landwehr, which states (emphasis added):

- 2. [Student SS]
 - long piece of wood
 - **Rule up 3 cuts at saw**
 - **Cut 2. Deliberately move ruler**
 - **Mr Landwehr adjusted the angle of the saw**
 - **3 cut – didn't remove ruler**
 - hit ruler
 - ruler cut [Student SS's] left thumb

63 This is further supported by the letter from the Principal to Eva Staltari, Coordinator Regional Operations, North Metropolitan Regional Education Office, dated 6 August 2020. The letter states (emphasis added):

I worked with the HOLA of Technology, Ms Barbara Woulfe, to gather statements from the teacher, Mr Barry Landwehr and [Student SS].

The common elements confirm from both signed statements:

- Mr Landwehr demonstrated how to use the Mitre Saw to the whole class in Term 1 2020.
- Mr Landwehr did not understand that he needed to directly supervise a student using the Mitre Saw.
- **[Student SS] was given permission to measure the long piece of wood on the Mitre Saw Bench before cutting. Instruction were given to move the metal measure away from the cut area before commencing any cut.**
- **Two cuts were conducted with the metal measure clearly out of the way.**
- **On the third cut, Mr Landwehr was at a table across the other side of the classroom and was not aware that [Student SS] was about to conduct the third cut.**
- **[Student SS] did not follow the instruction to put the measuring device to one side.**
- When [Student SS] cut through the wood, the measuring device was hit and a piece of the fractured metal cut his thumb

64 This is inconsistent with Mr Landwehr's statement in the Second Response that, 'When this accident did occur, I did not know that [Student SS] had the metal rule anywhere near the wood'.

65 Considering the consistent evidence provided by Student SS and Student AB, corroborated by Ms Woulfe's note from 5 August 2020, the Principal's note from 5 August 2020 that was countersigned by Mr Landwehr, and the Principal's letter of 6 August 2020, I find Mr Landwehr's claim that he did not know Student SS had a metal ruler at the saw to be unsustainable. Therefore, I find that it was reasonable for the Report to resolve the discrepancy regarding Mr Landwehr leaving Student SS at the saw with a metal ruler, against Mr Landwehr.

66 The analysis on page 18 of the Report that Student AB 'provided evidence that Mr Landwehr showed [Student SS] how to measure the wood while at the saw' does not undermine this finding. This is because the subsequent sentence and paragraph accurately summarise and assess the evidence as follows:

It is reasonable to expect that only the wood would be at the saw to avoid entanglement of other items on/near the blade.

[Student SS] provided credible evidence that Mr Landwehr instructed him to bring the metal ruler to the saw in the first instance and Mr Landwehr used the metal ruler (not a tape measure) while instructing [Student SS]. [Student SS] and [Student AB] provided evidence that while Mr Landwehr was instructing [Student SS], Mr Landwehr had seen the metal

ruler on the wood and he instructed [Student SS] take the metal ruler off the wood. This suggests Mr Landwehr knew the metal ruler was a potential hazard near the saw.

67 Further, the Report accurately summarises Student AB's evidence on page 7 as follows:

On one occasion, [Student SS] had a metal ruler in the way of the saw and Mr Landwehr told [Student SS] to move the ruler, as it should not be there during cutting.

...

Twice that same day, prior to the incident, [Student SS] had measured with a ruler while at the saw. The wood should be measured with a ruler away from the machine, and only the wood should be taken to the machine.

68 The finding that Mr Landwehr was aware that Student SS had a metal ruler at the saw is also not undermined by the analysis on page 18 of the Report that Mr Landwehr 'provided a detailed response of how [Student SS] was shown to measure the wood at the saw with a tape measure'. This is because the Report includes the First Response as Attachment L and accurately summarises it on page 11 as follows:

He provided a demonstration and used a tape measure for both projects.

...

After the incident, he identified that [Student SS] used a metal ruler instead of a tape measure and had measured the wood at the machine instead of the bench.

Conflict of evidence regarding instruction to stop

69 In the First Response, Mr Landwehr states, '[Student SS] was not left unsupervised'.

70 This statement appears to contradict Mr Landwehr's assertion that he was not required to directly supervise Student SS due to his unawareness of the 2019 Machine Usage Chart.

71 It also appears to contradict the contention that without the 2019 Machine Usage Chart referencing a compound mitre saw, the supervision and usage requirements should align with those at Mr Landwehr's prior schools; that is, with teacher permission but without direct teacher supervision, which would allow Student SS to use the saw unsupervised provided Student SS had obtained his permission.

72 Mr Landwehr claims he did not grant Student SS permission to use the saw. In the First Response, Mr Landwehr states that Student SS 'failed to follow my instruction when I was supervising other students and without my knowledge continued working.' In the Second Response, he states, 'I maintain that [Student SS] cut the wood whilst I was providing supervision to another student in the room. I clearly told [Student SS] to stop and he obviously did not.'

73 The contention is consistent with the Principal's note, dated 5 August 2020 2.35pm, signed by the Principal and Mr Landwehr, which states:

5. Knew he was cutting, but the student didn't seek permission before doing the last cut.

74 However, the contention is inconsistent with other contemporaneous documents, namely:

(a) The 'Accident/incident report for students and visitors' completed by Mr Landwehr on 24 June 2020 (**Incident report**). In the section 'Action taken/planned to prevent reoccurrence:', Mr Landwehr wrote, 'Try to prevent metal rule to be on the saw when cutting (Education Retraining).' The Incident report does not mention Student SS not following instructions, nor does the preventative action mention ensuring the student follows instructions. If the failure to follow instructions was the cause of the accident, it would have been reasonable for this to be included in the Incident report.

(b) Ms Woulfe's note of 5 August 2020, which states, 'Mr Landwehr put/set [angle] that it was cut on. He tested with a scrap piece. Left him to cut the wood'.

75 The contention is also inconsistent with the evidence from Students SS, AB and BD that they and other students used the saw unsupervised. Students SS and BD had used the saw unsupervised on that day. Each of Students SS, AB and BD had used the saw unsupervised on previous days. Their evidence was that they were allowed to use the saw unsupervised and did not need to ask for permission beforehand.

76 The evidence of Student SS was that:

(a) Students do not need to be supervised using the mitre saw, 'We can do it by ourself.'

(b) He used the mitre saw 10 times previously, seven times without supervision.

(c) When the first few people use the saw, Mr Landwehr stands by them, but when the second part of the class use the saw, he does not check on them.

(d) He was not required to tell Mr Landwehr he was going to use the saw before using it.

(e) Mr Landwehr told him he could continue cutting.

77 The evidence of Student AB was that:

(a) He was assisting Student SS hold the wood steady for Student SS to cut.

(b) There were four cuts on the day, and Mr Landwehr came over once.

(c) He thought that Student SS was using a bandsaw.

(d) Students do not need to let Mr Landwehr know when they are going to use the bandsaw.

- (e) He has used the bandsaw without Mr Landwehr there.
- (f) He has used the bandsaw when Mr Landwehr was there. Mr Landwehr helped him use the saw.
- (g) He does not think they are allowed to use the machines on their own, but they did.
- (h) He used the machines on his own about 70-80% of the time.

78 The evidence of Student BD was that:

- (a) He had used the drop saw 5-10 minutes before Student SS used it, without supervision.
- (b) At least three other students had used the saw that day, without supervision.
- (c) Overall, he has used the drop saw 4-5 times.
- (d) Earlier in the year, Mr Landwehr demonstrated to the class how to use the drop saw.
- (e) On some students' first attempt, Mr Landwehr said you could ask him for help. He could come over and show you how to use the saw. After that, 'it was really just like if you were comfortable with it just go ahead by yourself and do it.'
- (f) The first time he used the drop saw, Mr Landwehr watched him use the saw. After that, he used the saw by himself all other times.
- (g) Most students used the saw at least once without assistance from Mr Landwehr.
- (h) There were a few students that would always have assistance, but most students after the first few attempts, would use it by themselves.
- (i) The first time you used the drop saw you needed to tell Mr Landwehr that you were about to use it, but not after the first time.
- (j) He saw Student SS use the drop saw by himself on the day.
- (k) There was no machine in Mr Landwehr's class that could only be used with teacher supervision.
- (l) If you had used the machine before, you do not need to ask for permission before using it, 'you can just go straight up and use it.'

79 Given the consistent evidence provided by Students SS, AB and BD, which is supported by the contemporaneous records, I find the claim that Mr Landwehr instructed Student SS to stop cutting to be unsustainable. Therefore, I find that it was reasonable for the discrepancy regarding whether Mr Landwehr had permitted Student SS to continue cutting to be resolved against Mr Landwehr.

80 In the circumstances, I find it was reasonable for the Report to include the following analysis:

Mr Landwehr was also wilfully negligent by not enforcing the supervision requirements and allowing students to use the saw unsupervised, on previous days and on the day of the incident. This lack of supervision on the saw ultimately led to [Student SS] using the saw incorrectly and being injured.

The incident could have been prevented had Mr Landwehr:

- Provided [Student SS] with competent instruction to measure the wood at a desk not at the saw.
- Refrained from using a metal ruler at the saw.
- Taken the metal ruler away from the saw upon ceasing his instructions to [Student SS].
- Not allowed [Student SS] to use the saw unsupervised, previously or at the time of the incident.
- Followed the 'Ellenbrook Secondary College – Power Tool and Machine Usage 2019' and supervised [Student SS] when he was cutting the wood.

Other contentions regarding the Report

81 The Union contends that the Report does not mention Ms Naik's statement that it would not surprise her to hear that a student had not followed Mr Landwehr's instruction, which would have supported Mr Landwehr's version of events. I do not find this contention assists Mr Landwehr for the following reasons.

82 Firstly, the Report does not include everything a witness stated during their interview. Seven witnesses were interviewed regarding Allegation 1, with one witness interviewed twice. The Report summarises these interviews, Attachments A-H and the First Response across six pages, with the analysis and conclusion across 2½ pages.

83 Secondly, the evidence of the students interviewed was that Mr Landwehr did not supervise them or other students when using the mitre saw and did not require them to seek his permission before using the saw, except for their very first usage. Based on the evidence, I have found it was reasonable for the Report to include the following:

Mr Landwehr was also wilfully negligent by not enforcing the supervision requirements and allowing students to use the saw unsupervised, on previous days and on the day of the incident. This lack of supervision on the saw ultimately led to [Student SS] using the saw incorrectly and being injured.

84 Thirdly, Ms Naik stated it was 100% inaccurate for Mr Landwehr to claim that he did not know he was supposed to supervise Student SS. When asked if Mr Landwehr had accepted his supervision responsibility but the student 'just went and did it anyway?', Ms Naik responded that that is 100% understandable because 'kids do that.' However, Mr Landwehr does not accept that he was required to supervise Student SS and that Student SS had used the saw unsupervised anyway. Instead, he claims he was not required to supervise Student SS because the supervision requirements in the 2019 Machine Usage Chart are

not applicable to Allegation 1. He claims he did not know about the 2019 Machine Usage Chart and the 2019 Machine Usage Chart did not reference a compound mitre saw.

- 85 The Union contends that the Report does not mention the remedial and improvement action undertaken by the School and the Department following the incident, although such facts were reasonably available during the investigation. The Union contends that the remedial and improvement action undermines a finding of Mr Landwehr's negligence or carelessness.
- 86 I disagree. Although the 2020 Machine Usage Chart removed 'Cut off Saw (wood)' and incorporated a 'Compound Mitre Saw (Wood)', modifying the 2019 Machine Usage Chart does not undermine a finding regarding Mr Landwehr's negligence or carelessness for the following reasons.
- 87 Firstly, amending the 2019 Machine Usage Chart is consistent with Ms Naik's evidence that the document was developed 7-10 years ago and undergoes annual updates. This is consistent with the School amending the 2020 Machine Usage Chart in 2021.
- 88 Secondly, although the Department's Safe Work Procedure for a Sliding Compound Mitre Saw (18 March 2021) prescribes that Year 10+ students must receive instruction and permission prior to using the machine, the Union agrees that the School has discretion to enforce more stringent supervision and usage requirements, which it did.

Conclusion regarding Allegation 1

- 89 The Allegations Letter states the conduct was a breach of:

- (a) the 2019 Machine Usage Chart;
- (b) the Policy – to protect students from risk of harm that can reasonably be foreseen; and
- (c) section 64(1)(a) and s 64(1)(b) of the *School Education Act 1999* (WA) (**School Education Act**) – to foster and facilitate learning in students, give competent instruction to students in accordance with the curriculum, standards and school's plan, and to undertake the preparation necessary to do so.

- 90 *Connor v Grundy Television Pty Ltd* [2005] VSC 466 (*Connor*) [43] states (footnote omitted) (emphasis added):

An employer may dismiss an employee summarily if the employee is negligent in the course of the employment. The law is summarised by Gillard J in *Rankin v Marine Power International Pty Ltd*:

“On the other hand, there is a good ground for the dismissal of an employee if he is negligent in the course of his employment. However, it would indeed be a very grave case of negligence, causing substantial damage, to justify dismissal for a single act of negligence. As a general proposition, the neglect would have to be habitual.

In *Baster v London and County Printing Works* (1899) 1 QB 901 at 903, Darling J said –

“Neglect as often arises from forgetfulness as from anything else; and, if the forgetfulness is with respect to an important thing it may well, in my view, be good ground for dismissal of the servant without notice. I do not say that it would be a good ground for dismissal in every case. Some trivial acts of forgetfulness might not even justify a complaint or remark; but **to forget to do a thing which, if not done, may cause considerable damage to the master, or to his property, or to fellow servants, may be a serious neglect of duty.**”

- 91 *Connor* [44] states (footnote omitted) (emphasis added):

Both the notions of misconduct and negligence must of course be applied and understood in the context of the particular contract in issue.

“Until the terms of the contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract. **One cannot begin the inquiry without ascertaining what work ... the employee was employed and had undertaken to perform. It is also necessary to ascertain what particular obligations the parties had agreed upon as important or even vital.**”

- 92 *Connor* [48] states (emphasis added):

The negligence or misconduct may be sufficient to justify dismissal either if it is a substantial enough breach of the employee's duty or if its consequences are sufficiently damaging to the employer.

- 93 In *Ash v Chabad Institutions of Victoria Limited* [2020] FWC 1744 (*Ash*) the Fair Work Commission found that the obligation to supervise students was fundamental to the role of a teacher, and an injury of any magnitude underscores the approach taken by the school (to require supervision) in the interests of protecting its students [137].

- 94 Section 64(1) of the School Education Act outlines a Teacher's functions and expressly includes the obligation to supervise students (emphasis added):

The functions of a teacher in a government school are –

...

- (b) **to give competent instruction to students** in accordance with –
 - (i) the curriculum; and
 - (ii) standards determined by the chief executive officer; and
 - (iii) the school's plan referred to in section 63(1)(e),
 and to undertake the preparation necessary to do so; and

...

(e) **to supervise students** and to maintain proper order and discipline on their part; and

- 95 Based on *Connor, Ash* and the express obligation to supervise students in the School Education Act, I find that Mr Landwehr's single act of negligence or carelessness could justify dismissal in the circumstances.
- 96 The Union contends that dismissal for Allegation 1 is unjustifiable considering the disciplinary process took almost a year and a half to complete, during which time, Mr Landwehr continued teaching at the School. The respondent submits the alternative would have been for Mr Landwehr to be suspended without pay.
- 97 A disciplinary process over more than 16 months during which a teacher remained in employment was the subject of *The State School Teachers' Union of WA (Incorporated) v The Director General, Department of Education* [2012] WAIRC 00127; (2012) 92 WAIG 362 (*Scott*). In *Scott*, the Union challenged the reprimand imposed for misconduct committed by Ms Scott, in circumstances where the employer had characterised the misconduct as relatively minor. In *Scott*, the Commission found the employer's decision to reprimand Ms Scott was reasonable in the circumstances, and that Ms Scott was afforded natural justice and procedural fairness in accordance with the standard principles, notwithstanding the 'lengthy time to pursue the disciplinary process' [125], [133].
- 98 The Allegations Letter is dated 22 February 2021 and outlines six allegations in chronological order of their occurrence. The first allegation, Allegation 1 relates to the incident on 24 June 2020. The most recent allegations, being allegations 5-6, relate to an incident in late October/early November 2020.
- 99 This means the Allegations Letter was sent 7-8 months after the Allegation 1 incident. This is unfortunate. However, an early cause of the delay appears to be due to the School Principal first raising the matter with SID almost two months after the incident. The Report states that SID first received information regarding Allegation 1 from the School Principal on 18 August 2020.
- 100 The Report states that on 24 September 2020, a decision was made to deal with Allegation 1 as a misconduct matter with SID commencing an investigation on 29 September 2020. The Report further states that during the course of the investigation into Allegation 1, a further five allegations were received by SID, and a decision was made to also deal with the further allegations as misconduct matters and to include those matters in the investigation.
- 101 Three witnesses were interviewed in relation to Allegation 1 on 21-22 October 2020, and one witness was interviewed on 11 November 2020. Two witnesses were interviewed in relation to allegation 2 on 21 October 2020. Three witnesses were interviewed in relation to Allegation 3 on 21-22 October 2020. Two witnesses were interviewed in relation to allegation 4 on 11 November 2020. One witness was interviewed in relation to allegations 5-6 on 11 November 2020.
- 102 The Allegations Letter outlines six serious allegations against Mr Landwehr and therefore needed to be constructed as well as possible in the circumstances: *James v St Thomas Aquinas College Limited T/A St Thomas Aquinas College* [2016] FWC 6360 (*James*) [142]. As such, I am satisfied that the Allegations Letter was sent within a reasonable period of the last interviews conducted on 11 November 2020.
- 103 On 15 March 2021, Mr Landwehr responded to the Allegations Letter with the First Response. On 31 March 2021, three further witnesses were interviewed in relation to Allegation 1, and one witness originally interviewed on 11 November 2020 was re-interviewed. A further and final witness was interviewed in relation to Allegation 1 on 4 May 2021.
- 104 Two to three months after the last interview, the Report was finalised. The Report was sent with the Proposed Outcome Letter on 6 August 2021.
- 105 The Proposed Outcome Letter requests Mr Landwehr provide any response within 10 business days, which he did with the Second Response on 20 August 2021. The Dismissal Letter was then sent 6-7 weeks later, on 7 October 2021.
- 106 Whilst the Allegations Letter was sent 7-8 months after the Allegation 1 incident, and the Dismissal Letter was sent 15-16 months after the Allegation 1 incident, I am satisfied that the number and seriousness of the allegations warranted a thorough investigation. The investigation concluded within 5-6 months of the date of the Allegations Letter, and the disciplinary process concluded within a further 8-9 weeks of the Proposed Outcome Letter. This meant the disciplinary process took 7-8 months from the date of the Allegations Letter to the date of the Dismissal Letter.
- 107 I am satisfied that during the disciplinary process, Mr Landwehr was given a reasonable period of time (three weeks) to respond to the Allegations Letter, and to respond to the Proposed Outcome Letter (two weeks).
- 108 Although the delays are regrettable, considering the quantity and seriousness of the allegations, a disciplinary period of 7-8 months from the Allegations Letter to the Dismissal Letter does not, in my view, prejudice Mr Landwehr or render a justifiable dismissal unjustifiable under the given circumstances.
- 109 As to a consideration of the mitigating circumstances at *Drake-Brockman* [66], the Proposed Outcome Letter states that the respondent expressly considered Allegation 1 in the context of Mr Landwehr's 15 years of employment and significant experience as a D&T Teacher.
- 110 For the preceding reasons, I am satisfied the respondent has discharged the onus of establishing that Mr Landwehr was guilty of Allegation 1 and that the misconduct justified dismissal: *Drake-Brockman* [66].

Allegation 3

111 The Allegations Letter set out Allegation 3 as follows:

On 25 September 2020, at Ellenbrook Secondary College you committed an act of misconduct amounting to a breach of discipline pursuant to section 80(c) of the *Public Sector Management Act 1994*.

Particulars

- a. You were employed as a teacher at Ellenbrook Secondary College.
- b. On 25 September 2020, you were showing a class how to do brick paving.
- c. You bent over to work on the paving, at which time [Student BR], Year 11 Student, Ellenbrook Secondary College, put a small rock down the back of your pants.
- d. You walked towards [Student BR], grabbed the shoulder of his clothing and tugged him towards you.
- e. You shouted words to the effect of “*if you were at a work site it would be more than a pull by a teacher, you could possibly get hit.*”
- f. The physical contact you made with [Student BR] was not compliant with Regulation 38 of the *School Education Regulations 2000*.
- g. Your comment and actions towards [Student BR] were unnecessary and contrary to the Department’s *Code of Conduct*, which states in part:

1. Personal Behaviour

As employees of the Department we behave with integrity in all personal conduct and treat all others with due consideration.

- 112 The Allegations Letter notifies Mr Landwehr that Allegation 3 would be treated as a disciplinary matter pursuant to s 81 of the PSM Act, and that Ms Pelham had been appointed to investigate the matter.
- 113 The Allegations Letter invites Mr Landwehr to respond in writing, or to contact Ms Pelham to respond in person.
- 114 In the First Response, Mr Landwehr responds to the Allegations Letter as follows:

[Student BR] can be a distracting student. He can get worked up quickly, become very hyperactive and act out in ways that could harm himself or others. I have to constantly deal with his behaviours and calm him down. I need to get him to stop doing what he is doing and get focussed on settling him down in order to keep both him and the class safe from some of his behaviours.

The class is a Certificate II in Building and Construction that is timetabled for a whole day, being a Friday each week. The class was doing Paving for the school in the Year 7’s courtyard. This was the last day of Term 3 and needed to be completed and [Student BR] was displaying silly behaviour and put a rock down the back of my pants whilst I was doing a paving demonstration and then ran off. I got up to stop him, I placed my hands on his shoulders to calm him down and explained the consequences of the impact of his actions should it be a real work site.

I did make physical contact with [Student BR], however it was minimal, and appropriate at the time in order to maintain the safety of the class and to ensure [Student BR’s] welfare as there was tools and other construction material around that could potentially cause harm to [Student BR].

- 115 The Proposed Outcome Letter notifies Mr Landwehr that the investigation has been completed, Allegation 3 has been substantiated, and the proposed action is dismissal.
- 116 The Proposed Outcome Letter states:

To assist you in preparing any response you might wish to make, and to aid your understanding of the investigation, the report is now supplied to you. You should not make use of the report for any purpose that is not directly related to the proper conduct of the investigation or any subsequent appeal process.

...

In your response you deny that you acted contrary to Departmental policies and maintain that there were circumstances to mitigate your actions, however, the evidence provided by the witnesses is consistent and supports that you acted as alleged. ... Under no circumstances is it acceptable to make physical contact with students in the manner described at allegations 2, 3, 5 and 6, inclusive.

Physical contact with students should be avoided, both for their protection and to safeguard staff members. Any physical contact used on a student must be reasonable, proportionate and necessary in the circumstances and should only be used when all other non-physical interventions have been considered and exhausted.

You are responsible for establishing and maintaining professional boundaries in your interactions with students to help protect everyone from any misunderstandings or a violation of the professional teacher/student relationship.

In particular, I acknowledge in your response that you believe your physical contact with [Student BR] was minimal. In the circumstances, however, physical contact with [Student BR] was not required. Your actions towards [Student BR] reflect that you were reacting to his poor behaviour, not for any other reason. As such, you breached your professional boundaries with [Student BR].

I have considered your 15 years of employment with the Department and your significant experience as a Design and Technology teacher.

I also have considered your discipline history and the fact that you were previously found to have committed a breach of discipline on 10 June 2015, in relation to similar incidents to allegation 3. As a result, you received a fine of one day’s pay, a reprimand, and improvement action by way of counselling from your principal regarding the Department’s policies on physical contact and completion of the Department’s online Accountable and Ethical Decision Making course.

In relation to the reprimand you received, you were informed that the community has an expectation that Departmental employees will behave in a manner that reflects the important role they have in modelling community values and

standards. It was deemed that your actions were wholly inconsistent with these values and standards.

It was made clear to you that a repeat of this kind of behaviour may well have more serious repercussions. I consider that your conduct as outlined in the allegations, particularly allegation 1 and 3, are serious matters. I must have confidence that someone in your position will properly perform their duties and act appropriately in the presence of students. I no longer have trust or confidence in you to perform your duties to the required standard.

Of concern, and relevant to my decision, I note the six incidents relating to the allegations occurred within a five month period in 2020, and four of these allegations relate to physical contact with students.

...

In relation to allegation 2, 3, 5 and 6, you should have refrained from using physical contact with the students and you had the option to use verbal communication with the students in the first instance.

...

This proposed action takes into account the fact that you previously committed a breach of discipline on 10 June 2015, relating to a similar incident as allegation 3.

117 The Proposed Outcome Letter invites Mr Landwehr to respond in writing, or to contact Ms Pelham to respond in person.

118 In the Second Response, Mr Landwehr responds to the Proposed Outcome Letter as follows:

I did make contact with [Student BR] and outlined the reasons why in my original response and wanted to provide further information and respond to the proposal to terminate my employment.

Previously in the Departments employment, I was assaulted in the workshop and this has had an ongoing effect on me even until this day. It has drastically changed my life and destroyed my 20 year marriage and has had a serious effect on the relationship with my young adult children. I had to leave Harvey to move to Perth. My new fiancé has supported me throughout my case. She is stressed and always worries about me and the pressures I put on myself to get students to perform to the best of their abilities. I believe as in my original case regarding this matter that I was at risk of very serious physical harm or death. This matter was publicly listed and dealt with by the Western Australian Industrial Relations Commission U93/2016.

When the student made unexpected physical contact with me, with the intention of pulling some kind of prank, this was in a similar fashion and in a similar physical way to how I was previously assaulted in the workshop. This previous assault was very traumatic on me and I have not completely recovered from the memory and the emotional hurt of the incident.

This caused me to react completely by surprise and seemed to trigger my bodies natural defence response to being assaulted again. It was a complete nervous reaction that shocked me and, regrettably I did make contact with [Student BR]. I believed at the time I was giving him an appropriate warning about his conduct, with concerns for his safety had he done this to somebody else in the future who may not take kindly to his actions.

I believe terminating my employment for these 2 matters would be harsh and excessive. I am willing to take any steps that the Department deems necessary to better improve my teaching ability and conduct, but I do not believe that termination of my employment is warranted and I ask that my experience, general good conduct over a 15 year teaching career and remorse is taking into account.

- I have planned and completed numerous building projects around the school which is above and beyond my teaching requirements. I always set a very high standard and complete projects with students help and do not except a low quality product.
- In the next couple weeks the students will be laying 1.2 Cubic meters of concrete for a path on two separate occasions. This is what I did with the Yr 12 students last year. I worked after school to prepare site on several days and stayed after school to prevent students from vandalising the finished project. This is in order to get students to obtain a Building and Construction unit in VET laying concrete to simple forms. This will make them finish and obtain their Cert II in Building and Construction.
- Teaching is just the minor part of my job. I believe being a VET teacher is all about improving students skills and getting them to work to their full potential and preparing them to be work ready.

119 The Dismissal Letter states:

In relation to the physical contact you used against [Student BR], you asserted that your actions were partly as a result of the incident with a student in 2015.

I do not consider this reasonable mitigation for your physical contact with [Student BR]. The act of a student putting a rock down your pants is seemingly innocuous, however, the evidence shows that you responded aggressively and in the context of conveying expected behaviour on a worksite, not in relation to fears for your safety.

Your reasoning is conjectural and you have provided no evidence to support this claim.

There was no requirement to engage in any physical contact with [Student BR]. It is not an appropriate response to mere 'bad behaviour' or 'non-compliance' by a student, unless of course there is an actual risk.

It appears that you view the physical contact as being minimal and appropriate, and you have not provided any assurance that an incident of this nature will not occur again. This presents an unacceptable risk to students in your care.

Further consideration of your response

Whilst you express a willingness to complete any steps to improve your teaching and conduct, I am of the view that prior to these incidents, you have been provided sufficient education and training in relation to the Department's expectations

regarding the use of physical contact with students, including:

- You completed Classroom Management Strategies (CMS) professional learning workshops on 14 August 2019, 12 September 2019 and 24 October 2019. Your training on 14 August 2019 (prior to the incident with [Student BR]) specifically provided you with de-escalation strategies, other than physical contact.
- The WAIRC proceedings and subsequent reports provided you with extensive details about what constitutes reasonable physical contact by a teacher towards a student, such as:
 - 2018 WAIRC 003200 paragraph 20 reads, in part:

“Firstly, a teacher has a particular duty of care towards a student. Secondly, the teacher is under direction from policies as to the appropriate circumstances in which to have physical contact with or restrain a student (Department of Education, Behaviour Management in Schools). The policy says the degree of physical contact must be proportionate ‘to the seriousness of the behaviour or the circumstances it is intended to prevent or manage’. The teacher will have been trained in the application of such a policy. A teacher is also a mentor and exemplar to the students of appropriate behaviour and self-control. In his interview with the investigator, Mr Landwehr said, ‘I am there as a role model to try and teach them’ (Investigation Report, 11)”.
 - 2017 WAIRC 00233, acknowledged the related investigation report and paragraph 37 reads in part that Mr Landwehr is recorded to:
 - *“say that the two incidents in 10 years of teaching were out of character and demeanour, not due to him not having learned, but due to the confluence of a number of unfortunate circumstances in which ‘I was found vulnerable’; and*
 - *“express an assurance that he intended to not repeat the behaviour in the future ‘whatever it takes’”.*
 - 2017 WAIRC 00233, paragraph 42 reads, in part:

“Staff must only use reasonable physical contact once other less intrusive alternatives have failed.” and “Physical contact must not to be used where it is intended to provoke or punish a student or is intended to cause pain, injury or humiliation.”
- On 30 July 2012 and 26 May 2015, you completed the Department’s on-line AEDM course, which clearly outlines that physical contact by teachers towards students is only used in reasonable circumstances and that restraint is used only as a last resort.
- In 2012, you received improvement action from Mr Neale Armstrong, Principal, Western Australian College of Agriculture – Harvey, in respect to a complaint that you used unnecessary physical contact, by grabbing a student and swinging him towards a bin, in reaction to him verbally abusing you. It is recorded that Mr Armstrong counselled you about the Department’s policies on physical contact and provided you with the Department’s *Code of Conduct* 2011. In relation to your improvement action Mr Armstrong recorded:
- In an email to you, dated 6 August 2012, *“... the meeting between you and I on July 6th 2012, was an important part of the process to understand how some situations can very quickly become inflamed. Your assurances of choosing a different student management option and personal letter outlining some issues you were dealing with in your private life, together with the view that this was a one off event, leads to the belief that you have learned a great deal from this situation, and acceptance, that should this situation arises in the future, the outcomes are very likely to be different.”*
- *“Mr Landwehr agreed to step back from issues when confronted by students, look at cues when students are baiting staff and take a few breaths before over reacting.”*

I would have expected that given the previous counselling, education, training and your ongoing assurances, that you would understand the standard of behaviour expected in your role.

Of relevance, the Director General’s letter to you in 2015, regarding your physical contact with a student stated:

- A repeat of this kind of behaviour that resulted in the need for this action may well have more serious repercussions.
- To avoid any further allegations of misconduct, the Director General directed you to avoid the behaviour that resulted in that finding of a breach of discipline.

Dismissal

The community and the Department have an expectation that employees will behave in an exemplary manner and uphold the values and standards of the Department. In my view, you have failed in this regard and the seriousness of your conduct has established reasonable doubt about your suitability as a teacher.

I must have confidence that someone in your position will properly perform their duties and act appropriately in the presence of students.

I find that you have committed breaches of discipline in relation to allegations 1 and 3.

Your conduct demonstrates a lack of self-control and a failure to learn and improve. I no longer have trust or confidence in you to perform your teaching duties to the required standard.

Your actions were inconsistent with the Department’s values and standards and accordingly, I dismiss you from your

employment with the Department of Education without notice or payment in lieu of notice for serious misconduct pursuant to clause 11(4) of the *Teachers [Public Sector Primary and Secondary Education] Award 1993*.

Union's contentions

- 120 The Union contends that the respondent could not have been reasonably satisfied that Mr Landwehr's physical contact with Student BR did not comply with Regulation 38, or that his remark to Student BR was unnecessary and contrary to the Code of Conduct.
- 121 The Union contends that there is a reasonable case suggesting Mr Landwehr's conduct was excused by Regulation 38. Further, even if Mr Landwehr was frustrated during the interaction with Student BR, it does not negate the reasonableness of his conduct if it was primarily driven by safety concerns.
- 122 Similarly, Mr Landwehr's remark, made with the intent of ensuring Student BR's ability to work safely in the workplace, should be considered within context.
- 123 The Union contends that the evidence indicates Mr Landwehr acted with reasonable restraint. Even if his conduct did not strictly adhere to Regulation 38 and the Code of Conduct, they do not warrant dismissal.
- 124 In any event, dismissal for Allegation 3 is unjustifiable when Mr Landwehr continued to teach at the School for over a year without further incident.

