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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2023 WAIRC 00687

APPEAL AGAINST A DECISION OF THE PUBLIC SERVICE APPEAL BOARD IN MATTER NUMBER PSAB 60/2022 GIVEN ON 5 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00687
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA
HEARD	:	WEDNESDAY, 19 JULY 2023
DELIVERED	:	14 AUGUST 2023
FILE NO.	:	FBA 2 OF 2023
BETWEEN	:	ROBERT DONALD GODDARD Appellant AND GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE Respondent

Catchwords	:	Industrial law (WA) - Appeal instituted from a decision of Public Service Appeal Board - Full Bench has no jurisdiction to hear appeals from Public Service Appeal Board - Appeal dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) s 49, s 49(1), s 49(2)
Result	:	Appeal dismissed for want of jurisdiction
Representation:		
Counsel:		
Appellant	:	In person
Respondent	:	Mr D Anderson of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Henryk Turlinski v Norman Baker, Managing Director, Pilbara Institute [2014] WAIRC 00263; (2014) 94 WAIG 341

Hill v Commissioner, Corrective Services, Dept. of Corrective Services [2009] WAIRC 00166; (2009) 89 WAIG 417

State Government Insurance Commission v Johnson (1996) 76 WAIG 4142

Reasons for Decision

THE FULL BENCH:

1 By a notice of appeal filed on 11 May 2023, the appellant purported to file an appeal under s 49(2) of the *Industrial Relations Act 1979* (WA) from a decision of the Public Service Appeal Board in application PSAB 60 of 2022. The following day, on 12 May 2023, the respondent filed an application that the appeal should be dismissed, as not being within the jurisdiction of the Full Bench under s 49 of the *Act*. In light of that application, the procedural requirement for the filing of appeal books was suspended, pending the hearing and determination of the respondent's application to dismiss the appeal.

2 At the direction of the Full Bench, the Registry, on 15 May 2023, provided to the appellant a copy of the decision of the Full Bench of the Commission in ***Henryk Turlinski v Norman Baker, Managing Director, Pilbara Institute*** [2014] WAIRC 00263; (2014) 94 WAIG 341. That decision of the Full Bench refers to and confirms a line of authority to the effect that no appeal lies to the Full Bench from a decision of the Appeal Board under s 49 of the *Act*.

3 The appellant considered that the decision of the Full Bench in ***Turlinski*** was not similar to the circumstances of his case. He did not indicate that he would discontinue or otherwise not proceed with his appeal. Accordingly, given the application by the respondent to dismiss the appeal, that application was listed for hearing on 19 July 2023. In connection with the application to dismiss, the respondent filed a written outline of submissions, referring to previous authority of the Commission, including ***Turlinski***, where the Full Bench has consistently confirmed that it has no jurisdiction to hear an appeal of the present kind.

4 After hearing from the appellant, the Full Bench announced its decision that the appeal must be dismissed, with reasons to be published in due course.

5 In ***Turlinski,*** the Full Bench referred to earlier authority confirming the absence of jurisdiction in the Full Bench to hear appeals of the present kind, including ***State Government Insurance Commission v Johnson*** (1996) 76 WAIG 4142 and ***Hill v Commissioner, Corrective Services, Dept. of Corrective Services*** [2009] WAIRC 00166; (2009) 89 WAIG 417. As those cases confirm, a decision of the Appeal Board is not a decision of 'the Commission constituted by a Commissioner', for the purposes of s 49(1) of the *Act*. That being so, for the purposes of s 49(2) of the *Act*, no appeal is being brought from 'any decision of the Commission'. Accordingly, the appeal must be dismissed.

2023 WAIRC 00688

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT DONALD GODDARD

APPELLANT

-and-

GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE

RESPONDENT

CORAM FULL BENCH
CHIEF COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL
COMMISSIONER T KUCERA

DATE 14 AUGUST 2023

FILE NO/S FBA 2 OF 2023

CITATION NO. 2023 WAIRC 00688

Result Appeal dismissed

Appearances

Appellant In person

Respondent Mr D Anderson of counsel

Order

This appeal having come on for hearing before the Full Bench on 19 July 2023, and having heard Mr R Goddard on his own behalf as appellant, and Mr D Anderson of counsel on behalf of the respondent, and reasons for decision having been delivered on 14 August 2023, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

COMMISSION IN COURT SESSION—Unions—Application for Alteration of Rules—

2023 WAIRC 00702

APPLICATION PURSUANT TO S.62(2) - ALTERATION OF REGISTERED RULES AND NAME

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00702
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG
HEARD	:	THURSDAY, 10 AUGUST 2023
DELIVERED	:	TUESDAY, 15 AUGUST 2023
FILE NO.	:	CICS 7 OF 2023
BETWEEN	:	THE STATE SCHOOL TEACHERS' UNION OF W.A (INCORPORATED) Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial Law (WA) - Application pursuant to s 62(2) - Alteration of registered rules to change name of organisation - Application granted
Legislation	:	*Associations Incorporation Act 2015* (WA) *Industrial Relations Act 1979* (WA) ss 55, 56, 58(3), 59, 60 and 62(2) *Industrial Relations Commission Regulations 2005* (WA) reg 71
Result	:	Order issued
Representation:		
Counsel:		
Applicant	:	Mr D Stojanoski of counsel
Solicitors:		
Applicant	:	Slater and Gordon

Case(s) referred to in reasons:

Reasons for Decision

COMMISSION IN COURT SESSION:

1 The State School Teachers' Union of W.A. (Incorporated) is an organisation registered under the *Industrial Relations Act 1979* (WA). By this application, it seeks the authority of the Commission in Court Session to alter its rules that relates to its name, under s 62(2) of the *Act*. The application seeks an alteration of the name of the applicant, The State School Teachers' Union of W.A. (Incorporated), by deleting the reference to '(Incorporated)'. The reason the applicant seeks this alteration to its name is that it is no longer an incorporated association under the *Associations Incorporation Act 2015* (WA). This is a separate incorporation to the incorporated status of an organisation which is registered under the *Act*, which incorporation is given effect by s 60 of the *Act*.

2 The application was supported by a detailed statutory declaration made by Mr Jarman, the President of the applicant. In his statutory declaration, Mr Jarman sets out the requirements of r 39 – Alteration of Rules, read with r 23 – State Council of the applicant, and the steps taken to comply with them. These requirements include:

(a) the receipt by the Secretary of proposed rule amendments and publication requirements and their inclusion in the agenda for the meeting of the State Council;

(b) the publication of the agenda in the 'Western Teacher' or other publication of the applicant no less than three weeks prior to the meeting of the State Council;

(c) the meeting of the minimum quorum requirement for State Council;

(d) the achievement of at least a majority of not less than two thirds of the delegates present and voting at the State Council meeting;

(e) as soon as practicable following the State Council meeting, the publication of the proposed rule amendments in the 'Western Teacher' or other publication and their distribution to workplaces; and

(f) the publication in (e) above must inform members of the proposed rule changes endorsed by the State Council; the reasons for the change; that the applicant intends to apply to the Commission to register the proposed alterations; and the right of members to object to the proposed alterations by forwarding a written objection to the Registrar of the Commission.

3 In considering this application, by s 62(4) of the *Act*, the terms of ss 55, 56 and 58(3) of the *Act*, apply with such modifications as may be necessary. Having regard to those requirements, the evidence before the Commission in Court Session, and the outline of submissions filed by the applicant, we are satisfied that the relevant provisions of the *Act*, and also reg 71 of the *Industrial Relations Commission Regulations 2005* (WA), dealing with a change of name application by an organisation, have been met. Specifically, we are satisfied that:

(a) the application has been authorised in accordance with the Rules of the applicant;

(b) reasonable steps have been taken to adequately inform members of the applicant of the proposed amendments to the Rules and that members may object to the making of such an application or the amendments to the Rules by forwarding a written objection to the Registrar;

(c) having regard to the structure of the applicant, that members have had a reasonable opportunity to make such an objection; and

(d) no objections to the proposed alterations to the Rules have been received by the Registrar.

4 Furthermore, having regard to s 59 of the *Act*, we are satisfied that the proposed alteration to the name of the applicant would not, by reason of its resemblance to the name of any other registered organisation, be likely to deceive or mislead any person. The name, as proposed to be altered, continues to make it clear that the organisation is an organisation of employees under the *Act*. The other alterations proposed to be made, albeit minor, not strictly in terms of the name of the applicant as altered, are required to be progressed by an application to the Registrar.

5 For the foregoing brief reasons, we are satisfied that the Commission in Court Session should authorise the proposed alteration to the applicant's rules in terms of the order to issue.

2023 WAIRC 00705

APPLICATION PURSUANT TO S.62(2) - ALTERATION OF REGISTERED RULES AND NAME

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSION IN COURT SESSION
CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER C TSANG

DATE THURSDAY, 17 AUGUST 2023

FILE NO/S CICS 7 OF 2023

CITATION NO. 2023 WAIRC 00705

Result Order issued

Representation

Applicant Mr D Stojanoski of counsel

Order

HAVING heard from Mr D Stojanoski of counsel on behalf of the applicant, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the Registrar is hereby authorised to register the alterations to the Rules of The State School Teachers' Union of W.A. (Incorporated) as follows:

(a) In Rule 1 – NAME: alter the name "The State School Teachers' Union of W.A. (Incorporated)" to "The State School Teachers' Union of W.A.";

(b) In the heading to the contents page: alter the name "THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)" to "THE STATE SCHOOL TEACHERS' UNION OF W.A.";

(c) In the heading to the commencement of the Rules at page 1 of the Rules: alter the name "THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)" to "THE STATE SCHOOL TEACHERS' UNION OF W.A."; and

(d) In Rule 4 – MEMBERSHIP in the preamble of the rule: alter the name "The State School Teachers' Union of W.A. (Incorporated)" to "The State School Teachers' Union of W.A.".

(Sgd.) S J KENNER,
Chief Commissioner,
[L.S.] By the Commission In Court Session.

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

2023 WAIRC 00750

REVIEW OF CONTRACT CLEANERS AWARD, 1986 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 WEDNESDAY, 13 SEPTEMBER 2023

FILE NO/S CICS 16 OF 2022

CITATION NO. 2023 WAIRC 00750

Result Order issued

Representation

Ms A Kothapalli and Ms M Williams on behalf of the Hon. Minister for Industrial Relations

Dr T Dymond on behalf of UnionsWA

Order

HAVING heard from Ms A Kothapalli and Ms M Williams on behalf of the Hon. 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 –

THAT the *Contract Cleaners Award, 1986* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the date of this order.

(Sgd.) S J KENNER,
Chief Commissioner,
[L.S.] By the Commission In Court Session.

SCHEDULE

1. Delete Clause 3 **Area and Scope** and substitute with a new Clause 3 **Area and Scope** as follows:

3. - AREA AND SCOPE

(1) This Award has effect throughout Western Australia.

(2) This Award has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this Award.

Note: for a non-exhaustive list of indicators of when an employer may be connected to the State of Western Australia, see s 3(2) of *the Industrial Relations Act 1979*. Indicators include but are not limited to, whether the employer is:

- domiciled or resident in, or has a place of business in, the State; or
- registered, incorporated, or established under a law of the State; or
- the holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority.

(3) This Award applies to employees working in the classifications specified in clause 20. - Wages of this Award, in the contract cleaning industry, and their employers.

(4) This Award also applies to employers that supply labour on an on-hire basis to host employers in respect of on-hire employees working in the classifications specified in clause 20. - Wages and those on hire employees, while engaged in the performance of work covered by this Award.