Respondent's contentions

- 125 The respondent contends that there is no credible evidence that Mr Landwehr made contact with Student BR in order to manage him or in the interests of safety.
- 126 The respondent contends that the decision to dismiss Mr Landwehr is fair on a finding that Allegation 3 was made out.
- 127 Further, a single loss of control due to student behaviour is sufficient to warrant dismissal of a teacher.
- 128 Where there are reasonable grounds based on the findings by the Commission in *Landwehr No. 1* and *Landwehr No. 4* for the respondent to suspect that a loss of control may occur again, dismissal in the interests of student safety should be inevitable.
- 129 The respondent relies upon *Balfour v Attorney-General* [1991] 1 NZLR 519, for the proposition that when it comes to disciplinary proceedings involving a teacher, the law recognises the balance between a teacher's right to procedural fairness and the respondent's responsibility to act on their prime duty to protect children, particularly where clear proof may be difficult to obtain:

The second point is one that must not be lost sight of, and it is the great care that educational authorities must exercise when made aware of an allegation, even a rumour, of this kind. Their prime duty must be the protection of the children, if possible to prevent problems rather than await their occurrence. They also have a duty to their employees, to act justly and with discretion. The duties may conflict, and to maintain a balance between them can be a delicate matter. There can be no criticism of action taken in the interests of the children, even if there is no more than suspicion, provided the action is appropriately restrained and rational, and the ultimate need for a balanced judgment on the validity of the suspicion is not lost sight of (524).

...

Furthermore, the law must recognise the balance to be preserved between a teacher's rights and the Department's wider responsibilities. Particularly in the case of moral suitability clear proof may be difficult to obtain. Yet to ignore possible warning signals may be responsible (529).

The evidence

- 130 Ms Cox was interviewed by Ms Pelham on 4 May 2021. She stated:
- (a) A first aid officer, Joanne Hunt, noticed Mr Landwehr being 'a bit rough' with one of the students, and came to her and said she was concerned.
 - (b) She told Ms Hunt that, if she finds that he had manhandled a student, and it was inappropriate, that she had to report it.
- 131 Joanne Hunt, First Aid Officer (**Ms Hunt**), was interviewed by Ms Pelham on 22 October 2020. She stated:
- (a) Her office backs onto the Year 7 courtyard. She has a big window, but her back faces the window. The window was open, and she noticed a class of 15-20 upper school students undertaking a brick paving job, in the presence of adult staff members.
 - (b) One male teacher was bent over, demonstrating screeding (leveling out the sand), smoothing the ground out, about 30 m from the window. The teacher was in the middle of a 6 sqm area of sand. The students were standing in a group, in a semi-circle, watching the demonstration.
 - (c) She heard shouting (a loud, emotionally driven voice) and turned around.
 - (d) 'As the student was walking away', the teacher stepped out of the sand area and took 2-3 steps towards the student, grabbed the student by the scruff of the fabric of the student's Hi-Vis shirt on the left-hand shoulder, and pulled the student forward for 3-4 steps. The teacher was a 'couple of inches from the student's face shouting quite loudly to him.' The teacher and student were facing the same direction, standing side by-side. They were 2 m from the other students.
 - (e) She could not grasp the words, but observed that it was 'very, very heated.'
 - (f) The other adult in the courtyard did not react.

- (g) She watched for a few minutes. In that time, the teacher ‘let the young man’s shoulder go.’ The grab, and shouting, lasted for less than one minute. ‘The teacher said his piece’ and ‘they all resumed what they were doing.’ The student ‘joined back in to a lesson’, and the teacher went ‘back into the middle of the sand pit and continued demonstrating the lesson.’
- (h) The incident ‘just didn’t sit right with me’ and that is why she went to speak to the HR officer. She asked the HR officer who the teacher was. The HR officer asked her why she was asking about the teacher’s identity. When she described what she had observed, the HR officer advised her to inform the principal.
- (i) One to two hours after the incident she typed a statement, which states she ‘heard a loud voice of someone yelling and getting angry.’

132 Student BR was interviewed by Ms Pelham and Ms Cann on 21 October 2020. He stated:

- (a) He finds Mr Landwehr has a short temper, ‘he can get mad pretty easy.’ This was the worst that has happened, as Mr Landwehr has not grabbed anyone before.
- (b) ‘Throughout the whole day we were kind of getting on his nerves, so he was obviously already mad.’ His frustration played out in his facial expressions and tone of voice.
- (c) Throughout the day, students were being cheeky with their comments. Mr Landwehr had asked students to help him, but the students would not, and would ‘just sit out, be cheeky.’ This left Mr Landwehr to do the work, which he imagines frustrates Mr Landwehr. When Mr Landwehr was explaining calculations, some of the students ‘will be cheeky about that as well.’ When Mr Landwehr was trying to get students to pay attention to him, they were ‘just all doing other things, their own little things, shooting basketballs in the hoop that’s in the same area.’
- (d) There was a small set of students that were helping Mr Landwehr at the time. Mr Landwehr was leaning over in a corner doing some brick paving and the students were standing a maximum of 2 m behind him. The area is ‘rocky all the way around, sandy and rocks where - - - we were just paving it.’
- (e) He had a 1-2 cm rock and asked the students, ‘Should I get this rock and put it down his plumber crack? And then it’s just like laughing around.’
- (f) He then went up to ½ m behind Mr Landwehr, and with a tiny little throw with a ‘bit of force behind it’, dropped the rock down Mr Landwehr’s plumber’s crack.
- (g) As soon as it happened, he ‘did a quick turn to my left and then walked’ off. He ‘was the only one moving away out of everyone around, so it was pretty obvious it was me especially me laughing as well.’
- (h) He heard Mr Landwehr ask, ‘Who did that?’ as he was ‘walking away laughing.’
- (i) Within five seconds, when he was 2 m away, he turned around to look at Mr Landwehr, they made eye contact, and Mr Landwehr ‘walked up to’ him and asked him, ‘Why are you doing this?’ ‘He was really frustrated and mad, like you could tell by his tone and face. So and then, um, yeah, he grabbed me by the shirt and he started like to pull me over.’
- (j) Mr Landwehr had grabbed him on his left shoulder.
- (k) Mr Landwehr was not ‘pulling me around in like a mean way, he was kind of pulling me aside.’ ‘It was just like a little jolt of my body really.’ ‘It wouldn’t have been more than three times.’ ‘It wasn’t really forceful, I mean it was little tugs of my shirt and then obviously I’ve jolted along with the tug.’
- (l) Mr Landwehr said that if he was at a TAFE site, it would be more than just a pull by a teacher, he could possibly get hit.
- (m) Mr Landwehr ‘was obviously mad, so after he did it he walked off and then I walked off cos I knew I did the wrong thing, so I just left him alone and went back up to my class.’
- (n) The rock would not have hurt Mr Landwehr. ‘It just would have just been a frustrating sort of thing.’ The incident lasted a maximum of 10 seconds. The incident was seen by the TAFE lecturer and ‘pretty much everyone in the class.’
- (o) Later that day, Mr Landwehr told him, ‘They got us for it’. When he asked what he meant, Mr Landwehr said, ‘the shirt pulling’. Mr Landwehr said, ‘I just want to say sorry for it’. He said, ‘I may as well say sorry for it as well cos, yeah, I did frustrate you.’

133 Ron Simion, TAFE lecturer (**Mr Simion**) was interviewed by Ms Pelham on 21 October 2020. He stated:

- (a) He has been a trade lecturer at TAFE for 30 years.
- (b) Every Friday he goes to the School for the whole day.
- (c) On Fridays, the attendance rate is 98-99%. Other days of the week, the attendance rate is 65% or less for the 15 boys at the School.
- (d) He and Mr Landwehr were doing some brick paving in the courtyard.
- (e) Mr Landwehr was ‘bending over and showing the students how to level sand and screed off and make it all flat’ to lay the brick paving.
- (f) He and the 15 students were standing in a circle around Mr Landwehr, 2 m away.
- (g) Student BR decided it would be funny to put ‘some stones down the back’ of Mr Landwehr’s pants. So ‘he did this and then run off to the fence yelling and screaming and waving his hands around.’

- (h) 'And as soon as he'd done it, [Mr Landwehr] went to the back of his pants and went "What the hell, what - what's that you put down there?"'
- (i) Mr Landwehr 'got a bit of a shock when it happened. He jumped up and [Student BR] was running - running around the fence being stupid.' Student BR was 5-10 m from Mr Landwehr when Mr Landwehr stood up.
- (j) 'Because it's all - it's all enclosed. And then he come running back across the front where [Mr Landwehr] was and that's when [Mr Landwehr] stopped him' by grabbing him by 'the front of his shirt' - at the chest area, below the chin. The fence is 1½-2 m from where Mr Landwehr was.
- (k) Mr Landwehr and Student BR were facing each other. The grab was a 4-5 out of 10. The grab involved 'enough aggression to stop him running.' When Mr Landwehr grabbed Student BR, the student stood still. He did not see anything else happen with his body.
- (l) Mr Landwehr said, 'Hey, you're being rude, you're being disrespectful.' 'Settle down.' 'Cos you're being stupid and if you don't settle down' 'I'm going to kick you out of the class.'
- (m) The incident lasted 20-30 seconds. In this time, Student BR had run to the side fence and then run along the back fence. He was running like an uncoordinated clown, with his arms and legs going in different directions, and he was yelling.
- (n) After Mr Landwehr let go of Student BR's shirt, he told the students to settle down and get back and do some work. The class settled down and everyone 'got on with it.'
- (o) Mr Landwehr is always loud, and the boys are always trying to get a rise out of him. Sometimes it works, and Mr Landwehr will yell at them and they think it is funny.
- (p) Some days Student BR will come in and just be rude. Other days he will sit there and just stare off into space.
- (q) He thinks that Student BR thought he was being funny, and the only way Mr Landwehr could stop him running around was to grab him.
- (r) They are in a work situation, with bricks and holes, and tools on the ground, so if Mr Landwehr did not grab Student BR and he fell over and hit his head there would be a serious occupational health and safety problem. They had pulled out some brick paving and there were brick pavers around, concrete, wheelbarrows and piles of sand.
- (s) He does not think it would have made a difference to ask Student BR to stop running, based on having dealt with him for 6-8 months.
- (t) Afterwards, the headmaster came and asked him about the incident. He mentioned this to Mr Landwehr, who told him the headmaster had already spoken to him.

Consideration

134 Allegation 3 pertains to Mr Landwehr's non-compliance with Regulation 38. As such, the Union contends that the investigation needed to objectively evaluate if a potential risk to Student BR's safety existed, which was justifiable under Regulation 38(c)(i): *Ayling v Director-General, Department of Education and Training* [2009] WAIRC 00413; (2009) 89 WAIG 824 (*Ayling*).

135 The Union argues that no assessment was conducted; however, the Report's conclusion on page 22 states, 'On the balance of probabilities, there is sufficient evidence to substantiate this allegation and establish that Mr Landwehr committed a breach of discipline.'

136 Regulation 38 states:

Staff member's powers to manage etc. students

A member of staff of a government school may, in the performance of the person's functions, take such action, including physical contact with a student or a student's property, as is reasonable —

- (a) to manage or care for a student; or
- (b) to maintain or re-establish order; or
- (c) to prevent or restrain a person from —
- (i) placing at risk the safety of any person; or
- (ii) damaging any property.

137 The Guidelines give effect to Regulation 38 and states (original emphasis):

Staff can take **reasonable** action, including physical contact with a student or a student's property, to:

- manage or care for a student
- maintain or re-establish order or
- prevent or restrain a person from —
 - placing at risk the safety of any person or
 - damaging any property.

The action taken must be proportionate to the circumstances of the situation.

When dealing with disciplinary appeals involving physical contact, the WA Industrial Relations Commission has applied

the following principles in deciding whether the contact was reasonable:

- physical contact is not appropriate as a response to mere ‘bad behaviour’ by a student, unless there is an actual risk of self harm, or harm to others;
- physical contact is not to be used to discipline students;
- even ‘minimal’ physical contact **can** be unreasonable if there were reasonable alternatives; and
- even if a student initiates physical contact, the staff member must ensure that any response is linked to what is necessary to deal with the risk of harm, and not continued beyond a point where it is needed. This may include the staff member avoiding if possible any physical contact with the student.

....

The use of clear verbal directions is always preferred to physical intervention. It is not appropriate to make physical contact with a student (e.g. tapping, pushing, grabbing, poking, pulling, blocking, slapping, punching) to ensure they comply with directions. An exception to this rule is if the student is placing themselves or others at risk.

Conflict of evidence regarding running

- 138 The Union contends that the Report fails to address a conflict in the evidence regarding whether Student BR was walking or running away. In the absence of further inquiry, the Union argues this conflict should have been resolved in Mr Landwehr’s favour.
- 139 In the First Response, Mr Landwehr states that Student BR put a rock down the back of his pants ‘and then ran off’ and he ‘got up to stop him.’
- 140 Mr Simion’s evidence was that he, and the students, were standing in a circle 2 m from Mr Landwehr. Student BR put some stones down the back of Mr Landwehr’s pants and ran off to the fence yelling and screaming and waving his hands around, like an uncoordinated clown. When Mr Landwehr jumped up, Student BR was 5-10 m away, having run to the side fence. Student BR then ran along the back fence, which was 1½-2 m away, when Mr Landwehr grabbed him, and loudly asked, ‘What are you doing?’.
- 141 Ms Hunt gave evidence that Mr Landwehr was in the middle of 6 sqm of sand and the students were standing in a semi-circle watching. She heard shouting, turned around and saw Student BR walking away from Mr Landwehr as Mr Landwehr stepped out of the sand and took 2-3 steps towards Student BR and grabbed him.
- 142 Student BR gave evidence that Mr Landwehr was leaning over doing some brick paving and the students were standing behind him, a maximum of 2 m away. He went up to ½ m behind Mr Landwehr and dropped a rock down Mr Landwehr’s pants. He did a quick turn to his left and walked off. Within five seconds he was 2 m away and Mr Landwehr had walked up to him and grabbed him.
- 143 The evidence of Mr Simion, Ms Hunt and Student BR was that Mr Landwehr was bent over demonstrating screeding to the students and the students were standing in a semi-circle around him. The evidence of Mr Simion and Student BR was that the students were 2 m away. Student BR and Ms Hunt state that Student BR walked away from Mr Landwehr. Student BR says he was 2 m from Mr Landwehr when Mr Landwehr grabbed him. This is corroborated by Ms Hunt who stated that Mr Landwehr took 2 -3 steps towards Student BR before grabbing him.
- 144 Given the consistencies in Ms Hunt’s and Student BR’s account, I find it is more likely that Student BR walked away from Mr Landwehr after dropping the rock down Mr Landwehr’s pants, rather than ran away.
- 145 Whilst Mr Simion’s evidence is that Student BR was running, and this is consistent with Mr Landwehr’s statement in the First Response that Student BR ‘ran off’, there are aspects of Mr Simion’s evidence that are inconsistent with the generally consistent evidence of Ms Hunt and Student BR.
- 146 Firstly, Ms Hunt and Student BR gave evidence that in the seconds between Mr Landwehr first yelling and then grabbing Student BR, that Student BR was 2 m, or 2-3 steps, from Mr Landwehr. In contrast, Mr Simion stated that Student BR had run 5-10 m in this time.
- 147 Secondly, Ms Hunt and Student BR gave evidence that Mr Landwehr had grabbed Student BR’s shirt at his left shoulder. In contrast, Mr Simion stated that Mr Landwehr had grabbed Student BR’s shirt at the chest area, below his chin.
- 148 Thirdly, Ms Hunt and Student BR gave evidence that after Mr Landwehr had grabbed Student BR, that Mr Landwehr had pulled Student BR such that Student BR had been pulled forward by a few steps. The pulling was described by Student BR as being jolted along with no more than three tugs. In contrast, Mr Simion’s evidence is that after Mr Landwehr grabbed Student BR, that he did not see Student BR’s body move at all, describing Student BR as standing still.
- 149 Fourthly, Student BR gave evidence that Mr Landwehr said to him that, ‘If you were at a work site it would be more than a pull by a teacher, you could possibly get hit’. The Allegations Letter states that Mr Landwehr shouted these words at Student BR. The Union’s written submissions states that this aspect of Allegation 3 is not disputed. In contrast, Mr Simion’s evidence was that Mr Landwehr did not make any reference to Student BR being in a workplace, but made the comment that Student BR was being rude and disrespectful and if he did not settle down that he would be kicked out of the class.

Regulation 38

- 150 The Union contends that the Report lacks an examination of whether Mr Landwehr’s contact with Student BR complied with Regulation 38(c)(i).
- 151 I disagree. The analysis on page 21 of the Report states (emphasis added):

Mr Landwehr stated he used physical contact with [Student BR] to address safety and welfare concerns as [Student BR]

could have harmed himself on the nearby work tools/materials. Mr Simion provided evidence that there were bricks, tools and holes in the area and an accident could have occurred if [Student BR] ran around.

Contrary to Mr Landwehr's and Mr Simion's statement regarding safety concerns, the evidence provided by Mr Simion, Ms Hunt and [Student BR] supports that Mr Landwehr actions towards [Student BR] were not in the context of addressing safety concerns but in angry retaliation to [Student BR] dropping a rock down his pants. Of significance, Mr Landwehr and the witnesses provided evidence that immediately after [Student BR] dropped the rock down Mr Landwehr's pants, Mr Landwehr walked towards [Student BR], took hold of his clothing shoulder and verbally chastised him for putting a rock down his pants.

...

The Accident/Incident Investigation Report (AIIR) Form, completed by Mr Landwehr (Attachment F) makes no mention of any safety concerns regarding [Student BR] or the class during the incident. Mr Landwehr stated on the AIIR Form, that '*I grabbed the student by the shoulders and chastised him for his behaviour*', this being further evidence that Mr Landwehr was reacting to [Student BR's] behaviour **as opposed to addressing any safety concerns or preventing any harm to [Student BR]/the class.**

- 152 Based on the above passages in the Report, it can be reasonably inferred that Mr Landwehr's conduct was considered in the context of Regulation 38(c)(i) but ultimately rejected.
- 153 *Ayling* provides that when considering whether an act placed at risk the safety of a student, the test is objective and not subjective. The test is whether a reasonable person in all the circumstances would consider there was a risk to the safety of the student: *Ayling* [157]. The concept of risk conveys the possibility of danger rather than actual danger: *Ayling* [157] citing *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 (1177).
- 154 Given that I have found that the evidence supports Student BR was walking (rather than running) away from Mr Landwehr when the physical contact occurred, I do not consider Mr Landwehr's claim that he made physical contact with Student BR because there was a possibility of danger to Student BR's safety to be sustainable for the following reasons.
- 155 Mr Simion's evidence was that there were bricks and holes, tools, brick pavers, concrete, wheelbarrows and piles of sand around, which is consistent with Mr Landwehr's statement in the First Response that, 'there was tools and other construction material around that could potentially cause harm to [Student BR].'
- 156 However, Student BR's evidence was that the area was 'rocky all the way around, sandy and rocks where - - - we were just paving it.'
- 157 Further, there was no mention of any safety risk in the account given by Mr Simion and Student BR to Nathan Brown, Deputy Principal immediately following the incident, which was recorded in an email Mr Brown sent to the Principal and Rowena Howe on 25 September 2020 at 11.48am. The email concludes, 'I am going to get a relief to sit in now and get [Mr Landwehr] to fill out the incident report.'
- 158 There was also no mention of any safety risk in the Accident/Incident Investigation Report (AIIR) Form completed by Mr Landwehr on 25 September 2020 (**Form**). On the Form, the incident is recorded as occurring at 9.50-10am. On the Form, Mr Landwehr states that the incident was contributed by 'The child's/students action/behaviour', and in the section, 'What (if any) training has been received for the task?' Mr Landwehr states, 'Behaviour Mgt – teacher.'
- 159 Mr Brown countersigns the Form, noting that '4 parties were involved in or witnessed part of or all of the incident', and in the section 'Contributing factors' that, 'The incident was initiated by the students poor behaviour'.
- 160 Had there been a possibility of danger to Student BR's safety, justifying Mr Landwehr's physical contact, it would have been logical for both Mr Simion's report to Mr Brown immediately after the incident and Mr Landwehr's account upon completing the Form to mention the safety concern.
- 161 Although the immediate area may have contained equipment and potential trip hazards, considering I have found it more likely that Student BR was walking (not running) away from Mr Landwehr when the physical contact occurred, I do not find it likely that the equipment or the site itself posed a risk to Student BR's safety.
- 162 The Union contends that the Report dismissed the accounts of Mr Simion, Mr Landwehr and Student BR, who were involved in and present at the incident, as being 'from a tradesperson point of view in the workplace.'
- 163 The full context of the analysis on page 22 of the Report follows:
- The accounts provided by Mr Landwehr, Mr Simion and [Student BR] appeared to be from a tradesperson point of view in the workplace, in that [Student BR] instigated the incident so Mr Landwehr's reaction to [Student BR] was reasonable and not all that serious. Neither Mr Simion or [Student BR] are Departmental employees and may not understand the Department's expectations of a teacher. Ms Hunt, being an independent witness to the incident and a Departmental employee, perceived that someone should have intervened between Mr Landwehr and [Student BR], this being a reasonable expectation based on the circumstances of the incident.
- 164 It can be reasonably inferred from the above passage that the accounts were evaluated based on the evidence presented. In the First Response, Mr Landwehr states that the class was a Certificate II in Building and Construction, and regarding Student BR he states, 'I got up to stop him, I placed my hands on his shoulders to calm him down and explained the consequences of the impact of his actions should it be a real work site'. Mr Simion, when questioned, stated he did not recall Mr Landwehr referring to the site as a workplace, but suggested that if such a reference was made, it would have been a good one, as Student BR would have faced dismissal for putting a rock down someone's pants in the workplace. Student BR's evidence was that he understood Mr Landwehr's comment to him, because 'obviously they're trying to prep us for when we go into a TAFE course. And obviously if we're going around on a worksite putting rocks down people's plumber cracks and obviously

there is a big possibility we could get hit for it.’

- 165 It is also reasonably clear, that the analysis evaluates the evidence against the Department’s expectations for a teacher. In situations where physical contact occurs in a workplace, relevant factors include provocation and the reasonable proportionality of the response: *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch v Inghams Enterprises Pty Ltd* [2005] WAIRC 02347; (2005) 85 WAIG 3385 [13].
- 166 In contrast, the Guidelines state, ‘physical contact is not appropriate as a response to mere “bad behaviour” by a student’ and, ‘It is not appropriate to make physical contact with a student (e.g. tapping, pushing, grabbing, poking, pulling, blocking, slapping, punching) to ensure they comply with directions.’
- 167 Further, the issue of provocation of a teacher by a student is not to be seen in the same way as provocation between fellow employees: *Landwehr No. 4* [22].
- 168 Under the circumstances, I find the analysis in the above passage (as appears on page 22 of the Report) to be reasonable in assessing whether Mr Landwehr’s conduct constituted a breach of Regulation 38.
- 169 The Union additionally argues that this passage refers to Ms Hunt as an independent witness, while not attributing a similar characterisation to Mr Simion, who provided a firsthand eyewitness account of the incident. It also inaccurately attributes to Ms Hunt that she ‘perceived that someone should have intervened between Mr Landwehr and [Student BR]’ which Ms Hunt did not actually provide as evidence.
- 170 I disagree. Ms Hunt’s evidence was that she was not involved in the incident, observed it from her office window, and did not know any of the individuals involved. Given these circumstances, I do not consider it unreasonable to describe her as an independent witness.
- 171 Further, Ms Hunt’s evidence was on the following terms, and consistent with the statement in the Report that she ‘perceived that someone should have intervened’:
- [A]nd nobody else sort of - I mean everyone was sort of, you know, watching sort of a little dumbstruck and the other teacher didn’t react either.
- ...
- I was quite surprised cos I was waiting for the student to actually, ah, retaliate or push or - or whatever but, um, he didn’t. And no one came to his aid or even reacted because I then looked at the other teacher to see if the other teacher was going to intervene. But there was nothing, nobody flinched.
- 172 The Union contends that the Report erroneously attributes statements to Mr Simion, Ms Hunt and Student BR, specifically that Mr Landwehr’s ‘actions towards [Student BR] were not in the context of addressing safety concerns but in angry retaliation to [Student BR] dropping a rock down his pants.’ The Union also contends that the analysis on page 21 of the Report stating, ‘The evidence shows that Mr Landwehr’s demeanour at the time was angry and aggressive’ lacks supporting evidence and is highly prejudicial.
- 173 I disagree. The evidence is that Ms Hunt prepared a statement within 1-2 hours of the incident, which states, ‘As I was doing my work, I heard a loud voice of someone yelling and getting angry.’
- 174 This aligns with Ms Hunt’s interview, in which she stated she turned around upon hearing a loud, emotionally driven voice, and observed Mr Landwehr ‘shouting quite loudly’ at Student BR from a couple of inches from Student BR’s face.
- 175 Further, this is consistent with Student BR’s evidence that Mr Landwehr was ‘really frustrated and mad, like you could tell by his tone and face’, and Mr Simion’s evidence that Mr Landwehr loudly said to Student BR, ‘What are you - what are you doing?’
- 176 The Union objects to the analysis on page 21 of the Report stating, ‘Mr Landwehr could have refrained from using physical contact and in the first instance he could have verbally addressed [Student BR’s] behaviour in order to deescalate the situation’, when the evidence of Mr Simion was diametrically opposed to that conclusion.
- 177 The Union submits that the incident happened quickly, and the evidence of Mr Landwehr and Mr Simion was that it was unrealistic or unreasonable to expect Mr Landwehr to make a verbal attempt before making physical contact in the circumstances.
- 178 Whilst Mr Landwehr addresses Student BR’s general behaviour in the First Response, he does not address first making a verbal attempt before making physical contact with Student BR:
- [Student BR] can be a distracting student. He can get worked up quickly, become very hyperactive and act out in ways that could harm himself or others. I have to constantly deal with his behaviours and calm him down. I need to get him to stop doing what he is doing and get focussed on settling him down in order to keep both him and the class safe from some of his behaviours.
- 179 Mr Simion gave evidence that considering his experience dealing with Student BR for 6-8 months, even if Mr Landwehr had told Student BR to stop running, it would not have made a difference. Mr Simion gave further evidence that if Student BR is in a blank mood, he will stare off into space, while in ‘more agro moods’ he needs to be told four or five times before the message sinks in.
- 180 The Proposed Outcome Letter outlines the expectations for Mr Landwehr to first attempt other non-physical interventions (emphasis added):
- Physical contact with students should be avoided, both for their protection and to safeguard staff members. Any physical contact used on a student must be reasonable, proportionate and necessary in the circumstances **and should only be used when all other non-physical interventions have been considered and exhausted.**

You are responsible for establishing and maintaining professional boundaries in your interactions with students to help protect everyone from any misunderstandings or a violation of the professional teacher/student relationship.

In particular, I acknowledge in your response that you believe your physical contact with [Student BR] was minimal. In the circumstances, however, physical contact with [Student BR] was not required. Your actions towards [Student BR] reflect that you were reacting to his poor behaviour, not for any other reason. As such, you breached your professional boundaries with [Student BR].

181 The Proposed Outcome Letter attaches the Report. The Report summarises Mr Simion's evidence on page 14 as follows:

It would not have made any difference if Mr Landwehr had told [Student BR] to stop running around, because [Student BR] was unpredictable and did not comprehend [what] he was told. [Student BR] was being stupid and the only way Mr Landwehr could stop [Student BR] from running around was to grab him.

182 The Report also contains the following analysis on page 21:

There is no evidence that Mr Landwehr verbalised safety concerns to [Student BR] during the incident or addressed his behaviour in any other way than immediately utilising physical contact and chastising him. Mr Landwehr could have refrained from using physical contact and in the first instance he could have verbally addressed [Student BR's] behaviour in order to deescalate the situation.

183 In the Second Response, Mr Landwehr states:

When the student made unexpected physical contact with me, with the intention of pulling some kind of prank, this was in a similar fashion and in a similar physical way to how I was previously assaulted in the workshop. This previous assault was very traumatic on me and I have not completely recovered from the memory and the emotional hurt of the incident.

This caused me to react completely by surprise and seemed to trigger my bodies natural defence response to being assaulted again. It was a complete nervous reaction that shocked me and, regrettably I did make contact with Blake. I believed at the time I was giving him an appropriate warning about his conduct, with concerns for his safety had he done this to somebody else in the future who may not take kindly to his actions.

184 In the Second Response, Mr Landwehr refers to a 'nervous reaction' to the 'unexpected physical contact'. Whilst the Proposed Outcome Letter and the Report specify the expectation of Mr Landwehr to first attempt non-physical interventions, Mr Landwehr does not address this in the Second Response. He did not, at the time, contend that non-physical intervention would have been futile in the circumstances.

185 Consequently, I find it was reasonable for the Report to conclude that, consistent with the Guidelines, Mr Landwehr should have initially attempted a non-physical intervention, which he did not do.

186 The Union contends the Report reached a wrong and misleading conclusion that was not reasonably available on all of the evidence, namely that:

It is reasonable to conclude Mr Landwehr reacted in a disproportionate and angry manner to a seemingly innocuous practical joke by [Student BR], where there was no danger to anything but Mr Landwehr's pride. Based on Mr Landwehr's reaction to [Student BR], it is likely that he felt somewhat taunted or agitated by [Student BR's] behaviour. Mr Landwehr was not physically provoked or threatened by [Student BR] and there was no justifiable reason for Mr Landwehr to use physical contact with [Student BR] in the manner that he did. His actions were unreasonable and unnecessary.

187 I disagree. Student BR's evidence was that the rock being dropped down Mr Landwehr's pants would not have caused any pain, only frustration.

188 Additionally, considering I have found it more likely that Student BR was walking (not running) away from Mr Landwehr thus no risk to Student BR's safety existed, and it was reasonable for Mr Landwehr to attempt a non-physical intervention before making physical contact with Student BR as required by the Guidelines, I find the Report's conclusion to be reasonable in light of all the circumstances.

189 For the preceding reasons, I find that Mr Landwehr's physical contact with Student BR was not reasonable contact that was excused by Regulation 38(c)(i) and I find it was reasonable for the Report to state that Mr Landwehr's 'actions towards [Student BR] were not in the context of addressing safety concerns.'

Other contentions regarding the Report

190 The Union contends that the analysis on page 21 of the Report that Student BR 'indicated Mr Landwehr looked mad and as if he may strike [Student BR]' was taken from the evidence of the Deputy Principal that was inconsistent with Mr Simion's evidence. The Union objects to this evidence as hearsay evidence because the Deputy Principal was not interviewed by Ms Pelham as part of the investigation into Allegation 3.

191 Mr Simion's evidence was that he did not believe Mr Landwehr intended to fight Student BR. Based on his experience working with Mr Landwehr for 6-9 months, Mr Simion stated that even when students try to bait and rile Mr Landwehr, he may yell and scream, but has never reached a point where Mr Simion thought he would hit or fight a student.

192 This is consistent with Student BR's evidence that Mr Landwehr has 'a very short temper', and 'can get mad pretty easy', although, 'this is the worst I would say has ever happened and, um, he's never actually grabbed anyone before or anything else.'

193 However, this is inconsistent with a record made by the Deputy Principal within two hours of the incident. The Form notes that the incident occurred at 9.50-10am, and the Deputy President sent the email at 11.48am, summarising what Mr Simion and Student BR had informed him on the morning of the incident. The Report attaches both the Form and the email. The email

states (emphasis added):

Upon the rock hitting/going down the pants (unsure), Mr BL turned and grabbed [Student BR] by his shirt around the left shoulder region and dragged [Student BR] around a little bit. [Student BR] said that Mr BL was yelling at him to stop doing stupid stuff. **[Student BR] noted that BL looked very mad and looked like he may strike [Student BR] but BL did not physically hit him.** The whole incident was over in 5 to 10 seconds according to [Student BR].