(5) This Award does not apply to employers and employees who are covered by the following awards:

(a) Cleaners and Caretakers Award, 1969.

(b) Cleaners and Caretakers (Car and Caravan Parks) Award 1975.

(c) Security Officers' Award.

(6) This Award does not apply to employers and employees who are subject to the national industrial relations system.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2023 WAIRC 00701

LOCAL GOVERNMENT OFFICERS' (WESTERN AUSTRALIA) AWARD 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES

APPLICANT

-v-

CITY OF KALAMUNDA, THE ASSOCIATION OF PROFESSIONAL ENGINEERS, AUSTRALIA (WESTERN AUSTRALIAN BRANCH) ORGANISATION OF EMPLOYEES (APEA), SHIRE OF BODDINGTON, SHIRE OF DALWALLINU, SHIRE OF YALGOO, SHIRE OF BRIDGETOWN GREENBUSHES, SHIRE OF BRUCE ROCK, SHIRE OF CARNAMAH, SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HALLS CREEK, SHIRE OF HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA, SHIRE OF MURRAY, SHIRE OF NANNUP, SHIRE OF NAREMBEEN, SHIRE OF RAVENSTHORPE, SHIRE OF SANDSTONE, SHIRE OF THREE SPRINGS, SHIRE OF VICTORIA PLAINS, SHIRE OF WAGIN, SHIRE OF WANDERING, SHIRE OF WAROONA, SHIRE OF WOODANILLING, WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

RESPONDENTS

CORAM COMMISSIONER T B WALKINGTON

DATE TUESDAY, 15 AUGUST 2023

FILE NO. APPL 4 OF 2023

CITATION NO. 2023 WAIRC 00701

Result Direction issued

Representation

Applicant Mr C Fogliani (of counsel)

Respondents Ms T Rowlands

Mr M FitzGerald

Ms S Lyon

Direction

HAVING heard from Mr C Fogliani on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Ms T Rowlands on behalf of the Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, Mr M FitzGerald on behalf of the Shires of Bridgetown-Greenbushes, Goomalling, Laverton, Leonora, Sandstone, Victoria Plains and Waroona and Ms S Lyon appearing on behalf of both the Western Australian Local Government Association; and also appearing for the remaining named Local Governments, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the questions referred for hearing and determination are:
   a. Should the amendments set out in Annexure 1 be made to the *Local Government Officers' (Western Australia) Award 2021* (the LGO Award)?
   b. If any of the amendments set out in Annexure 1 should not be made to the LGO Award, should some alternate wording be adopted and inserted into the LGO Award to give effect to the changes set out in Annexure 1?
2. THAT the applicant file and serve any documents it intends to rely upon in support of the application to vary the LGO Award; and an outline of evidence for each witness the applicant intends to call to give evidence, such outline of evidence is to comply with practice note 9 of 2021, by no later than 29 September 2023;
3. THAT the respondents file and serve any documents they intend to rely upon either in support of or opposed to the applicant's application to vary the LGO Award; and an outline of evidence for each witness the respondents intend to call to give evidence, such outline of evidence is to comply with practice note 9 of 2021, by no later than 10 November 2023;
4. THAT the matter is listed for a further directions hearing on 20 November 2023; and
5. THAT the parties have liberty to apply.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

Annexure 1

Part 1 — Casual employment

Casual loading

1. Clause 10.2.1 amended

In clause 10.2.1(1) delete "20%" and replace it with: "25%"

Casual conversion provisions

2. Clause 10A inserted

After clause 10 insert:

10A. – CASUAL CONVERSION

10A.1 Clause 10A only applies if:

a. the employer has 15 or more employees;

b. the employee seeking casual conversion has been employed by the employer on a casual basis for at least 12 months;

c. during the last 6 months of the employee's employment with the employer, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be); and

d. the employee has not made a request to the employer for casual conversion under this clause during the last 6 months.

10A.2 A casual employee is entitled to make a written request to their employer to have their employment converted to:

a. if the employee has worked the equivalent of full-time hours during the 6 months before making the request – full time employment; or

b. otherwise – part-time employment that is consistent with the regular pattern of hours worked by the employee during the 6 months before making the request.

10A.3 If the employer receives a request for casual conversion in accordance with clause 10A.2, the employer must:

a. genuinely consider the request;

b. respond to the employee, in writing, within 21 days of receiving the request;

c. either:

i. agree to the request; or

ii. subject to clause 10A.4, not agree to the request; and

d. if the employer does not agree to the request, set out all of the reasons for refusing the request in the written response to the employee.

10A.4 The employer can only refuse an employee's request for casual conversion if:

a. one of the conditions in clause 10A.1 or 10A.2 are not met; or

b. there are reasonable business grounds for refusing the request that are based on facts that are known, or reasonably foreseeable, at the time of the refusal.

10A.5 For the purpose of clause 10A.4(b), reasonable business grounds include:

a. the employee's position will cease to exist in the period of 12 months after the employee's request for casual conversion;

b. the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after the employee's request for casual conversion;

c. there will be a significant change in either or both of the following in the period of 12 months after the employee's request for casual conversion:

i. the days on which the employee's hours of work are required to be performed;

ii the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period;

d. making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

10A.6 If the employer agrees to the employee's request for casual conversion, then:

a. the employer must record the variation to the employment contract in writing;

b. the written contract variation must stipulate the following details:

i. the basis of the employment (i.e. full-time or part-time);

ii. the employee's number of ordinary hours per week under the varied contract of employment;

iii. the date on which the contract variation took effect – which must be within 21 days of the employer agreeing to the employee's request for casual conversion unless otherwise agreed between the employer and employee;

c. the employer and the employee must sign a copy of the written contract variation; and

d. the employer must provide a copy of the written contract variation to the employee.

10A.7 The employer must not reduce or vary an employee's hours of work, or terminate an employee's employment in order to avoid any right or obligation under this clause 10A.

~~Part 2 — Employment equity~~

3. Part 10 inserted

After clause 33 insert:

PART 10 – EMPLOYMENT EQUITY

34. – OBJECTS OF THIS PART

34.1 In this Part 10, the term "*preferential treatment*" of Aboriginal and Torres Strait Islander persons means giving them priority in decisions on employment matters such as hiring, promotion, training, and lay-off.

34.2 The objects of this Part 10 are to:

a. increase the standard of living of Aboriginal and Torres Strait Islander persons by increasing their participation in the workforce;

b. recognise that local governments play an important role in providing employment opportunities to Aboriginal and Torres Strait Islander persons, especially in relation to employing local residents in remote and rural locations within the State where there is limited employment opportunities;

c. acknowledge that Aboriginal and Torres Strait Islander persons often have a cultural connection to the land that is managed by local governments;

d. recognise that Aboriginal and Torres Strait Islander persons may be affected by social, economic, and cultural circumstances which place them at a disadvantage in the job market compared to non-Aboriginal and non-Torres Strait Islander persons;

e. recognise that the only way to lift Aboriginal and Torres Strait Islander persons out of conditions of disadvantage within society, such as unemployment and poverty, is to provide them with preferential treatment in employment; and

f. to provide preferential treatment of Aboriginal and Torres Strait Islander persons in employment with the aim of eliminating or reducing the disadvantages suffered by Aboriginal and Torres Strait Islander persons.

35. – OBLIGATION ON EMPLOYERS

35.1 The employer must develop, implement, review, and maintain policies and procedures which aim to achieve the objects set out in clause 34.

35.2 The policies and procedures referred to in clause 35.1 must require the employer to provide preferential treatment of Aboriginal and Torres Strait Islander persons in employment where it is reasonably practicable to do so.

35.3 Without limiting what may go into the policies and procedures referred to in clause 35.1, those policies and procedures may provide for the following:

a. the need for job postings and advertisements to indicate whether Aboriginal and Torres Strait Islander persons will be given preference;

b. employees and job candidates signing acknowledgements as a condition of their employment that Aboriginal and Torres Strait Islander persons will be given preference in accordance with the policy referred to in clause 35.1; and

c. adequate measures to ensure that non-Aboriginal and non-Torres Strait Islander employees or candidates for employment are treated fairly and reasonably.

Part 3 — Redundancy

4. Clause 12.3 amended

In clause 12.3 amend the opening line of clause 12.3.1 to read:

"Subject to clause 12.3.1A, an employee, other than an employee of a small business employer as defined in 12.1.3, whose…"

and then after clause 12.3.1 insert the following clause 12.3.1A:

12.3.1A Severance pay - Outside of the Perth Metropolitan region

If an employee is employed by a local government entity that is outside of the Perth Metropolitan region, then that employee is entitled to the severance entitlement in this clause 12.3.1A instead of the entitlement in clause 12.3.1.

An employee, other than an employee of a small employer as defined in clause 12.1.3, whose employment is terminated by reason of redundancy is entitled to two weeks' pay for each completed year of continuous service with the employer but capped at 26 weeks' pay.

*Week's pay is defined in clause 12.1.5.

Part 4 — Annual Leave for Shift Workers

5. Clause 24.1 amended

After clause 24.1.5 insert:

24.1.6 Additional week of annual leave for Shift Workers

a. In addition to the annual leave prescribed in clause 24.1.1 and section 23 of the *Minimum Conditions of Employment Act 1993* (WA), a Shift Worker shall accrue an additional week leave of annual leave per year, up to a maximum of 190 hours.

b. For the avoidance of doubt, the additional week of annual leave under clause 24.1.6 accrues pro rata on a weekly basis and is cumulative.

24.1.7 For the purpose of clause 24, a 'Shift Worker' is a person who works shifts in accordance with clause 21.2.

Part 5 — Cultural and Ceremonial Leave

6. Clause 26A inserted

After clause 26 insert:

26A. – CULTURAL AND CEREMONIAL LEAVE

26A.1 This clause 26A applies to Aboriginal and Torres Strait Islander employees only and is in addition to any other forms of leave under this Award and the *Minimum Conditions of Employment Act 1993* (WA).

26A.2 An employee may request to take cultural and ceremonial leave in any of the following circumstances:

a. where the leave is connected with the death of a close relative and the entitlement to paid bereavement leave under clause 26 is inaccessible or insufficient; or

b. where the leave is for ceremonial obligations under Aboriginal and Torres Strait Islander law.

26A.3 The employer must provide a written response to the employee as soon as practicable setting out whether the employer grants employee's request for cultural and ceremonial leave and, if the request is refused, the reasons for refusing the request.

26A.4 The employer may only refuse a request for cultural and ceremonial leave on reasonable business grounds.

26A.5 If an employee is granted a period of cultural and ceremonial leave, that leave is to be paid leave as follows:

a. where the employee needs to travel to country for the purpose of the leave – up to three days for the return trip to and from country; and

b. up to two days to accommodate the reasons set out in clause 26A.2.

26A.6 Nothing in this clause 26A prevents the employer and employee from agreeing to a longer period for cultural and ceremonial leave.

26A.7 For the purpose of clause 26A, a *close relative* is a person who is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

Part 6 — Flexible Working Arrangements

7. Clause 12A inserted

After clause 12 insert:

12A. – FLEXIBLE WORKING ARRANGEMENTS

Employee's request for flexible working arrangements

12A.1 If:

a. any of the circumstances referred to in subclause 12A.2 apply to an employee; and

b. the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

12A.2 The following are the circumstances:

a. the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

b. the employee is a carer (within the meaning of the *Carer Recognition Act 2010* (Cth));

c. the employee has a disability;

d. the employee is 55 or older;

e. the employee is experiencing violence from a member of the employee's family;

f. the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

12A.3 For the purpose of this clause, examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

12A.4 To avoid doubt, and without limiting subclause 12A.1, an employee who:

a. is a parent, or has responsibility for the care, of a child; and

b. is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

12A.5 The employee's request under subclause 12A.1 must be in writing and set out the details of the change sought and the reasons for the change.

12A.6 An employee is not entitled to make a request under subclause 12A.1 unless:

a. for an employee other than a casual employee – the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

b. for a casual employee – the employee:

i. is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and

ii. has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Employer's response to the employee's request for flexible working arrangements

12A.7 If the employer receives a request under clause 12A.1, then the employer must give the employee a written response to the request within 21 days of receipt, stating whether the employer grants or refuses the request.

12A.8 The employer may refuse the request only on reasonable business grounds.

12A.9 Without limiting what are reasonable business grounds for the purposes of sub-clause 12A.8, reasonable business grounds include the following:

a. that the new working arrangements requested by the employee would be too costly for the

employer;

b. that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

c. that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

d. that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

e. that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

12A.10 If the employer refuses the request, the written response under sub-clause 12A.7 must include details of the reasons for the refusal.

2023 WAIRC 00699

MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES

APPLICANT

-v-

CITY OF KALAMUNDA, LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA), SHIRE OF BODDINGTON, SHIRE OF DALWALLINU, SHIRE OF YALGOO, SHIRE OF BRIDGETOWN GREENBUSHES, SHIRE OF BRUCE ROCK, SHIRE OF CARNAMAH, SHIRE OF DOWERIN, SHIRE OF GOOMALLING, SHIRE OF HALLS CREEK, SHIRE OF HARVEY, SHIRE OF KONDININ, SHIRE OF LAVERTON, SHIRE OF LEONORA, SHIRE OF MURRAY, SHIRE OF NANNUP, SHIRE OF NAREMBEEN, SHIRE OF RAVENSTHORPE, SHIRE OF SANDSTONE, SHIRE OF THREE SPRINGS, SHIRE OF VICTORIA PLAINS, SHIRE OF WAGIN, SHIRE OF WANDERING, SHIRE OF WAROONA, SHIRE OF WOODANILLING, WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

RESPONDENTS

CORAM COMMISSIONER T B WALKINGTON

DATE TUESDAY, 15 AUGUST 2023

FILE NO. APPL 3 OF 2023

CITATION NO. 2023 WAIRC 00699

Result Direction issued

Representation

Applicant Mr C Fogliani (of counsel)

Respondents Mr K Trainer

Mr M FitzGerald

Ms S Lyon

Direction

HAVING heard from Mr C Fogliani on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA), Mr M FitzGerald on behalf of the Shires of Bridgetown-Greenbushes, Goomalling, Laverton, Leonora, Sandstone, Victoria Plains and Waroona and Ms S Lyon appearing on behalf of both the Western Australian Local Government Association; and also appearing for the remaining named Local Governments, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the questions referred for hearing and determination are:

   a. Should the amendments set out in Annexure 1 be made to the *Municipal Employees (Western Australia) Award 2021* (the ME Award)?

   b. If any of the amendments set out in Annexure 1 should not be made to the ME Award, should some alternate wording be adopted and inserted into the ME Award to give effect to the changes set out in Annexure 1?

2. THAT the applicant file and serve any documents it intends to rely upon in support of the application to vary the ME Award; and an outline of evidence for each witness the applicant intends to call to give evidence, such outline of evidence is to comply with practice note 9 of 2021, by no later than 29 September 2023;
3. THAT the respondents file and serve any documents they intend to rely upon either in support of or opposed to the applicant's application to vary the ME Award; and an outline of evidence for each witness the respondents intend to call to give evidence, such outline of evidence is to comply with practice note 9 of 2021, by no later than 10 November 2023;
4. THAT the matter is listed for a further directions hearing on 20 November 2023; and
5. THAT the parties have liberty to apply.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

Annexure 1

Part 1 — Casual employment

Casual loading

1. Clause 13.1 amended

In clause 13.1 delete "20%" and replace it with: "25%"

Casual conversion provisions

2. Clause 13A inserted

After clause 13 insert:

13A. – CASUAL CONVERSION

13A.1 Clause 13A only applies if:

a. the employer has 15 or more employees;

b. the employee seeking casual conversion has been employed by the employer on a casual basis for at least 12 months;

c. during the last 6 months of the employee's employment with the employer, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be); and

d. the employee has not made a request to the employer for casual conversion under this clause during the last 6 months.

13A.2 A casual employee is entitled to make a written request to their employer to have their employment converted to:

a. if the employee has worked the equivalent of full-time hours during the 6 months before making the request – full time employment; or

b. otherwise – part-time employment that is consistent with the regular pattern of hours worked by the employee during the 6 months before making the request.

13A.3 If the employer receives a request for casual conversion in accordance with clause 13A.2, the employer must:

a. genuinely consider the request;

b. respond to the employee, in writing, within 21 days of receiving the request;

c. either:

i. agree to the request; or

ii. subject to clause 13A.4, not agree to the request; and

d. if the employer does not agree to the request, set out all of the reasons for refusing the request in the written response to the employee.

13A.4 The employer can only refuse an employee's request for casual conversion if:

a. one of the conditions in clause 13A.1 or 13A.2 are not met; or

b. there are reasonable business grounds for refusing the request that are based on facts that are known, or reasonably foreseeable, at the time of the refusal.

13A.5 For the purpose of clause 13A.4(b), reasonable business grounds include:

a. the employee's position will cease to exist in the period of 12 months after the employee's request for casual conversion;

b. the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after the employee's request for casual conversion;

c. there will be a significant change in either or both of the following in the period of 12 months after the

employee's request for casual conversion:

i. the days on which the employee's hours of work are required to be performed;

ii. the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period;

d. making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

13A.6 If the employer agrees to the employee's request for casual conversion, then:

a. the employer must record the variation to the employment contract in writing;

b. the written contract variation must stipulate the following details:

i. the basis of the employment (i.e. full-time or part-time);

ii. the employee's number of ordinary hours per week under the varied contract of employment;

iii. the date on which the contract variation took effect – which must be within 21 days of the employer agreeing to the employee's request for casual conversion unless otherwise agreed between the employer and employee;

c. the employer and the employee must sign a copy of the written contract variation; and

d. the employer must provide a copy of the written contract variation to the employee.

13A.7 The employer must not reduce or vary an employee's hours of work, or terminate an employee's employment in order to avoid any right or obligation under this clause 13A.

~~**Part 2 — Employment equity**~~

3. Part 9 inserted

After clause 32 insert:

PART 9 – EMPLOYMENT EQUITY

33. – OBJECTS OF THIS PART

33.1 In this Part 9, the term "preferential treatment" of Aboriginal and Torres Strait Islander persons means giving them priority in decisions on employment matters such as hiring, promotion, training, and lay-off.

33.2 The objects of this Part 9 are to:

a. increase the standard of living of Aboriginal and Torres Strait Islander persons by increasing their participation in the workforce;

b. recognise that local governments play an important role in providing employment opportunities to Aboriginal and Torres Strait Islander persons, especially in relation to employing local residents in remote and rural locations within the State where there is limited employment opportunities;

c. acknowledge that Aboriginal and Torres Strait Islander persons often have a cultural connection to the land that is managed by local governments;

d. recognise that Aboriginal and Torres Strait Islander persons may be affected by social, economic, and cultural circumstances which place them at a disadvantage in the job market compared to non-Aboriginal and non-Torres Strait Islander persons;

e. recognise that the only way to lift Aboriginal and Torres Strait Islander persons out of conditions of disadvantage within society, such as unemployment and poverty, is to provide them with preferential treatment in employment; and

f. to provide preferential treatment of Aboriginal and Torres Strait Islander persons in employment with the aim of eliminating or reducing the disadvantages suffered by Aboriginal and Torres Strait Islander persons.

34. – OBLIGATION ON EMPLOYERS

34.1 The employer must develop, implement, review, and maintain policies and procedures which aim to achieve the objects set out in clause 33.

34.2 The policies and procedures referred to in clause 34.1 must require the employer to provide preferential treatment of Aboriginal and Torres Strait Islander persons in employment where it is reasonably practicable to do so.

34.3 Without limiting what may go into the policies and procedures referred to in clause 34.1, those policies and procedures may provide for the following:

a. the need for job postings and advertisements to indicate whether Aboriginal and Torres Strait Islander persons will be given preference;

b. employees and job candidates signing acknowledgements as a condition of their employment that Aboriginal and Torres Strait Islander persons will be given preference in accordance with the policy referred to in clause 34.1; and

c. adequate measures to ensure that non-Aboriginal and non-Torres Strait Islander employees or candidates for employment are treated fairly and reasonably.

Part 3 — Redundancy

4. Clause 14.3 amended

In clause 14.3 amend the opening line of clause 14.3.1 to read:

"Subject to clause 14.3.1A, an employee, other than an employee of a small business employer as defined in 14.1.3, whose…"

and then after clause 14.3.1 insert the following clause 14.3.1A:

14.3.1A Severance pay - Outside of the Perth Metropolitan region

If an employee is employed by a local government entity that is outside of the Perth Metropolitan region, then that employee is entitled to the severance entitlement in this clause 14.3.1A instead of the entitlement in clause 14.3.1.

An employee, other than an employee of a small employer as defined in clause 14.1.3, whose employment is terminated by reason of redundancy is entitled to two weeks' pay for each completed year of continuous service with the employer but capped at 26 weeks' pay.

*Week's pay is defined in clause 14.1.5.

Part 4 — Annual Leave for Shift Workers

5. Clause 23 amended

After clause 23.11 insert:

23.12 Additional week of annual leave for Shift Workers

a. In addition to the annual leave prescribed in clause 23.1.1 and section 23 of the *Minimum Conditions of Employment Act 1993* (WA), a Shift Worker shall accrue an additional week leave of annual leave per year, up to a maximum of 190 hours.

b. For the avoidance of doubt, the additional week of annual leave under clause 23.12 accrues pro rata on a weekly basis and is cumulative.

23.13 For the purpose of clause 23, a 'Shift Worker' is a person who works shifts in accordance with clause 22.2.

Part 5 — Flexible Working Arrangements

6. Clause 14A inserted

After clause 14 insert:

14A. – FLEXIBLE WORKING ARRANGEMENTS

Employee's request for flexible working arrangements

14A.1 If:

a. any of the circumstances referred to in subclause 14A.2 apply to an employee; and

b. the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

14A.2 The following are the circumstances:

a. the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

b. the employee is a carer (within the meaning of the *Carer Recognition Act 2010* (Cth));

c. the employee has a disability;

d. the employee is 55 or older;

e. the employee is experiencing violence from a member of the employee's family;

f. the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

14A.3 For the purpose of this clause, examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

14A.4 To avoid doubt, and without limiting subclause 14A.1, an employee who:

a. is a parent, or has responsibility for the care, of a child; and

b. is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

14A.5 The employee's request under subclause 14A.1 must be in writing and set out the details of the change

sought and the reasons for the change.

14A.6 An employee is not entitled to make a request under subclause 14A.1 unless:

a. for an employee other than a casual employee – the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

b. for a casual employee – the employee:

i. is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and

ii. has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Employer's response to the employee's request for flexible working arrangements

14A.7 If the employer receives a request under clause 14A.1, then the employer must give the employee a written response to the request within 21 days of receipt, stating whether the employer grants or refuses the request.

14A.8 The employer may refuse the request only on reasonable business grounds.

14A.9 Without limiting what are reasonable business grounds for the purposes of sub-clause 14A.8, reasonable business grounds include the following:

a. that the new working arrangements requested by the employee would be too costly for the employer;

b. that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

c. that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

d. that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

e. that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

14A.10 If the employer refuses the request, the written response under sub-clause 14A.7 must include details of the reasons for the refusal.