- 194 Given the nature and timing of the Deputy Principal's email, I do not find it unreasonable for the email to be included in the Report. Where the rules of evidence do not apply, an investigator is entitled to base their conclusions on material that has probative value, with the weight to be given to such material being a matter for the investigator: *Parnell v The Roman Catholic Archbishop of Perth* [2021] WAIRC 00102; (2021) 101 WAIG 186 citing *Parnell v The Roman Catholic Archbishop of Perth* [2020] WAIRC 00420; (2020) 100 WAIG 1216 [177].
- 195 Further, given that the Report accurately summarises and includes the Deputy Principal's email in its entirety, I do not find it unreasonable for the analysis to refer to the email's content.
- 196 The Union contends that the Report neglects to mention the class being a VET class aimed at preparing students for placements with employers, even though this information would have been reasonably accessible during the investigation.
- 197 I disagree. The Report summarises the evidence of the witnesses on pages 12-15. On page 12, Student BR's evidence is summarised to include reference to a TAFE site, and Mr Simion is noted as a TAFE Lecturer. Further, the Deputy Principal's email of 25 September 2020 is attached and refers to the class as the 'BCN Cert class', and the First Response is attached, in which Mr Landwehr states that the class is a 'Certificate II in Building and Construction.'
- 198 The Union submits that the remark Mr Landwehr made to Student BR that, 'If you were at a work site it would be more than a pull by a teacher, you could possibly get hit' was made in the context of preparing students for work placement. However, if the comment was problematic such as to amount to wrongdoing or misconduct, it could have been addressed with counselling or coaching.
- 199 The analysis on page 21 of the Report states:
- It could be accepted that Mr Landwehr had good intentions towards [Student BR] in terms of addressing safety concerns and [Student BR's] behaviour, however, the manner in which he acted does not reflect good intentions by a teacher in a school setting.
- ...
- It is not considered to be Mr Landwehr's role as a teacher to explain to a student when/how physical violence could occur in the workplace. As, such a verbal reference by Mr Landwehr is considered inappropriate.
- 200 If Mr Landwehr's remark to Student BR was made in isolation, it may have been reasonable to conclude that counselling or coaching may have been a proportionate response. However, the remark was made concurrently with the physical contact.
- 201 Given I have found that it was reasonable for the Report to conclude the contact was a reaction in 'a disproportionate and angry manner to a seemingly innocuous practical joke by [Student BR], where there was no danger to anything but Mr Landwehr's pride', I further find that it is reasonable for the Report to conclude that a remark made in such circumstances is inappropriate and contrary to the Code of Conduct.
- 202 The Union contends that the Report fails to mention Mr Simion's evidence regarding 98-99% attendance in Mr Landwehr's class compared to attendance on other days of the week, which would have been relevant to the broader context of the incident and presented Mr Landwehr positively. However, I do not find this argument assists Mr Landwehr for the following reasons.
- 203 Firstly, the Report does not include everything a witness stated during their interview. Four witnesses were interviewed regarding Allegation 3. The Report summarises these interviews, Attachments I-K and the First Response across three pages, with the analysis and conclusion across 1½ pages.
- 204 Secondly, a single incident of an unreasonable use of force by a teacher against a student, unless permitted by Regulation 38, is 'culpable and inexcusable, and would justify dismissal': *Landwehr No. 4* [65].
- 205 The Union disputes that Mr Landwehr's physical contact was driven by frustration from having a rock placed down his pants. The Union further asserts that even if there was a finding that the contact was made out of frustration, considering this was a VET class, the contact took place in a reasonably restrained manner.
- 206 I disagree for the following reasons.
- 207 Firstly, absent a valid reason for making physical contact with a student, physically moving a student by grabbing their clothing is not considered to be minimal or restrained contact: *James*.
- 208 In *James* the College found Year 7 teacher Mr James' actions unreasonable, rejected his contentions that he used minimal force out of a concern for the safety of students, and found his actions amounted to misconduct [6]. Mr James gave evidence that the student was being disruptive and refused to return to his seat, so Mr James grabbed the back of the student's blazer collar with his left hand, adjusted the student's seat with his right hand, and put the student down on his seat [28]. Mr James acknowledged that *The Victorian Teaching Profession Code of Conduct* prohibits the touching of a child without a valid reason, and claimed he considered the student to be a threat to the welfare of the other students, and as the student was small, he only moved the student 1-1½ m [31]-[32]. Fair Work Commissioner Bissett accepted the student was a difficult and unruly child, but found, 'I have trouble conceiving a circumstance where it is appropriate to lift a student off the floor by the collar of his blazer. Even if there were grounds that warranted MF being touched or lifted by Mr James, the way he did go about that is astounding. Further, Mr James lifted MF high enough to place him on his seat, clearly higher than necessary to move him out of harm's way' [85].

209 Secondly, whilst the class was a VET class, in circumstances where I have found it was reasonable for the Report to conclude that 'Mr Landwehr reacted in a disproportionate and angry manner', it follows that Mr Landwehr's statement in the First Response that the contact was 'minimal, and appropriate at the time in order to maintain the safety of the class and to ensure [Student BR's] welfare as there was tools and other construction material around that could potentially cause harm to [Student BR]' is unable to be substantiated.

210 The Union contends that the Report reached an exaggerated conclusion, unsupported by any evidence, and inconsistent with the whole of the evidence, that Mr Landwehr's conduct 'could have escalated the incident resulting in [Student BR], or another student/staff member, physically retaliating against Mr Landwehr.'

211 I agree that there is no evidence suggesting the potential for another student/staff member to physically retaliate against Mr Landwehr. However, I disagree with the claim that there is no evidence regarding the possibility of Student BR retaliating against Mr Landwehr. Ms Hunt's evidence was that she 'was quite surprised cos I was waiting for the student to actually, ah, retaliate or push or - or whatever but, um, he didn't.'

212 In any event, the full context follows (emphasis added):

It is reasonable to consider that Mr Landwehr's action of physically grabbing and moving [Student BR] (**a Year 11 Student**), **could have** escalated the incident resulting in [Student BR], or another student/staff member, physically retaliating against Mr Landwehr.

213 Given Ms Hunt's evidence of the potential for Student BR, a Year 11 student, to retaliate against Mr Landwehr, I find it reasonable for the Report's analysis to state that Mr Landwehr's actions 'could have' escalated the incident.

Conclusion regarding Allegation 3

214 For the reasons stated, I find that Mr Landwehr's physical contact with Student BR was not authorised by Regulation 38, consistent with the analysis on page 21 of the Report that:

Contrary to Mr Landwehr's and Mr Simion's statement regarding safety concerns, the evidence provided by Mr Simion, Ms Hunt and [Student BR] supports that Mr Landwehr actions towards [Student BR] were not in the context of addressing safety concerns but in angry retaliation to [Student BR] dropping a rock down his pants.

215 Therefore, as outlined in the Allegations Letter, Mr Landwehr's conduct breached:

- (a) Regulation 38; and
- (b) the Code of Conduct.

216 As to a consideration of the mitigating circumstances at *Drake-Brockman* [66], the Proposed Outcome Letter states that the respondent expressly considered Allegation 3 in the context of Mr Landwehr's employment history, and his disciplinary history in relation to similar incidents to Allegation 3. The Proposed Outcome Letter states:

I have considered your 15 years of employment with the Department and your significant experience as a Design and Technology teacher.

I also have considered your discipline history and the fact that you were previously found to have committed a breach of discipline on 10 June 2015, in relation to similar incidents to allegation 3. As a result, you received a fine of one day's pay, a reprimand, and improvement action by way of counselling from your principal regarding the Department's policies on physical contact and completion of the Department's online Accountable and Ethical Decision Making course.

In relation to the reprimand you received, you were informed that the community has an expectation that Departmental employees will behave in a manner that reflects the important role they have in modelling community values and standards. It was deemed that your actions were wholly inconsistent with these values and standards.

It was made clear to you that a repeat of this kind of behaviour may well have more serious repercussions. I consider that your conduct as outlined in the allegations, particularly allegation 1 and 3, are serious matters. I must have confidence that someone in your position will properly perform their duties and act appropriately in the presence of students. I no longer have trust or confidence in you to perform your duties to the required standard.

Of concern, and relevant to my decision, I note the six incidents relating to the allegations occurred within a five month period in 2020, and four of these allegations relate to physical contact with students.

217 The breach of discipline on 10 June 2015 was summarised in *Landwehr No. 2* as follows:

Prior to the incident on 13 August 2015, Mr Landwehr, on 29 October 2014, had physical contact with another student that was not reasonable or necessary in managing the student's behaviour. The circumstances of the first incident were that two students had approached a door through which Mr Landwehr had just gone. The door locked immediately after him. One of the students banged on the door reasonably hard for a short period of time. Mr Landwehr opened the door and told the student that he was being disrespectful. He pushed the student backwards against a wall. An investigation report records that the investigator found that there was no requirement for Mr Landwehr to make physical contact with the student to manage or care for him, to maintain order or to prevent the risk of harm to any person (AB 205). When spoken to about the incident, Mr Landwehr said he had never intended to hurt the student. However, he admitted that he should not have made contact with the student, he was agitated by the student's mocking attitude and his reaction may have caused the student to feel intimidated. Mr Landwehr was disciplined for that incident, by the imposition of a fine and one day's pay, a reprimand and a requirement to undertake improvement action. The improvement action required Mr Landwehr to complete an online course on accountable and ethical decision-making and undertake counselling [5].

218 The Dismissal Letter refers to another incident in 2012:

In 2012, you received improvement action from Mr Neale Armstrong, Principal, Western Australian College of

Agriculture – Harvey, in respect to a complaint that you used unnecessary physical contact, by grabbing a student and swinging him towards a bin, in reaction to him verbally abusing you. It is recorded that Mr Armstrong counselled you about the Department’s policies on physical contact and provided you with the Department’s *Code of Conduct* 2011. In relation to your improvement action Mr Armstrong recorded:

- In an email to you, dated 6 August 2012, “... *the meeting between you and I on July 6th 2012, was an important part of the process to understand how some situations can very quickly become inflamed. Your assurances of choosing a different student management option and personal letter outlining some issues you were dealing with in your private life, together with the view that this was a one off event, leads to the belief that you have learned a great deal from this situation, and acceptance, that should this situation arises in the future, the outcomes are very likely to be different.*”
- “*Mr Landwehr agreed to step back from issues when confronted by students, look at cues when students are baiting staff and take a few breaths before over reacting.*”

219 The Dismissal Letter also refers to the education and training provided to Mr Landwehr in relation to the Department’s expectations regarding physical contact with students, namely, Classroom Management Strategies workshops on 14 August 2019, 12 September 2019 and 24 October 2019, and the Department’s on-line Accountable and Ethical Decision Making course on 30 July 2012 and 26 May 2015.

220 The Dismissal Letter states:

I would have expected that given the previous counselling, education, training and your ongoing assurances, that you would understand the standard of behaviour expected in your role.

Of relevance, the Director General’s letter to you in 2015, regarding your physical contact with a student stated:

- A repeat of this kind of behaviour that resulted in the need for this action may well have more serious repercussions.
- To avoid any further allegations of misconduct, the Director General directed you to avoid the behaviour that resulted in that finding of a breach of discipline.

221 Prior acts of misconduct are relevant as background to the assessment of the cumulative significance of subsequent conduct: *Connor* [50].

222 *Connor* [50] states (footnote omitted) (emphasis added):

The relevant principle was stated by Shepherd J in *John Lysaght (Australia) Ltd v Federated Iron Workers Association; Re York*:

“It is no doubt possible for the company to waive particular acts of misconduct that would otherwise have justified dismissal without notice. These particular acts could not subsequently be used for this purpose once the decision was made not to rely on them. **The act of misconduct, however, does not then disappear and become irrelevant when further misconduct occurs. It remains and makes up the continuing history and record of a man’s service. That record may always be referred to for the purpose for which the company now points to it and the presence of incidents such as I have described will always be a relevant factor to be weighed in the balance by an employer when he comes to consider whether or not a further breach or other act or misconduct should not bring about a dismissal.**”

223 The Union accepts the respondent was entitled to consider Mr Landwehr’s prior physical contact with students and does not challenge the prior contact as irrelevant or as unsubstantiated: cf *Puccio v Catholic Education Office* (1996) 68 IR 407 (*Puccio*) (418).

224 However, the Union argues that Allegation 3 should have been differentiated from the prior incidents because the contact in Allegation 3 was authorised by Regulation 38.

225 For the reasons stated, I do not consider Mr Landwehr’s contact with Student BR was authorised by Regulation 38. Therefore, I find the respondent was entitled to place weight on his disciplinary history for the reasons outlined in *Puccio* (emphasis added):

It cannot be doubted that to dismiss a school teacher with 13 years experience on the ground of serious misconduct is a matter likely to cause considerable hardship to him and indirectly to his family, and to impair, if not destroy, his future prospects for employment as a teacher. Those are matters appropriately to be weighed, and they were, in my view, given serious consideration by the respondents. **On the other hand the care, safety and well-being of students is a matter also entitled to great weight. Where a teacher commits a clear breach of a direction squarely related to safety and welfare issues after due warning, the school, generally speaking, will be left with no option but to terminate the services of the teacher. To allow the teacher to continue would be to allow a foreseeable risk of further transgression by the teacher to occur. The school has a clear duty at law to take steps to guard its students against foreseeable risks adverse to their safety and welfare and will be held liable if it fails to do so and a claim is made against the school.** So important is the duty of care resting on an employer where safety issues are involved, that the employer may have a valid reason relating to an employee’s capacity or conduct within the meaning of s 170DE(1) of the Act to dismiss an employee even where reported misconduct is disputed by the employee: see *Sangwin v Imogen* (unreported, Industrial Relations Court of Australia, von Doussa J, 8 March 1996) (417).

226 The Union contends that dismissal for Allegation 3 is unjustifiable when Mr Landwehr continued to teach at the School for over a year, without further incident.

227 In *Scott*, Ms Scott admitted to tapping a student on the head, although she denied that she used an unreasonable degree of force

[123]. The employer summarised Ms Scott's conduct as 'relatively minor' and therefore subjected the penalty of reprimand, which the Commission characterised as unfortunate [130]. The Commission found Ms Scott's conduct was not covered by Regulation 38. Further, notwithstanding the lengthy time to pursue the disciplinary process (over 16 months), the Commission found the penalty was reasonable and that Ms Scott was afforded natural justice and procedural fairness [125], [133].

228 For the reasons outlined in relation to Allegation 1, given the number and seriousness of the allegations, I do not find a disciplinary period of 7-8 months between the Allegations Letter and the Dismissal Letter to be prejudicial to Mr Landwehr (as submitted by the respondent, the alternative would have been to suspend Mr Landwehr without pay), or to render a justifiable dismissal unjustifiable in the circumstances.

229 For the preceding reasons, I am satisfied the respondent has discharged the onus of establishing that Mr Landwehr was guilty of Allegation 3 and that the misconduct justified dismissal: *Drake-Brockman* [66].

Procedural fairness

Union's contentions

230 The Union raises three grounds of serious denials of procedural fairness in relation to Mr Landwehr's dismissal.

231 Firstly, the Union contends that the disciplinary process was marred by apprehended bias and non-compliance with the Commissioner Instruction and s 22A of the PSM Act, because of Ms Pelham's participation in the compressed air incident investigation.

232 Secondly, the Union maintains that Ms Pelham failed to conduct a thorough investigation conforming to the Discipline Standard and s 21 of the PSM Act.

233 Thirdly, the Union asserts that Mr Landwehr was denied the chance to address the Investigation Outcome Briefing Note (**Briefing Note 1**) and the Disciplinary Outcome Briefing Note (**Briefing Note 2**), which they allege distort the evidence and contain prejudicial statements.

Respondent's contentions

234 The respondent maintains that disciplinary proceedings are summary and administrative, functioning as a means for employers to gather evidence in order to ascertain if a condition of employment has been breached.

235 The respondent argues that a fair-minded lay observer would not conclude bias from Ms Pelham's involvement in the compressed air incident investigation. Rather, a fair-minded lay observer would consider Ms Pelham's employment in SID and her participation in a related investigation involving the same employee and similar circumstances as unremarkable.

236 The respondent argues that the Briefing Notes are internal documents, summarising the evidence and recommending the proposed action, with all pertinent material submitted to the respondent for examination. Moreover, there is no evidence implying the respondent was biased or unable to make, or did not make, the dismissal decision.

Consideration

Bias

237 The Union relies on the cases of *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, *Minister for Immigration and Multicultural Affairs v Legeng* (2001) 205 CLR 507, *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135 (*Isbester*), *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; (2001) 179 ALR 425 (*Ex parte H*), *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209; (2008) 251 ALR 558 (*McGovern*), *Greyhound Racing NSW v Cessnock & District Agricultural Association Inc* [2006] NSWCA 333 and *Webb v The Queen* (1994) 181 CLR 41 as establishing the principles for determining an allegation of apprehended bias.

238 The Union also relies on *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 (*Hot Holdings*) (448-449) [22]-[24] (Gleeson CJ), *Isbester* [60] (Gageler J) and *Minister for Immigration & Multicultural Affairs v SZFDE* [2006] FCAFC 142 [101]-[103] (French J) as authority for the proposition that the respondent can be deprived of the appearance of impartiality if she acted on the recommendation of Ms Pelham and Ms Pelham's involvement and conduct gives rise to an apprehension of bias.

239 The Union submits that the test for perceived bias is the same as the test for apprehended bias: *Quigley (A Practitioner) v The Legal Practitioners Complaints Committee* [2003] WASCA 228 [94], where the Commissioner Instruction, issued pursuant to s 22A of the PSM Act, required the disciplinary process to be fair and free of perceived bias.

240 The Commissioner's Instruction states:

When acting under Part 5 of the PSM Act (Divisions 1 and 3), employing authorities must comply with the PSM Act, the rules of procedural fairness, the Discipline Standard (Public Sector Standards in Human Resource Management) and this instruction.

...

The employing authority is to ensure that he or she, or any delegate or authorised person, acts fairly when dealing with disciplinary matters and that all issues of perceived or actual bias, or conflicts of interest are appropriately recorded and resolved.

241 The statement of agreed facts notes that 'the Union forwarded' the First Response and the Second Response to the respondent. The respondent maintains that Mr Landwehr was represented by the Union (an organisation specialised in providing industrial support and representation) during the disciplinary process, and the bias issue was not raised until these proceedings. Consequently, the respondent remained unaware of the bias allegation and was unable to address it before finalising the decision to dismiss Mr Landwehr. The respondent contends that this should be differentiated from a scenario where

- Mr Landwehr raised the bias allegation with the respondent, and she did not address it.
- 242 Regardless, the respondent maintains there was no bias. Ms Pelham did not investigate Allegation 1 and Allegation 3 single-handedly. The interviews were generally conducted by a pair of SID investigators.
- 243 The general approach to whether there is a reasonable apprehension of bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the exercise of the power: *McGovern* [9], [42], [72], [82]-[83], [113].
- 244 The application of the apprehended bias rule, when considered outside the judicial system, must accommodate the different nature of the body or tribunal whose decision is in question and the different character of its proceedings. Attention must be paid to the relevant statutory provisions, if any, the nature of the inquiries to be conducted, and the specific subject matter associated with the decision under consideration: *Ex parte H* [5].
- 245 In examining allegations of employee misconduct, the respondent contends that the rules concerning apprehended bias do not apply to investigators unless the perceived bias reaches a level that could potentially undermine the impartiality of the ultimate decision-maker in the determination they render.
- 246 The respondent asserts that for any bias attributable to Ms Pelham to be of consequence, it would need to influence the respondent's decision in such a manner that she did not, or could not, apply an independent mind to the decision free of that bias.
- 247 In the case of immigration officers, the obligation to act in a way that does not generate a reasonable apprehension of bias is applicable to all 'officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officers plays an important part in the process, and if a person with such a role does not act impartially, the decision itself cannot be said to have been made in an impartial manner': *McGovern* [181] citing *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 [45].
- 248 In *Hot Holdings* [24], Gleeson CJ explained that a distinction must be drawn between an officer having 'a central role' and one whose involvement was 'peripheral' and whose contribution was not significant: *McGovern* [182].
- 249 Ms Pelham conducted 11 interviews, eight of which were conducted together with another SID investigator. The Report includes spaces for the typed name, position and signature for three members of SID – Ms Pelham, Mr Milward and Mr Wells. The Report was signed by Ms Pelham and Mr Wells on 30 July 2021.
- 250 The respondent submits that the escalation process for the Report was for it to be escalated to Craig Ward (A/Executive Director, Professional Standards and Conduct) (**Mr Ward**) for review, before being escalated to the respondent to make a decision regarding the Proposed Outcome Letter.
- 251 The respondent submits that the escalation process for Briefing Note 1 is similarly escalated to Mr Ward for endorsement, before being escalated to the respondent to make a decision. Briefing Note 2 is escalated to Darren Wallis (A/Director, SID) for endorsement, before being escalated to Mr Ward for endorsement, before being escalated to the respondent to make a decision.
- 252 The respondent maintains that she is the exclusive decision-maker. She argues that although Ms Pelham contributed to the preparation of the Report and the recommendations for the drafts of the Proposed Outcome Letter and Dismissal Letter, Ms Pelham did not possess decision-making authority.
- 253 The respondent contends that the Union has not furnished any evidence suggesting she was incapable of making, or did not make, the decisions concerning Mr Landwehr's employment. She submits that, in the absence of any contrary evidence, the presumption to be made is that she was capable of, and did in fact, make the decisions regarding Mr Landwehr's employment.
- 254 In my assessment, the evidence substantiates that Ms Pelham did not function as a decision-maker concerning Mr Landwehr's employment. The evidence corroborates that she did not occupy 'a central role' but rather served in a 'peripheral' capacity in regard to the decision-making process for Mr Landwehr's employment: *McGovern* [182].
- 255 I find no grounds to suggest that the respondent did not solely make the decisions concerning Mr Landwehr's employment. Furthermore, I see no basis to determine that the respondent was or might have been influenced by bias due to Ms Pelham's involvement in the compressed air hose incident investigation.
- 256 Having found the Report offers a largely accurate summary of the witness evidence, and the analysis and conclusions can reasonably be drawn from the entirety of the evidence, I also find no grounds to suggest that a fair-minded lay observer might reasonably apprehend that Ms Pelham might not approach the investigation of Allegation 1 and Allegation 3 with an impartial mind because of her previous involvement in the compressed air hose incident investigation.
- 257 In this respect, I agree with the respondent's arguments and do not believe that a fair-minded lay observer might reasonably apprehend that Ms Pelham, an investigator with SID tasked with examining the misconduct of the respondent's employees, might not approach the investigation of Allegation 1 and Allegation 3 with an impartial mind due to her previous involvement in the compressed air hose incident investigation.

Discipline Standard

- 258 Under s 21 of the PSM Act, the Public Sector Commissioner establishes minimum standards of merit, equity and probity to be complied with in the public sector in the recruitment, selection, appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment of employees (**Standards**).
- 259 The Standards are principles-based rather than comprising rules (<https://www.wa.gov.au/organisation/public-sector-commission/public-sector-standards-human-resource-management>), and are established with regard to the principles set out in s 7, s 8 and s 9 of the PSM Act, the context and language of which are in the nature of guidelines and are not mandatory in nature: *Director General, Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244

[145] (Hasluck J).

260 The Discipline Standard states:

The minimum Standard of merit, equity and probity is met for discipline if:

- decisions are based on a proper assessment of the facts and circumstances prevailing at the time of the suspected breach of discipline.
- the employing authority ensures procedural fairness is applied to all parties.
- decisions are impartial, transparent and capable of review.

261 The terms 'reviewable decision', 'registered employee', 'job' and 'proper assessment' in the Standards are defined. The term 'proper assessment' is defined as 'A genuine and thorough examination that takes into account all relevant facts and circumstances that are reasonably available and known at the time of the decision.'

262 The Union submits that the Discipline Standard was breached in two ways.

263 Firstly, there was not a proper assessment of the facts. The Union argues that in relation to Allegation 1, Ms Pelham conducted the investigation under the assumption that the 2019 Machine Usage Chart applied, even though the compound mitre saw was not covered by that document. Moreover, she failed to acknowledge that the prevailing standards for a compound mitre saw used by Year 10 students did not necessitate direct supervision. Furthermore, instead of conducting a comprehensive inquiry to address conflicts in evidence regarding whether Mr Landwehr instructed Student SS to use a metal ruler at the saw and whether he granted permission to Student SS to continue cutting, Ms Pelham simply resolved those conflicts against Mr Landwehr without further inquiry.

264 Regarding Allegation 3, the Union contends that instead of conducting a comprehensive inquiry to address the conflict about whether Student BR was walking away or running around dangerously, Ms Pelham dealt with the discrepancy by omitting any reference in her analysis to Student BR running around the tools and materials. This omission was significant because a conclusion that Student BR was running around would have supported a finding that Regulation 38 was engaged. Additionally, in her analysis, Ms Pelham did not engage in any, or any proper, evaluation of Regulation 38, despite the allegation stating that there was non-compliance with Regulation 38.

265 Secondly, there was an absence of procedural fairness. The Union asserts that Briefing Note 1, which was produced simultaneously with the Report, was notably prejudicial to Mr Landwehr. Additionally, it was sent to the respondent but not provided to Mr Landwehr.

266 Regarding the Union's contention about a proper assessment of Allegation 1 and Allegation 3, I have determined that the conclusions reached in the Report were reasonably available based on all the evidence, and that the respondent satisfied the evidential onus as outlined in *Drake-Brockman* [66].

267 Implicit in this finding, is that the respondent 'conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal': *Drake-Brockman* [49] citing *Bi-Lo* (229-230).

268 As such, I do not consider the Union's contention that the respondent breached the Discipline Standard by failing to properly assess the facts to be sustainable.

Briefing notes

269 The Union contends that in relation to Allegation 1, Briefing Note 1 refers to a generic saw and makes no reference to the compound mitre saw in circumstances where the 2019 Machine Usage Chart had been updated to refer to the compound mitre saw. Further, Briefing Note 1 refers to Mr Landwehr having been 'given' the 2019 Machine Usage Chart when there was no evidence of this.

270 For reasons already stated, I have found, based on the evidence, that it was reasonable for the Report to use the term 'saw' as referring to the saw that was used by Student SS on the day. I make the same finding in relation to Briefing Note 1.

271 For reasons already stated, I disagree with the argument that it was essential for the Report to acknowledge the update to the 2019 Machine Usage Chart. As mentioned, I do not believe that modifying the 2019 Machine Usage Chart to include a compound mitre saw undermines a finding related to Mr Landwehr's negligence or carelessness. I make the same finding in relation to Briefing Note 1.

272 I agree that there is no evidence supporting the statement that Mr Landwehr was 'given' a copy of the 2019 Machine Usage Chart. Instead, the evidence provided by Ms Naik and Mr Nielsen was that Mr Landwehr would have been aware of the 2019 Machine Usage Chart as it was located in the classrooms and machine workshop area, and was discussed in Learning Area and OSH Training meetings in Term 1 week 2 of 2020.

273 However, I do not consider the statement that Mr Landwehr being 'given' a copy of the 2019 Machine Usage Chart to discredit the disciplinary process when the evidence supported a finding that Mr Landwehr would have been expected to be cognisant of the 2019 Machine Usage Chart as part of his responsibilities. Consequently, irrespective of whether Mr Landwehr was formally provided with a copy of the 2019 Machine Usage Chart or not, it was reasonable for Briefing Note 1 to state that, 'he was responsible for understanding the student supervision requirements when using machinery'.

274 Concerning Allegation 3, the Union asserts that Briefing Note 1, prepared concurrently with the finalisation of the Report,

- compares incidents involving physical contact in 2012, 2014 and 2015 as concluding that Mr Landwehr resorts to physical contact when provoked (when on this occasion, there was a safety risk to Student BR), which might lead a reasonable lay observer to be concerned that Ms Pelham prejudged the outcome of Allegation 3.
- 275 For reasons previously mentioned, I have found, based on the evidence, that Mr Landwehr's physical contact with Student BR was not authorised by Regulation 38. This finding aligns with the analysis on page 21 of the Report, from which it is reasonable to infer that Mr Landwehr's conduct was evaluated in the context of Regulation 38 but ultimately dismissed.
- 276 Based on the reasons provided, I have found that Mr Landwehr's previous physical contact with students is a relevant consideration (as was acknowledged by the Union), on which the respondent was justified in attributing weight.
- 277 Further, there is no evidence that Briefing Note 1 was not prepared after the Report was finalised. Whilst the date under Ms Pelham's signature on Briefing Note 1 is stated as 30 June 2021, I agree with the respondent's submission that it is reasonable to assume that this is a typographical error and should be read as 30 July 2021.
- 278 Moreover, the purpose of Briefing Note 1 appears to be to provide the respondent with a summary of the disciplinary outcomes that are available to the respondent, ranging from a reprimand, or a fine not exceeding five days' pay, to a reduction of classification level, and/or dismissal from employment; and to make a recommendation on the proposed disciplinary outcome for the respondent's consideration and action. In this context, I do not believe that a fair-minded lay observer would consider the inclusion of Mr Landwehr's prior disciplinary history in Briefing Note 1 would indicate pre-judgment.
- 279 Particularly where, Briefing Note 1 specifically refers to and attaches advice from the State Solicitor's Office and advice from the Department's Legal Services, that it is open to the respondent to impose the following outcomes in respect of the six allegations:
- Allegation 1 – dismissal from employment.
 - Allegation 2 – a reprimand and improvement action by way of completing the Department's online AEDM course.
 - Allegation 3 – dismissal from employment.
 - Allegation 4 – a reprimand and improvement action by way of completing the Department's online AEDM course.
 - Allegation 5 – a reprimand and improvement action by way of completing the Department's online AEDM course.
 - Allegation 6 – a reprimand and improvement action by way of completing the Department's online AEDM course.
- 280 The Report and Briefing Note 1 state that all six allegations were substantiated. Whilst allegations 2, 3 and 5-6 relate to physical contact with a student, of these, only Allegation 3 has resulted in a proposed outcome of dismissal from employment.
- 281 It is reasonable to infer from this, that there was a consideration of the nature and context of the physical contact in relation to each allegation in determining the proposed outcome, which speaks against the assertion of pre-judgement.
- 282 Further, it is also reasonable to infer that the proposed outcome did not arise from the pre-judgment of Ms Pelham, but instead was proposed after having obtained legal advice from both the State Solicitor's Office and the Department's Legal Services.
- 283 In the circumstances, I do not believe that a fair-minded lay observer might reasonably apprehend that Ms Pelham had prejudged the outcome of Allegation 3.
- 284 The Union contends that it was procedurally unfair for Briefing Note 1 to be produced concurrently with the Report, and for Mr Landwehr to be denied an opportunity to see and respond to Briefing Note 1 and Briefing Note 2.
- 285 Having reviewed Briefing Note 1 and Briefing Note 2, I find that they are (with the exception of the statement that Mr Landwehr was 'given' a copy of the 2019 Machine Usage Chart in Briefing Note 1), an accurate summary of the relevant sections of the Report (in the case of Briefing Note 1) and of the Second Response (in the case of Briefing Note 2).
- 286 In addition to summarising the Report, Briefing Note 1 offers a synopsis of Mr Landwehr's past disciplinary matters, an outline of the disciplinary options available to the respondent in the given circumstances, an analysis of the First Response, an observation that Mr Landwehr 'does not comprehend how his actions are inappropriate' which presents an ongoing risk, and a recommendation stating, 'Should you agree with the findings and the proposed actions, a draft letter for Mr Landwehr is attached for your consideration.' Briefing Note 1 includes designated spaces for the typed name, position, and signature of three SID members – Ms Pelham, Mr Milward, and Mr Wells. Briefing Note 1 is signed by Ms Pelham and the date under her signature is typed as 30 June 2021 but for reasons stated this is likely a typographical error, and it is more likely she signed Briefing Note 1 on the same day that Mr Wells signed it, namely on 30 July 2021.
- 287 In addition to a summary of the Second Response, Briefing Note 2 provides an analysis of the responses in the Second Response and a consideration of mitigating circumstances, a summary of a recent matter brought to SID's attention through a complaint from the School Principal, and a recommendation that 'Based on all the information, it is open to the Director General to maintain the findings and impose the action as proposed. A final outcome letter is attached for consideration by the Director General.' Briefing Note 2 includes designated spaces for the typed name, position and signature for three SID members, and was signed by Ms Pelham (undated), and by Mr Staples and Susie Baker (Manager Investigations) on 30 September 2021.
- 288 The respondent asserts that the Briefing Notes are internal documents, and as a result, Mr Landwehr does not possess the right to respond to them.
- 289 I do not consider that the existence of internal documents, specifically Briefing Note 1 and Briefing Note 2, should be construed as an infringement on procedural fairness. These internal documents serve as summaries and assessments for the respondent's consideration. They appear designed to facilitate internal discussions, analysis, and decision-making. Consequently, I do not consider the procedural fairness afforded to Mr Landwehr to be affected by the presence and content of these internal documents.