2023 WAIRC 00744

WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ELECTRICAL TRADES UNION WA

APPLICANT

-v-

CHILD AND ADOLESCENT HEALTH SERVICE AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO

DATE MONDAY, 11 SEPTEMBER 2023

FILE NO/S APPL 62 OF 2023

CITATION NO. 2023 WAIRC 00744

Result	Award Varied
Representation	(on the papers)
Applicant	Electrical Trades Union WA
First to Seventh Respondents	Department of Health
Eighth Respondent	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers Western Australian Branch
Ninth Respondent	The Plumbers and Gasfitters Employees Union of Australia West Australian Branch Industrial Union of Workers
Tenth Respondent	Construction, Forestry, Mining and Energy Union of Workers

Order

WHEREAS this is an application filed by the Electrical Trades Union WA (**ETU**) on 11 August 2023 to vary the *WA Government Health Services Engineering and Building Services Award 2004* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2023 State Wage case ([2023] WAIRC 00337; (2023) 103 WAIG 748), that is an increase of 5.3% and by relevant CPI rates from June 2022 to June 2023;

AND WHEREAS the Health Service Provider respondents proposed further variations to Appendix A of the application which the ETU agreed to;

AND WHEREAS the variations proposed were otherwise consented to by the Health Service Provider respondents to the Award, and were not opposed by any other respondent;

AND WHEREAS the parties consented to the application being determined on the papers;

AND BEING satisfied that:

(a) The variations proposed do not affect any substantive change to the scope of the Award or its area of operation;

(b) The variations are by consent; and

(c) The requirements for varying the Award are met;

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

THAT the *WA Government Health Services Engineering and Building Services Award 2004* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 19. – Leading Hand Allowance: Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid –

(a)	Not less than 3 and not more than 10 other employees -	$57.50 per week;
(b)	More than 10 and not more than 20 other employees -	$77.10 per week;
(c)	More than 20 other employees -	$96.30 per week.

2. Clause 23. – Special Rates and Provisions:

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

(1) Disability Allowances

(a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. – Title, as at the date of registration of this Award.

(b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of $2.89 for each hour or part thereof whilst so engaged.

(c) Asbestos:

(i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.

(ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, ie. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of $0.96 per hour for each hour or part thereof whilst so engaged.

(d) Furnace Work

Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid $2.11 per hour or part thereof whilst so engaged.

(e) Construction Allowance

(i) In addition to the appropriate rate of pay prescribed in Appendix A. – Salaries of this Award, an employee shall be paid –

(aa) $63.50 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(bb) $57.40 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.

(cc) $33.60 per week if engaged otherwise on Construction Work.

(ii) The rates specified in paragraph (1)(e)(i) shall be discounted by $26.10 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.

(f) Asbestos Eradication

(i) This subclause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

(ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.

(iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.

(iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of $2.10 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23. – Special Rates and Provisions.

(v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (i.e. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.

(g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

B. Delete paragraphs (b), (d), (e) and (f) of subclause (3) of this Clause and insert in lieu thereof the following:

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $25.00 for that week in addition to the rates otherwise prescribed.

(d) Scaffolding Certificate Allowance

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid $0.77 per hour or part thereof, in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of $25.00 per week.

(f) Setter Out

A setter out (other than a leading hand) in a joiner's shop shall be paid $7.40 per day in addition to the rates otherwise prescribed.

3. Clause 25. – Overtime: Delete paragraph (a) of subclause (7) of this Clause and insert in lieu thereof the following:

(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of $16.75 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the previous day of the requirement to work such overtime.

4. Appendix A. – Salaries: Delete subclause (1) of this Appendix and insert in lieu thereof the following:

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Tradesperson	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I	Supplementary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading 2023	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	560.70	977.90	12.40	$131.70	12.00	59,156
	Building Tradesperson Level 05	105	383.50	54.60	566.50	1004.60	13.04	$132.20	12.00	60,609
	Building Tradesperson Level 06	110	401.70	57.20	572.10	1031.00	13.68	$132.50	12.00	62,035
	Building Tradesperson Level 07	115	420.00	59.80	575.50	1055.30	14.22	$132.70	12.00	63,341
	Building Tradesperson Level 08	120	438.20	62.40	581.10	1081.70	14.86	$110.20	12.00	63,578
	Building Tradesperson Level 09	125	456.50	65.00	586.90	1108.40	15.50	$110.90	12.00	65,041
Painter	Building Tradesperson Level 04	100	365.20	52.00	560.70	977.90	12.40	$102.20	12.00	57,617
	Building Tradesperson Level 05	105	383.50	54.60	566.50	1004.60	13.04	$102.60	12.00	59,064
	Building Tradesperson Level 06	110	401.70	57.20	572.20	1031.10	13.68	$102.80	12.00	60,491
	Building Tradesperson Level 07	115	420.00	59.80	575.50	1055.30	14.22	$103.20	12.00	61,802
	Building Tradesperson Level 08	120	438.20	62.40	578.40	1079.00	14.86	$80.60	12.00	61,893
	Building Tradesperson Level 09	125	456.50	65.00	586.90	1108.40	15.50	$81.10	12.00	63,486
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	560.70	977.90	12.40	$124.70	12.00	58,791
	Building Tradesperson Level 05	105	383.50	54.60	566.50	1004.60	13.04	$125.00	12.00	60,233
	Building Tradesperson Level 06	110	401.70	57.20	572.10	1031.00	13.68	$125.50	12.00	61,670
	Building	115	420.00	59.80	575.50	1055.30	14.22	$125.80	12.00	62,981

	Tradesperson Level 07								
	Building Tradesperson Level 08	120	438.20	62.40	581.10	1081.70	14.86	$103.30	12.00	63,218
	Building Tradesperson Level 09	125	456.50	65.00	586.90	1108.40	15.50	$103.60	12.00	64,660
Plumber	Building Tradesperson Level 04	100	365.20	52.00	560.70	977.90	12.40	$160.10	12.00	60,638
	Building Tradesperson Level 05	105	383.50	54.60	566.50	1004.60	13.04	$160.50	12.00	62,085
	Building Tradesperson Level 06	110	401.70	57.20	572.10	1031.00	13.68	$160.80	12.00	63,511
	Building Tradesperson Level 07	115	420.00	59.80	575.50	1055.30	14.22	$161.30	12.00	64,833
	Building Tradesperson Level 08	120	438.20	62.40	581.10	1081.70	14.86	$138.80	12.00	65,070
	Building Tradesperson Level 09	125	456.50	65.00	586.90	1108.40	15.50	$139.20	12.00	66,517
Other Building employees not elsewhere classified	Building Employee Entrant Level	78	284.86	40.56	537.98	863.40	9.68	$90.80	14.00	51,012
	Building Employee Level 1	82	299.46	42.64	541.20	883.30	10.20	$91.00	14.00	52,088
	Building Employee Level 2	87	319.18	45.45	545.37	910.00	10.87	$91.30	14.00	53,531
	Building Employee Level 3	92	337.44	48.05	549.51	935.00	11.51	$91.60	14.00	54,884
	Building Employee Level 4	100	365.20	52.00	560.70	977.90	12.40	$92.00	14.00	57,190
Mechanical Fitter, Motor Mechanic, Refrigeration Fitter & other Engineering trades employees not elsewhere classified	Engineering Employee Level 14	78	284.86	40.56	537.98	863.40	14.68	$89.40	14.00	51,200
	Engineering Employee Level 13	82	299.46	42.64	541.20	883.30	15.40	$89.60	14.00	52,286
	Engineering Employee Level 12	87.4	319.18	45.45	545.37	910.00	16.47	$89.90	14.00	53,750
	Engineering Employee Level 11	92.4	337.44	48.05	549.51	935.00	17.41	$90.20	14.00	55,119
	Engineering Tradesperson Level 10	100	365.20	52.00	560.70	977.90	18.80	$111.40	12.00	58,431
	Engineering Tradesperson Level 09	105	383.50	54.60	566.50	1004.60	19.70	$111.80	12.00	59,892
	Engineering Tradesperson Level 08	110	401.70	57.20	572.10	1031.00	20.70	$112.00	12.00	61,332
	Engineering Tradesperson Level 07	115	420.00	59.80	575.50	1055.30	21.60	$112.40	12.00	62,667
	Engineering	125	456.50	65.00	589.50	1111.00	23.50	$90.30	12.00	64,519

	Tradesperson Level 06									
	Engineering Tradesperson Level 05	130	474.80	67.60	592.60	1135.00	24.40	$90.70	10.00	65,734
Electrical Fitter/Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	560.70	977.90	18.80	$140.80	12.00	59,965
	Engineering Tradesperson Level 09	105	383.50	54.60	566.50	1004.60	19.70	$141.30	12.00	61,431
	Engineering Tradesperson Level 08	110	401.70	57.20	572.10	1031.00	20.70	$141.70	12.00	62,881
	Engineering Tradesperson Level 07	115	420.00	59.80	575.50	1055.30	21.60	$141.90	12.00	64,206
	Engineering Tradesperson Level 06	125	456.50	65.00	586.90	1108.40	23.50	$119.50	12.00	65,907
	Engineering Tradesperson Level 05	130	474.80	67.60	592.60	1135.00	24.40	$120.10	10.00	67,268

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2023 WAIRC 00667

INTERPRETATION OF THE

EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2023

AND

GOVERNMENT SERVICE (MISCELLANEOUS) GENERAL AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00667
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD ON THE PAPERS	:	WRITTEN SUBMISSIONS FILED: FRIDAY, 12 MAY 2023, FRIDAY, 26 MAY 2023, MONDAY, 29 MAY 2023 AND MONDAY, 12 JUNE 2023
DELIVERED	:	WEDNESDAY, 9 AUGUST 2023
FILE NO.	:	APPL 6 OF 2023
BETWEEN	:	UNITED WORKERS UNION Applicant AND DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Industrial Law (WA) - Interpretation of Agreement - s 46 - Education Assistants' (Government) General Agreement 2023 - Government Services (Miscellaneous) General Agreement 2023 - Clauses providing long service leave for casual employees - Dispute about the way service should be recognised for the purpose of long service leave under the casual LSL clauses - What is 'continuous service'? - Whether clauses are ambiguous - Ordinary meaning of continuous service - Whether service includes pre-registration service - Declaration issued
Legislation	:	*Industrial Relations Act 1979* (WA) *Long Service Leave Act 1958* (WA)
Result	:	Declaration issued
Representation:		
Applicant	:	United Workers Union
Respondents	:	State Solicitor's Office

Case(s) referred to in reasons:

Australian Boot Trade Employees' Federation v The Commonwealth [1954] HCA 9; 90 CLR 24; [1954] ALR 321

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) [2018] FCAFC 88; (2018) 262 FCR 473

United Workers Union v Child and Adolescent Health Service & Ors [2023] WAIRC 00666

Reasons for Decision

1 The abbreviations used in these reasons are defined in the list at the end of the reasons.

2 This matter was determined on the papers together with ***United Workers Union v Child and Adolescent Health Service & Ors*** [2023] WAIRC 00666 concerning agreements in the Western Australian health system. These reasons should be read with the reasons in that matter.

3 As with the health system matter, UWU, as a party to relevant industrial agreements that cover the Western Australian education system brought this application under s 46 of the IR Act, seeking a declaration as to the correct interpretation of casual LSL clauses in:

(a) the Education Assistants Agreement; and

(b) the Government Services Agreement.

4 The Director-General, Department of Education, is the Employer party to the Education Assistants Agreement. Some 20 government agencies are the employer parties to the Government Services Agreement. All of the respondent employers were represented by the State Solicitor's Office. I refer to them collectively as the Employers.

5 The parties agreed that the question for the Commission to decide in this matter is:

> What is the true interpretation of the following clauses?
>
> (a) Clause 13.5 of the *Education Assistants' (Government) General Agreement 2023 (AG 20/2022).*
>
> (b) Clause 52.4 of the *Government Services (Miscellaneous) General Agreement 2023 (AG 23/2022).*

6 The core elements of the casual long service leave entitlements in each of the agreements are, very broadly, the same as those in the casual LSL clauses considered in the health system matter: an entitlement to take 13 weeks' paid long service leave on the completion of 10 years continuous service and an additional 13 weeks paid long service leave for each subsequent period of completed continuous service.

7 Broadly, UWU and the Employers made the same submissions in relation to construction of the casual LSL clauses as the UWU and HSPs in health system matter respectively did. UWU says 'continuous service' has its common sense, plain English meaning. The Employers say 'continuous service' means only qualifying service since the registration of the industrial agreement which first contained a casual LSL clause.

8 However, there are some important differences in this matter compared with health system matter. They include:

(a) the text of the relevant casual LSL clauses;

(b) the casual LSL clauses' location in the structure of the agreements; and

(c) the agreements' interaction with other industrial instruments.

9 I must separately construe the casual LSL clauses in their particular context, applying the principles set out in the APPL 5 Reasons.

The Education Assistants Agreement

10 The Education Assistants Agreement covers education assistants in the Western Australian education system.

11 It was registered under s 41 of the IR Act.

12 It is arranged in 12 parts and 77 clauses. Relevantly, Part 1 is headed 'Application of Agreement', Part 2 'General Terms of Employment' and Part 6 'Leave of Absence'.

13 The purpose of the Education Assistants Agreement is expressed as being to provide wage increases and core employment conditions together with applicable Awards. To that end, the agreement is expressed to be read in conjunction with the *Teachers' Aides' Award* and the *Miscellaneous Government Conditions and Allowances Award*: cl 5.3.

14 At the time of registration, it was estimated the agreement covered 11,859 education assistants: cl 5.2.

15 The registration of the Education Assistants Agreement had the effect of cancelling and replacing the 2021 Education Assistants Agreement: IR Act s 41(8).

16 Various terms and conditions of the Education Assistants Agreement are service related. For example, the requirement for employer notice of termination is scaled depending on the employee's period of 'continuous service' from not more than 1 year to more than 5 years continuous service: cl 18.3.

17 Unsurprisingly, many of the leave provisions of the Education Assistants Agreement are also service related: 'Personal Leave' cl 43, 'Maternity Leave' cl 58, 'Adoption Leave' cl 59, and 'Other Parent Leave' cl 60, all refer to 'continuous service' as a condition for the relevant leave entitlement.

18 In Part 2 'General Terms of Employment', cl 13 of the Education Assistants Agreement deals with casual employment, including long service leave for casual employees, at cl 13.5:

> **13. CASUAL EMPLOYMENT**

13.1 A casual Employee means an Employee engaged on an hourly basis in a specified position for a period not exceeding four weeks in any school, centre or site.

13.2 Casual employees will receive a 25% loading in lieu of personal leave and any student vacation time.

13.3 …

13.4 …

13.5 A casual Employee shall become entitled to 13 weeks' long service leave after a period of 10 years' continuous service and each further period of seven years' continuous service, in accordance with clause 54 of this General Agreement.

19 Clause 54 is headed 'Long Service Leave Flexibilities'. It appears under Part 6 'Leave of Absence'. It does not purport to be the exclusive source of regulation of the entitlement to long service leave. Rather, it is to be read in conjunction with cl 12 'Long Service Leave' of the *Teachers' Aides' Award* and the General Order.

20 Clause 54 is lengthy, but its text is important to the resolution of this matter. Rather than set out the text here, it is included in these reasons as an appendix.

21 Some particular points of note about cl 54 include:

(a) It is to be read in conjunction with cl 12 'Long Service Leave' of the *Teachers' Aides' Award* and General Order: cl 54.1.

(b) The agreement prevails over the General Order where there is inconsistency: cl 54.2.

(c) It provides 13 weeks' long service leave after 10 years continuous service and after each subsequent period of 7 years: cl 54.3.

(d) It expressly deals with how the entitlement must be determined for casual employees: cl 54.20(a). This clause includes deeming certain absences to count as service, and certain employment with other public sector employers to count as service.

(e) It expressly deals with periods of casual employment that will not count as service: cl 54.20(b).

(f) It expressly deems service of casual employees not to be broken in some circumstances: cl 54.20(c).

22 Clause 54 incorporates the provisions of cl 12 of the *Teachers' Aides' Award* and the General Order. It is therefore necessary to refer to those as well.

23 Clause 12 of the *Teachers' Aides' Award* provides:

12. - LONG SERVICE LEAVE

The conditions governing the granting of long service leave to government wages employees generally shall apply to workers covered by this award. Provided that any day referred to in Clause 7. - Holidays of this award, on which the worker is relieved of the obligation to present herself for work shall be deemed to be 'service' for the purpose of those conditions.

24 'Continuous service' is not a term that is defined, or indeed used, in the *Teachers' Aides' Award.*

25 The General Order is attached as an appendix to these reasons. Of particular note:

(a) Clause 1 refers to the treatment of qualifying service prior to 1 January 1986 and qualifying service after that date, for the purpose of the second period of long service leave.

(b) Clause 2(a) enlarges the meaning of 'service' by deeming various absences to be included as service.

(c) Clause 2(b) qualifies the meaning of 'service' by deeming certain situations not to be service, including, at clause 2(b)(iii), any period during which an employee has been paid as a casual.

(d) Clause 3 sets out situations where service is deemed not to be broken.

(e) Clause 6 provides that long service leave must be commenced within 6 months of becoming due and that where leave is taken in more than one portion, the final portion must be taken within 3 years of it becoming due.

(f) Clause 11 provides for payment of pro rata long service leave on termination of employment in six qualifying circumstances, some of which require a minimum period of 'continuous service'.

26 Casual long service leave was provided for in the 2021 Education Assistants Agreement, which the Education Assistants Agreement replaced, in substantially the same terms as the Education Assistants Agreement.

27 It is uncontroversial that no industrial agreement prior to 2021 provided for long service leave for casual employees.

28 For completeness, the entitlement as contained in an industrial agreement commenced on 4 February 2021 when the 2021 Education Assistants Agreement was registered. That is because, until the 2021 Education Assistants Agreement, there was no inconsistency between the industrial agreement and the *Teachers' Aides' Award* and General Order in relation to casual employees, so that the exclusion of periods of casual employment in cl 2(b)(iii) of the General Order effectively excluded casual employees from the entitlement.

Is there ambiguity in cl 13.5?

29 In the APPL 5 Reasons, I considered whether there was ambiguity in casual LSL clauses in the Enrolled Nurses Agreement and the Hospital Support Workers Agreement. I concluded that the phrase 'continuous service' in the relevant clauses of those agreements was not ambiguous, but carried its ordinary meaning.

30 The core of the Employers' case is that the words are ambiguous in light of the history of the agreements, and in particular the fact that until the introduction of a long service leave entitlement for casuals in industrial agreements, casuals were entitled to long service leave under the LSL Act. Its case is that because there was previously an entitlement, albeit less favourable, continuous service for the purpose of the agreement excluded continuous service during the period that the LSL Act governed long service leave entitlements.

31 The Employers' case is that 'continuous service' means continuous service from the date of registration of the 2021 Education Assistants Agreement, that is, that it excludes service prior to the date of registration of the 2021 Education Assistants Agreement.

32 In the APPL 5 Reasons, I rejected this construction as being a construction that the words were incapable of bearing.

33 The same considerations apply in this case. I do not consider the phrase 'continuous service' in the Education Assistants Agreement is ambiguous. Nor are the words capable of having the meaning the Employers contend for.

34 UWU also relied on its submissions in the health system matter to contend that the words 'continuous service' in the Education Assistants Agreement also bear their ordinary common sense meaning. In the APPL 5 Reasons, I ultimately agreed with UWU's contended for construction.

35 It does not automatically follow, that the same, ordinary meaning must be given to the words 'continuous service' in the Education Assistants Agreement.

36 As observed earlier, the casual LSL clause in the Education Assistants Agreement is different in both its text and its context. Most significantly, cl 13.5 provides that the entitlement to long service leave is 'in accordance with' cl 54. The words 'in accordance with' can mean either:

(a) in conformity with, in harmony with; or

(b) consistently with, or covered by, under;

see ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)*** [2018] FCAFC 88; (2018) 262 FCR 473 per Tracey J at [81]-[84] and ***Australian Boot Trade Employees' Federation v The Commonwealth*** [1954] HCA 9; 90 CLR 24; [1954] ALR 321 per Dixon CJ at [4].

37 Because cl 13.5 appears in Part 2 'General Terms of Employment', whereas cl 54 appears under Part 6 'Leave of Absence', the reference to long service leave being 'in accordance with' cl 54, means that long service leave is covered by, or provided under cl 54, not cl 13.5.

38 Clause 13.5 is just a flag that casual employees are entitled to long service leave, that is, that status as a casual employee does not exclude employees from the entitlement to long service leave.

39 Although the question referred concerns the meaning cl 13.5, the more pertinent question is the meaning of cl 54; that being the source of the long service leave entitlement.

40 Clause 54 expressly enlarges and qualifies what service counts as continuous service for the purpose of long service leave including in the case of casual employees.

41 The fact that cl 54 does so essentially leaves no room for the implication of any other qualifications that are not expressed. The conclusion that service does not mean service limited to an agreement registration date is all the more compelling.

42 Another obvious reason that the meaning of 'continuous service' cannot be the Employers' contended for meaning is that it requires the one phrase to bear two different meanings in cl 54. The phrase cannot mean one thing for casual employees, and something else for non-casual employees. And there is no suggestion that service in cl 54 means service from the date of registration in relation to non-casual employees.

43 Clause 52.20 extends the meaning of 'service' to deem it includes periods of employment in the service of the Commonwealth or another State. This suggests the parties had contemplated service prior to registration of the agreement.

44 The Employers say that the deeming provisions in cl 54.20 which provide that some service is not counted as service supports the construction that service can only mean service from the date of registration. Their written submissions state:

> 86. In addition to those submissions, further textual support for the respondent's construction is provided by the cl 54.20(b) which provides that "service" is deemed not to include service after the day on which the employee has become entitled to 26 weeks' long service leave until the day on which they commence the taking of 13 weeks' of that leave. If the term "service" in cl 13.5 was construed to mean service provided before and after registration, it is possible that immediately upon registration some casual employees will be entitled to 26 weeks' long service leave and therefore their service will immediately be deemed not to be good service for the purposes of cl 13.5. This would arise through no fault of their own, but merely because it is unlikely to be practicable for casual employees to commence long service leave immediately on registration of the Agreement.

45 There are three reasons why this submission does not advance the Employers' case.

46 First, the fact that the clause itself contemplates the possibility of an employee having an entitlement to take 26 weeks long service leave means that the parties intended continuous service to include pre-registration service. If service does not mean pre-registration service, then it would be impossible for an employee to have accrued an entitlement to 26 weeks long service leave under the Education Assistants Agreement, let alone the 2021 Education Assistants Agreement.

47 Second, there is no reason to consider this practical consequence is unintended. Even if an employee has accrued a long service leave entitlement of 26 weeks', the entitlement to take the leave is not lost. While their service ceases to count towards the next

accrued entitlement, they gain a greater period of long service leave than they would have had under the LSL Act. There is no reason to conclude this is not a commercially sensible trade-off, or that it is contrary to the parties' objective intention.