Conclusion regarding procedural fairness

- 290 The failure of an employer to adopt a fair procedure can render the dismissal unfair: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 (*Bogunovich*) (3645).
- 291 If procedural fairness was not afforded and the outcome would have been altered had it been afforded, this alone can render a dismissal unfair: *West Australian Branch, Australasian Meat Industry Employees' Union v Geraldton Meat Exports Pty Ltd* [2001] WAIRC 03573; (2001) 81 WAIG 2523 (*Australasian Meat Industry*) [101].
- 292 The evidence in this matter is that:
- (a) the Allegations Letter dated 22 February 2021, expressly invited Mr Landwehr to respond in writing, or to contact Ms Pelham to respond in person;
 - (b) three weeks later, on 15 March 2021, Mr Landwehr responded to the Allegations Letter by the First Response, which was forwarded to the respondent on Mr Landwehr's behalf by the Union;
 - (c) the Proposed Outcome Letter dated 6 August 2021, expressly invited Mr Landwehr to respond in writing, or to contact Ms Pelham to respond in person;
 - (d) the Proposed Outcome Letter attached the Report in its entirety;
 - (e) two weeks later, on 20 August 2021, Mr Landwehr responded to the Proposed Outcome Letter by the Second Response, which was forwarded to the respondent on Mr Landwehr's behalf by the Union; and
 - (f) within seven weeks, the Dismissal Letter dated 7 October 2021, notified Mr Landwehr of the respondent's decision to terminate his employment.
- 293 I agree with the respondent's argument that there can be no justifiable criticism that Mr Landwehr was not interviewed by Ms Pelham when the Allegations Letter and the Proposed Outcome Letter explicitly invited him to contact Ms Pelham to respond in person.
- 294 The respondent submits that Mr Landwehr, and his representatives who forwarded the First Response and the Second Response on his behalf, were furnished with the Report and invited to present any relevant information to the respondent, but did not raise any procedural irregularities regarding the disciplinary process until these proceedings.
- 295 I agree with the respondent's submission that in the circumstances, Mr Landwehr was provided with a fair opportunity to respond to the allegations made against him.
- 296 The central task for the investigator was to obtain credible relevant and significant evidence that addressed whether Mr Landwehr had committed the acts of misconduct. I find the respondent's representatives carried out that task, and Mr Landwehr was given an adequate opportunity to answer all adverse information that was relevant to the allegations of misconduct: *Drake-Brockman* [115].
- 297 Mr Landwehr was provided with detailed particulars of Allegation 1 and Allegation 3, an opportunity to be heard in relation to the allegations, and the chance to bring forward any witnesses or other evidence, and to raise any concerns about the investigative process, in answer to the allegations: *Bi-Lo* (230).
- 298 The parties agree that the Union forwarded the First Response and the Second Response to the respondent on Mr Landwehr's behalf. In the circumstances, it cannot be said that Mr Landwehr was denied the time to reflect on the allegations and to seek advice before answering the allegations: cf *Sangwin v Imogen Pty Ltd* [1996] IRCA 100 (*Sangwin*) (30).
- 299 For the preceding reasons, I find Mr Landwehr was given fair and specific warning that he was in jeopardy of dismissal and was given an opportunity to respond: *Bogunovich* (3645).
- 300 I find no basis for a conclusion that the respondent prejudged the issue and failed to conduct a proper investigation: cf *Sangwin* (30).
- 301 On the contrary, I find that Mr Landwehr was given an adequate opportunity to answer adverse information that was credible, relevant, and significant to the issues of whether he committed misconduct and whether he should be dismissed, and was provided with an opportunity to make representations and to provide material to the respondent that was centrally relevant to these issues: *Drake-Brockman* [113].
- 302 As such, I find that Mr Landwehr was provided with procedural fairness, as part of the obligation on the respondent on instituting disciplinary action, to ensure he received a fair go: *Drake-Brockman* [113].
- 303 As noted, there were various statements in the Report (and Briefing Note 1) that did not completely or accurately summarise a witnesses' evidence. As stated, I do not consider the analysis or conclusion in the Report (or Briefing Note 1) to be undermined by these incomplete or inaccurate statements. I consider any procedural irregularity to arise from these statements to be of a minor nature and would not have altered the outcome such as to render the dismissal unfair: *Australasian Meat Industry* [101].
- 304 I find Mr Landwehr was afforded both substantive and procedural fairness in relation to the dismissal: *Bi-Lo* (229).
- 305 I am satisfied that the respondent did not exercise her legal right to dismiss in a manner so harshly or oppressively as to amount to an abuse of that right: *Undercliffe*.

Conclusion

- 306 For the preceding reasons, I am satisfied that the Union has not discharged the onus to establish that Mr Landwehr's dismissal was harsh, oppressive or unfair.
- 307 As a result, it is unnecessary to consider the orders the parties ask the Commission to consider on a finding of unfair dismissal.
- 308 Accordingly, application CR 33 of 2021 will be dismissed.

2023 WAIRC 00288

DISPUTE RE TERMINATION OF EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INC.)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** COMMISSIONER C TSANG**DATE** TUESDAY, 23 MAY 2023**FILE NO/S** CR 33 OF 2021**CITATION NO.** 2023 WAIRC 00288**Result** Application dismissed**Representation****Applicant** Mr D Rafferty (of counsel)**Respondent** Mr R Andretich (of counsel)*Order*

HAVING heard from Mr D Rafferty (of counsel) on behalf of the applicant, and Mr R Andretich (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 CR 33 of 2021 is dismissed.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2023 WAIRC 00326

CITY OF COCKBURN ENTERPRISE AGREEMENT 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CITY OF COCKBURN

APPLICANT

-v-

WESTERN AUSTRALIA MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES
UNION OF EMPLOYEES (WASU), LOCAL GOVERNMENT, RACING AND CEMETERIES
EMPLOYEES UNION (LGRCEU)

RESPONDENTS**CORAM** COMMISSIONER T B WALKINGTON**DATE** WEDNESDAY, 14 JUNE 2023**FILE NO.** AG 7 OF 2023**CITATION NO.** 2023 WAIRC 00326**Result** Direction issued**Representation****Applicant** Ms K Groves (of counsel)**Respondents** Mr C Fogliani (of counsel) for the WASU

Mr A Johnson for the LGRCEU

Direction

HAVING heard from Ms Groves on behalf of the applicant, Mr Fogliani on behalf of the first respondent and Mr Johnson on behalf of the second respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the parties file written submissions addressing the issue of whether the proposed agreement, the 'City of Cockburn Enterprise Agreement 2022', ought to be registered with the inclusion of award offset provisions and individual flexibility arrangements;
2. THAT the parties file and serve these written submissions, by no later than 21 June 2023;
3. THAT the parties file and serve any written submissions in reply, by no later than 28 June 2023;
4. THAT the parties confirm, by way of email to my Chambers, whether they seek for these issues to be determined on the papers or at an oral hearing, by no later than 30 June 2023; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2023 WAIRC 00317

INTERPRETATION OF THE 'WA HEALTH SYSTEM - UNITED WORKERS UNION (WA) - ENROLLED NURSES, ASSISTANTS IN NURSING, ABORIGINAL HEALTH WORKERS, ETHNIC HEALTH WORKERS AND ABORIGINAL HEALTH PRACTITIONERS INDUSTRIAL AGREEMENT 2022' AND 'WA HEALTH SYSTEM - UNITED WORKERS UNION (WA) - HOSPITAL SUPPORT WORKERS INDUSTRIAL AGREEMENT 2022'

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED WORKERS UNION

APPLICANT

-v-

CHILD AND ADOLESCENT HEALTH SERVICE AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO
DATE WEDNESDAY, 7 JUNE 2023
FILE NO/S APPL 5 OF 2023
CITATION NO. 2023 WAIRC 00317

Result Order issued
Representation (on the papers)
Applicant United Workers Union
Respondents State Solicitor's Office

Order

WHEREAS on 16 March 2023, an order issued in respect of programming and listing this matter for hearing;

AND WHEREAS this matter is currently listed for hearing on Wednesday, 21 June 2023;

AND WHEREAS neither party intends to lead any evidence in this matter, and therefore are agreeable to the matter being determined on the papers, and the hearing being vacated;

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

1. THAT the respondent file any further written submissions by no later than 12 June 2023.
2. THAT the applicant file any written submissions in response to those filed by the respondent under order 3 by no later than 14 June 2023.
3. THAT the hearing listed for Wednesday, 21 June 2023 be vacated.
4. THAT the matter be determined on the papers.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2023 WAIRC 00318

**INTERPRETATION OF THE 'EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2023' AND
'GOVERNMENT SERVICE (MISCELLANEOUS) GENERAL AGREEMENT 2023'**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED WORKERS UNION

APPLICANT

-v-

DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 7 JUNE 2023

FILE NO/S

APPL 6 OF 2023

CITATION NO.

2023 WAIRC 00318

Result

Order issued

Representation

(on the papers)

Applicant

United Workers Union

Respondent

State Solicitor's Office

Order

WHEREAS on 16 March 2023, an order issued in respect of programming and listing this matter for hearing;

AND WHEREAS this matter is currently listed for hearing on Wednesday, 21 June 2023;

AND WHEREAS neither party intends to lead any evidence in this matter, and therefore are agreeable to the matter being determined on the papers, and the hearing being vacated;

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

1. THAT the respondent file any further written submissions by no later than 12 June 2023.
2. THAT the applicant file any written submissions in response to those filed by the respondent under order 3 by no later than 14 June 2023.
3. THAT the hearing listed for Wednesday, 21 June 2023 be vacated.
4. THAT the matter be determined on the papers.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2023 WAIRC 00314

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 170/2021 GIVEN
ON 22 MARCH 2023**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPELLANT

-v-

DIRECTOR GENERAL AS THE EMPLOYING AUTHORITY, DEPARTMENT OF JUSTICE

RESPONDENT**CORAM**

FULL BENCH

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER C TSANG

DATE

FRIDAY, 2 JUNE 2023

FILE NO/S

FBA 1 OF 2023

CITATION NO.

2023 WAIRC 00314

Result	Order issued
Appearances	
Appellant	Ms D Larson of counsel and Mr R Sumner
Respondent	Mr J Carroll of counsel

Order

HAVING heard Ms D Larson of counsel and Mr R Sumner on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the Appeal Book be amended by the addition of the *Form 20 – Orders* of the Industrial Magistrate dated 22 March 2023.
2. THAT the appellant file an Appeal Book index by no later than 9 June 2023.
3. THAT any application to amend the Grounds of Appeal be filed no later than 16 June 2023.
4. THAT the respondent file a response to any application filed pursuant to order 3 by no later than 30 June 2023.
5. THAT the parties each file a schedule setting out the pages of the Appeal Book on which the party intends to rely in the appeal and indicating the ground of appeal or ground of contention to which that page relates concurrently with the filing of that parties' submissions and list of authorities filed in accordance with Practice Note 12 of 2021.
6. THAT there be liberty to apply.

By the Full Bench
(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2023 WAIRC 00292

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 13 MARCH 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CLIVE PETER JENKINS

APPELLANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
MR G LEE - BOARD MEMBER
MS B SKALKO - BOARD MEMBER

DATE

THURSDAY, 25 MAY 2023

FILE NO

PSAB 7 OF 2023

CITATION NO.

2023 WAIRC 00292

Result	Order issued
Representation	(on the papers)
Appellant	Lawfield Legal Practice
Respondent	State Solicitor's Office

Order

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 14 June 2023.
2. THAT the appellant file outlines of evidence complying with Practice Note 9 of 2021 and documents (other than the agreed documents) on which he intends to rely by 28 June 2023.
3. THAT the respondent file outlines of evidence complying with Practice Note 9 of 2021 and documents (other than the agreed documents) on which they intend to rely by 12 July 2023.
4. THAT the appellant file written submissions by 26 July 2023.

5. THAT the respondent file written submissions by 9 August 2023.
6. THAT discovery be informal.
7. THAT the matter be listed for a one-day hearing on a date to be fixed.
8. THAT the parties have liberty to apply.

[L.S.]

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

2023 WAIRC 00290

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 15 MARCH 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MICHAEL GREGORY JOHN COWLEY

APPELLANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MR M ABRAHAMSON - BOARD MEMBER
MS N PYNE - BOARD MEMBER

DATE

TUESDAY, 23 MAY 2023

FILE NO

PSAB 9 OF 2023

CITATION NO.

2023 WAIRC 00290

Result	Directions issued
Representation	
Appellant	Mr S Hicks (of counsel)
Respondent	Mr N John (of counsel)

Direction

HAVING heard from Mr S Hicks (of counsel) on behalf of the appellant and Mr N John (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 14 June 2023;
2. THAT the appellant file outlines of evidence and documents (other than the agreed documents) on which he intends to rely by 28 June 2023;
3. THAT the respondent file outlines of evidence and documents (other than the agreed documents) on which he intends to rely by 12 July 2023;
4. THAT the appellant file written submissions by 26 July 2023;
5. THAT the respondent file written submissions by 9 August 2023;
6. THAT discovery be informal;
7. THAT the matter be listed for a one-day hearing on a date to be fixed; and
8. THAT the parties have liberty to apply.

[L.S.]

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

2023 WAIRC 00322

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 26 MAY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BROCK ELLIOTT BURSTON

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G LEE – BOARD MEMBER
MS T BORWICK – BOARD MEMBER

DATE

TUESDAY, 13 JUNE 2023

FILE NO

PSAB 46 OF 2022

CITATION NO.

2023 WAIRC 00322

Result Order issued**Representation****Appellant** Ms Z Gilders (of counsel)**Respondent** Mr J Carroll (of counsel)

*Order*HAVING heard from Ms Gilders (of counsel) on behalf of the appellant 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 respondent is granted leave to file and rely upon the supplementary witness outline of Mr P Bridge and the supplementary documents attached to the respondent's application filed on 30 May 2023.
2. THAT the respondent is granted leave for Mr P Bridge and Mr L Crawley to give evidence by video link at the hearing in this matter.

(Sgd.) C TSANG,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2023 WAIRC 00311

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 26 MAY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BROCK ELLIOTT BURSTON

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G LEE – BOARD MEMBER
MR M TAYLOR – BOARD MEMBER

DATE

FRIDAY, 2 JUNE 2023

FILE NO.

PSAB 46 OF 2022

CITATION NO.

2023 WAIRC 00311

Result Direction issued**Representation****Applicant** Ms Z Gilders (of counsel)**Respondent** Mr J Carroll (of counsel)

Direction

HAVING heard from Ms Gilders (of counsel) on behalf of the appellant 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 directs –

1. THAT the respondent's application filed on 30 May 2023 (**Application**) be determined on the papers.
2. THAT the appellant file any witness statements (attaching any documents referred to in the statement) in accordance with Practice Note 9 of 2021 and any written submissions opposing the Application by Friday, 9 June 2023.
3. THAT the time within which the appellant is required to file an outline of legal submissions be extended to Tuesday, 6 June 2023.
4. THAT the time within which the respondent is required to file an outline of legal submissions be extended to Tuesday, 13 June 2023.

[L.S.]

(Sgd.) C TSANG,
Commissioner,
On behalf of the Public Service Appeal Board.

2023 WAIRC 00310**APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 18 JULY 2022**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LOANNE CARTER

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

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

DATE

THURSDAY, 1 JUNE 2023

FILE NO.

PSAB 66 OF 2022

CITATION NO.

2023 WAIRC 00310

Result Direction issued

Representation

Appellant Ms L Carter (on her own behalf)

Respondent Ms N Negus (of counsel)

Direction

WHEREAS on 1 June 2023 the respondent requested an extension to comply with Direction 6 of the Directions issued on 13 April 2023 ([2023] WAIRC 00199);

NOW THEREFORE the Public Service Appeal Board pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the date by which the respondent is required to file outlines of evidence and the documents the respondent intends to rely upon at the hearing of the Application, stated in Direction 6 of the Directions issued 13 April 2023 ([2023] WAIRC 00199), be extended to Tuesday, 6 June 2023.
2. THAT the date by which the appellant is required to file outlines of evidence and the documents the appellant intends to rely upon at the hearing of the Application, stated in Direction 7 of the Directions issued 13 April 2023 ([2023] WAIRC 00199), be extended to Tuesday, 18 July 2023.

[L.S.]

(Sgd.) C TSANG,
Commissioner,
On behalf of the Public Service Appeal Board.

2023 WAIRC 00328

**DISPUTE RE WORKING FROM HOME REQUESTS MADE UNDER CL 51 OF THE PUBLIC SECTOR CSA
AGREEMENT 2022**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WA (INC.)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

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

WEDNESDAY, 14 JUNE 2023

FILE NO

PSAC 12 OF 2023

CITATION NO.

2023 WAIRC 00328

Result	Order issued
Representation	
Applicant	Mr J Tebbutt
Respondent	Mr R Andretich of counsel

Order

Having heard from Mr J Tebbutt on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the parties confer in relation to the draft Memorandum of Matters Referred and advise the Commission by 22 June 2023 of any amendments that are required.
2. THAT the directions hearing be adjourned and re-listed for Tuesday, 27 June 2023 at 9.30 am.
3. THAT there be liberty to apply.

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

[L.S.]

2023 WAIRC 00329

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WARREN ROBERT JOHNSTON

APPLICANT

-v-

LOOMA COMMUNITY INC

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 14 JUNE 2023

FILE NO.

U 16 OF 2023

CITATION NO.

2023 WAIRC 00329

Result	Direction issued
Representation	
Applicant	Mr S Kemp (of counsel)
Respondent	Ms V Stamper (of counsel)

Direction

HAVING heard from Mr Kemp on behalf of the applicant and Ms Stamper on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the jurisdictional issue of whether the respondent is a national system employer be determined as a preliminary matter;
2. THAT the respondent file and serve upon the applicant any affidavits or statutory declarations addressing the jurisdictional issue, by no later than 7 July 2023;
3. THAT the applicant may file and serve upon the respondent any affidavits or statutory declarations addressing the jurisdictional issue, by no later than 28 July 2023;
4. THAT the parties file and serve any written submissions addressing the jurisdictional issue, by no later than 4 August 2023;
5. THAT the parties confirm, by way of email to my Chambers, whether they seek for the jurisdictional issue to be determined on the papers or at an oral hearing, by no later than 11 August 2023; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Insurance Commission of Western Australia (Government Officers) CSA Agreement 2022 PSAAG 3/2023	25/05/2023	Insurance Commission of Western Australia	Civil Service Association of Western Australia Incorporated	Senior Commissioner R Cosentino	Agreement registered
Quintilian School Enterprise Bargaining Agreement 2023 AG 6/2023	02/06/2023	The Independent Education Union of Western Australia, Union of Employees	The Quintilian School (Inc)	Commissioner C Tsang	Agreement registered
WA Health System Engineering and Building Services Industrial Agreement 2023 AG 10/2023	01/06/2023	North Metropolitan Health Service and Others	Electrical Trades Union WA and Others	Senior Commissioner R Cosentino	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2023 WAIRC 00321

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 26 MAY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CHERYL KUIPERS

APPELLANT

-v-

DEPARTMENT OF COMMUNITIES, CHILD PROTECTION & FAMILY SUPPORT

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T B WALKINGTON - CHAIR
MR G RICHARDS - BOARD MEMBER
MS J VAN DEN HERIK - BOARD MEMBER

DATE

TUESDAY, 13 JUNE 2023

FILE NO

PSAB 47 OF 2022

CITATION NO.

2023 WAIRC 00321

Result Appeal discontinued by leave
Representation
Appellant Ms Kuipers (in person)
Respondent Mr Carroll (of counsel)

Order

WHEREAS on 30 May 2023, the appellant sought leave to discontinue this appeal;
 AND WHEREAS on 7 June 2023, the respondent advised it has no objection to the appellant discontinuing this appeal;
 NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the appeal be, and by this order is, discontinued by leave.

(Sgd.) T B WALKINGTON,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2023 WAIRC 00298

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2023 WAIRC 00298
CORAM : PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T KUCERA - CHAIRPERSON
 MR B HAWKINS - BOARD MEMBER
 MS B BOGDAN - BOARD MEMBER
HEARD : MONDAY, 17 APRIL 2023
DELIVERED : THURSDAY, 18 MAY 2023
FILE NO. : PSAB 64 OF 2022
BETWEEN : SAFETA KOS
 Appellant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT
 Respondent

CatchWords : Public Service Appeal Board – Dismissal – Mandatory requirement to wear a face covering or mask and declare vaccination status – Lawful direction to return to work wearing a mask and to declare vaccination status – Employee absent from work without authorisation – Procedural fairness – Dismissal proportionate response to conduct – Decision to dismiss upheld
Legislation : *Public Sector Management Act 1994* s 78, s 80(c), s 80A, s 82A
Industrial Relations Act 1979 s 80I(1)(b)
Result : Application dismissed
Representation:
Appellant : Ms S Kos on her own behalf
Respondent : Mr M McIlwaine of counsel

Case(s) referred to in reasons:

Csomore v Public Service Board of New South Wales (1987) 10 NSWLR 587

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

Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police) [2022] WASC 272

Jessica Heller-Bhatt v Director General, Department of Communities [2022] WAIRC 00719

T. Mollinger v National Jet Systems Pty Ltd Print R3130 (AIRC FB, Giudice J, Polites SDP, Gregor C, 18 March 1999); [1999] AIRC 285

Sanja Spasojevic v Speaker of the Legislative Assembly [2021] WAIRC 00641 (Spasojevic No 1)

Sanja Spasojevic v Speaker of the Legislative Assembly [2023] WAIRC 00001 (Spasojevic No 2)

Selvahandran v Peteron Plastics Pty Ltd (1995) 62 IR 371

Case(s) also cited:

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

Krishna Thavarasan v The Water Corporation [2006] WAIRC 04089; (2006) 86 WAIG 1434

Michael John Millward v Chief Executive, North Metropolitan Health Service [2021] WAIRC 00152

Reasons for Decision

- 1 This is the unanimous decision of the Public Service Appeal Board (**Board**).
- 2 In this appeal, Safeta Kos (**appellant**) has applied to the Public Service Appeal Board (**Board**) to adjust the decision the Director General, Department of Transport (**Department**), made to terminate her employment.
- 3 The appellant who was prior to her dismissal, employed by the Department as a “Group 3 Governance Assurance Officer” had not attended work since 22 February 2022. Her absence was initially because the appellant was not prepared to wear a face mask at work, which was a requirement of a Public Health Order (**PHO**) that applied to her workplace.
- 4 A number of PHOs were made in preparation for the opening of Western Australia’s borders after they were closed in response to the COVID 19 Pandemic. Although it appears the appellant also had some difficulty with the requirement to provide evidence of her vaccination status, the direction the appellant took particular exception to was the requirement to wear a face mask.
- 5 Whilst the appellant continued to be absent from work, the PHO which imposed the requirement to wear a face mask at work was lifted. Despite this change, the appellant did not return to work, make an application for annual leave, or provide a medical certificate or other evidence to justify her absence.
- 6 On 3 August 2022 the Department dismissed the appellant for being absent from work without authorisation (**dismissal decision**).
- 7 On 24 August 2022 the appellant filed an appeal against the dismissal decision (**appeal**). By way of relief, the appellant sought an order that would see her reinstated to her former position.
- 8 In the paragraphs that follow, the Board provides its reasons as to why we have dismissed the appeal.

Principles to be applied in the appeal

- 9 The appeal is brought under s 78 of the *Public Sector Management Act 1994* (WA) (**PSM Act**) and s 80I(1)(b) of the *Industrial Relations Act 1979* (**IR Act**).
- 10 Part 5 of the PSM Act applies to public service officers and other prescribed employees (**public sector employees**) in relation to any suspected breaches of discipline, including acts of misconduct.
- 11 Under s 78 of the PSM Act, a public sector employee may appeal a decision to take disciplinary action to a Public Service Appeal Board. The Board is a constituent authority of the Commission and exercises jurisdiction under the IR Act when hearing and determining such appeals. Under s 80I of the IR Act, the Board may “adjust” the matters referred to in s 80I(1).
- 12 Under s 80 of the PSM Act, a public sector employee who commits an act of misconduct commits a breach of “discipline” and is liable to face disciplinary action. Section 80A provides that ‘disciplinary action’ includes a reprimand, fine, transfer, reduction in remuneration or classification and dismissal. Section 82A sets out how an employing authority deals with a disciplinary matter.
- 13 Section 26(1)(a) of the IR Act applies to the exercise of the Board’s jurisdiction. It requires the Board to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms.
- 14 The Board is empowered to review the Department’s decision de novo: see *Deborah Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525.
- 15 This means the Board is able to decide the matter afresh, on the evidence before it, not merely on the basis of whether the Department made the right decision available to it at the time. It also means an appeal board has much greater scope to substitute its own view for that of the Department. In the case of disciplinary action for misconduct, it is for the employer to establish on the evidence that the misconduct occurred: see *Harvey* at [24]-[25] citing *Gary Mark Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266; *Krishna Thavarasan v The Water Corporation* [2006] WAIRC 04089; (2006) 86 WAIG 1434. Also see *Sanja Spasojevic v Speaker of the Legislative Assembly* [2021] WAIRC 00641 (*Spasojevic No 1*) at [36] – [37].
- 16 When determining matters de novo, the Board makes its own decision as to whether the appellant engaged in the misconduct alleged: see *Harvey* at [31] and [65].
- 17 The Department’s decision is not to be totally disregarded by the Board. However, a hearing de novo does not necessarily mean the Board must re-hear every aspect of the allegations afresh. The matters to be considered in the appeal will largely depend on the circumstances of the particular case: see *Harvey* at [29]-[30] and *Spasojevic No 1* at [40]-[44].

Evidence and submissions

- 18 In the lead up to the hearing, the parties were directed to file any witness statements and outlines of submissions. Neither party filed any witness statements.

- 19 Although the appellant did not file an outline of submissions pursuant to the Board's directions, she was given an opportunity to make oral submissions during the hearing.
- 20 The Department filed an outline of submissions which it adopted and relied upon at the hearing.
- 21 The evidence in this appeal was drawn from the following documentary sources:
- (a) Attachments to the Appellant's application;
 - (b) Attachments to the Department's response;
 - (c) A Bundle of Agreed Documents;
 - (d) A bundle of documents the Department filed; and
 - (e) Document which the parties provided in response to specific requests from the Board.
- 22 The documents described were collated and assembled as an agreed Book of Documents. The appellant and the Department both confirmed they were content for the matter to be decided by reference to the evidence contained in the Book of Documents.
- 23 Relying on the Book of Documents, the Board was able to reach its factual findings about the events which culminated in the dismissal decision. A chronological summary of this evidence is set out below.

The appellant's employment with the Department

- 24 The appellant commenced employment with the Department on 4 August 2008. She performed various roles on a permanent full-time basis. From 13 March 2018 until her dismissal, the appellant was employed as a Governance Assurance Officer, which is a Level 3 position.
- 25 The appellant was, for the period 1 February to 17 March 2022 scheduled to "act up" into a Level 4 Senior Business Analyst role. Upon completion of this work, the appellant was, on 21 March 2022, to return to her substantive Governance Assurance Officer role.
- 26 It is not in dispute the appellant had no disciplinary history with the Department. The appellant submitted and we accept, that she was committed to and loved her job.

Mask wearing directions

- 27 On 29 January 2022 the State Emergency Coordinator issued the *COVID Transition Face Covering Directions (Mask directions)* which required, in the absence of a medical exemption, the appellant to wear a face mask/covering (**mask**) while she worked in the Department's offices.
- 28 The Mask directions applied to all of the Department's employees. An exemption from wearing a mask could only be provided by a doctor with the issuance of a prescribed form.

Appellant's response to the Mask directions

- 29 Perhaps expecting the Mask directions were about to issue, the appellant sent a letter to the Department the day before on 28 January 2022. The subject of the letter was:

RE: Conditional Acceptance of Offer for COVID Mask Mandate

- 30 By this letter, which was addressed to Iain Cameron – Managing Director, Department of Transport (**Cameron**), the appellant sought detailed information about the Mask directions. Some of the matters she raised included questions on the legal right of the Department to direct employees to wear masks and whether wearing a mask would cause respiratory conditions in the wearer.
- 31 The appellant sought guarantees from the Department and placed a series of conditions on her compliance with the directions as follows:
- i. You, Iain Cameron as Managing Director of Department of Transport, confirm that I will suffer no harm;
 - ii. Following acceptance of this, the offer 'must be signed by a fully qualified doctor who will take full legal and financial responsibility for any injuries occurring to me, and/or from any interactions by authorised personnel regarding the mandated mask requirements;
 - iii. If I should have to decline the offer cited above by Iain Cameron as Managing Director of the Department of Transport not fulfilling obligations herein, please confirm that it will not compromise my ability and right to attend work without a mask and that I will not suffer prejudice and discrimination as a result, and I would also advise that my inalienable rights are reserved.

Refusal to wear a mask

- 32 Despite the Mask directions, the appellant attended her workplace on 4 February 2022 without wearing a mask. Managers from the Department directed the appellant to leave the workplace. The appellant was told that if she was not prepared to wear a mask at work then she would have to stay at home and utilise leave entitlements or take leave without pay until she complied with the mask directions.
- 33 On 15 February 2022 the appellant sent a further letter to Cameron. In this letter, the appellant continued to press her requests for information about the Mask directions. She also repeated the conditions of her return to work outlined in her letter of 28 January.
- 34 On 17 February 2022 the Department in a letter from Isabeau Korpel – Acting Executive Director People and Culture (**Korpel**) responded to the appellant's letters of 28 January and 15 February. In her response, Korpel explained the Department did not

have a discretion to ignore or make exceptions to the Mask directions or any other PHOs, including those relating to mandatory vaccinations.

- 35 Despite Korpel making it clear the Department was required to follow the Mask directions, on 22 February 2022, the appellant attempted to return to work without wearing a mask. As happened on 4 February 2022, the appellant was told to leave the workplace.
- 36 Following this, the Department, in an email from Alan Bates - Process Support Co-ordinator, told the appellant she would, in the absence of a valid medical exemption, need to utilise her “existing leave entitlements”.

22 February letter from the appellant to the Department

- 37 On 22 February 2022, the appellant sent an email and a further letter to the Department. The letter confirmed the appellant was not prepared to accept the Mask directions, which she described as an offer from the Department to provide a “mandated medical prevention procedure” (**22 February letter**). The appellant also continued to press the conditions upon which she would return to work wearing a mask from her letters of 28 January and 15 February 2022.
- 38 The email which attached the 22 February letter, raised different matters. Firstly, the appellant characterised the direction she received to leave the workplace because she was not wearing a mask, as a request, which the appellant said she was prepared to accept if her absence was treated as “stress leave”.
- 39 Secondly, the appellant claimed the Department had breached various parts of its Code of Conduct (**Code**) by telling her to leave the workplace. Although she referred to various sections of the Code in her email, the appellant did not provide any details of her allegations.

Department’s response and personal leave granted

- 40 On 1 March 2022, Cameron sent a letter to the appellant in which he again confirmed the Department was required to follow the Mask directions. Whilst he stated he understood the appellant was “anxious” about the Mask directions, he urged her to raise any medical concerns, including a possible medical exemption from wearing a mask, with her doctor. He also re-stated the direction the appellant had to wear a mask at work.
- 41 Following Cameron’s letter, the appellant obtained and submitted a medical certificate which declared her unfit to work due to a “medical condition”, for the period 4 March to 18 March 2022. It is not in dispute the appellant was granted personal leave for this period.
- 42 On 17 March 2022, Kevin Davis – Manager Quality Assurance (**Davis**) sent an email to the appellant in which he made inquiries about her return to work, which at the time, was scheduled to happen on 21 March 2022. He also reminded the appellant she would have to wear a mask at work and to disclose whether she had been vaccinated.
- 43 The appellant responded to the email from Davis the same day. The appellant thanked him for advising her about her work requirements and indicated that she would keep him updated if there was any change to her current situation.

Initial communication between Ms Kos and Bruce Moore

- 44 The appellant did not return to work on 21 March 2022. In response to her absence, Bruce Moore – Director Governance and Intelligence (**Moore**) on Friday 25 March 2022 emailed the appellant. Moore confirmed that he would have preferred to speak to her directly, but was unable to do so because the appellant had asked for all contact to be in writing.
- 45 It is clear from Moore’s email that he was trying to find out why the appellant was still absent from work and to advise that her absence would be treated as leave without pay if she had not provided a medical certificate or received approval to take leave.
- 46 Moore invited the appellant to provide a response to his inquiry by 28 March 2022. Moore also confirmed he was open to supporting a leave request from the appellant, subject to available leave credits and understanding the reasons why she was not attending work.
- 47 On 26 March 2022 the appellant provided Moore with a statutory declaration dated 21 March 2022 (**statutory declaration**). In her statutory declaration, the appellant stated her doctor had been told “by the system”, that she was not allowed to issue any continuing medical certificates that were in any way related to COVID 19 and that her previous medical certificate was her final.
- 48 The appellant then stated her situation had not changed. She relied upon her statutory declaration in support of her claim for “stress leave”.

Further emails from Moore

- 49 In the period 30 March – 8 April 2022, Moore sent the appellant three emails in which he asked the appellant why she was absent from work and to outline any concerns regarding her return.
- 50 An email Moore sent to the appellant on 8 April 2022 was particularly detailed. It also put the appellant on notice regarding her ongoing absence from work and the requirement for her to wear a mask at work despite her opposition. On the issue of her absence from work, Moore stated:

As you know, an employee is to attend work or support their absence with approved leave. If an employee doesn’t do this they are away from work without authorisation and given leave without pay until they return to work. I have been trying to work with you to either facilitate your return to work or approve a leave request to ensure you that you meet your obligations as an employee and continue to be paid.

- 51 Regarding the requirement for the appellant to follow the Mask directions, Moore said:

All correspondence from the MD, ED P&C and Director WFM has communicated that the Directions made under the Public Health Act 2016 and Emergency Management Act 2005 require you as a Group 3 employee to declare your

vaccination status (including not vaccinated) and to wear a face mask in the workplace. The correspondence sent to you confirmed the Directions which apply to you are legally binding and are not subject to your conditional acceptance. It confirmed the Directions could only not apply if you have provided a valid exemption from meeting this legal requirement.

52 In his email, Moore issued the following directions that are relevant to the dismissal decision:

I require that you by Monday 11 April 2022:

1. Support your absence from work by sending a leave request to me to take your existing leave entitlements which include personal (9 hours) and annual leave (69 hours) to cover your absence from work from 21 March 2022 – 4 April 2022;
2. Support your absence from work and any further absences from work by sending a leave request to me for leave without pay from 4 April 2022 to your requested return to work date; and
3. Log in to myHRspace remotely and declare your vaccination status which includes partially vaccinated, fully vaccinated or not vaccinated.

53 Moore also foreshadowed the following outcome in the event of non-compliance with his directions the following would occur:

If you do not undertake the abovementioned actions by cob 11 April 2022 you will be on leave without pay from 12 April 2022.

- A lawful direction will be issued to you to return to work by a certain date wearing a face mask and to declare your vaccination status.
....
- If you do not return to work and/or declare your vaccination status the Department will be obliged to initiate a disciplinary process.
....

Response to Moore's 8 April email

54 On 11 April 2022, the appellant sent a lengthy reply to Moore's 8 April email. In her email, the appellant declared her 22 February 2022 letter clearly stated her position, which the Board understands to mean the appellant would not be returning to work until the conditions she had outlined in her previous letters were met.

Department's direction to return to work

55 On 22 April 2022, Korpel sent a letter to the appellant headed:

Lawful direction to return to work wearing a face mask and declare your vaccination status.

56 With this letter, the Department put the appellant on notice that it was required by law, to follow PHOs including the Mask directions.

57 Korpel indicated the Department had responded to all correspondence the appellant had sent since February 2022. She advised that PHOs were not subject to conditional acceptance by staff and the only circumstance in which the directions would not apply, was when a staff member had a valid medical exemption.

58 Korpel then directed the appellant to return to work at 9am on Wednesday 27 April 2022 wearing a mask or to provide a valid medical exemption from wearing a mask, prior to returning to work on 27 April.

59 Korpel also directed the appellant to declare her vaccination status by close of business the same day and went on to warn the appellant that if she failed to comply with these directions, she could face disciplinary action, including dismissal.

Reply to the direction to return to work

60 On 27 April 2022, the appellant sent a reply to the Department's direction to return to work. In short, the appellant continued to demand that her return was dependent upon her previous conditions being met.

61 The appellant's letter of 27 April stated:

... I have advised that my mental health, which I am seeing multiple doctors and am now medicated, has been adversely affected as a result of the treatment I have received from my employer...

62 The appellant did not however provide a medical certificate to verify the reason for her absence and provide the relevant evidence required to access her entitlement to paid personal leave.

Mask directions revoked

63 On 28 April 2022, the State Emergency Co-ordinator revoked the Mask directions. On 3 May 2022 Korpel emailed Kos and advised:

Good afternoon Safeta

I wanted to check in with you now the indoor face mask mandate has been lifted. This means that employees are no longer required to wear a face mask at work

I trust this will alleviate your concerns around wearing a face mask and you will return to work.

Could you please advise on whether you intend to return to work? If so do you intend on returning to work?

Please respond by close of business on Thursday 5 May 2022.

Kind regards

Isabeau

64 The appellant did not respond to Korpel's 3 May 2022 email.

Warning of impending disciplinary action

65 On 27 May 2022, Korpel sent a letter to the appellant which warned her of impending disciplinary action. In her letter Korpel noted the appellant had been absent from the workplace since 21 March 2022 and the Department had not had any further contact from her since 27 April 2022.

66 Korpel referred to her email of 3 May and noted the appellant had not replied. She again confirmed the Mask directions no longer applied and suggested that any concerns the appellant may have had about wearing a mask should not have prevented her from returning to work since 29 April 2022.

67 Korpel then directed the appellant to contact her by close of business 3 June 2022 to explain her reason for being absent from work and to advise when she intended to return.

68 After reminding the appellant of her obligations under the Department's Leave Management Policy and that her current absence from work was unauthorised, Korpel warned the appellant that if her absence from work continued, she could face disciplinary action that could result in her dismissal.

69 By her letter, Korpel put the appellant on notice that her employment was in jeopardy if she did not comply with the Department's directions.

Response to the warning of disciplinary action

70 On 3 June 2022, the appellant provided a response to Korpel's letter of 27 May. The appellant referred to her letter of 22 February and asserted the directions she had received, including the direction to return to work without wearing a mask, were unlawful.

71 The appellant also demanded compensation for loss she claimed to have suffered due to the Department's "unlawful actions". Her letter did not provide any reasons as to why she thought the directions from Korpel were unlawful.

Proposed disciplinary action

72 On 1 July 2022, Cameron sent the appellant a letter responding to her 3 June 2022 response in which he said:

....

I take from your most recent response that you have no intention of immediately returning to the workplace to undertake the duties of your position nor do you intend to apply for leave in relation to your ongoing unauthorised absence. In my last letter to you I confirmed that if your ongoing absence continued without proper explanation then this would likely amount to a breach of discipline.

....

73 Cameron went on to confirm that he viewed the appellant's ongoing absence from the workplace, without authorisation, to be an act of misconduct warranting disciplinary action under s 80(c) of the PSM Act.

74 The disciplinary action he proposed was dismissal. After foreshadowing dismissal, Cameron gave the appellant 14 days until 15 July 2022 to respond to his letter.

75 It is not in dispute the appellant did not reply to Cameron's 1 July 2022 letter.

Termination of Employment

76 On 3 August 2022, the Department by way of letter dated 3 August 2022 dismissed the appellant from her employment (**letter of dismissal**).

77 Although dismissed for misconduct, the letter of dismissal confirmed the Department would pay the appellant four weeks wages in lieu of notice, along with any leave entitlements owing to her on termination.

Decision under appeal and relief sought

78 In her Form 8B Notice of Appeal, the appellant sought orders for two things. The appellant asked the Board to adjust the dismissal decision by reinstating her. She also sought an order for backpay for wages and other entitlements on and from 22 February 2022 to the date of her reinstatement.

79 The appellant challenges the dismissal decision on two bases; that she was denied procedural fairness and there were alternatives to dismissal the Department should have imposed instead of dismissing her. In relation to the second ground, the appellant takes issue with the severity of the disciplinary action that was taken against her.

Dismissal decision is the only decision that may be considered

80 In this matter, the only decision the Board is permitted to consider afresh is the dismissal decision and whether that decision should be adjusted by re-instating her.

81 Although the appellant may be aggrieved by the various directions the Department issued to her on or from 4 February 2022 which resulted in a loss of wages, the Board does not have the power to deal with those matters. This is because the wages and entitlements the appellant says she has lost from 22 February 2022 to the date of her dismissal were not due to the decision that is under appeal.

82 During the hearing the appellant conceded the dismissal decision was the only decision the Board could reconsider in the appeal. Having said this, the Board acknowledges the dismissal decision did not happen in a vacuum.

83 The sequence of events which preceded the appellant's dismissal, including her responses to the various directions the Department issued provides the explanatory context in which the dismissal decision must be considered.

An employee's obligation to follow reasonable and lawful directions

84 The issue that first arises when considering the dismissal decision afresh is whether the appellant was required to comply with the Mask directions.

85 Of relevance is the recent decision of Public Service Appeal Board in *Jessica Heller-Bhatt v Director General, Department of Communities* [2022] WAIRC 00719 (*Heller-Bhatt*) which summarised the law on an employee's obligation to follow the directions issued by a public sector employer that are mandated under PHOs.

86 The Board drew to the parties' attention to the decision in *Heller-Bhatt* prior to the hearing of this appeal. The respondent was the only party that addressed the decision of *Heller-Bhatt* in its submissions.

87 The Board in *Heller-Bhatt* noted at [93]:

It is trite that an employee has a duty to obey an employer's lawful and reasonable orders (see *R v Darling Island Stevedoring and Lighterage Company Limited* (1938) 60 CLR 601 at 621; *Adami v Maison de Luxe Limited* (1924) 35 CLR 143 at 151; *McManus v Scott-Charlton* (1996) 70 FCR 16 at 21AD (*McManus*)). Disobeying or disregarding a reasonable lawful order is a serious matter. Reasonableness is a question of fact and balance/degree: *McManus* at 30C.

88 At [94] and [95] the Board in *Heller-Bhatt* observed this reasoning was adopted and accepted as applying in a public sector employment setting. The Board noted:

In his recent decision of *Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police)* [2022] WASC 272 (*Finlay*), Justice Allanson set out the law in relation to lawful orders at [21]:

It is a fundamental term implied by law into all employment contracts that employees are contractually obliged to follow the lawful and reasonable directions of their employer. At common law, an employee's obligation of obedience is to lawful commands - commands which involve no illegality, which fall within the scope of the contract of service, and are reasonable: *R v Darling Island Stevedoring and Lighterage Co; Ex parte Halliday v Sullivan* (1938) 60 CLR 601, 621 - 622. Reasonableness is not a separate requirement, but is the standard or test by which the common law determines whether an order is lawful: *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2018] FCAFC 77; (2018) 262 FCR 527, 564; *McManus v Scott-Charlton* (1996) 70 FCR 16, 21. Reasonableness is not determined in a vacuum, but rather by reference to 'the nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship...': *R v Darling Island Stevedoring and Lighterage*, 622.

His honour held at [23]:

The authority of the employing authority under the *Public Sector Management Act* to issue lawful orders should be understood as having the same content of the common law rule, and to authorise orders which involve no illegality, which fall within the scope of the contract of service, and are reasonable.

89 As in *Heller-Bhatt*, the Board has adopted Justice Allanson of the Supreme Court of Western Australia's reasoning in *Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police)* [2022] WASC 272 (*Finlay*) and followed it in this matter.

90 In *Finlay*, Allanson J held employer directions requiring public sector employees to be vaccinated as result of the issuance of public health orders, were both reasonable and lawful.

91 Allanson J concluded the issuance of such directions by employers would be justified for the purposes of managing statutory responsibilities for health and safety and responding to the risks of the pandemic for the workforce and others who may be affected.

92 Although the case in *Finlay* centred on directions, mandated by PHOs, requiring employees to be vaccinated, the Board takes the view the Mask directions, which were also subject of a PHO, fall into the same category. In short, the Department's direction the appellant wear a face mask at work was a reasonable and lawful direction which the appellant was required to follow.

Consequences for an employee who refuses to follow a lawful direction

93 There are two potential consequences for employees who do not follow their employer's reasonable and lawful directions.

94 The first consequence is that an employee who refuses to follow a reasonable and lawful direction may face disciplinary action, which could include dismissal.

95 A second consequence is the application of the well-known industrial principle of "no work no pay". This principle which applied to the appellant, means an employee who does not perform work as directed is not entitled to payment: *Csomore v Public Service Board of New South Wales* (1987) 10 NSWLR 587 (*Csomore*).

96 Under this principle, the appellant's entitlement to the payment of wages required her to perform the full range of work assigned to her and to follow all reasonable and lawful directions: *Csomore* per Rogers J at 595.

97 The no work no pay principle may also apply even where (as in this case), an employee who refuses to follow a reasonable and lawful direction is told to stay away from the workplace until they comply with that direction.

- 98 In these circumstances, and as the Public Service Appeal Board held in; *Sanja Spasojevic v Speaker of the Legislative Assembly* 2023 WAIRC 00001 (*Spasojevic No 2*) an employee who does not perform work as directed, is not entitled to be paid unless the employer allows the employee to use any accumulated leave entitlements.

Direction to take leave entitlements

- 99 In a case where an employee is directed to stay home in response to their refusal to follow a reasonable and lawful direction (as in this case), an employee is not entitled to be paid unless an employer allows the employee to use any accumulated leave entitlements, subject to any requirements that apply under any relevant industrial instrument.
- 100 In *Spasojevic*, the Board at paragraphs [54] - [56] set out the general principles that apply to an employee's leave entitlements, noting:

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.

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.

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].

- 101 The appellant's obligations to provide an explanation for her absence from work and the process to be followed when applying for leave were set out in the Department's Leave Management Policy.
- 102 The Department's Leave Management Policy which restates the obligations which apply under the industrial agreement that applied to the appellant's employment with the Department was included in the Book of Documents.

Failure to follow the Mask directions

- 103 The evidence establishes that from as early as 4 February 2022, the appellant refused to comply with the Mask directions. She directly breached the Mask direction on two occasions by refusing to wear a mask in the workplace, on 4 and 22 February 2022.
- 104 The evidence also shows the appellant was insistent, she would not return to the workplace wearing a mask unless the Department met the conditions set out in her letters of 28 January and 17 February 2022.

Department's response to the refusal to wear a mask

- 105 Rather than moving straight to disciplinary action, the Department's response to the appellant's refusal to comply with the Mask directions was to direct her to remain at home and to utilise her leave entitlements.
- 106 For the period 4 - 17 March 2022, during which the appellant had a medical certificate the appellant was authorised to be absent from work.
- 107 From 21 March 2022, the situation for the appellant was much different. Despite claiming in her statutory declaration, she was not fit for work, the appellant did not provide any medical evidence to verify this. In addition, the appellant continued to press the Department to meet the conditions of her return.
- 108 From 21 March until 29 April, it is reasonable to conclude the appellant was in breach of two lawful directions for which the Department could have commenced disciplinary action. One was her continued refusal to wear a mask at work, the other being absent from work without authorisation. The Department's response on both matters did not waiver.
- 109 On 3 May 2022, circumstances changed significantly for the appellant in that the Mask directions were lifted. Despite the appellant's previous refusal to wear a mask at work, the Department asked her to return.

Department's response to the appellant's absence from work

- 110 From 3 May 2022, the issue for the appellant then evolved into the reason for which she was ultimately dismissed; her absence from work without authorisation and her non-compliance with the Department's Leave Management Policy.
- 111 In addition to its requests for the appellant to provide an explanation for her absence from work in the period 30 March - 22 April 2022, the Department gave the appellant at least two further opportunities to return to work or to provide medical evidence to explain why she was absent from work before it commenced disciplinary action.
- 112 Although from the Applicant's perspective, returning to work might have left any dispute over wages lost prior to her return unresolved, it is reasonable to conclude both from the evidence and the amount of the latitude the Department gave her, that her dismissal was not inevitable.

Was the dismissal decision valid?

- 113 When deciding whether to adjust the dismissal decision it is open to the Board to consider whether the Department had a valid reason for the appellant's dismissal.
- 114 In an employment context, whether in the public sector or otherwise, a valid reason for dismissal is "sound, defensible or well founded" and one that is not "capricious, fanciful, spiteful or prejudiced". In considering whether a reason is valid, it must be remembered that this requirement applies in the practical sphere of the relationship between an employer and an employee, where each has rights and privileges and duties and obligations, conferred, and imposed, on them. The provisions must be applied in a practical and common-sense way to ensure "the employer and employee are each treated fairly": *Selvahandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at (373).
- 115 Whether in the public or private sector, an employee's ongoing refusal to provide an explanation for being absent from work, supported by medical evidence, would provide a valid reason for an employee's dismissal. In a public sector setting it would similarly constitute a breach of discipline within the meaning of s 80(c) of the PSM Act.
- 116 There is little doubt the appellant's ongoing conduct by refusing to comply with the Department's directions to return to work after 3 May 2022 was inconsistent with the continuation of her employment: *Heller-Bhatt* at [108].

Consideration – Was the appellant denied procedural fairness?

- 117 Turning to the appellant's first ground of appeal, the Board does not accept the appellant was denied procedural fairness.
- 118 In an employment context, the obligation to provide procedural fairness requires an employee be given an opportunity to respond to any allegations of unsatisfactory performance or conduct. It also requires an employee be notified of the reason for any proposed disciplinary action or dismissal before a final decision is made to take the proposed action. This is to give an employee an opportunity to provide a response to the proposed reason for the dismissal and to suggest alternative disciplinary outcomes: *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [73].
- 119 As the evidence in the Book of Documents shows, there was a very long runway to the dismissal decision. We have also concluded the appellant, in the period from 21 March 2022 until the date the dismissal decision was made, should have been under no illusion that she had embarked upon a course that placed her employment in jeopardy.
- 120 The process the Department followed was procedurally stepped out, which gave the appellant an opportunity to respond to matters for which there were potential adverse consequences. The opportunity the Department gave the appellant to respond to its conclusion she had committed a breach of discipline is but one example of the appellant being afforded procedural fairness during the lead up to her dismissal.
- 121 The appellant was afforded procedural fairness in that she was given 14 days to explain why she should not be dismissed. The appellant's dismissal at that stage was "proposed" and she was given an opportunity to provide a response to the foreshadowed disciplinary action.
- 122 During the hearing, the appellant conceded that despite being afforded the opportunity to respond to her proposed dismissal, she declined to do so.
- 123 The appellant's explanation as to why she did not try and return to work after the Mask direction was lifted, was provided in the following exchange:
- KUCERA C:** So from about 27 May right up until July, it was pretty clear that the Department has indicated that it was telling you that it was looking at terminating your employment.
- Why didn't you go back to work or try and go back to work at that stage?
- KOS, MS:** Because I believe that my situation was still the same as at 22 February. No one has followed up on my claims of the – the breaches against me. Um, I was being dismissed for all – anything I had said. Nothing was taken seriously from my side.
- 124 Whilst the appellant may have felt this way, it does not provide a basis to conclude she was denied procedural fairness. The provision of procedural fairness does not require the employer to ensure an opportunity to respond is actually taken up by the employee concerned: *T Mollinger v National Jet Systems Pty Ltd* Print R3130 (AIRC FB, Giudice J, Polites SDP, Gregor C, 18 March 1999); [1999] AIRC 285 (cited in *Michael John Millward v Chief Executive, North Metropolitan Health Service* [2021] WAIRC 00152 as *Mollinger v National Jet Systems Pty Ltd* (C no 5 of 1998, unreported, Dec 27/99 M Print R3130)).
- 125 From the evidence, there is no basis to conclude the appellant was denied procedural fairness. Moreover, it is reasonable to conclude the Department was more than tolerant and even accommodating, in circumstances where it could have taken disciplinary action much sooner.

Consideration – Was there an alternative to the appellant's dismissal?

- 126 In relation to the appellant's second ground of appeal, the Board does not accept there were alternatives to dismissal.
- 127 When reaching this conclusion, the Board considered several factors, which when viewed together, weighed against the relief the appellant sought. These include the appellant's failure to attempt a return to work at any time after 3 May 2022; the opportunities the Department gave the appellant to comply with the Department's reasonable and lawful directions; the payment of notice on termination; the length of time she spent off work; the appellant's ongoing refusal to return to work despite not having a medical certificate; as well as a factor favourable to the appellant, her lack of a prior disciplinary history.
- 128 The Board is mindful the appellant had no prior or relevant disciplinary history and the reason for which she was dismissed did not involve dishonesty. We considered this for two reasons.
- 129 Firstly, it provides context as to why the Department did not immediately take disciplinary action following the appellant's refusal to wear a mask at work.

- 130 Secondly, it also explains why the Department accommodated the appellant's absence from work for so long, despite her failure to comply with its Leave Management Policy.
- 131 The Board had regard to the appellant's disciplinary history because the Board's view may have been different if the appellant had prior to 3 August 2022, attempted return to work but still faced dismissal.
- 132 This is because from 3 May 2022, after the Mask directions were revoked, there was no defensible reason why the appellant could not have returned to work. Even if the appellant was correct in her view the Mask directions were unlawful, notwithstanding the decision in *Finlay*, the situation had now changed and the requirement to wear a mask at work was no longer a barrier to the appellant's return.
- 133 Despite this, the appellant remained steadfast in her belief that she was in the right. Regrettably, it was her inability to compromise that is the source of her down-fall. It would not have been fair to the Department if the Board had adjusted the dismissal decision and re-instated the appellant in circumstances where she was not prepared to follow reasonable and lawful directions.
- 134 We have therefore concluded the appellant's dismissal was in the circumstances of this case, a proportionate response to the conduct for which she was dismissed.

Conclusion

- 135 For all of the reasons set out in the preceding paragraphs we have decided to dismiss the appeal.
- 136 Orders to follow.

2023 WAIRC 00297

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SAFETA KOS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T KUCERA - CHAIRPERSON
 MR B HAWKINS - BOARD MEMBER
 MS B BOGDAN - BOARD MEMBER

DATE

THURSDAY, 25 MAY 2023

FILE NO

PSAB 64 OF 2022

CITATION NO.

2023 WAIRC 00297

Result	Application dismissed
Representation	
Appellant	Ms S Kos on her own behalf
Respondent	Mr M McIlwaine of counsel

Order

HAVING heard from Ms S Kos on her own behalf and Mr M McIlwaine on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby ORDERS –

THAT this appeal be and is dismissed.

[L.S.]

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

2023 WAIRC 00293

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 7 MARCH 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SANIA PUGH

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
MR D HILL - BOARD MEMBER
MS M DI LELLO - BOARD MEMBER**DATE**

THURSDAY, 25 MAY 2023

FILE NO

PSAB 6 OF 2023

CITATION NO.

2023 WAIRC 00293

Result	Appeal discontinued by leave
Representation	(on the papers)
Appellant	Ms S Pugh
Respondent	PathWest Laboratory Medicine WA

Order

WHEREAS the appellant sought and was granted leave to discontinue the appeal, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the 2-day hearing listed for Wednesday, 26 and Thursday, 27 July 2023 be vacated.
2. THAT the matter PSAB 6 of 2023 be and is hereby discontinued by leave.

(Sgd.) R COSENTINO,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2023 WAIRC 00270

APPEAL AGAINST THE DECISION OF THE RESPONDENT DATED 3 JULY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TREVOR LEWIS WALLEY

APPELLANT

-v-

DBCA

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MR B HAWKINS - BOARD MEMBER
MR S BARRETT - BOARD MEMBER**DATE**

FRIDAY, 12 MAY 2023

FILE NO

PSAB 57 OF 2022

CITATION NO.

2023 WAIRC 00270

Result	Application discontinued
Representation	
Appellant	On his own behalf
Respondent	Mr J Carroll (of counsel)

Order

Having heard from the appellant on his own behalf and Mr J Carroll (of counsel) on behalf of the respondent –
 WHEREAS the appellant asked the Public Service Appeal Board at a hearing on 12 May 2023 to discontinue his application;
 NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA) and by consent, orders –

THAT application PSAB 57 of 2022 is discontinued.

(Sgd.) T EMMANUEL,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2023 WAIRC 00302

REFERRAL OF A MATTER UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00302
CORAM	:	COMMISSIONER C TSANG
HEARD	:	WEDNESDAY, 22 MARCH 2023, WEDNESDAY 26 APRIL 2023
DELIVERED	:	MONDAY, 29 MAY 2023
FILE NO.	:	APPL 42 OF 2021
BETWEEN	:	JAMES THOMAS WATERTON Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent
CatchWords	:	Industrial Law (WA) - Jurisdiction - Endorsement of employment file not to be permitted future employment without prior reference to the Director, Standards and Integrity - Whether endorsement of employment file is a decision to take disciplinary action - Matters an individual may refer to the Commission - Estoppel
Legislation	:	<i>Industrial Relations Act 1979</i> (WA), s 7(1), s 7(2A), s 23(2a), s 23(3)(e)(ii), s 27(1)(a)(ii), s 27(1)(a)(iv), s 29(1), s 29(1)(c), s 29(1)(d), s 29(1)(e), s 44(7), s 44(7)(a)(i), s 44(7)(a)(iii), s 53, s 54 <i>Public Sector Management Act 1994</i> (WA), s 78, s 78(2), s 78(2)(b)(iv), s 80(c), s 80A, s 81, 82A(3)(b), s 82A(3)(b)(iii)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr J T Waterton (on his own behalf)
Respondent	:	Mr J Carroll (of counsel)

Cases referred to in reasons:

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

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) and the Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers and the Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers and the Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch (1986) 67 WAIG 466

State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education [2014] WAIRC 00753; (2014) 94 WAIG 1469

State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education [2015] WAIRC 00875; (2015) 95 WAIG 1661

The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc [1994] 181 CLR 404

Reasons for Decision

The application

1 This is an application to determine whether the Commission has jurisdiction to hear the applicant's (**Mr Waterton's**) application which challenges the respondent endorsing his employment record on the following terms:

[N]ot to be permitted future employment with the Department of Education without prior reference to the Director, Standards and Integrity.

2 In these reasons for decision, the above endorsement is referred to as a 'flag'.

Background

3 By letter dated 19 February 2021, the respondent wrote to Mr Waterton alleging he had committed three acts of misconduct amounting to breaches of discipline pursuant to s 80(c) of the *Public Sector Management Act 1994* (WA) (**PSM Act**) on 4 December 2020 when he taught a class of Year 5 students as a relief teacher at Butler Primary School (**Allegations Letter**).

4 The Allegations Letter informed Mr Waterton that the respondent had made a decision to treat the allegations of misconduct as a disciplinary matter in accordance with s 81 of the PSM Act. Furthermore, a Senior Investigator from the respondent's Standards and Integrity Directorate had been appointed to conduct an investigation.

5 The Allegations Letter advised Mr Waterton that, given he was not currently employed, he is deemed a 'former employee'. Consequently, should a breach of discipline be established, the action that may be taken against him is a reprimand and/or a fine not exceeding five days' pay.

6 By letter dated 7 March 2021, Mr Waterton responded to the Allegations Letter.

7 By letter dated 22 March 2021, the respondent informed Mr Waterton that the investigation had concluded, the disciplinary process concerning allegation 1 would be discontinued, allegations 2 and 3 were substantiated, and the proposed action regarding allegations 2 and 3 entailed issuing a reprimand (**Proposed Outcome Letter**).

8 The Proposed Outcome Letter states:

The nature of your conduct leads me to question your overall suitability to be offered further work with the Department, either on a casual or more permanent basis. For these reasons, I intend to have your employment record endorsed '*not to be permitted future employment with the Department of Education without prior reference to the Director, Standards and Integrity.*'

The endorsement of your record is not a disciplinary measure, nor is it a refusal to reemploy you. However, should you seek employment with the Department in the future you will need to address the concerns about your conduct to the satisfaction of the Employee Suitability Assessment Committee.

This could take the form of a written or verbal submission from you or could entail an interview with a representative of the Department but would be decided at the relevant time.

9 By letter dated 1 April 2021, Mr Waterton responded to the Proposed Outcome Letter.

10 By letter sent on 7 May 2021, Mr Waterton was notified that the respondent maintained that he had committed breaches of discipline in respect to allegations 2 and 3, pursuant to s 82A(3)(b) of the PSM Act (**Outcome Letter**).

11 The Outcome Letter informed Mr Waterton that he would be reprimanded for the breaches of discipline.

12 The Outcome Letter states:

Reprimand

I must be able to rely on employees in important positions, such as that of teachers, to act appropriately towards students. I expect all employees of the Department to comply with the standards set out in the Department of Education's *Code of Conduct*.

The community also has an expectation that employees of the Department will behave in an exemplary manner and uphold the values and standards of the Department. In my view, your actions did not meet these expectations.

Endorsement of Employment Record

I proposed to endorse your employment record '*not to be permitted future employment with the Department of Education without prior reference to the Director, Standards and Integrity*', and provided you with an opportunity to respond.

I have considered your response and maintain the view that the endorsement of your employment record is appropriate.

13 On 7 May 2021, Mr Waterton filed a *Form 2 – Unfair Dismissal Application* (U 36/2021).

14 On 31 May 2021, the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application* (**Form 2A**).

15 In the Form 2A, the respondent raised a jurisdictional objection, asserting that Mr Waterton lacked a continuous employment relationship with the respondent, resulting in no dismissal.

16 U 36/2021 was listed for conciliation conferences on 15 June 2021 and 25 August 2021. The second conference was adjourned to allow for Mr Waterton to obtain legal advice.

- 17 On 17 November 2021, Mr Waterton discontinued U 36/2021.
- 18 On 18 November 2021, Mr Waterton filed a *Form 5 – Referral of a matter under the Public Sector Management Act 1994 (Form 5)*.
- 19 In the Form 5, Mr Waterton challenged the respondent’s decision to take disciplinary action against him as a result of a finding that a breach of discipline has been committed, pursuant to s 82A(3)(b) of the PSM Act.
- 20 On 8 December 2021, the respondent filed a *Form 4 – Response (General) (Response)*. The Response states:
- Imposition of the reprimand**
19. Because the Applicant was a former employee, the only penalties open were that of a reprimand and/or a fine not exceeding five day’s pay.
20. If the Commission accepts that the misconduct occurred, or that it was reasonably open for the Respondent to find that the misconduct occurred, a reprimand was appropriate.
- The “flag”**
21. The decision to endorse the Applicant’s employment record with the flag was not part of the disciplinary action taken by the Respondent.
22. The flag is an administrative measure which is only of relevance if the Applicant seeks further employment with the Respondent (which he has not), and it does not preclude his future employment. Any application for future employment with the Respondent would be assessed separately through the Employee Suitability Assessment Committee.
- 21 Following a conciliation conference on 8 February 2022, directions were issued to program the matter to hearing. Subsequently, on 29 March 2022, Mr Waterton filed seven outlines of witness evidence.
- 22 The respondent raised concerns about the evidence that Mr Waterton intended to call and requested a conciliation conference to discuss the proposed evidence. Following a conciliation conference on 12 April 2022, Mr Waterton was directed to re-file the outlines of witness evidence.
- 23 On 21 June 2022, Mr Waterton filed nine outlines of witness evidence.
- 24 On 30 June 2022, the respondent filed 14 outlines of witness evidence, 12 of which were from students.
- 25 The matter was listed for a third conciliation conference on 19 August 2022 and a Directions Hearing on 6 October 2022. At the Directions Hearing, the Commission raised a jurisdictional concern with Mr Waterton regarding the remedies he sought in his Form 5. Additionally, the respondent objected to Mr Waterton’s outlines of witness evidence, arguing that they did not provide the respondent with a clear understanding of the case to answer.
- 26 After hearing from the parties, directions were issued granting Mr Waterton leave to file an amended Form 5 to amend the remedies sought by 3 November 2022. Directions were also issued requiring Mr Waterton to file amended outlines of evidence by 1 December 2022.
- 27 Mr Waterton did not comply with the directions issued at the Directions Hearing on 6 October 2022. In response to a query from the Commission about his non-compliance, Mr Waterton requested an extension until 5 December 2022 to file an amended Form 5, citing a recently received notification from the respondent revoking the reprimands imposed. The respondent did not oppose Mr Waterton’s extension request. Consequently, directions were issued, by consent, to extend the time for Mr Waterton to file an amended Form 5 to 5 December 2022.
- 28 On 5 December 2022, Mr Waterton filed an application for leave to amend his Form 5, citing the respondent’s decision to endorse his employment record with the flag. This change was prompted by the respondent’s revocation of the reprimands initially imposed on 7 May 2021, as expressed in a letter to Mr Waterton dated 25 October 2022. Mr Waterton attached a copy of this letter to his application. The letter states:
- In light of proceedings APPL 42 of 2021 and the need for a significant number of student witnesses to be called to give evidence if the proceedings proceed to trial, I have had cause to reconsider whether public interest considerations weigh in favour or against maintaining the reprimands in relation to the two allegations (Allegations 2 and 3) which I found to be substantiated.
- Ultimately I have decided that public interest considerations weigh against maintaining those reprimands. In particular, I consider that the potential stress and trauma for the student witnesses in having to give evidence in a formal setting, considering their age, weighs against the reprimands remaining in place, particularly where the Department owes a duty of care to those students. Additionally, although of lesser weight, the significant amount of public resources that will be required to proceed to trial in APPL 42 of 2021 also weigh against the reprimands remaining in place.
- Accordingly, I have decided to revoke the reprimands I imposed upon you and by this letter I revoke those reprimands. For the avoidance of doubt, I do not withdraw my findings that you breached discipline as set out in Allegations 2 and 3. Despite those findings of breach of discipline, rather than impose reprimands, I have decided to act under section 82A(3)(b)(iii) of the *Public Sector Management Act 1994* (WA) and take no further action.
- 29 On 20 December 2022, the respondent filed an application for an order that the proceedings be dismissed under s 27(1)(a)(ii) or s 27(1)(a)(iv) of the *Industrial Relations Act 1979* (WA) (**Act**) (**Jurisdictional Objection**).
- 30 At a Directions Hearing on 15 February 2023, the Jurisdictional Objection was listed for hearing on 22 March 2023, and directions were issued requiring the parties to file outlines of evidence and documents and their outline of legal submissions in advance of the hearing.