48 Third, as UWU points out, the practical consequence is not directly related to the meaning of 'service' anyway. Whatever 'continuous service' means, an entitlement to take 26 weeks' long service leave will have the effect of stalling the start of the next period of service towards the next long service leave entitlement.

49 There is another difference between the Education Assistants Agreement and the health system agreements which has some significance. It is that the structure of the Education Assistants Agreement locates the source of casual long service leave entitlements within the same clause as the source of long service leave for non-casual employees. This is indicative of an intention to align the entitlements of casual and non-casual employees more closely.

50 Although there are differences between the Education Assistants Agreement and the health system agreements, they are not differences which advance the Employers' contended for construction.

The Government Services Agreement

51 The Government Services Agreement was registered under s 41 of the IR Act.

52 The Government Services Agreement is divided into eight parts and 66 clauses. Relevantly, Part 1 is headed 'Application of Agreement', Part 2 is headed 'Types of Employment' and Part 4 is headed 'Leave of Absence'.

53 The purpose of the Government Services Agreement is to provide wage increases and, in conjunction with nine relevant awards, core employment conditions.: cl 4.1.

54 The Government Services Agreement applies to all employees who are eligible to be members of the UWU and who are covered by the nine awards listed in cl 7.1: cl 5.3.

55 At the time of registration, it was estimated the Government Services Agreement covered 4,674 employees: cl 5.3.

56 The registration of the Government Services Agreement had the effect of cancelling and replacing the 2021 Government Services Agreement: cl 5.1; IR Act, s 41(8).

57 In Part 2 'Types of Employment', cl 11.3 provides that a person may be appointed on a casual basis.

58 Clause 17 deals with casual employment specifically:

> **17. Casual Employment**
>
> 17.1. A casual Employee shall mean an Employee engaged on an hourly basis for a period not exceeding four weeks in any workplace.
>
> 17.2. Casual Employees shall receive a casual loading of 25% in lieu of annual and personal leave and public holidays.
>
> 17.3. The employment of a casual Employee may be terminated at any time by the casual Employee or the Employer giving to the other, one hour's prior notice. In the event of the Employer or the casual Employee failing to give the required notice, one hour's wages shall be paid or forfeited.
>
> 17.4. This clause shall not apply to Employees covered by the Catering Employees and Tea Attendants (Government) Award 1982.

59 Various terms and conditions contained in the agreement are service related. For example, the requirement for employer notice of termination is scaled depending on the employee's period of 'continuous service' from not more than 1 year to more than 5 years continuous service: cl 20.3.

60 Several leave provisions are also service related: 'Maternity Leave' cl 41, 'Adoption Leave' cl 42, 'Other Parent Leave' cl 43 and 'Personal Leave' cl 47, each refer to 'continuous service' as a condition for the relevant leave entitlement.

61 Annual leave is dealt with by the applicable awards, most of which also condition the entitlement on 'continuous service'.

62 Clause 52 is titled 'Long Service Leave'. It appears under Part 4 'Leave of Absence'. It does not purport to be the exclusive source of regulation of the entitlement to long service leave. Rather, it is to be read in conjunction with the long service leave provisions of the relevant award and the General Order.

63 Again, because the clause is lengthy, but important, it is set out in its entirety in an appendix to these reasons.

64 Notably:

(a) The agreement prevails over the General Order where there is inconsistency: cl 52.3.

(b) Clause 52.4 sets out casual employee entitlements in these terms:

> A casual Employee shall become entitled to 13 weeks' long service leave after a period of 10 years' continuous service and each further period of seven years' continuous service, in accordance with clause 52 of this Agreement.

(c) Clause 52.12 states part time and casual employees have the same entitlement as full time employees.

(d) Clause 52.20 is headed 'Casual Employees application of long service leave and interaction with the General Order'. In this clause, 'service' is deemed to include various absences and employment with other employers: cl 52.20(a). Service is deemed not to include specified absences: cl 52.20(b), and certain circumstances are deemed not to break service: cl 52.20(c).

(e) The period from the day after an employee becomes entitled to 26 weeks' long service leave to the day they commence taking 13 weeks of that leave is not counted as service: cl 52.20(b)(i).

65 The relevant long service leave provisions of each of the nine awards referenced by cl 52 are set out in an appendix to these reasons. All but one, refer, in turn, to the General Order, which is set out in an appendix to these reasons.

66 Relevant observations about the General Order are set out in paragraph [25] above.

67 Casual long service leave was provided for in the 2021 Government Services Agreement, which the Government Services Agreement replaced, in substantially the same terms as the Government Services Agreement.

68 It is uncontroversial that no earlier industrial agreement provided for long service leave for casual employees.

Is there ambiguity in cl 52.4?

69 My reasons concerning the Education Assistants Agreement apply equally to the Government Services Agreement and lead me to the same conclusion that there is no ambiguity in cl 52.4's references to 'continuous service'.

Conclusion: What is the true interpretation of the casual LSL clauses?

70 For the above reasons and those expressed in the APPL 5 Reasons, I propose making the following declarations:

(a) That the true interpretation of 'continuous service' in clause 13.5 of the Education Assistants' (Government) General Agreement 2023 is continuous service under clause 54 of the Education Assistants' (Government) General Agreement 2023.

(b) That the true interpretation of 'continuous service' in clause 52.4 of the Government Services (Miscellaneous) General Agreement 2023 is a period of unbroken service to the employer by an employee and the periods specified in clause 52.20(a) and qualified by clause 52.20(c) but does not include the periods specified in clause 52.20(b).

List of Abbreviations

2019 Education Assistants Agreement	Education Assistants' (Government) General Agreement 2019
2019 Government Services Agreement	Government Services (Miscellaneous) General Agreement 2019
2021 Education Assistants Agreement	Education Assistants' (Government) General Agreement 2021
2021 Government Services Agreement	Government Services (Miscellaneous) General Agreement 2021
APPL 5 Reasons	***United Workers Union v Child and Adolescent Health Service & Ors*** [2023] WAIRC 00666
Director-General	The Director-General of the Department of Education being the Chief Executive Officer as defined in s 4 of the *School Education Act 1999* (WA) and s 3 of the *Public Sector Management Act 1994* (WA)
Education Assistants Agreement	Education Assistants' (Government) General Agreement 2023 Registered: 1 December 2022 (and varied on 3 March 2023) Nominal Expiry Date: 31 December 2024
Employers	The Director General of the Department of Education or successor and/or any of the following: Botanic Gardens and Parks Authority Central Regional TAFE Department of Biodiversity, Conservation and Attractions Department of Communities Department of Education Department of Health Department of Justice Department of Local Government, Sport and Cultural Industries Department of Planning, Lands and Heritage Department of Primary Industries and Regional Development Forest Products Commission North Metropolitan TAFE North Regional TAFE Perth Theatre Trust Rottnest Island Authority South Metropolitan TAFE South Regional TAFE Western Australian Museum Western Australia Police Zoological Parks Authority

Enrolled Nurses Agreement	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 Registered: 23 December 2022 Nominal Expiry Date: 6 October 2024
General Order	Long Service Leave Conditions - State Government Wages Employees General Order
Government Services Agreement	Government Services (Miscellaneous) General Agreement 2023 Registered: 8 December 2022 (varied on 3 March 2023) Nominal Expiry Date: 31 December 2024
Hospital Support Workers Agreement	WA Heath System – United Workers Union (WA) – Hospital Support Workers Industrial Agreement 2022 Registered: 12 December 2022 Nominal Expiry Date: 4 August 2024
IR Act	*Industrial Relations Act 1979* (WA)
LSL Act	*Long Service Leave Act 1958* (WA)
Miscellaneous Government Conditions and Allowances Award	*Miscellaneous Government Conditions and Allowances Award No A 4 of 1992*
Teachers' Aides' Award	*Teachers' Aides' Award, 1979*
UWU	United Workers Union

Appendix 1

Clause 54 of the Education Assistants' (Government) General Agreement 2023

54. LONG SERVICE LEAVE FLEXIBILITIES

54.1 This Clause is to be read in conjunction with Clause 12 – Long Service Leave of the *Teachers' Aides' Award 1979* and the General Order.

54.2 Where provisions of the General Order are inconsistent with this General Agreement the provisions of this General Agreement prevail.

54.3 An Employee shall become entitled to 13 weeks' long service leave after a period of 10 years' continuous service and each further period of seven years' continuous service, in accordance with clause 54 of this General Agreement.

54.4 A part-time Employee who qualifies for accrued long service leave or early access to pro-rata long service leave shall be paid that entitlement according to the variation to their hours worked over the applicable accrual period.

54.5 Employees may, by agreement with their Employer, clear any accrued entitlement to long service leave, or long service leave accessed pursuant to subclause 54.10, in minimum periods of one day.

54.6 Notwithstanding clause 6 of the General Order, an employee may retain up to five days of a long service leave credit to be available until their next entitlement of long service leave is accrued. At this time, if there is any credit remaining, it will be cashed out.

Long Service Leave on Half Pay

54.7 Subject to the Employer's convenience, the Employer may approve an Employee's application to take an accrued entitlement to long service leave on half pay.

Long Service Leave on Double Pay

54.8 Employees may by agreement with their Employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.

54.9 Where Employees proceed on long service leave on double pay in accordance with subclause 54.8, the entitlement accessed is excised for the purpose of continuous service in accordance with the General Order.

Early Access to Pro-Rata Long Service Leave

54.10 Casual Employees shall qualify for pro-rata payment in lieu of leave pursuant to Clause 11 of the General Order.

54.11 Subject to subclause 54.13, Employees within seven years of their preservation age under Western Australian Government superannuation arrangements may, by agreement with their Employer, choose early access to their long service leave at the rate of:

(a) 6.5 days per completed twelve-month period of continuous service for full time employees in their first period of long service leave accrual; or

(b) 9.28 days per completed twelve month periods of continuous service for full time employees in subsequent periods of long service leave accrual.

54.12 Part time Employees have the same entitlement as full time Employees.

(a) For part time Employees, their entitlement is calculated on a pro-rata basis according to any variations to their ordinary working hours during the accrual period.

(b) For casual Employees, their entitlement is calculated on a pro-rata basis according to the average hours worked during the accrual period.

54.13 Early access to pro-rata long service leave does not include access to long service leave to which the Employee has become entitled or accumulated prior to being within seven years of their preservation age.

54.14 Under this clause, pro-rata long service leave can only be taken as paid leave and there is no capacity for payment in lieu of leave.

54.15 Early access to pro-rata long service leave can be taken at half or double pay in accordance with subclauses 54.7, 54.8 and 54.9.

54.16 Where Employees access pro-rata long service leave early, any period of leave taken will be excised for the purpose of continuous service in accordance with the General Order.

Cash Out of Accrued Long Service Leave Entitlement

54.17 Employees may by agreement with their Employer, cash out any portion of an accrued entitlement to long service leave.

54.18 Casual Employees who agree to cash out accrued long service leave entitlement will receive that payment at the rate of pay applicable to the last engagement with the Employer, including the loading prescribed at clause 13.2.

54.19 Where an Employee cashes out any portion of an accrued entitlement to long service leave in accordance with subclause 54.16, the entitlement accessed is excised for the purpose of continuous service in accordance with the General Order.