- 31 The hearing, part-heard on 22 March 2023, was adjourned to enable Mr Waterton to file material addressing the true nature of the Jurisdictional Objection. Mr Waterton had misconceived the Jurisdictional Objection as relating to whether his matter was an industrial matter as defined by s 7 of the Act, and whether his matter was precluded by s 23(2a) of the Act which states:

Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act.

- 32 The part-heard hearing of the Jurisdictional Objection was listed for further hearing on 26 April 2023.

The respondent's contentions

- 33 Mr Waterton was formerly employed by the respondent as a teacher and subject to Part 5 of the PSM Act, which contains a statutory scheme for dealing with disciplinary matters.

- 34 Part 5 of the PSM Act states, that if an employing authority finds that an employee has engaged in a breach of discipline, the employing authority may take 'disciplinary action', defined by s 80A of the PSM Act to mean any one or more of the following (emphasis added):

- (a) a reprimand;
- (b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;
- (c) transferring the employee to another public sector body with the consent of the employing authority of that public sector body;
- (d) if the employee is not a chief executive officer or chief employee, transferring the employee to another office, post or position in the public sector body in which the employee is employed;
- (e) reduction in the monetary remuneration of the employee;
- (f) reduction in the level of classification of the employee;
- (g) dismissal;

- 35 Section 78 of the PSM Act provides appeal and referral rights for employees and former employees aggrieved by certain decisions made under Part 5 of the PSM Act.

- 36 Section 78(2) of the PSM Act states (emphasis added):

Despite section 29 of the *Industrial Relations Act 1979*, but subject to subsection (3), an employee or former employee who —

...

- (b) is aggrieved by —

...

- (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.

- 37 The reference to s 29(b) of the Act in s 78(2) of the PSM Act is a drafting or printing slip and should be read as s 29(1)(b): *Johnston v Mance, Acting Director-General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553 [14]. The respondent contends that, given recent amendments to the Act, the reference to s 29(b) of the Act in s 78(2) of the PSM Act should now be read as s 29(1)(c) of the Act. I agree.

- 38 The respondent contends that when she revoked the reprimands, there was no longer any 'decision to take disciplinary action' which Mr Waterton could seek to have referred to the Commission under s 78(2) of the PSM Act.

- 39 The respondent contends that the endorsement of Mr Waterton's employment record with the flag is not a 'decision to take disciplinary action'. The flag is an 'administrative part of the respondent's process for employing teachers. It is the means to an end because it ensures that [Mr Waterton] is not offered further employment in the respondent's schools unless his application is first approved by the Director, Standards and Integrity': *State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education* [2015] WAIRC 00875; (2015) 95 WAIG 1661 (*Appleton*) [21].

Mr Waterton's contentions

- 40 Mr Waterton accepts that the respondent revoked the reprimands and decided instead to act under s 82A(3)(b)(iii) of the PSM Act and take no further action. He accepts that a decision under s 82A(3)(b)(iii) of the PSM Act is not one that can be referred to the Commission.

- 41 Mr Waterton accepts the respondent withdrew a decision to take disciplinary action against him. Consequently, he no longer seeks to refer a decision of the respondent to the Commission under s 78(2) of the PSM Act.

- 42 Mr Waterton contends that the Commission's jurisdiction to hear his matter pertaining to the flag arises under s 29(1) of the Act, for the following reasons.

- 43 Firstly, a determination that the Commission lacks jurisdiction to hear his application would contravene s 23(3)(e)(ii) of the Act, as the Commission would be providing for his non-employment.

- 44 Secondly, the preferred construction of s 29(1) of the Act is one that affords the Commission jurisdiction to hear his application, taking into account the text and context of s 29(1) of the Act and the purpose of the Act.
- 45 Thirdly, the respondent should be estopped from applying for an order that the proceedings be dismissed because of the conduct of the respondent.

Consideration

Non-employment

- 46 In *State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education* [2014] WAIRC 00753; (2014) 94 WAIG 1469 (*Munforti*), the State School Teachers' Union of W.A. (Incorporated) (SSTU) brought an application seeking an order that the respondent remove the flag from its member's (Mr Munforti's) employment record.
- 47 The SSTU's application in *Munforti* was brought under s 44 of the Act.
- 48 Section 44(7) of the Act states (emphasis added):

The Commission may exercise the power conferred on it by subsection (1) –

(a) on the application of –

- (i) any **organisation, association** or employer; or
 - (ii) the Minister on behalf of the State; or
 - (iii) an employee in respect of a dispute relating to an entitlement to long service leave;
- or

(b) on the motion of the Commission itself whenever industrial action has occurred or, in the opinion of the Commission, is likely to occur.

- 49 Section 7(1) of the Act defines an 'organisation' as meaning 'an organisation that is registered under Division 4 of Part II' and defines an 'association' as meaning 'an association that is registered under Division 4 of Part II'.
- 50 Section 53 outlines the organisations of employees which can be registered, and s 54 outlines the organisations of employers which can be registered, under Division 4 of Part II of the Act.
- 51 Relevantly, the SSTU is an organisation of employees.
- 52 Mr Waterton is not a member of the SSTU.
- 53 Section 23(3)(e)(ii) of the Act states (emphasis added):

The Commission **in the exercise of the jurisdiction conferred on it by this Part** must not –

(e) provide for –

...

- (ii) non-employment by reason of being or not being a member of an **organisation**;

- 54 Mr Waterton contends that a finding that the Commission lacks jurisdiction would breach s 23(3)(e)(ii) of the Act because it would provide for his non-employment by reason of him not being a member of an organisation, because:
- (a) if he was a member of the SSTU, the SSTU would have standing to bring an application to the Commission to review the flag on his employment record under s 44(7)(a)(i) of the Act, as the SSTU did in *Munforti*;
 - (b) whilst he does not seek employment with the respondent, the flag results in non-employment with the respondent; and
 - (c) the flag has the potential to have an adverse impact on his future employment prospects in other professions, and therefore could potentially result in non-employment in the future.
- 55 The respondent contends that Mr Waterton's argument is misconceived, as s 23(3)(e)(ii) of the Act limits the Commission's powers when it has jurisdiction. The issue of whether the Commission holds jurisdiction is an anterior question that must be addressed, and s 23(3)(e)(ii) of the Act is not relevant to that question.
- 56 I agree with the respondent's contention. Section 23(3)(e)(ii) of the Act does not assist Mr Waterton. The words 'in the exercise of the jurisdiction conferred on it by this Part' make clear that s 23(3)(e)(ii) of the Act is applicable only if the Commission possesses jurisdiction.

Construction of s 29(1) of the Act

- 57 Mr Waterton contends that s 29(1) of the Act should be construed to provide him with standing to continue his application. He asserts it would be an unreasonable result that if he was a member of the SSTU that the SSTU could bring an application under s 44(7)(a)(i) of the Act to contest the flag on his employment record, as they did in *Munforti*, but as an individual he does not have standing to contest the flag on his employment record under s 29(1) of the Act.
- 58 Section 29(1) of the Act outlines the parties that have standing to refer an industrial matter to the Commission.
- 59 Section 29(1)(c), s 29(1)(d) and s 29(1)(e) of the Act outline the matters that an individual may refer to the Commission. These provisions state (emphasis added):
- (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.

60 Section 7(2A) of the Act (referred to in s 29(1)(e) of the Act) states that a matter relating or pertaining to the bullying or sexual harassment of a worker is an industrial matter.

61 Mr Waterton does not contend that his matter arises under s 29(1)(d) or s 29(1)(e) of the Act.

62 Although Mr Waterton accepts that the respondent did not dismiss him, he contends that the Commission has jurisdiction to hear his matter under s 29(1)(c) of the Act.

63 He submits that this is because s 29(1)(c) of the Act should be construed to apply to a claim that he has been harshly, oppressively or unfairly treated.

64 Alternatively, he submits that s 29(1) of the Act should be construed such that ‘an additional provision could be read in on the basis that the purpose of the Act is not to prevent [him], in this situation, from bringing [his] matter before the Commission whilst an organisation could.’

65 The respondent contends that both the text and context of the Act clearly indicate an intended distinction between unions and individual employees concerning the types of claims each can bring before the Commission. The respondent submits that this differentiation is explicitly supported by the second reading speech of the *Industrial Arbitration Bill 1979* (WA) which enacted the *Industrial Arbitration Act 1979* (WA), the predecessor to the Act, which states:

One of the special privileges contained in the earlier legislation was to give unions sole right of access to industrial tribunals to the exclusion not only of other unions but also of individual employees. The individual employee was dependent upon the union or, in some cases, the Industrial Registrar or other official, if he or she wished to seek remedy under the Act for any grievance he or she might have had. In 1963 some modification was made but this was extremely limited.

The Bill provides employees with the capacity to move under the industrial law to protect certain basic entitlements. These are limited and therefore do not threaten the existence or viability of unions or provide an incentive for them to leave the system.

The Bill enables an employee, on his own account, to refer to the commission a claim that he has been unfairly dismissed or that he has not been allowed a benefit to which he is entitled under his contract of employment – a right he did not have before.

66 The respondent maintains that if such a distinction leads to an unreasonable result as Mr Waterton suggests, the Commission cannot rectify it by introducing new provisions or amending existing ones in a manner that directly conflicts with the Act’s current provisions. Instead, addressing any unreasonable result falls under the purview of parliament.

67 I agree. The provisions of s 44 and s 29(1) of the Act are plain on their reading.

68 Section 44 provides an organisation of employees, such as the SSTU, with standing to bring matters on behalf of its members, that an individual does not have standing to bring.

69 Parliament’s intention for an organisation of employees having standing to bring matters on behalf of its members, that an individual does not have standing to bring, was set out in the second reading speech when introducing the provisions which are now s 29(1)(c) and s 29(1)(d) of the Act.

70 Mr Waterton accepts he no longer has standing to seek to have the Commission review a decision of the respondent under s 78(2) of the PSM Act.

71 As Mr Waterton is not contesting an entitlement to long service leave, he does not have standing to pursue an application under s 44(7)(a)(iii) of the Act.

72 As Mr Waterton accepts he was not dismissed, he does not have standing to pursue an application under s 29(1)(c) of the Act.

73 Section 29(1)(c) of the Act cannot be interpreted to encompass not only harsh, oppressive, or unfair dismissal but also any harsh, oppressive, or unfair treatment of an employee.

74 Section 29(1) of the Act does not permit a construction that would allow Mr Waterton to challenge the endorsement of his employment record with a flag.

75 In the absence of any other provision allowing Mr Waterton to challenge the endorsement of his employment record with a flag, I find that the Commission lacks jurisdiction to hear Mr Waterton’s Form 5.

76 If this finding leads to an unreasonable result as contended by Mr Waterton, I agree with the respondent’s contention that this is a matter for parliament.

Estoppel

77 Mr Waterton contends that the respondent should be estopped from pursuing the Jurisdictional Objection for the following reasons.

78 Firstly, Mr Waterton claims the respondent’s conduct has been unconscionable. Mr Waterton argues the unconscionability stems from procedural deficiencies in the investigation process concerning the misconduct allegations. Additionally, he asserts that since the respondent chose to call 12 student witnesses, her claim of revoking the reprimands in the best interests of the students is both pious and disingenuous.

79 Secondly, Mr Waterton claims the respondent made a promise, which he reasonably relied and acted upon, that if he discontinued U 36/2021 and filed a Form 5 the respondent would not object to the Commission hearing and determining an

appeal on that basis.

- 80 The respondent contends that estoppel does not arise. Any procedural deficiencies are irrelevant to the jurisdictional question. Moreover, the respondent's email to Mr Waterton states that she 'would not object to the WAIRC hearing and determining the appeal on that basis' – with 'that basis' referring to an appeal against the decision to impose the reprimands. As the reprimands have been withdrawn, there is no longer a necessity for Mr Waterton to seek a Commission review of the reprimands. Consequently, the respondent has not resiled from a promise that could give rise to estoppel.
- 81 Regardless, the respondent maintains that Mr Waterton's argument is misplaced, as even if an estoppel properly arose, the parties cannot confer jurisdiction upon the Commission when none exists. Similarly, estoppel cannot confer jurisdiction to the Commission when such jurisdiction is non-existent.
- 82 I agree with the respondent's contentions for the following reasons.
- 83 Firstly, neither the parties nor estoppel can grant jurisdiction to the Commission when jurisdiction is absent.
- 84 Jurisdiction has to be determined as a preliminary issue and on the balance of probabilities: *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* [1994] 181 CLR 404 (426).
- 85 The Commission is obliged to enquire into and determine whether it has jurisdiction before proceeding further: *Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) and the Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers and the Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers and the Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch* (1986) 67 WAIG 466 (467).
- 86 Secondly, upon examining the correspondence between the parties in U 36/2021, I find no grounds for Mr Waterton to claim that the respondent made a promise which he relied upon to his detriment.
- 87 In the Form 2A filed in U 36/2021, the respondent placed Mr Waterton on notice that she considered the unfair dismissal application filed by Mr Waterton to be without foundation because 'it did not, and could not, either consider or impose a penalty of dismissal.'
- 88 In the email sent by the respondent's representative to Mr Waterton on 30 August 2021, the representative states that the respondent, having not dismissed Mr Waterton but imposed reprimands against him, acknowledges his right to appeal the reprimands under s 78(2)(b)(iv) of the PSM Act. The email highlights that the respondent was indifferent to the form used by Mr Waterton (be it a Form 5 or another form) so long as he made it clear that he was appealing against the reprimands rather than arguing he had been dismissed. In such a case, the respondent's jurisdictional objection (that he had been dismissed) would no longer be applicable.
- 89 The relevant sections of the email the respondent's representative sent to Mr Waterton on 5 November 2021, that Mr Waterton seeks to rely upon as supporting the argument for an estoppel, states:

I confirm that if you discontinue the current matter and commence a new appeal against your reprimand by filing a Form 5, the Respondent will not object to the WAIRC hearing and determining the appeal on that basis. In particular, the Respondent will not argue that there is any prejudice to it arising from the time between the imposition of the reprimand and the filing of the appeal.

To be completely transparent, there is in the Respondent's view a question about whether the "flag" on your employment record is part of the disciplinary action against you. The Respondent's view is that it is merely the administrative consequence of the disciplinary action, being the reprimand.

However, it appears to me this is another technical point it is unnecessary to resolve for the purposes of achieving your primary object of having the WAIRC rule on whether the disciplinary findings against you were fair or not, which it will do in the course of reviewing the reprimand.

- 90 A fair reading of the above email indicates that the respondent only represented that she would not oppose Mr Waterton filing a Form 5 to contest the reprimands, which she did not do.
- 91 Furthermore, the respondent reiterated the stance expressed in the Form 2A, that she does not consider the flag to be an issue that can be referred to the Commission. The respondent has consistently maintained this position.
- 92 No interpretation of the above email suggests that the respondent was precluded from revoking the reprimands. Moreover, there is no implication that once the reprimands were revoked, that the respondent would be prevented from arguing that there was no longer a decision to take disciplinary action that was referable to the Commission under s 78(2) of the PSM Act.

Conclusion

- 93 Mr Waterton did not assert that the Commission's jurisdiction arises under s 78(2) of the PSM Act and consequently did not argue that the endorsement of his employment record with a flag constituted a decision to take disciplinary action.
- 94 In the circumstances, I find no reason not to follow *Appleton*, and find that the endorsement of Mr Waterton's employment record with a flag is not a decision to take disciplinary action, but an 'administrative part of the respondent's process for employing teachers. It is the means to an end because it ensures that [Mr Waterton] is not offered further employment in the respondent's schools unless his application is first approved by the Director, Standards and Integrity' [21].
- 95 As a result, I find that when the respondent revoked the reprimands, there was no longer a decision by the respondent that Mr Waterton could seek to refer to the Commission under s 78(2) of the PSM Act.
- 96 For the reasons stated, s 29(1) of the Act does not allow Mr Waterton to challenge in the Commission the endorsement of his employment record with a flag.

97 Given that no other provision under the Act allows for Mr Waterton to proceed with his Form 5, I am satisfied that his application should be dismissed in accordance with s 27(1)(a)(ii) or s 27(1)(a)(iv) of the Act.

98 Accordingly, application APPL 42 of 2021 will be dismissed.

2023 WAIRC 00303

REFERRAL OF A MATTER UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAMES THOMAS WATERTON

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER C TSANG

DATE MONDAY, 29 MAY 2023

FILE NO/S APPL 42 OF 2021

CITATION NO. 2023 WAIRC 00303

Result Application dismissed

Representation

Applicant Mr J T Waterton (on his own behalf)

Respondent Mr J Carroll (of counsel)

Order

HAVING heard from Mr J T Waterton on his own behalf, and Mr J Carroll (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 APPL 42 of 2021 is dismissed.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00324

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2023 WAIRC 00324

CORAM : SENIOR COMMISSIONER R COSENTINO

HEARD : MONDAY, 29 MAY 2023

DELIVERED : TUESDAY, 13 JUNE 2023

FILE NO. : APPL 36 OF 2022

BETWEEN : PENELOPE ANNE FAGAN

Applicant

AND

WILLIAM (BILL) JOHNSTON MINISTER FOR CORRECTIVE SERVICES

Respondent

CatchWords : Industrial Law (WA) – Chief Health Officer WA Correctional Facility Entrant (Restrictions on Access) Directions – Employer Direction to be vaccinated against COVID-19 not complied with – Breach of discipline – Decision to dismiss made under s 82A(3)(b) of the *Public Sector Management Act 1994* (WA) – Subjective reasons for not complying with the Employer Direction – Whether subjective belief lessens culpability – Seriousness/gravity of conduct – Breach of discipline warranted dismissal – Inconsistent treatment of employees – Applicant treated differently from comparable employee in similar circumstances – Dismissal harsh – Reinstatement ordered – Quantum of compensation for remuneration lost to be determined

Legislation : *Industrial Relations Act 1979* (WA)
Prisons Act 1981 (WA)

Public Health Act 2016 (WA)

Public Sector Management Act 1994 (WA)

Result : Application upheld

Representation:

Applicant : Mr C Fordham of counsel

Respondent : Mr J Carroll of counsel

Case(s) referred to in reasons:

Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WASCA 86; (2017) 97 WAIG 431

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66

Capral Aluminium Ltd v Sae (1997) 75 IR 65; BC9703967

Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal [2021] FWCFB 6059; (2021) 310 IR 399

Donaldson v NSW National Parks & Wildlife Service [1997] FCA 837

Electricity Commission of New South Wales t/a Pacific Power v Nieass (1995) 81 IR 46

Fagan v William (Bill) Johnston Minister for Corrective Services [2023] WAIRC 00017; (2023) 103 WAIG 159

Falconer v Chief Health Officer [No 3] [2022] WASC 270

Finlay v Commissioner of Police as the Chief Executive Officer of the Department Known as the Police Service (Department of Police) [2022] WASC 272

Heller-Bhatt v Director General, Department of Communities [2022] WAIRC 00719

Holman v Telstra Corporation Ltd [2006] SAIRC 16; (2006) 153 IR 445

Inwood v Baxter & Co Pty Ltd [2022] FWC 792

Jones v Dunkel [1959] HCA 8

McManus v Scott-Charlton [1996] FCA 1820; (1996) 70 FCR 16

National Jet Systems Pty Ltd v Mollinger AIRC R3130, 18 March 1999

North v Television Corporation Ltd (1976) 11 ALR 599

Portilla v BHP Billiton Iron Ore Pty Ltd [2005] WAIRC 02604; (2005) 85 WAIG 3441

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2016] WAIRC 00236; (2016) 96 WAIG 408

R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan [1938] HCA 44; (1938) 60 CLR 601

Roman v Mercy Hospitals Victoria Ltd [2022] FWC 711

SERCO Gas Services (Vic) Pty Ltd v Alkemade AIRC R6090, 21 June 1999

Sexton v Pacific National (ACT) Pty Ltd [2003] AIRC 506

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

Reasons for Decision

- 1 Ms Penelope Fagan was employed by the **Minister** for Corrective Services as Bunbury Regional Prison's Drug Detection Officer. Her job was to detect and prevent drugs and other contraband entering into Bunbury Regional Prison. She did that by conducting searches of prisoners, visitors, the premises and property. She also trained, maintained and handled a drug detection dog.
- 2 Ms Fagan's role is critical for the safety and security of the prison, and community safety. The control of drugs entering prisons also reduces offender involvement in the justice system.
- 3 Ms Fagan was committed to her important work and diligently served the community and her Employer from 2018.
- 4 During the COVID-19 pandemic, Ms Fagan's work took a turn down a now familiar path.
- 5 The Chief Health Officer made a direction under the *Public Health Act 2016 (WA)* to put in place measures to address the unique risks posed by COVID-19 in Western Australian prisons and correctional facilities to limit the spread of COVID-19 to the vulnerable population in those facilities: Chief Health Officer WA Correctional Facility Entrant (Restrictions on Access) Directions (**CHO Directions**). Relevantly, the CHO Directions prohibited people from entering or remaining at prisons unless they were partially vaccinated against COVID-19 from 1 December 2021 and fully vaccinated from 1 January 2022. Failure to comply with the CHO Directions was an offence, which could attract fines of \$20,000 for individuals and \$100,000 for bodies corporate.

- 6 To comply with the CHO Directions, the **Director-General** of the **Department** of Justice directed that its employees and the Minister's employees, including Ms Fagan, be vaccinated against COVID-19 and provide evidence of vaccination or of any exemption (**Employer Direction**).
- 7 Ms Fagan refused. After a disciplinary process, her employment was summarily terminated.
- 8 Ms Fagan disputes her dismissal. She seeks reinstatement to her position. She does not contend that the Employer Direction was unlawful or unreasonable. She concedes that she failed to comply with the Employer Direction, and that the failure to comply was a breach of discipline.
- 9 Ms Fagan relies on three grounds to show that termination was unfair and harsh.
- 10 First, she says that in deciding to dismiss her, the Employer wrongly attributed to her knowledge that the Employer Direction was lawful. Ms Fagan says this was wrong, because at all times she mistakenly, but 'firmly' believed that the Employer Direction was unlawful or unreasonable. She says she was not 'knowingly disobedient'. If the decision is tainted by such an error, it is oppressive.
- 11 Second, Ms Fagan says her culpability or the severity of her disobedience needed to be assessed in light of her genuinely and reasonably held (but mistaken) belief that the Employer Direction was unlawful or unreasonable. This ground and the first ground are two sides of the same coin. Both are based Ms Fagan having a subjective belief that she did not need to comply with the Employer Direction. For this ground to succeed, I must also find that she had the belief, that her belief was objectively reasonable, and that it reflects on the gravity of her breach. If this ground is made out, the dismissal decision is harsh.
- 12 Third, Ms Fagan says the sanction of dismissal was harsh in circumstances where other employees who failed to comply with the Employer Direction did not lose their jobs and continue to work for the Employer. In other words, she was treated unfairly.

Legal Framework

- 13 The decision to dismiss Ms Fagan was made under s 82A(3)(b) of the *Public Sector Management Act 1994* (WA) (**PSMA**). That section provides that if an employing authority finds that an employee has committed a breach of discipline, the employing authority can take disciplinary action, which, by s 80A(g) includes dismissal. Under s 80(a), an employee who disobeys or disregards a lawful order commits a breach of discipline.
- 14 Ms Fagan was appointed to her position under the *Prisons Act 1981* (WA). She is not a Government Officer within the meaning of s 80C of the PSMA.
- 15 Accordingly, Ms Fagan is able to refer the decision by her Employer made under s 82A(3)(b) of the PSMA to the Commission as if the decision was an industrial matter: PSMA s 78(2). The Commission has jurisdiction to hear and determine Ms Fagan's referral: *Fagan v William (Bill) Johnston Minister for Corrective Services* [2023] WAIRC 00017; (2023) 103 WAIG 159.
- 16 The industrial matter that has been referred is a claim by Ms Fagan that she has been harshly, oppressively or unfairly dismissed from her employment: *Industrial Relations Act 1979* (WA) (**IR Act**) s 29(b)(c). In this kind of industrial matter, the test is whether the right of the employer to terminate the employment was exercised so harshly or oppressively as to constitute an abuse of that right: *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386.
- 17 At the time of the dismissal, Ms Fagan was neither employed for a probationary period nor employed in a private home. Accordingly, the IR Act s 23A(2) factors are not relevant to this matter.

What knowledge did the Employer attribute to Ms Fagan?

- 18 The facts in this matter were largely agreed. The parties filed a Statement of Agreed Facts, and a book of Agreed Documents. In combination, these represented the evidence about the process that led to the decision to terminate Ms Fagan's employment as well as the reasons for termination. The Employer did not lead any other evidence.
- 19 The Employer Direction was issued on 15 November 2021. It directed employees to:
- be vaccinated against COVID-19 in accordance with Part 1 of the Schedule to this direction unless you are exempt from the requirements of the Directions; and
 - provide evidence of your vaccination or of any exemption applying to you in accordance with Part 2 of the Schedule to this direction.
- 20 Part 1 of the Schedule required employees to have a first dose of vaccination by 1 December 2021 and be fully vaccinated by 1 January 2022.
- 21 According to the Department's letter to Ms Fagan dated 20 December 2021, she was given until 9.00 am on 15 December 2021 to attend to the requirements of the Employer Direction and provide the Department with evidence of her compliance.
- 22 The disciplinary process against Ms Fagan started in December 2021. On 20 December 2021, Ms Fagan was advised that she had not complied with the requirement to be vaccinated and she would be referred to the Professional Standards Division for Assessment. A day later, she received a letter notifying her that the Department had decided to deal with a disciplinary matter under s 81 of the PSMA on the basis that:

...Following a review of the available information, the Department is concerned that you may have acted in manner that could, if proven, constitute a breach of discipline pursuant to s.80 of the Act.

- 23 The allegations were set out:

Allegation One

On 1 December 2021 at the Drug Detection Unit, you committed a breach of discipline contrary to section 80(a) of the Public Sector Management Act 1994, in that you disobeyed or disregarded a lawful order when **you failed to be partially vaccinated against COVID-19, or provide an exemption**, before this date.

...

Allegation Two

On 1 December 2021 at the Drug Detection Unit, you committed a breach of discipline contrary to section 80(a) of the Public Sector Management Act 1994, in that you disobeyed or disregarded a lawful order when **you failed to provide evidence of your partial vaccination** against COVID-19, or provide an exemption, before this date.

(emphasis added)

- 24 On 1 February 2022, the Director-General wrote to Ms Fagan advising her that the investigation into the two allegations had been completed and an investigation report submitted to him for consideration, along with her response to the allegations. The Director-General advised Ms Fagan that he had formed a preliminary view that it was open on the evidence for him to find she had committed the alleged breaches of discipline, as set out in the letter of 21 December 2021. He also stated that he proposed to take dismissal action in respect of each allegation.
- 25 The 1 February 2022 letter contains the following remarks which reveal the Director-General's reasoning:
- ...
- In proposing this discipline action, I have taken into account that your conduct clearly disobeyed or disregarded the lawful order I issued on 15 November 2021 with the effect that you can no longer lawfully access the workplace to perform the duties required of your position as a Drug Detection Officer with the Department.
- I acknowledge your response to the allegations dated 4 January 2022. The Public Health Directions are made under the *Public Health Act 2016* (WA). The Department does not have a discretion in complying with the Public Health Directions in so far as they apply to employees. An employee can apply for a medical or temporary exemption from the Chief Health Officer, but you have not done so. The Department cannot relieve employees of the application of the Public Health Directions, which is in essence the justification for the Direction.
- I have considered alternative disciplinary outcomes available under the Act including the possibility of transferring you to another work location or position in the Department or another public sector body where you are not required to access a correctional facility to carry out the duties of your role. I have concluded that this is not a feasible option in your case given the specificity of your role in the Department and the inherent requirement that you attend custodial facilities in-person to effectively perform your role. The Department is not required to, in effect, create a new role or substantially change the nature of your role in response to your failure to comply with a Direction that would enable you to continue to carry out your existing role.
- ...
- 26 The disciplinary process was paused from 29 March 2022 to 4 May 2022 because judicial review proceedings had been commenced by other individuals in the Supreme Court, challenging the legality of the CHO Directions and the Employer Direction.
- 27 The final disciplinary outcome of dismissal was communicated to Ms Fagan by letter dated 26 May 2022. After setting out the steps taken in the disciplinary process, the Director-General stated:
- I have considered your response dated 14 May 2022 and I maintain my position that you have committed breaches of discipline regarding your failure to comply with my Directions. Accordingly, I am dismissing you from your employment with the immediate effect.
- 28 In other words, the preliminary view he formed on 1 February 2022 had not changed. That view was formed regardless of Ms Fagan's subjective reasons for not complying with the Employer Direction.
- 29 Nothing in the communicated reasons for dismissal expressly states that any particular knowledge about the legality or requirement to comply with the Employer Direction was attributed to Ms Fagan. The findings are uncontentious. They are that the Employer Direction was not complied with and that the effect of non-compliance was that Ms Fagan was unable to perform her duties. It is of course implicit in the findings that Ms Fagan knew about the Employer Direction, but not that her non-compliance was accompanied by any particular state of mind.
- 30 Ms Fagan argued that the Employer must have attributed to Ms Fagan knowledge that she 'wilfully disregarded an order that she knew to be lawful'. She says this finding is implicit in the ultimate decision to dismiss her, because, in order to have decided that her conduct justified dismissal, that is, that it was of such severity to justify dismissal, the Employer must have 'imputed a wilful intent'.
- 31 To support this argument, Ms Fagan relies upon *North v Television Corporation Ltd* (1976) 11 ALR 599. In that case, the High Court took into account the employee's subjective motivations for his conduct, in deciding whether his conduct was a repudiation of the essential conditions of the contract.
- 32 *North v Television Corporation* is authority for the principle that employee misconduct may justify summary dismissal where the employee's conduct is so seriously in breach of the employment contract that by standards of fairness and justice, the employer should not be bound to continue it.
- 33 The corollary is that breaches of contract of a non-serious nature are not grounds for termination, even if the breach is misconduct.

- 34 I do not understand *North v Television Corporation* requires consideration of the employee's subjective state of mind in every instance of misconduct. But, leaving that question aside, the fundamental problem with Ms Fagan's case is that it involves backwards reasoning. She seeks to establish facts from legal principles.
- 35 Whether the Employer found that Ms Fagan knew the direction was lawful and that she was obliged to comply is a question of fact. I cannot make that finding of fact from an assumption that particular legal principles have been applied in the Director-General's reasoning. The law operates on facts, not vice versa. Inferences can be drawn from proven facts, but not from legal rules (unless the rules involve a presumption, like *Jones v Dunkel* [1959] HCA 8).
- 36 Ms Fagan's submissions turn the fact-finding process on its head.
- 37 Ms Fagan must prove the facts on which she relies on the balance of probabilities. I am not satisfied that the Employer's decision implicitly imputes to Ms Fagan knowledge that the Direction was lawful and that she was required to comply.
- 38 I accept that there may be circumstances where the subjective intention of an employee when not complying with a direction may be relevant to a finding of misconduct. Inadvertent or unintentional non-compliance may be insufficient to warrant dismissal. For example, if an employee arranged to be vaccinated against COVID-19, but the vaccination provider had run out of vaccination stock by the time the employee arrived for the vaccination. Or if an employee believed they had been fully vaccinated, but it transpired that an insufficient dose was administered for evidence of vaccination to be provided.
- 39 This was not a case where Ms Fagan's non-compliance with the Employer Direction was inadvertent or unintentional.
- 40 She told the Commission she understood the Employer Direction.
- 41 She knew that the CHO Directions meant a person could not enter a prison without being vaccinated or having an exemption.
- 42 She knew that she could not perform her duties as a Drug Detection Officer while non-compliant with the Employer Direction.
- 43 She understood that non-compliance with the Employer Direction placed her employment at risk.
- 44 Ms Fagan determinedly chose not to comply with the Employer direction. In her response to the allegations of breach of discipline, she stated:

...

I value my role in the Department of Justice. I have always been a dedicated worker and have complied with all code of conduct policies that come with this job. Until now, I have not been outspoken in relation to this matter despite my concerns going back months...I do not wish to lose my position within the department, but my health and my human right to maintain control over my own body is more important to me than this job. I will not quit - I am hoping there is some sort of resolution that we can come to that allows me to continue in my role as a valued member of the Drug Detection Unit and the Bunbury Regional Prison Security Team without getting the COVID-19 'vaccine'.

...

- 45 Even if the Employer did find that Ms Fagan's non-compliance was deliberate and wilful, that finding was obviously open.
- Does Ms Fagan's subjective belief about the Employer Direction lessen her culpability?**
- 46 Ms Fagan's counsel opened on the basis that Ms Fagan did not comply with the Employer Direction because she was worried about the effects of the vaccination on her. That is consistent with the evidence, as summarised below. However, Ms Fagan's case proceeded on the different basis that her reason for not complying with the Employer Direction was that she believed it was not a lawful direction. She bore the onus of establishing this reason for non-compliance as a matter of fact.
- 47 The relevant time for having the belief, is the time during which she was failing to comply with the Employer Direction. That was from 15 November 2021 when the Employer Direction was issued, to 15 December 2021, when the requirements of the Employer Direction had to be met.
- 48 Ms Fagan's letter to her Employer, dated 23 October 2021 but sent on 4 November 2021, did not assert that the Employer Direction was unreasonable or unlawful. Rather, Ms Fagan requested a litany of information 'before making a decision in this matter'.
- 49 Ms Fagan explained to the Commission that she was trying, by her letter, to express her major concerns about the experimental nature of the vaccines, and that she did not feel it was safe for her to have a vaccine.
- 50 This means that, as at 4 November 2021, Ms Fagan had not formed a belief about the direction being lawful or unlawful. Nor had she decided whether she would or would not comply with the Employer Direction. She said she would comply, that is, receive the vaccine, if she was given answers to her questions and other conditions set out in her letter were met. She confirmed in her answers in cross-examination that she intended to comply if her questions were answered.
- 51 The Commission was provided with an email Ms Fagan sent to the Department's Investigations Branch on 4 January 2022. In it, she provides detail on 'the reasons for my declination'. It sets out her concerns about the possible side effects of 'the Covid vaccine' in light of her own, unspecified, personal medical needs. She details her understanding of how mRNA vaccines work to build immunity. She then states:
- This is the main reason I am declining this injection. It is not the traditional vaccine that has been used effectively for decades. This is a relatively new technique that has failed in animal studies in the past...
- 52 There is no allegation made by her that the Employer Direction is unlawful or unreasonable, or that she need not comply with it. She makes it clear that she is making her own choice that vaccination does not suit her or her personal medical history.
- 53 On 22 February 2022, in response to the Director-General's proposed outcome letter, Ms Fagan raised issues about human rights. She alleged that it is unlawful to discriminate against someone based on their medical history. She alleged that vaccines cannot be mandated under the Commonwealth Constitution. She referred to the *Occupational Safety and Health*

Act 1984 (WA), the Nuremburg Code (1947), the *Biosecurity Act 2015* (Cth), the Siracusa Principles, and various other extracts from handbooks, legislation and case law.

- 54 Clearly, by this time Ms Fagan was relying on an argument that the Employer Direction was unlawful. However, by the time Ms Fagan has expressed the view that the Employer Direction was unlawful, the alleged breach of discipline had already occurred and the disciplinary process was well advanced.
- 55 The 22 February 2022 letter does not show what Ms Fagan's belief was at the time she was in breach of the Employer Direction. It does not explain Ms Fagan's failure to comply with the Employer Direction as being because of a genuinely held belief that she did not need to comply. Rather, the 22 February 2022 letter suggests Ms Fagan resorted to an illegality argument only as a defence to the disciplinary action. That is, it was in an attempt to keep her job, not an explanation for her non-compliance.
- 56 I also note that Ms Fagan's 22 February 2022 correspondence contains verbatim questions and content that were reproduced in the Fair Work Commission decision *Inwood v Baxter & Co Pty Ltd* [2022] FWC 792 at [16]. That decision sets out the content of a letter sent by the applicant, Ms Inwood to Ms Inwood's employer. Deputy President Easton described the letter as 'prepared apparently by a firm of Solicitors that is circulating in public service and private workplaces' and as 'obviously a template': *Inwood v Baxter & Co Pty Ltd*.
- 57 Ms Fagan was not questioned about the source of the text in her 22 February 2022 correspondence. Nor was Ms Fagan questioned about her understanding of the arguments made in the correspondence. It is obvious on its face that it has been reproduced from other sources. While Ms Fagan has adopted the contents as her own, I have reservations about whether she understood the contents so as to have genuinely held the views they express, not least because of the vast quantity, and obscurity, of sources referenced.
- 58 Ms Fagan has not established that she genuinely believed that she did not need to comply with the Employer Direction at the relevant time, that is, prior to 15 December 2021. Certainly she argued after the fact that the Employer Direction was unlawful. But she did not explain her non-compliance as arising from her belief that she did not need to comply.
- 59 Had Ms Fagan's reason for not complying been that she genuinely questioned the lawfulness of the Employer Direction, it could be expected that her explanation be accompanied by an undertaking to comply with the Employer Direction once its lawfulness was clarified or confirmed by legal advice or a relevant judicial determination. There was never any such indication from Ms Fagan.
- 60 Accordingly, I do not find there were circumstances concerning Ms Fagan's beliefs which lessen her culpability for non-compliance with the Employer Direction.
- 61 It was common ground that Ms Fagan's subjective beliefs about the Employer Direction would only lessen the seriousness of her conduct if those subjective beliefs were objectively reasonable. I have not found the reason for Ms Fagan's non-compliance was a belief that the Employer Direction was unlawful and that she need not comply with it. It is not necessary for me to consider the objective reasonableness of a belief that was not held. However, if I had been satisfied that Ms Fagan held such a belief at the relevant time, and that it explained her conduct, I would find that the belief was objectively reasonable.
- 62 The Employer argued that a belief that the Employer Direction was unlawful was not reasonable because:
- (a) Ms Fagan understood that, because of the nature of her role and the CHO Directions, failure to comply with the Employer Direction meant that she could not do her job.
 - (b) Her written responses revealed her position was unreasonable, because she was relying on information that was clearly irrelevant to her circumstances, and therefore irrelevant to whether the Employer Direction was reasonable and lawful. Examples were her questions about the COVID-19 vaccination effects on pregnant recipients and children when she was neither pregnant nor a child.
 - (c) There was no evidence she had sought credible legal or industrial advice about the lawfulness of the Employer Direction or her obligations concerning it. I note in this regard that Ms Fagan's own response of 22 February 2022 contained the recommendation 'all employees should seek specific legal advice for their specific set of circumstances'. It would appear that Ms Fagan instead relied on what she found on the internet. She led no evidence of having taken any other steps to find out whether the Employer Direction was lawful.
- 63 While there is merit to each of these points, I return to my previous observation that the relevant time was the period 15 November 2021 to 15 December 2021. At that time, COVID-19 vaccination mandates were widespread in Australian workplaces, but they were far from business as usual. Like many of the trends that emerged during the COVID-19 pandemic, such workplace directions were widely considered unprecedented. Accordingly, uncertainty surrounded the lawfulness of directions to employees that effectively mandated vaccination. Many legal actions were launched, testing the parameters of what is a lawful direction, including *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059; (2021) 310 IR 399; *Falconer v Chief Health Officer [No 3]* [2022] WASC 270 and *Finlay v Commissioner of Police as the Chief Executive Officer of the Department Known as the Police Service (Department of Police)* [2022] WASC 272 (delivered August 2022).
- 64 It matters not. Even if the evidence established Ms Fagan did not comply with the Employer Direction because she genuinely believed it was unlawful and need not be followed, and even if such a belief was reasonable, it would not sufficiently diminish the seriousness or gravity of the breach of discipline. I discuss my conclusion in this regard under the following heading 'Other gravity considerations'.

Other gravity considerations

- 65 In her written outline of submissions, Ms Fagan alludes to arguments that her conduct in refusing to comply with the Employer Direction was not sufficiently serious to warrant dismissal because:

- (a) The pre-appointment requirements of the role did not contemplate a direction that she agree to undergo vaccination against COVID-19. As such, the refusal was not a rejection of her essential obligations as an employee.
This point was not developed during the hearing. It is not supported by established principles. It is illogical. A lawful direction need not be in contemplation at the contract commencement in order to assess the seriousness of its breach.
- (b) The blanket and blunt approach taken by the Employer and represented by the Employer Direction supported Ms Fagan's view that the Employer Direction was not reasonable or not lawful, or both.
This submission falls away because Ms Fagan did not establish that she had the view the Employer Direction was not lawful or not reasonable at the relevant time.
- (c) The Employer's unwillingness to engage in discussion fuelled Ms Fagan's belief that the Employer Direction was unreasonable.
Again, this submission falls away because Ms Fagan did not establish that she had the view the Employer Direction was not reasonable at the relevant time. Ms Fagan did establish that she had concerns, but those concerns related to the information she had about the effects of the COVID-19 vaccines. She asked questions, but the questions did not themselves reveal her view of the reasonableness of the Employer Direction. Indeed her questions suggest she was yet to form a view.
- (d) The Employer was not actually of the view that the refusal to be vaccinated against COVID-19 was inconsistent with ongoing employment. In this regard, Ms Fagan points to the fact that after the CHO Directions were lifted in June 2022, the Employer permitted a majority of unvaccinated employees to continue in their employment. She also points to the case of Ms Penelope Beere, whose evidence is discussed below.
The answer to this contention is that the evidence relied upon is evidence of the Employer's conduct after the date of Ms Fagan's dismissal. It cannot be relevant to the seriousness or gravity of Ms Fagan's breach, which occurred from 15 November 2021 to 15 December 2021, because it is evidence of the Employer's position at a different time, in different circumstances.

- 66 Ultimately, in my view, Ms Fagan's breach of the Employer Direction was serious enough to warrant dismissal.
- 67 It is well established that a refusal on the part of an employee to comply with a lawful and reasonable direction, will generally constitute a valid reason for dismissal: *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* [1938] HCA 44; (1938) 60 CLR 601 and *McManus v Scott-Charlton* [1996] FCA 1820; (1996) 70 FCR 16 cited in *Heller-Bhatt v Director General, Department of Communities* [2022] WAIRC 00719 at [93]. The degree of conduct that will justify disciplinary action is a question of fact: *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66 citing *Clouston & Co v Corry* (1906) AC 122; *Portilla v BHP Billiton Iron Ore Pty Ltd* [2005] WAIRC 02604; (2005) 85 WAIG 3441 at [131].
- 68 Ms Fagan could not continue to work in her role if she did not follow the Employer Direction. Her failure to follow the Employer Direction had significant impacts for the operation of the prison. Ms Fagan understood the direction, and she understood her non-compliance would have that effect. Her non-compliance was wilful and deliberate. And because it meant she could not work, it was also inconsistent with the continuation of the contract of employment: *Roman v Mercy Hospitals Victoria Ltd* [2022] FWC 711 at [41] and *Heller-Bhatt* at [108]. The conduct, therefore, went to the heart of the employment contract. It was conduct that was incompatible with the fulfilment of Ms Fagan's duties and impeded the performance of the employment contract.
- 69 Dismissal in these circumstances is not disproportionate to the gravity of Ms Fagan's conduct.

Was Ms Fagan treated differently from other employees in similar circumstances?

- 70 Inconsistent treatment of employees can render a dismissal unfair, even if dismissal might otherwise be justified or warranted. The dismissal of an employee may be unfair if another employee guilty of similar or the same misconduct, and without other mitigating features to differentiate, is not dismissed: *Portilla* at [166] citing *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* [2004] WAIRC 13424; *Sexton v Pacific National (ACT) Pty Ltd* [2003] AIRC 506 at [33].
- 71 The reasoning in the cases concerning differential treatment can be traced to a basic notion of fairness: *National Jet Systems Pty Ltd v Mollinger* AIRC R3130, 18 March 1999. In *Donaldson v NSW National Parks & Wildlife Service* [1997] FCA 837, Madgwick J articulated the reasons why differential treatment could render an otherwise 'unexceptional' dismissal unfair by drawing from the criminal law:

It is no answer to say to this that Mr Kettlewell's good fortune, or the NPWS's lack of due firmness with him, is irrelevant to the consideration of the relationship between Mr Donaldson and the NPWS. The criminal law, for example, aims at the protection of citizen's lives, limbs and property by punishing those found guilty of deliberate, reckless or gravely negligent acts. With purposes of such fundamental importance, it is nevertheless the case that, as between co-offenders, the principle of parity of treatment is of such weight that it may be appropriate, where one offender has escaped with too lenient a sentence, to reduce an otherwise appropriate penalty for his colleague in crime to a level which, looked at alone, would be inadequate; and the reason why the principle of disparity of treatment is accorded such weight is that:

"disparity engenders a justifiable sense of grievance in the applicant and an appearance of injustice to that impassive representative of the community, the objective bystander" (*Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606, per Mason J at 613-4)

- 72 Naturally, differential treatment will give rise to a sense of grievance by employees, and be an affront to what His Honour referred to as the 'objective bystander'. However, the enquiry is focused on consistency of treatment, not consistency of outcome: *Capral Aluminium Ltd v Sae* (1997) 75 IR 65; BC9703967.
- 73 *SERCO Gas Services (Vic) Pty Ltd v Alkemade* AIRC R6090, 21 June 1999 is a good illustration of the need to look to treatment not outcome. In that case, several employees' positions had been made redundant. Redundancy was a valid reason for the termination of their employment. However, white collar workers were paid a redundancy calculated using a different methodology to blue collar workers whose positions were redundant. The less favourable methodology applied to the white-collar applicants, not the comparative final amount of their redundancy pay, rendered their terminations unfair.
- 74 Caution must be exercised in approaching claims of differential treatment. As Vice President Lawler said in *Sexton* at [36]:
- In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a "fair go all round" within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing "apples with apples". There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. Obviously, where, as in *National Jet Systems*, there is differential treatment between persons involved in the same incident the Commission can more readily conclude that the cases are properly comparable. However, even then the Commission must approach the matter with caution. Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of particular misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent. Another worker guilty of the same misconduct could not necessarily rely upon the leniency shown to the first worker as a basis for demonstrating that his or her termination was harsh, unjust or unreasonable. Many other examples could be constructed.
- 75 The Full Commission of the NSW Industrial Relations Commission has also described the need for care in deciding whether inconsistency in punishment is a matter that can be taken into account in determining if a dismissal is unfair:
- The response to misconduct is a matter of discretion. The time, place and circumstance of one breach, the circumstances of the offender and the implications for adequate administration of an enterprise, will seldom coincide.
- Electricity Commission of New South Wales t/a Pacific Power v Nieass* (1995) 81 IR 46 at [66].
- 76 The timing of the comparative treatment may be relevant. In *Portilla*, Beech C suggested that the comparative treatment must occur at a contemporaneous point in time: [230]. In *Holman v Telstra Corporation Ltd* [2006] SAIRC 16; (2006) 153 IR 445, the Full Bench of the South Australian Industrial Relations Commission refused to admit fresh evidence, which was said to demonstrate disparity, for reasons that included the fact that the material post-dated the appellant's dismissal: [132].
- 77 In this case, it was agreed that as of the date of the Ms Fagan's dismissal (26 May 2022):
- (a) ten prison officers (including Ms Fagan) had been dismissed by the Employer following a disciplinary process for failing to comply with the Employer Direction;
 - (b) three prison officers had resigned in the course of a disciplinary process for failing to comply with the Employer Direction;
 - (c) 49 prison officers remained subject to a disciplinary process for failing to comply with the Employer Direction for which the process was not complete; and
 - (d) save for those who resigned, no other prison officer had a disciplinary process finalised by the respondent for failing to comply with the Employer Direction with a disciplinary outcome less than dismissal.
- 78 It was also agreed that as of 2 February 2023, 40 of the 49 prison officers who remained subject to a disciplinary process on 26 May 2022 are currently employed.
- 79 Ms Penelope Beere was the only witness in these proceedings, in addition to Ms Fagan. Ms Beere worked as a Security Intelligence Officer at Bunbury Regional Prison. She was asked questions about what she knew about other prison officers who had been the subject of a disciplinary process for not complying with the Employer Direction. She did not know enough about any other person's individual circumstances, or the source of her knowledge was so indirect, that no more could reliably be found about other prison officers beyond the agreed facts.
- 80 The agreed facts are not sufficient evidence of the circumstances of comparable cases to enable a finding that there was inconsistent treatment between Ms Fagan and any other person.
- 81 Ms Fagan's case about disparate treatment also relies upon a comparison with the circumstances, treatment and outcome for Ms Beere. Ms Beere did not comply with the Employer Direction, but the sanction imposed on her was a reprimand, not dismissal.
- 82 I must first assess whether Ms Beere is properly comparable to Ms Fagan. This does not involve an assessment of Ms Beere's and Ms Fagan's relative culpability: *Holman* at [131]. Rather it requires an enquiry into whether there are reasons to have differentiated between Ms Beere and Ms Fagan. If Ms Beere is comparable, then I must consider whether Ms Fagan was treated differently to Ms Beere.
- 83 Ms Beere told the Commission that she worked for the Department as a Security Intelligence Officer appointed under the PSMA, and was based at Bunbury Regional Prison. Her role was to collect and assess intelligence used to identify threats to the safety and security of prisoners and staff. Her work was mostly computer based, although at times she was required to be present at interviews with prisoners.

- 84 Ms Beere received the Director-General's email of 15 November 2021, which contained the Employer Direction. She understood it was a direction to get a COVID-19 vaccination and to provide evidence of having received it, failing which she would not be able to attend the prison.
- 85 Ms Beere did not get a vaccination, nor did she provide evidence of an exemption. She provided her Employer with her personal medical reasons and her own research to explain why she was unwilling to receive the COVID-19 vaccination.
- 86 A disciplinary process was commenced against Ms Beere, in relation to her non-compliance with the Employer Direction. Before the disciplinary process was concluded, on 10 June 2022, Ms Beere returned to work in the same position she was performing as at November 2021. The disciplinary process concluded on 22 February 2023 when Ms Beere was informed that she was being reprimanded.
- 87 The Commission was provided with a copy of a letter from the Director-General sent to Ms Beere dated 22 February 2023. It records that:
- (a) On 1 February 2022, the Director-General advised Ms Beere that he had formed a preliminary view that she had committed two breaches of discipline and that he intended to impose the disciplinary action of dismissing her under s 82A(3)(b) of the PSMA.
 - (b) The disciplinary action was paused whilst judicial review was underway.
 - (c) On 25 November 2022, the Department recommenced the disciplinary process.
 - (d) Ms Beere provided a written submission dated 13 December 2022 in which she 'cite[d] that the vaccination must be given voluntarily in the absence of undue pressure, coercion or manipulation as well as your personal medical history as explanations for non-compliance'.
 - (e) Ms Beere had since returned to her employment as a prison officer after the Employer Direction that required employees to be vaccinated was removed on 10 June 2022.
 - (f) The Director-General had now decided given all the circumstances that Ms Beere will instead receive a reprimand for the two breaches of discipline.
 - (g) The breach/disobedience was serious causing Ms Beere to be away from the workplace and unable to fulfill her duties as an Intelligence Officer.
- 88 Compared with Ms Fagan:
- (a) Ms Beere and Ms Fagan had the same or a substantially similar understanding of the requirements and effect of the Employer Direction.
 - (b) Ms Beere's breaches of discipline occurred over precisely the same period as Ms Fagan's.
 - (c) Ms Beere's breaches of discipline involved precisely the same conduct as Ms Fagan's namely failure to comply with the Employer Direction by failing to be vaccinated against COVID-19 and failing to provide evidence of vaccination or an exemption.
 - (d) The consequence of the breach was the same in both cases: Ms Fagan and Ms Beere were both unable to attend their workplace or fulfil their respective duties.
 - (e) The disciplinary action for both employees was taken under the same provisions of the PSMA.
 - (f) Precisely the same preliminary findings and proposed action/outcome was issued to both employees at the same time: 1 February 2022.
 - (g) The disciplinary process was paused for both Ms Fagan and Ms Beere whilst judicial review proceedings were underway in the Supreme Court.
- 89 An obvious point of departure as between Ms Fagan and Ms Beere is the velocity of the disciplinary processes from 4 May 2022 onwards. The disciplinary process was recommenced for Ms Fagan on 4 May 2022 and concluded on 26 May 2022, but it was recommenced for Ms Beere on 25 November 2022 and concluded on 22 February 2023.
- 90 The Employer argued that Ms Beere was the wrong or an inappropriate comparator because:
- (a) Ms Fagan was engaged as a prison officer under the *Prisons Act*, whereas Ms Beere was engaged as a public servant under the PSMA.
 - (b) Ms Fagan was employed by the Minister, whereas Ms Beere was employed by the Director-General, a different employing authority.
 - (c) As a prison officer, Ms Fagan had specific duties under s 14 of the *Prisons Act*, and the failure to be vaccinated in accordance with the Employer Direction caused her to contravene those duties.
 - (d) The paramilitary nature of Ms Fagan's role as a prison officer meant that failure to follow a lawful direction is a matter of greater significance and seriousness than it is for a public servant.
 - (e) Ms Beere's duties were different to Ms Fagan's. In particular, Ms Fagan worked face to face with prisoners and visitors, while Ms Beere's role was not 'front line' and could be performed away from Bunbury Regional Prison.
 - (f) Ms Beere's circumstances as set out in her response to the disciplinary process was different to Ms Fagan's in that she identified matters relating to her own medical history; whereas Ms Fagan alluded to matters concerning her medical history without disclosing any details.

- 91 I consider there is sufficient evidence of Ms Beere's circumstances to enable a proper comparison between Ms Beere and Ms Fagan to be made. In my view, Ms Beere's circumstances are properly comparable, so that the Commission is comparing 'apples with apples'.
- 92 While it is technically correct that Ms Beere's employment was by a different employing authority and under a different legislative instrument, the distinction is not one of practical substance for present purposes.
- 93 Ms Fagan's appointment under s 13(1) of the *Prisons Act* meant that she was engaged as a 'prison officer' by the Minister. However, s 13(4) of the *Prisons Act* enables the Minister to delegate the Minister's powers under s 13(1) to the Chief Executive Officer of the Department of Justice. The Director-General is the CEO of the Department. Ms Fagan's offer of employment was made 'on behalf of the Director General Department of Justice' indicating that, in her case, the power of appointment was exercised by the Director-General under delegation, not by the Minister.
- 94 For relevant practical purposes, the Director-General had the same authority over Ms Beere and Ms Fagan. Under the *Prisons Act*, Ms Fagan was obliged to obey all lawful orders and directions given to her by the Director-General: s 14(1)(c). The Director-General's functions under the PSMA also included managing and directing employees of the Department, like Ms Beere and Ms Beere was, in turn, obliged to obey all lawful orders and directions given to her by the Director-General: PSMA s 29(1)(g) and s 80(a) and Exhibit A1.
- 95 Employees appointed under s 13 of the *Prisons Act* are subject to the same provisions of the PSMA in relation to substandard performance and disciplinary matters as all public service officers appointed under Part 3 of the PSMA: *Prisons Act* s 98 and PSMA s 76(1)(b).
- 96 The decision maker in the disciplinary process for both employees was the Director-General, Department of Justice, Dr Adam Tomison.
- 97 Importantly, the Employer Direction did not distinguish between employees' employing authority nor their duties. It applied to all employees in the same terms. The Employer Direction was addressed to 'employees' without qualification. Further, the Employer Direction was clearly underpinned by the CHO Directions, which in turn applied to 'Correctional Facility Entrants' which, under the CHO Directions, means any person who enters a correctional facility in any capacity other than an exempt person. Employer authority identity was irrelevant.
- 98 Both employees were based at Bunbury Regional Prison. However, Ms Beere's duties were different to Ms Fagan's duties. Ms Fagan's role was certainly more 'front line'. But the nature of the duties each employee performed was irrelevant to application of the Employer Direction. The Employer Direction applied because of the location of their work, that is, within a correctional facility, regardless of the duties associated with the work.
- 99 The suggestion that the paramilitary nature of Ms Fagan's role meant that her breach was more serious than Ms Beere's was not adequately elaborated upon. I understand the Employer uses the description 'paramilitary' to refer to the fact that, under the *Prisons Act*, a prison officer must make an oath of engagement to promise:
- ...
- (a) I will well and truly serve the State as a prison officer of Western Australia; and
 - (b) I will do my utmost in the performance of my duty as a prison officer to maintain the security of every prison in which I serve and the security of the prisoners and the officers employed at the prison; and
 - (c) I will uphold the *Prisons Act 1981*, as amended from time to time, and the regulations, rules and standing orders made under that Act from time to time; and
 - (d) I will deal with prisoners fairly and impartially; and
 - (e) I will obey the lawful orders of an officer under whose control or supervision I am placed.
- 100 Further, under s 14 of the *Prisons Act*, prison officers:
- (a) must obey the orders of their superintendents and other officers under whose control or supervision they are placed; and
 - (b) have the power to issue orders to prisoners for the security and good order of prisons, and to use reasonable force in ensuring compliance with orders.
- 101 As I understand it, the submission is that these characteristics mean prison officers had a higher duty to comply with the Employer Direction than public service employees.
- 102 I doubt the correctness of that position. The purpose of the Employer Direction was to aid in the security and safety of prisons. It achieved that purpose by mandating vaccination so as to limit the spread of COVID-19 through a combination of widespread vaccination and restrictions on access to prisons of those who were unvaccinated without an exemption. It required compliance across all employees who would ordinarily enter correctional facilities, whether public service employees or prison officers. The imperative for compliance was not dependent on or connected in any way with the features of prison officers' engagement under the *Prisons Act*.
- 103 I also note that the Director-General could have taken removal action under Part X Division 3 of the *Prisons Act* if he considered Ms Fagan's conduct went to her suitability to continue as a prison officer. He instead chose to take disciplinary action under the PSMA, meaning he considered the conduct as relevantly comparable to that of Ms Beere's and did not consider the conduct as going to the heart of Ms Fagan's oath of engagement under s 13(2) or her ability to fulfil her duties as a prison officer under s 14.
- 104 When responding to the disciplinary process, Ms Beere may have been more transparent about her medical history than Ms Fagan was. Ms Fagan did not disclose any details of her medical history, which were the basis for her concerns, whereas Ms Beere did refer to a specific medical complication she had suffered in the past. There was no suggestion Ms Beere provided

any medical exemption or expert medical opinion in support of her response to the disciplinary process. Ultimately, both employees declined to be vaccinated because of their own personal medical history and their concerns about the effects of the vaccine.

- 105 Any difference in the detail of Ms Beere's and Ms Fagan's respective responses does not detract from the comparability of their circumstances because the Director-General does not appear to have based his findings on this aspect of the responses anyway. The 1 February 2022 letters to both employees proposed the same preliminary findings and proposed action of dismissal. As at 1 February 2022, the Director-General apparently considered both employees' circumstances and their conduct to be comparable. Or, put another way, the Director-General did not consider there was reason to distinguish between them, as at 1 February 2022, based on their given reasons for non-compliance with the Employer Directions.
- 106 The Employer points out that the comparison with Ms Beere must fail because the evidence is that other prison officers were dismissed so Ms Fagan was not singled out. This is not the test. The Full Bench of the Australian Industrial Relations Commission rejected an argument that employer conduct must be oppressive or discriminatory in order to be a relevant circumstance in assessing whether there had been a fair go all round: *SERCO Gas Services (Vic) Pty Ltd* at [6], cited with approval in *Sexton* at [34].
- 107 Finally, the Employer made a faint submission that the more appropriate comparators were the prison officers referred to in the Statement of Agreed Facts. However, as I have indicated above, there is insufficient evidence before the Commission about the circumstances of those prison officers for them to be assessed for comparability.
- 108 As I am satisfied that Ms Beere is a proper comparator, I must now consider whether Ms Fagan was treated differently to Ms Beere. This question is not answered by reference to outcomes on their own.
- 109 What appears to be a significant factor in the different outcomes for Ms Beere and Ms Fagan is that the disciplinary action recommenced for Ms Fagan on 4 May 2022 but for Ms Beere, more than six months later, on 25 November 2022. Further, by the time the disciplinary process was recommenced for Ms Beere, the Employer Direction had been lifted and Ms Beere had been permitted to return to work.
- 110 The delay in recommencing the disciplinary process against Ms Beere, despite the fact that the disciplinary process had been at the same stage as Ms Fagan's, means that Ms Beere and Ms Fagan were treated differently.
- 111 There is nothing before the Commission which explains this inconsistent treatment. The difference appears to be nothing more than a matter of timing. This means that the outcome for Ms Fagan is random and arbitrary, and as such, Ms Fagan's dismissal, while Ms Beere remains employed, is harsh and unfair.
- 112 I should make it clear that my analysis does not mean either that the outcome for Ms Beere was the right outcome or that it was the wrong outcome. Nor does it detract from the requirement that each case of breach of discipline be decided on its own facts, taking into account the relevant individual employee's particular circumstances. I echo Vice President Lawler's exhortation against allowing the use of differential treatment to develop in such a way as to act as a disincentive to employers to show leniency in appropriate cases: *Sexton* at [39].

Remedy

- 113 Ms Fagan seeks reinstatement to her former position with no loss of continuity of service, and compensation for loss of remuneration from 10 June 2022 being the date that the vaccination mandates were lifted.
- 114 Reinstatement is the primary remedy under s 23A of the IR Act. The Employer bears the onus of establishing credible reasons why reinstatement is impracticable: *Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2016] WAIRC 00236; (2016) 96 WAIG 408 at [106]. In s 24A, impracticable means not reasonably feasible or reasonably capable of being accomplished. Assessing the practicability of reinstatement involves a bespoke factual evaluation, in a common sense way: *Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WASCA 86; (2017) 97 WAIG 431 per Kenneth Martin J at [148].
- 115 The Employer has not suggested that reinstatement is impracticable. I do not know whether or not Ms Fagan has since been vaccinated against COVID-19, but the requirement to be vaccinated is no longer in place. Her vaccination status is not a barrier to employment with the Employer. It is an agreed fact that, as at 2 February 2023, the Employer employed 40 prison officers who had previously been subject to a disciplinary process for non-compliance with the Employer Direction. I infer from this that those prison officers are not vaccinated against COVID-19 but that their vaccination status is not a barrier to employment.
- 116 Ms Fagan was not able to perform her role at least until the Employee Direction was revoked on 10 June 2022. In those circumstances, I would not order that she be reinstated with continuity of service from the date of the dismissal. Rather, I would order that Ms Fagan be re-instated to the position she held as at 26 May 2022 with effect from the date of my order.
- 117 Ms Fagan has not engaged in remunerated employment since 26 May 2022. She did start her own business of dog obedience training, and has worked in that business since November 2022. The Commission was not told what income Ms Fagan has earned.
- 118 In the absence of evidence of Ms Fagan's earnings, I am unable to quantify her loss. I will therefore order that the respondent pay Ms Fagan remuneration lost because of the dismissal in the period from 10 June 2022 to the date of my order, to be assessed if not agreed. I would make a further order for payment to be made within 14 days of the date of assessment or agreement.
- 119 I will hear from the parties for the purpose of assessing the quantum of compensation and the precise terms of the final orders.

2023 WAIRC 00327

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**

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 14 JUNE 2023

FILE NO/S

APPL 36 OF 2022

CITATION NO.

2023 WAIRC 00327

Result	Order issued
Representation	
Applicant	Mr C Fordham of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING heard from Mr C Fordham of counsel on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the application is upheld.
2. THAT the respondent reinstate the applicant to the position she held as at 26 May 2022 with effect 21 days from the date of the order.
3. THAT the respondent pay the applicant the remuneration lost by her because of the dismissal from 10 June 2022 to the date of reinstatement, to be assessed if not agreed.
4. THAT the parties confer for the purpose of agreeing the quantum of loss, or, if quantum cannot be agreed, for the purpose of programming orders to assess the quantum of loss.
5. THAT the parties provide a minute or minutes of proposed orders for programming the assessment of loss by no later than 28 June 2023.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

NOTICES—Union Matters—

2023 WAIRC 00319

NOTICE

CICS 7 of 2023

NOTICE is given of application CICS 7 of 2023 by The State School Teachers' Union of W.A. (Incorporated) to the Commission in Court Session of the Western Australian Industrial Relations Commission for an alteration to the Heading, Rule 1 – Name, Rule 3A – Definitions, Rule 4 – Membership, Rule 12 – Dispute Resolution Committee, Rule 20A – Control of Funds and Rule 31 – Elections: General Provisions of its registered rules (**the Rules**).

The proposed alterations are detailed below. Proposed alterations are shown as ~~strike through~~ for deletions and underlining for additions.

Existing Heading

RULES OF THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

Proposed HeadingRULES OF THE STATE SCHOOL TEACHERS' UNION OF W.A. (~~INCORPORATED~~)**Existing Rule 1****1 – NAME**

The Union shall be called “The State School Teachers' Union of W.A. (Incorporated)”.

Proposed Rule 1

1 – NAME

The Union shall be called “The State School Teachers' Union of W.A. (~~Incorporated~~)”.

Existing Rule 3A**3A – DEFINITIONS**

In these rules, unless the contrary intention appears:

“**AEU**” means the Australian Education Union.