Casual Employees application of long service leave and interaction with the General Order

54.20 A casual Employee's entitlement to long service leave as provided at clause 54.3 of this General Agreement shall be determined in the following manner:

(a) For the purposes of this clause 'service' shall be deemed to include:

(i) absence of the casual Employee on approved unpaid carer's leave and unpaid parental leave not exceeding 14 days;

(ii) absence of the casual Employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;

(iii) absence of the casual Employee on family and domestic violence leave, bereavement leave and long service leave;

(iv) absence of a casual Employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and

(v) employment in the service of the Commonwealth or another State of Australia as provided in clause 16 of the General Order.

(b) The service of an employee shall be deemed NOT to include:

(i) service of an employee after the day on which they have become entitled to 26 weeks' long service leave until the day on which they commence the taking of 13 weeks of that leave; and

(ii) any other absence of the Employee except such absences as are provided in service by virtue of subclause (a).

(c) Subject to subclause (a) and (b), the service of a casual Employee shall not be deemed to have been broken:

(i) by resignation if they resign from one Public Authority in this State and commences with another Public Authority in this State within one working week of the day on which this resignation became effective; or

(ii) if their employment is ended by the Employer for any other reason other than serious misconduct but only if the Employee resumes employment with the Government not later than six months from the day on which their employment has ended and payment pursuant to clause 11 of the General Order has not been made.

54.21 Any accrued long service leave entitlement is calculated on the average weekly hours worked by the Employee of the entire qualifying period.

54.22 A casual Employee shall be paid during long service leave the rate of pay applicable to the last engagement with the Employer, including the loading prescribed at clause 13.2.

54.23 Further to clauses 54.20 to 54.22, clauses 4 to 13, 15 and 16 of the General Order apply to the accrual and taking of long service leave by a casual Employee as if those clauses were part of this General Agreement.

Appendix 2

Clause 52 of the Government Services (Miscellaneous) General Agreement 2023

52. Long Service Leave

52.1. For the purposes of this clause:

(a) "Employee" includes full time, part time, permanent, fixed term contract and casual employees.

(b) "General Order' means General Order No. 763 of 1982 Long Service Leave Conditions - State Government Wages Employees (66 W.A.I.G 319).

52.2. This clause is to be read in conjunction with the long service leave provisions of the relevant Award and the General Order.

52.3. Where the provisions of the General Order are inconsistent with this Agreement, the provisions of this Agreement will prevail.

52.4. A casual Employee shall become entitled to 13 weeks' long service leave after a period of 10 years' continuous service and each further period of seven years' continuous service, in accordance with clause 52 of this Agreement.

52.5. Employees may, by agreement with their Employer, clear any accrued entitlement to long service leave including long service leave accessed pursuant to subclause 52.9, in minimum periods of one day.

52.6. Subclause 52.4 shall not apply to Employees covered by the Cultural Centre Award 1987 who will accrue long service leave in accordance with clause 14 of the *Cultural Centre Award 1987*.

Long Service Leave on Half Pay

52.7. Subject to the Employer's convenience, the Employer may approve an Employee's application to take an accrued entitlement to long service leave on half pay.

Long Service Leave on Double Pay

52.8. Employees may by agreement with their Employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.

52.9. Where Employees proceed on long service leave on double pay in accordance with subclause 52.8, the entitlement accessed is excised for the purpose of continuous service in accordance with the General Order.

Early Access to Pro Rata Long Service Leave

52.10. Casual Employees shall qualify for pro rata payment in lieu of leave pursuant to Clause 11 of the General Order.

52.11. Subject to subclause 52.13, Employees within seven years of their preservation age under Western Australian Government superannuation arrangements may, by agreement with their Employer, choose early access to their long service leave at the rate of:

(a) 6.5 days per completed twelve month period of continuous service for full time Employees in their first period of long service leave accrual; or

(b) 9.28 days per completed twelve month periods of continuous service for full time Employees in subsequent periods of long service leave accrual.

52.12. Part time and causal Employees have the same entitlement as full time Employees.

(a) For part time Employees their entitlement is calculated on a pro rata basis according to any variations to their ordinary working hours during the accrual period.

(b) For casual Employees, their entitlement is calculated on a pro rata basis according to the average hours worked during the accrual period.

52.13. Early access to pro rata long service leave does not include access to long service leave to which the Employee has become entitled, or accumulated prior to being within seven years of their preservation age.

52.14. Under this clause, long service leave can only be taken as paid leave and there is no capacity for payment in lieu of leave.

52.15. Early access to pro rata long service leave can be taken at half or double pay in accordance with subclauses 52.7, 52.8 and 52.9.

52.16. Where Employees access pro rata long service leave early, any period of leave taken will be excised for the purpose of continuous service in accordance with the General Order.

Cash Out of Accrued Long Service Leave Entitlement

52.17. Employees may by agreement with their Employer, cash out any portion of an accrued entitlement to long service leave, provided the Employee proceeds on a minimum of ten days annual leave in that anniversary year.

52.18. Where Employees cash out any portion of an accrued entitlement to long service leave in accordance with subclause 52.17, the entitlement accessed is excised for the purpose of continuous service in accordance with the General Order.

52.19. Casual Employees who agree to cash out accrued long service leave will receive that payment at the rate of pay applicable to the last engagement with the Employer, including the loading prescribed in subclause 17.2.

Casual Employees application of long service leave and interaction with the General Order

52.20. A casual Employee's entitlement to long service leave as provided at subclause 52.4 of this General Agreement shall be determined in the following manner:

(a) For the purposes of this clause "service" shall be deemed to include:

(i) absence of the casual Employee on approved unpaid carer's leave and unpaid parental leave not exceeding 14 days;

(ii) absence of the casual Employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;

(iii) absence of the casual Employee on family and domestic violence leave, bereavement leave and long service leave;

(iv) absence of a casual Employee on approved leave to attend Trade Union training courses or on approval leave to attend Trade Union business; and

(v) employment in the service of the Commonwealth or another State of Australia as provided in clause 16 of the General Order.

(b) The service of an employee shall be deemed NOT to include:

(i) service if an employee after the day on which they have become entitled to 26 weeks' long service leave until the day on which they commence the taking of 13 weeks of that leave; and

(ii) any other absence of the Employee except such absences as are provided in service by virtue of subclause (a).

(c) Subject to subclause (a) and (b), the service of a casual Employee shall not be deemed to have been broken:

(i) by resignation if they resign from one Public Authority in this State and commence with another Public Authority in this State within one working week of the day on which this resignation became effective; or

(ii) if their employment is ended by the Employer for any other reason other than serious misconduct but only if the Employee resumes employment with the Government not later than six months from the day on which their employment has ended and payment pursuant to clause 11 of the General Order has not been made.

52.21. Any accrued LSL entitlement is calculated on the average weekly hours worked by the employee of the entire qualifying period.

52.22. A casual Employee shall be paid during long service leave the rate of pay applicable to the last engagement with the Employer, including the loading prescribed at clause 17.2.

52.23. Further to clauses 52.20 to 52.22, clauses 4 to 13 and 16 of the General Order apply to the accrual and taking of long service leave by a casual Employee as if those clauses were part of this General Agreement.

Appendix 3

Referenced Awards' Long Service Leave Clauses

Auxiliary Staff Residential Colleges (Government) Award 2021

11. - LONG SERVICE LEAVE

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

Catering Employees and Tea Attendants (Government) Award 1982

20. - LONG SERVICE LEAVE

The conditions governing the granting of Long Service Leave to government wages employees generally shall apply to employees covered by this award.

Children's Services (Government) Award 1989

14. - LONG SERVICE LEAVE

The conditions governing the granting of long service leave to government wages employees generally shall apply to employees covered by this Award.

Cleaners and Caretakers (Government) Award 1975

6.5. - LONG SERVICE LEAVE

The conditions governing the granting of long service leave to government wages employees generally shall apply to employees covered by this award.

Community Welfare Department Hostels Award 1983

11. - LONG SERVICE LEAVE

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

Cultural Centre Award 1987

14. - LONG SERVICE LEAVE

The conditions governing the granting of long service leave to government wages employees generally shall apply to employees covered by this award except that long service leave shall accrue at the rate of three months' leave for each seven year period of continuous service.

Gardeners (Government) 1986 Award

15. - LONG SERVICE LEAVE

The conditions governing the granting of long service leave to Government wages employees generally shall apply to employees covered by this award.

Miscellaneous Government Conditions and Allowances Award 1992

This award contains no long service leave clause.

Recreation Camps (Department for Sport and Recreation) Award 1975

14. - LONG SERVICE LEAVE

(1) The conditions governing the granting of long service leave to Government wages employees generally shall apply to employees covered by this award.

(2) When an employee proceeds on long service leave, there shall be no accrual towards an accrued day off in accordance with the provisions of subclause (1) of Clause 6. - Hours of this award nor any credit accumulated for such periods of leave.

Appendix 4

General Order No. 763 of 1982

Long Service Leave Conditions - State Government Wages Employees (66 WAIG 319)

…

Long Service Leave Conditions.

State Government Wages Employees.

1. Subject to the conditions hereinafter prescribed all Government wages employees employed by a Public Authority shall become entitled to 13 weeks' long service leave:

    (a) after a period of 10 years' continuous service; and

    (b) after each further period of seven years' continuous service.

    The long service leave prescribed in this clause may, by consent between the employer, the employee and the employee's union be taken in more than one portion provided that no portion shall be less than four consecutive weeks.

    Provided further that these conditions shall have no application to employees who are subject to long service leave entitlements on an industry basis or wage employees who at the date of this order, or subsequent to this order, receive long service leave conditions which, when viewed as a whole, are more favourable than the conditions specified in this order.

    Any qualifying service prior to 1 January 1986 for the second period of long service leave, shall be calculated on a 10 year qualifying period basis but all qualifying service after 1 January 1986 shall be calculated on a seven year qualifying period basis.

2.

    (a) For the purpose of these conditions "service" means service as an employee of a Public Authority and . shall be deemed to include:-

        (i) absence of the employee on annual leave or public holidays;

        (ii) absence of the employee on paid sick leave or on an approved rostered day off;

        (iii) absence of the employee on approved sick leave without pay except that portion of a continuous absence which exceeds three months. Provided that prior to I July 1957 only two weeks in any year shall be allowed and provided that prior to I April 1974 and after 1 July 1957 only six weeks in any year shall be allowed;

(iv) absence of the employee on approved leave without pay, other than sick leave without pay but not exceeding two weeks in any qualifying period;

(v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;

(vi) absence of the employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;

(vii) absence of the employee on long service leave which accrues on or after 1 April 1974;

(viii) absence of an employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and

(ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.

(b) The Service of an employee shall be deemed NOT to include:-

(i) service of an employee after the day on which he has become entitled to 26 weeks' long service leave until the day on which he commences the taking of 13 weeks of that leave;

(ii) any period of service with an employer of less than 12 months . Provided where after 1 April 1974 an employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government employer to another; becoming redundant or qualifying for pro rata payment in lieu of leave pursuant to Clause 11, then such period of service shall count;

(iii) any period during which an employee has been paid as a casual;

(iv) any other absence of the employee except such absences as are included in service by virtue of subclause (a) hereof; and

(v) any service of an employee prior to 1 April 1974 where that employee was less than 18 years of age.

3. Subject to the provisions of Clause 2 of these conditions the service of an employee shall not be deemed to have been broken –

(a) by resignation, if he resigns from one Public Authority in this State and commences with another Public Authority in this State within one working week of the expiration of any period for which payment in lieu of annual leave and/or public holidays has been made by the employer from which he resigned, or, if no such payment has been made, within one working week of the day on which his resignation became. effective;

(b) if his employment is ended by his employer for any reason other than serious misconduct, but only if –

(i) the employee resumes employment with the Government not later than six months from the day on which his employment was ended; and

(ii) payment pursuant to Clause 11 of these conditions has not been made; or

(c) by any absence approved by the employer as leave whether with or without pay.