“**Agent**” in the context of elections conducted pursuant to these rules, means the member of a group or team who is appointed by the group or team members to act on their behalf.

“**Electoral Commissioner**” means the Electoral Commissioner of the Western Australian Electoral Commission.

“**executive committee**” means the committee of management of the union.

“**executive member**” means a member of the union’s committee of management.

“**member**” means an eligible, financial member of the union.

“**office**” means

- (a) The office of president, senior vice president, vice president, general secretary or executive member;
- (b) The office of State Council delegate.

“**officer**” means a person elected to an office within the union.

“**publication**” means the union journal known as the ‘Western Teacher’ or any other official union publication which may appear from time to time and shall include the official website of the union.

“**rules**” means the rules of the State School Teachers’ Union of WA (Incorporated).

“**senior officer**” means the President, Senior Vice-President, Vice-President and General Secretary of the union.

“**union**” means the State School Teachers’ Union of WA (Incorporated).

“**AEU WA Branch**” means the Western Australian branch of the Australian Education Union.

Proposed Rule 3A**3A – DEFINITIONS**

In these rules, unless the contrary intention appears:

“**AEU**” means the Australian Education Union.

“**Agent**” in the context of elections conducted pursuant to these rules, means the member of a group or team who is appointed by the group or team members to act on their behalf.

“**Electoral Commissioner**” means the Electoral Commissioner of the Western Australian Electoral Commission.

“**executive committee**” means the committee of management of the union.

“**executive member**” means a member of the union’s committee of management.

“**member**” means an eligible, financial member of the union.

“**office**” means

- (a) The office of president, senior vice president, vice president, general secretary or executive member;

- (b) The office of State Council delegate.

“**officer**” means a person elected to an office within the union.

“**publication**” means the union journal known as the ‘Western Teacher’ or any other official union publication which may appear from time to time and shall include the official website of the union.

“**rules**” means the rules of ~~the State School Teachers’ Union of W.A. WA (Incorporated).~~

“**senior officer**” means the President, Senior Vice-President, Vice-President and General Secretary of the union.

“**union**” means ~~the State School Teachers’ Union of W.A. WA (Incorporated).~~

“**AEU WA Branch**” means the Western Australian branch of the Australian Education Union.

Existing Rule 4

4 – MEMBERSHIP

The State School Teachers' Union of W.A. (Incorporated) shall consist of an unlimited number of persons employed or usually employed in the following categories:-

(a) **FULL MEMBERS:**

- (i) Teachers employed by or on behalf of the state of Western Australia including teachers employed in pre-school centres in Western Australia provided that such teachers hold or are enrolled for the purpose of obtaining a teaching academic qualification.
- (ii) Teachers, lecturers or trainers employed by any institution providing technical and further education in Western Australia.
- (iii) Any person employed by any of the employers or in any of the places referred to in sub-rule (a)(i) or (a)(ii) of this rule who is employed as an education officer, guidance officer, counsellor or demonstrator.
- (iv) Teachers employed in a temporary capacity by a technical and further education institution.
- (v) Teachers employed by and in a Community College in Western Australia.
- (vi) School teachers who are employed on a part-time (fractional) basis in the supervision and/or coordination of student teachers during their periods of practice teaching in schools provided that they are eligible for membership of the Union within one of the preceding paragraphs of this subrule.
- (vii) Any person elected to an office in the State School Teachers' Union of Western Australia.
- (viii) Any employee of the SSTUWA (Inc) provided that such persons are not eligible for membership of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees.
- (ix) Persons who are qualified to be and desire to be employed in any of the categories of persons specified in subrules (i) - (v) of this rule. Notwithstanding the above, any person who is not registered with the relevant employer as available for work, and has not worked as a teacher for at least two years and who no longer has a contract of employment with the relevant employer shall not be eligible for membership under this subrule.

(b) **HONORARY LIFE MEMBERS:** Any member of the Union who has rendered long and meritorious service to the Union may, upon retirement, be appointed as an Honorary Life Member. For the purpose of such an appointment it shall be necessary that nominations be received and approved by the Executive and published in The Western Teacher or other authorised publication of the Union at least three months prior to the opening of State Council.

(c) **HONORARY MEMBERS:** Exchange teachers who are members of a teachers' organisation in the State or country from which they have come may be appointed by the Executive as Honorary Members of this Union.

(d) **SPECIAL CATEGORY MEMBERSHIP:** Persons who are not trained teachers but who because of their special expertise are placed in charge of a class in any area of the educational service may become Special Category Members.

(e) **RETIRED TEACHER MEMBERS:** Teachers retired from the Department of Education and Training because of age or invalidism may be admitted as Retired Teacher Members at the discretion of the Executive.

(f) **ASSOCIATE MEMBERS:** The following persons are eligible:-

- (i) Retired employees of the Union.
- (ii) Former members, including all categories who are not eligible for any other form of membership.

Proposed Rule 4

4 – MEMBERSHIP

The State School Teachers' Union of W.A. (~~Incorporated~~) shall consist of an unlimited number of persons employed or usually employed in the following categories:-

(a) FULL MEMBERS:

- (i) Teachers employed by or on behalf of the state of Western Australia including teachers employed in pre-school centres in Western Australia provided that such teachers hold or are enrolled for the purpose of obtaining a teaching academic qualification.
 - (ii) Teachers, lecturers or trainers employed by any institution providing technical and further education in Western Australia.
 - (iii) Any person employed by any of the employers or in any of the places referred to in sub-rule (a)(i) or (a)(ii) of this rule who is employed as an education officer, guidance officer, counsellor or demonstrator.
 - (iv) Teachers employed in a temporary capacity by a technical and further education institution.
 - (v) Teachers employed by and in a Community College in Western Australia.
 - (vi) School teachers who are employed on a part-time (fractional) basis in the supervision and/or coordination of student teachers during their periods of practice teaching in schools provided that they are eligible for membership of the Union within one of the preceding paragraphs of this subrule.
 - (vii) Any person elected to an office in ~~the State School Teachers' Union of Western Australia~~ W.A..
 - (viii) Any employee of the SSTUWA (~~Inc~~) provided that such persons are not eligible for membership of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees.
 - (ix) Persons who are qualified to be and desire to be employed in any of the categories of persons specified in subrules (i) - (v) of this rule. Notwithstanding the above, any person who is not registered with the relevant employer as available for work, and has not worked as a teacher for at least two years and who no longer has a contract of employment with the relevant employer shall not be eligible for membership under this subrule.
- (b) **HONORARY LIFE MEMBERS:** Any member of the Union who has rendered long and meritorious service to the Union may, upon retirement, be appointed as an Honorary Life Member. For the purpose of such an appointment it shall be necessary that nominations be received and approved by the Executive and published in The Western Teacher or other authorised publication of the Union at least three months prior to the opening of State Council.
- (c) **HONORARY MEMBERS:** Exchange teachers who are members of a teachers' organisation in the State or country from which they have come may be appointed by the Executive as Honorary Members of this Union.
- (d) **SPECIAL CATEGORY MEMBERSHIP:** Persons who are not trained teachers but who because of their special expertise are placed in charge of a class in any area of the educational service may become Special Category Members.
- (e) **RETIRED TEACHER MEMBERS:** Teachers retired from the Department of Education and Training because of age or invalidism may be admitted as Retired Teacher Members at the discretion of the Executive.
- (g) **ASSOCIATE MEMBERS:** The following persons are eligible:-
- (iii) Retired employees of the Union.
 - (iv) Former members, including all categories who are not eligible for any other form of membership.

Existing Rule 12**12 – DISPUTE RESOLUTION COMMITTEE**

- (a) A Dispute Resolution Committee consisting of three members shall be empowered to consider and to make recommendations to the Executive in relation to:
- (i) charges under Rule 11;
 - (ii) any dispute a member or members may have concerning the application or interpretation of any rule or the registration of any proposed rule of the SSTUWA (Inc):
- (b) Subject to Rule 11, the Executive may confirm, quash or vary a recommendation made to it by the Dispute Resolution Committee.
- (c) The three members shall be selected by lot from a list of twelve financial members.
- (d) The names of twelve financial members shall be determined by ballot at the last meeting of State Council each year.
- (e) Neither a member of Executive nor the General Secretary may sit on the Dispute Resolution Committee.
- (f) Upon notification of a dispute under sub-rule (a)(ii), the Dispute Resolution Committee must convene for the purpose of hearing the dispute not more than 21 days after receipt of the notification, and provide all relevant parties to the dispute at least seven days' notification of the hearing date.

Proposed Rule 12**12 – DISPUTE RESOLUTION COMMITTEE**

- (a) A Dispute Resolution Committee consisting of three members shall be empowered to consider and to make recommendations to the Executive in relation to:
- (i) charges under Rule 11;
 - (ii) any dispute a member or members may have concerning the application or interpretation of any rule or the registration of any proposed rule of the SSTUWA (~~Inc~~):

- (b) Subject to Rule 11, the Executive may confirm, quash or vary a recommendation made to it by the Dispute Resolution Committee.
- (c) The three members shall be selected by lot from a list of twelve financial members.
- (d) The names of twelve financial members shall be determined by ballot at the last meeting of State Council each year.
- (e) Neither a member of Executive nor the General Secretary may sit on the Dispute Resolution Committee.
- (f) Upon notification of a dispute under sub-rule (a)(ii), the Dispute Resolution Committee must convene for the purpose of hearing the dispute not more than 21 days after receipt of the notification, and provide all relevant parties to the dispute at least seven days' notification of the hearing date.

Existing Rule 20A

20A – CONTROL OF FUNDS

- (a) The Union must open one or more accounts in the name of the State School Teachers' Union of WA (Incorporated) with one or more financial institutions from which all expenditure of the Union is made and into which all funds received by the Union are deposited.
- (b) Subject to any restrictions imposed at a general meeting or at a meeting of the State Council, the Executive may approve expenditure on behalf of the Union.
- (c) The Executive may authorise an Officer or Officers to expend funds on behalf of the Union up to a specified limit without requiring approval from the Executive for each item on which the funds are to be expended.
- (d) All cheques, drafts, bills of exchange, promissory notes and other negotiable instruments of the Union must be signed by:
 - (i) Two members of the Executive; or
 - (ii) One member of the Executive and a person authorised by the Executive.
- (e) All funds of the Union must be deposited in to the Union's account within 5 working days after their receipt.

Proposed Rule 20A

20A – CONTROL OF FUNDS

- (a) The Union must open one or more accounts in the name of the State School Teachers' Union of ~~W.A. WA (Incorporated)~~ with one or more financial institutions from which all expenditure of the Union is made and into which all funds received by the Union are deposited.
- (b) Subject to any restrictions imposed at a general meeting or at a meeting of the State Council, the Executive may approve expenditure on behalf of the Union.
- (c) The Executive may authorise an Officer or Officers to expend funds on behalf of the Union up to a specified limit without requiring approval from the Executive for each item on which the funds are to be expended.
- (d) All cheques, drafts, bills of exchange, promissory notes and other negotiable instruments of the Union must be signed by:
 - (i) Two members of the Executive; or
 - (ii) One member of the Executive and a person authorised by the Executive.
- (f) All funds of the Union must be deposited in to the Union's account within 5 working days after their receipt.

Existing Rule 31

31 – ELECTIONS: GENERAL PROVISIONS

- (a) Elections for Senior Officers and Executive Committee members shall be conducted by the Western Australian Electoral Commission under the direction of a Returning Officer appointed under the provisions of the Electoral Act 1907.
- (b) Elections for branch officers, branch delegates to District Council, delegates to State Council, and Union committees elected at State Council shall be conducted by the SSTUWA Returning Officer in accordance with the provisions of Rule 32 – SSTUWA Returning Officer and Assistant Returning Officer, Rule 33 – Elections: Branch Officers, District and State Councils, Union Committees, and Rule 34 – Elections for Senior Officers and Executive Members (g) – (k), and (m) – (w).
- (c) Only members of the union who are financial at the date on which nominations close, and have been continuously financial for two years immediately preceding that date, shall be eligible to stand for election as a Senior Officer or Executive Member. For the purposes of this rule, any member who has been a financial member of a teaching union in another state and has transferred such membership to the union within 3 months of commencing employment shall be eligible to stand for election after one year's continuous financial membership immediately preceding the close of nominations.
- (d) The provisions of the Rules of the State School Teachers' Union of WA (Inc) shall apply to the conduct of any election conducted under (a) and (b) of this rule.
- (e) All election material is required to be authorised; such authorisation must include the name and address of any persons authorising election material to be included on all such material.
- (f) In any election, no candidate or member, or employee shall use any logo or letterhead of the Union in electoral material; no senior officer, executive member or employee of the Union shall use that office or position to endorse electoral material on behalf on any candidate.

- (g) No candidate or member, or employee shall make use of any resources of the Union for the production and/or distribution of electoral material unless
- (1) such use is expressly authorised by this rule; or
 - (2) the opportunity for such use is
 - (i) expressly authorised by the Executive; and
 - (ii) available equally to all candidates in the relevant election; and
 - (iii) notified in writing to all candidates in the relevant election sent to the address appearing on each candidate's nomination form within three working days after the close of nominations.
 - (3) For the purposes of this rule, "resources of the Union" includes, but is not limited to, branch capitation fees, membership databases – including attendance lists collected by the union at member meetings – photocopying or printing facilities, email lists, email facilities, staff time, stationery, and stamps.
 - (4) Should candidates wish to include authorised election material as an advertisement in the "Western Teacher," this shall be charged at normal advertising rates. Such advertising shall be confined to the period of the election i.e. from the calling of nominations until the declaration of the poll.

Proposed Rule 31

31 – ELECTIONS: GENERAL PROVISIONS

- (a) Elections for Senior Officers and Executive Committee members shall be conducted by the Western Australian Electoral Commission under the direction of a Returning Officer appointed under the provisions of the Electoral Act 1907.
- (b) Elections for branch officers, branch delegates to District Council, delegates to State Council, and Union committees elected at State Council shall be conducted by the SSTUWA Returning Officer in accordance with the provisions of Rule 32 – SSTUWA Returning Officer and Assistant Returning Officer, Rule 33 – Elections: Branch Officers, District and State Councils, Union Committees, and Rule 34 – Elections for Senior Officers and Executive Members (g) – (k), and (m) – (w).
- (c) Only members of the union who are financial at the date on which nominations close, and have been continuously financial for two years immediately preceding that date, shall be eligible to stand for election as a Senior Officer or Executive Member. For the purposes of this rule, any member who has been a financial member of a teaching union in another state and has transferred such membership to the union within 3 months of commencing employment shall be eligible to stand for election after one year's continuous financial membership immediately preceding the close of nominations
- (d) The provisions of the Rules of ~~the~~ State School Teachers' Union of W.A. ~~WA (Inc)~~ shall apply to the conduct of any election conducted under (a) and (b) of this rule.
- (e) All election material is required to be authorised; such authorisation must include the name and address of any persons authorising election material to be included on all such material.
- (f) In any election, no candidate or member, or employee shall use any logo or letterhead of the Union in electoral material; no senior officer, executive member or employee of the Union shall use that office or position to endorse electoral material on behalf of any candidate.
- (g) No candidate or member, or employee shall make use of any resources of the Union for the production and/or distribution of electoral material unless
 - (1) such use is expressly authorised by this rule; or
 - (2) the opportunity for such use is
 - (i) expressly authorised by the Executive; and
 - (ii) available equally to all candidates in the relevant election; and
 - (iii) notified in writing to all candidates in the relevant election sent to the address appearing on each candidate's nomination form within three working days after the close of nominations.
 - (3) For the purposes of this rule, "resources of the Union" includes, but is not limited to, branch capitation fees, membership databases – including attendance lists collected by the union at member meetings – photocopying or printing facilities, email lists, email facilities, staff time, stationery, and stamps.
 - (4) Should candidates wish to include authorised election material as an advertisement in the "Western Teacher," this shall be charged at normal advertising rates. Such advertising shall be confined to the period of the election i.e. from the calling of nominations until the declaration of the poll.

A copy of the Rules of the organisation and the proposed rule alterations may be inspected in the Registry on Level 17, 111 St Georges Terrace, Perth WA.

Any organisation/association registered under the *Industrial Relations Act 1979* (WA), or any person who satisfies the Commission in Court Session that they have a sufficient interest or desires to object to the application may, having given notice of that objection within the time and in the manner prescribed, appear and be heard in objection to the application.

Pursuant to regulation 69(5) of the *Industrial Relations Commission Regulations 2005* (WA) a notice of an objection in the approved form (*Form 1A – Multipurpose Form*) must be filed within 21 days of this notice. A *Form 1A – Multipurpose Form* is available on the WAIRC website at www.wairc.wa.gov.au under Applications & Forms.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

9 June 2023

WORK HEALTH AND SAFETY ACT—Matters dealt with

2023 WAIRC 00268

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

CITATION	:	2023 WAIRC 00268
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	FRIDAY, 5 MAY 2023, WEDNESDAY, 10 MAY 2023
DELIVERED	:	THURSDAY, 11 MAY 2023
FILE NO.	:	WHST 3 OF 2023
BETWEEN	:	CLINICAL LABORATORIES (WA) PTY LTD Applicant AND THE GOVERNMENT OF WESTERN AUSTRALIA'S DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY Respondent

CatchWords	:	Application for external review – stay on Improvement Notice – stay principles – stay application granted
Legislation	:	<i>Work Health and Safety Act 2020</i> (WA) s 3, s 229, s 229A, s 229B <i>Industrial Relations Act 2020</i> (WA) s 49(11)
Result	:	Stay application granted
Representation:		
Counsel:		
Applicant	:	Mr Daniel Hill (of counsel)
Respondent	:	Mr David Blades (of counsel)

Case(s) referred to in reasons:

Elgas Ltd v SafeWork NSW (No 2) [2021] NSWIRComm 1102

Essential Energy (ACN 37428185226) v WorkCover Authority of New South Wales [2012] NSWIRComm 83

Multiplex Constructions Pty Ltd v The Regulator Under the Work Health and Safety Act 2011 [2018] QIRC 116; (2018) 281 IR 204

Soutorine v The Medical Board of Australia [2020] WASAT 5

Xu Hong Bin v Yan Li [2021] WAIRC 00662

Reasons for Decision

- 1 For simplicity, these reasons refer to the respondent as WorkSafe.
- 2 In February 2023, a WorkSafe Inspector issued Improvement Notice 90022369 to Clinical Laboratories (WA) Pty Ltd (**Clinical Laboratories**) requiring it to take practical measures to ensure its employees are not exposed to hazards arising from a lack of fresh air ventilation when working at the workplace by 24 March 2023. WorkSafe later extended the time for compliance with the Improvement Notice to 31 May 2023.
- 3 Clinical Laboratories has applied to the Tribunal for an external review. It argues that the Improvement Notice was invalidly issued and the *Work Health and Safety Act 2020* (WA) (**WHS Act**) does not require it to implement the measures in the Improvement Notice.
- 4 Clinical Laboratories seeks a stay of the Improvement Notice (**Stay Application**), which WorkSafe does not oppose.
- 5 These reasons deal with the Stay Application.

Legislative framework

- 6 Section 229 of the WHS Act sets out who may apply to the Tribunal for an external review of particular decisions.
- 7 Section 229A sets out the Tribunal's powers and the process for an external review. It provides:
 - (1) This section applies if an application is made under section 229 for an external review of a decision.

- (2) The Tribunal must review the decision (unless the applicant withdraws or discontinues the application).
 - (3) The review is to be by way of a hearing de novo, and it is not confined to matters that were before the decision-maker but may involve consideration of new material whether or not it existed at the time the decision was made.
 - (4) The purpose of the review is to produce the correct and preferable decision at the time of the completion of the review.
 - (5) When the review is completed, the Tribunal may —
 - (a) confirm or vary the decision; or
 - (b) set aside the decision and substitute another decision that the Tribunal considers appropriate.
 - (6) Despite subsections (2) to (4), the Tribunal may, with the agreement of the applicant and the decision-maker, act under subsection (5)(a) or (b) without starting or completing the review.
 - (7) Subsections (2) to (4) are also subject to Schedule 1 clause 30.
- 8 Section 229B of the WHS Act deals with the Tribunal’s power to order a stay. It provides:
- (1) This section applies if an application is made under section 229 for an external review of a decision.
 - (2) The Tribunal may stay the operation of the decision (wholly or partly) pending the Tribunal acting under section 229A(5)(a) or (b) or for any shorter period the Tribunal determines.
 - (3) The Tribunal may cancel or vary a stay.
 - (4) If the decision is a decision referred to in section 229(1)(c), if relevant, the staying of its operation does not revive the reviewable decision that was the subject of the internal review.
- 9 The objects of the WHS Act are set out in s 3. The WHS Act focusses on securing safety for workers and others in the workplace:
- (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by —
 - (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work; and
 - (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and
 - (c) fostering cooperation and consultation between, and providing for the participation of, the following persons in the formulation and implementation of work health and safety standards to current levels of technical knowledge and development and encouraging those persons to take a constructive role in promoting improvements in work health and safety practices —
 - (i) workers;
 - (ii) persons conducting businesses or undertakings;
 - (iii) unions;
 - (iv) employer organisations;

and

 - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
 - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
 - (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and
 - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
 - (h) providing for the formulation of policies, and for the coordination of the administration of laws, relating to work health and safety; and
 - (i) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in the State.
 - (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable.

Relevant principles

- 10 Recently in *Xu Hong Bin v Yan Li* [2021] WAIRC 00662; (2022) 102 WAIG 37, the Chief Commissioner confirmed at [8] the principles that apply in relation to stay applications under s 49(11) of the *Industrial Relations Act 1979* (WA).

For the purposes of the disposition of the present application, I refer to my recent decision on a stay application in *GHD Pty Limited v WorkSafe Western Australia Commissioner* [2021] WAIRC 00190; (2021) 101 WAIG 569 where at [8] I said as follows:

The relevant principles applicable to stay applications are not in contest. Reference was made by both parties to *John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* [2005] WAIRC 02983; (2005) 85 WAIG 3918, per Ritter AP at [31] – [38]. These principles were recently discussed and considered by the Court of Appeal in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2019] WASCA 141, where the Court, at [47] - [48] said:

An application for a suspension order under s 15 of the *Civil Judgments Enforcement Act 2004* (WA) or an interim order for a stay under r 44 of the *Supreme Court (Court of Appeal) Rules 2005* (WA) is generally considered in the framework of the principles enunciated in *Eastland Technology Australia Pty Ltd v Whisson*. Those principles were conveniently re-stated by Pullin JA in *Tradesman Technologies Pty Ltd v Ameduri* in the following terms:

- (a) The successful litigant is ordinarily entitled to enforce a judgment pending the determination of any appeal.
- (b) It is for the applicant for a stay to move the court to a favourable exercise of its discretion. Under s 15(3) this court may only make a suspension order if there are 'special circumstances' that justify doing so and in an application for a stay under the rules this is also a usual requirement.
- (c) The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation or whether a refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. This may shortly be described as requiring the court to consider whether the right of appeal will be rendered nugatory if a stay is not granted.
- (d) If it can be demonstrated that the right of appeal will be rendered nugatory if a stay is not granted, the stay will generally still be refused unless it can be established that the appeal has ultimately reasonable prospects of success.
- (e) Finally, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.

Accordingly, consideration of whether there are 'special circumstances' justifying an interim stay normally involves assessment of three things:

- (1) Is the stay necessary to preserve the subject matter or the integrity of the litigation?
- (2) Does the appeal have reasonable prospects of success?
- (3) Does the balance of convenience favour the grant of the stay?

- 11 The Tribunal's power to order a stay under s 229B of the WHS Act has not been considered before and there are few decisions arising under similar legislation in other jurisdictions.
- 12 In *Elgas Ltd v SafeWork NSW (No 2)* [2021] NSWIRComm 1102 Sloan C considered an application for the stay of decisions made by the work health and safety regulator that were the subject of an application for external review. Sloan C adopted the approach taken in *Essential Energy (ACN 37428185226) v WorkCover Authority of New South Wales* [2012] NSWIRComm 83 by Blackman J, which was to consider:
 - a. Is there a serious question to be tried?
 - b. Does the balance of convenience favour the granting of a stay of proceedings?
- 13 In *Multiplex Constructions Pty Ltd v The Regulator Under the Work Health and Safety Act 2011* [2018] QIRC 116; (2018) 281 IR 204 (**Multiplex**), O'Connor DP considered an application for the stay of a decision made on an internal review and the operation of a prohibition notice issued by an Inspector of Work Health and Safety Queensland. O'Connor DP applied the principles detailed by the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 68. These were summarised as:
 - a. The court has a discretion involving the weighing of considerations such as the balance of convenience and the competing rights of the parties.
 - b. Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay.
 - c. The court will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.
 - d. In considering whether to grant the stay, it is sufficient that the applicant for the stay demonstrate a reason or an appropriate case to warrant favourable exercise of the discretion.
- 14 In a decision of the State Administrative Tribunal, *Soutorine v The Medical Board of Australia* [2020] WASAT 5, Tottle J said:

The considerations that guide the exercise of the discretion to grant a stay pending an appeal in curial proceedings may provide some guidance when determining whether to grant a stay pending the determination of a review application – the relevance of those principles will vary according to the nature of the decision giving rise to the order in respect of which a stay is sought.

I agree with respect with Curthoys J's observations in *PAG [PAG (WA) Pty Ltd and Commissioner for Consumer Protection]* [2018] WASAT 57] that, in the context of a stay application brought within an application to review an administrative decision, a regulatory decision-making authority is not to be equated with the successful party in proceedings in which the issues have been contested and determined by a court or tribunal.

Similarly the decisions on applications to stay immediate action decisions in other jurisdictions may provide some guidance as to the considerations bearing upon the discretion to grant a stay but care must be taken to recognise any relevant differences in the legislative frameworks in which the interstate decisions were made and the nature of the decision that gave rise to the order the subject of the stay application [26] – [28].

- 15 The WHS Act does not prescribe the matters to be considered by the Tribunal when deciding whether to grant a stay under s 229B.
- 16 The decision under review is an administrative decision of a regulatory decision-making authority, and not an order made by a court or tribunal after the hearing and determination of contested proceedings.
- 17 Given the nature of this matter and the statutory context, I consider that the following considerations are relevant to considering the Stay Application:
 - a. Is the stay necessary to preserve the subject matter or integrity of the appeal?
 - b. Does the applicant have an arguable case?
 - c. Does the balance of convenience favour the grant of the stay?

Clinical Laboratories' submissions

- 18 Clinical Laboratories acknowledges that the ratio in *Multiplex* does not bind the Tribunal, but submits that the reasoning in that case can assist the Tribunal.
- 19 Clinical Laboratories argues that allowing the Improvement Notice to remain on foot, with a compliance date that will lapse before the substantive proceedings can be determined, would defeat the purpose of a statutory regime for external review. If Clinical Laboratories has to comply with the Improvement Notice, the substantive proceedings would be rendered nugatory.
- 20 Clinical Laboratories submits it has an arguable case that there is no reasonable basis in fact or law that gave the Inspector the power to issue the Improvement Notice.
- 21 In summary, Clinical Laboratories submits that the balance of convenience favours a stay, because:
 - a. The imposition of the disputed measures is at the heart of the substantive application.
 - b. Without a stay, Clinical Laboratories would be susceptible to prosecution if it did not comply with the Improvement Notice, in circumstances where Clinical Laboratories argues that the Improvement Notice was invalidly issued and requires Clinical Laboratories to take measures that the WHS Act does not require it to take.
 - c. There is public interest in not allowing statutory compliance and enforcement tools to be used by the regulator to extend the nature and operation of the duties that Parliament has imposed.
 - d. The public has an interest in workplace safety, but this is not a case where there is no safety management in place in the workplace.
 - e. There would be no disadvantage to WorkSafe if the stay is granted and WorkSafe does not oppose the stay.

WorkSafe's submission

- 22 WorkSafe does not oppose the Stay Application and says that the external review is unlikely to be completed by 31 May 2023 (the deadline for compliance with the Improvement Notice).
- 23 WorkSafe submits that the WHS Act does not prescribe the matters to be taken into account by the Tribunal when deciding whether to grant a stay. It argues that the Tribunal should infer that the public interest is also a relevant consideration of a stay application under the WHS Act. WorkSafe says public interest should be understood in the relevant statutory context, which in this case includes the objects of the WHS Act. WorkSafe emphasises the importance of the objects at s 3(a) and (e), as well as s 3(2) of the WHS Act. It argues that there is public interest in giving workers the highest level of protection against harm to health, safety and welfare from hazards and risks arising from work as is reasonably practicable, while at the same time:
 - a. fostering cooperation and consultation between workers and employers, and continuous improvement in work, health and safety;
 - b. securing compliance with the WHS Act through effective and appropriate measures taken by WorkSafe; and
 - c. ensuring appropriate scrutiny and review (including external review by the Tribunal) of actions taken by WorkSafe.
- 24 Importantly, WorkSafe says this is a matter where time can be allowed for the implementation of the improvement measures.
- 25 WorkSafe does not say Clinical Laboratories lacks an arguable case. In relation to whether there is a serious question to be tried, WorkSafe acknowledges that Clinical Laboratories is entitled to an external review of the relevant decision with the opportunity to present evidence and submissions contrary to the WorkSafe Inspector's view.

26 WorkSafe concedes that refusing the stay would render the substantive review nugatory.

Consideration

27 For the following reasons, I am satisfied that the Tribunal should grant the Stay Application.

28 In my view, the stay is necessary to preserve the subject matter or integrity of the litigation. If a stay is not granted, Clinical Laboratories would be required to implement the measures in the Improvement Notice by 31 May 2023 or risk prosecution. This creates practical difficulties in respect of the relief that could be granted by the Tribunal if Clinical Laboratories were to comply with the Improvement Notice and then be successful in its substantive application. As WorkSafe rightly concedes, once the improvement measures are implemented, from a practical perspective the appeal would be rendered nugatory.

29 Having considered the grounds of appeal set out in the Form 6 – Application to the Work Health and Safety Tribunal, there is at least an arguable case in relation to whether Clinical Laboratories should have to comply with the measures in the Improvement Notice. There is a serious question to be tried in relation to the reasonableness of the decision the subject of external review.

30 I agree that the public interest is relevant to the Tribunal’s consideration of the Stay Application. It is clear from the objects of the WHS Act that the legislation focusses on achieving safety in the workplace. It is relevant to consider whether a stay would create unacceptable risks for workers and others in the workplace. It is apparent from WorkSafe’s response to the Stay Application that the regulator considers that it would not. As WorkSafe submits:

- a. this matter involves improvement measures that may require external technical assistance to be implemented, and not a hazard requiring immediate attention to safeguard workers; and
- b. the timing of the stay is consistent with s 3(1)(e) of the WHS Act.

31 The Tribunal has already programmed the substantive application for hearing. In accordance with those directions, the matter should be heard in around five months. In all of the circumstances, the Tribunal is satisfied that the balance of convenience favours the grant of the stay.

32 An order will issue staying the operation of the Improvement Notice pending the Tribunal acting under s 229A(5) of the WHS Act in relation to application WHST 3 of 2023.

2023 WAIRC 00308

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES

CLINICAL LABORATORIES (WA) PTY LTD

APPLICANT

-v-

THE GOVERNMENT OF WESTERN AUSTRALIA'S DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE WEDNESDAY, 31 MAY 2023

FILE NO/S WHST 3 OF 2023

CITATION NO. 2023 WAIRC 00308

Result Application withdrawn and discontinued

Representation

Applicant Mr D Hill (of counsel)

Respondent Mr D Blades (of counsel)

Order

WHEREAS on 30 May 2023 the applicant sent to the Registry a Form 1A – Multipurpose Form asking to withdraw application WHST 3 of 2023;

AND WHEREAS the respondent confirmed on 31 May 2023 that it does not object to the application being withdrawn;

NOW THEREFORE the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA) and the *Industrial Relations Act 1979* (WA), orders –

THAT application WHST 3 of 2023 is withdrawn and discontinued.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2023 WAIRC 00271

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES

CLINICAL LABORATORIES (WA) PTY LTD

APPLICANT

-v-

THE GOVERNMENT OF WESTERN AUSTRALIA'S DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE FRIDAY, 12 MAY 2023

FILE NO/S WHST 3 OF 2023

CITATION NO. 2023 WAIRC 00271

Result Stay application granted

Representation

Applicant Mr Daniel Hill (of counsel)

Respondent Mr David Blades (of counsel)

Order

HAVING heard from Mr D Hill (of counsel) on behalf of the applicant and Mr D Blades (of counsel) on behalf of the respondent, pursuant to s 229B of the Work Health and Safety Act 2020 (WA), the Tribunal orders –

THAT the operation of Improvement Notice 90022369 is stayed pending the Tribunal acting under s 229A(5)(a) or (b) of the Work Health and Safety Act 2020 (WA).

(Sgd.) T EMMANUEL, Commissioner.

[L.S.]