4. Application for leave without pay in respect of any absence must be made before the commencement of the absence unless the cause of the absence occurs after the employee has left the job, in which case the application must be made not later than 14 days after the day on which the employee resumes work.

5. Long service leave shall be taken at a time convenient to the employer but not less than 30 days' notice shall be given to each employee of the day on which his long, service leave is to commence, except in cases where the employee and the employer agree to a lesser period of notice, or in other exceptional circumstances.

6. Long service leave must be commenced within six months of becoming due unless written permission of the employer concerned is obtained for postponement, but where the postponement sought is for more than 12 months, the approval of the Minister for Industrial Relations must be obtained . Provided that where an employer and an employee have agreed that the leave period will be taken in more than one portion the final portion of leave must be taken within three years of its becoming due, unless the approval of the Minister for Industrial Relations has been obtained to extend the period.

7. Any public holiday occurring during an employee's absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.

8. No employee is to undertake during long service leave, without the written approval of the Minister for Industrial Relations, any form of employment for hire or reward . Contravention of this clause may be followed by dismissal.

9. An employee who has become entitled to long service leave in accordance with Clause 1 of these conditions and whose employment is ended before that leave is taken shall be granted payment in lieu of that leave, unless he has been dismissed for an offence committed prior to the day on which he became entitled to that leave.

10. If an employee who has become entitled to Long Service Leave in accordance with Clause 1 of these conditions dies before taking that leave, payment in lieu of that leave shall be made to that employee's estate unless the employee leaves a spouse, children, parent or invalid brother or sister dependent on him. In which case such payment shall be made to such spouse or other dependant.

11. If the employment of an employee ends before he has completed the first or further qualifying periods in accordance with Clause 1 of these conditions, payment in lieu of long service leave proportionate to his length of service shall not be made unless the employee –

(a) has completed a total of at least three years' continuous service and his employment has been ended by his employer for reasons other than serious misconduct ; or

(b) is not less than 55 years of age and resigns, but only if the employee has completed a total of not less than 12 months' continuous service prior to the day from which the resignation has effect; or

(c) has completed a total of not less than 12 months'. continuous service and his employment' is ended by his employer on account of incapacity due to old age, ill health or the result of an accident; or

(d) has completed a total of not less than three years' continuous service and resigns or whose services are terminated because of her pregnancy after 1 April 1974 and who produces at the time of resignation or termination certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner; or

(e) dies after having served continuously for not less than 12 months before his death and leaves a spouse, children, parent or invalid brother or sister dependent on him in which case the payment shall be made to such spouse or other dependant; or

(f) has completed a total of not less than three years' continuous service and resigns in order to enter an Invitro Fertilisation Programme provided she produces written confirmation from an appropriate medical authority of the dates of involvement in the programme.

12.

(a) Notwithstanding the provisions of subclauses (a) and (c) of Clause 11, a worker whose position has become redundant and who refuses an offer by the employer of reasonable alternative employment or who refuses to accept a transfer in accordance with the terms of his employment, shall not be entitled to payment in lieu of long service leave proportionate to his length of service.

(b) Any dispute as to whether the alternative employment offered is reasonable shall be determined by the Long Service Leave Appeal Committee.

13. For the purpose of subclause (c) of Clause 11 a medical referee shall, if there is disagreement between the employee's doctor and the employer's doctor as to the employee's incapacity, be selected from an appropriate panel of doctors either by agreement between the employer and the employee or, failing agreement, by the Minister for Industrial Relations.

14.

(a) Subject to the provisions of this clause an employee shall be paid during long service leave at his permanent classified rate of pay.

(b) Except where otherwise approved by the Minister for Industrial Relations the rate of pay of an employee shall be deemed to be the total wage applicable to the classification which, for the purpose of this clause is, or is deemed to be his permanent classification.

(c) If an employee has been employed in one or more positions each of which carries a higher rate than his permanent classified rate for a continuous period of 12 months ending not earlier than two weeks before the day on which he commences long service leave or is paid pro raja in lieu of leave in accordance with Clause 11 hereof, the rate which he has received for the greatest proportion of that 12 month period shall, for the purpose of this clause, be deemed to be his permanent classified rate.

(d) Where an employee engaged on construction work has had no permanent designation or rate of wage for the period of 12 months prior to the commencement of his leave, the rate of wage applicable to the work he performed for the greatest proportion of that 12 month period shall, for the purpose of this clause, be deemed to be his permanent classified rate.

(e) In the case of a pieceworker the permanent classified rate shall be deemed to be the ordinary time rate of pay payable to an employee engaged on the same type of work on a time basis and not on piecework.

(f) If any variation occurs in the rate of wage applicable to an employee during any period when he is on long service leave, the employee's pay while he is on leave shall be varied accordingly and, if the employee has been paid in full for the leave before its commencement payment shall be adjusted as soon as practicable after the employee resumes work.

(g) District . allowance shall not be paid during long service leave unless the family or dependants of the employee. remain in the district.

15.

(a) A part-time employee shall be paid the proportion of the amount specified in Clause 14 hereof that his ordinary hours bear to the ordinary hours of a fulltime employee in the same classification.

(b) If the hours of a part-time employee have varied he shall be paid a rate based on the average number of hours worked over the full qualifying period.

(c) A full-time employee, who, during a qualifying period has been continuously employed on both full-time and part-time employment, may elect to take three months' long service leave at a rate determined by the proportion

of service on a part-time basis to that on a full-time basis; or, to take a lesser period than three months calculated by converting the part-time service to equivalent full-time service; or to work such additional time as will effectively make up the part-time service into full-time service so that the employee qualifies for three months' long service leave at the full-time rate of pay.

(d) A part-time employee, who, during the qualifying period has been continuously employed on both parttime and full-time employment, shall be paid at a rate determined by the proportion of service on a part-time basis to that on a full-time basis.

(e) The provisions of this clause shall not apply with respect to any part-time service for which the employee has received additional remuneration to compensate for or in lieu of long service leave.

16.

(a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:

(i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.

(ii) Service with the State necessary to complete a qualifying period for an entitlement of long service leave shall be calculated in accordance with the provisions of these conditions.

(iii) An employee shall not become entitled to long service leave or payment for long service leave unless he has completed three years' continuous service with the State.

(iv) Where an employee would but for the provisions of paragraph (iii) hereof have become entitled to long service leave before the expiration of three years' continuous service with the State, service subsequent to that date of entitlement shall count towards the next grant of long service leave.

(b) No employee shall be entitled to the benefit of this clause if service with the previous employer was terminated for reasons which would entitle that employer to dismiss the employee without notice.

(c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.

(d) Any dispute as to the application of paragraph (i) of subclause (a) hereof or whether the employee was previously engaged in the service of the Commonwealth or another State of Australia shall be determined by the Long Service Leave Appeal Committee.

17. Where an employee, through personal ill health, is confined to his place : of residence. or a hospital for a continuous . period of 14 days or more during any: period of long service. leave taken after 1 April 1974 and such ' : confinement is certified to by a duly qualified medical practitioner, such period shall be considered sick leave and subject to the provisions of the relevant sick leave clause of the award or agreement governing the conditions of employment of the employee.

The period during long service leave for which paid sick leave has been approved shall be given as additional long service at a time convenient to the employer.

18.

(a) There shall be a long service leave appeal committee consisting of the following honorary members:-

(i) Industrial Registrar - Western Australian Industrial Relations Commission (Chairman);

(ii) A representative of the Trades and Labor Council of WA (Member);

(iii) Director, Office of Industrial Relations (Member), or an officer nominated by the Director to act as his deputy.

(b) The function of the Committee shall be to hear appeals by any wages employee in respect of his long service leave entitlement or the rate to be paid during long service leave and to deal with any dispute arising out of the application of these conditions.

(c) An appellant may appear in person or may be represented by an accredited representative of the Union to which he belongs.

(d) Decisions of the Committee shall be final and binding on all parties thereto.

2023 WAIRC 00680

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	FRIDAY, 11 AUGUST 2023
FILE NO.	APPL 6 OF 2023
CITATION NO.	2023 WAIRC 00680

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

Declaration

HAVING heard from the parties on the papers through written submissions;

AND for the reasons stated in the published reasons for decision;

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

1. THAT the true interpretation of 'continuous service' in clause 13.5 of the *Education Assistants' (Government) General Agreement 2023* is continuous service under clause 54 of the *Education Assistants' (Government) General Agreement 2023*.
2. THAT the true interpretation of 'continuous service' in clause 52.4 of the *Government Services (Miscellaneous) General Agreement 2023* is a period of unbroken service to the employer by an employee and the periods specified in clause 52.20(a) and qualified by clause 52.20(c) but does not include the periods specified in clause 52.20(b).

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2023 WAIRC 00666

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

CITATION	:	2023 WAIRC 00666
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD ON THE PAPERS	:	WRITTEN SUBMISSIONS FILED: FRIDAY, 12 MAY 2023, FRIDAY, 26 MAY 2023, MONDAY, 29 MAY 2023 AND MONDAY, 12 JUNE 2023
DELIVERED	:	WEDNESDAY, 9 AUGUST 2023
FILE NO.	:	APPL 5 OF 2023
BETWEEN	:	UNITED WORKERS UNION Applicant AND CHILD AND ADOLESCENT HEALTH SERVICE AND OTHERS Respondents

CatchWords	:	Industrial Law (WA) - Interpretation of Agreement - s 46 - 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 - WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2022 - Clauses providing long service leave for casual employees - Dispute about the way service should be recognised for the purpose of long service leave under the casual LSL clauses - What is 'continuous service'? - Whether clauses are ambiguous - Ordinary meaning of continuous service - Whether service includes pre-registration service - Reference to history of clause in construction - Whether ordinary meaning of continuous service has retrospective effect on accrued rights or entitlements - Declaration issued
Legislation	:	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Industrial Relations Act 1999* (Qld) *Long Service Leave Act 1958* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Workplace Relations Act 1996* (Cth)
Result	:	Declaration issued
Representation:		
Applicant	:	United Workers Union
Respondents	:	State Solicitor's Office

Case(s) referred to in reasons:

Browne v Director General, Department of Water and Environmental Regulation [2020] WASCA 16

Conroy's Smallgoods v Australasian Meat Industry Employees Union [2023] FCAFC 59

Director General of the Ministry for Culture and Arts v The Civil Service Association of Western Australia Incorporated & Ors [2000] WASCA 13; (2000) 80 WAIG 453

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2014) 94 WAIG 1

FreshFood Management Services Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) [2023] FWCFB 97

Holland v UGL Resources Pty Ltd T/A UGL Resources [2012] FWA 3453

Jones v Barminco Pty Ltd (2001) 81 WAIG 1183

Maughan Thiem Auto Sales Pty Ltd v Cooper [2014] FCAFC 94; (2014) 222 FCR 1

Maurice Alexander Management Pty Ltd v Sato [2023] ICQ 14

Norwest Beef Industries Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124

Pooley v Commissioner of Police [2008] WAIRC 00216; 88 WAIG 310

Public Transport Authority of Western Australia v Yoon [2017] WASCA 25; (2017) 97 WAIG 249

Re Harrison; Ex parte Hames [2015] WASC 247

Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia & Ors (1987) 67 WAIG 1097

Short v FW Hercus Pty Ltd [1993] FCA 51

Spasojevic v Speaker of the Legislative Assembly [2023] WAIRC 00001; (2023) 103 WAIG 138

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) WAIG 366

WorkPac Pty Ltd v Skene [2018] FCAFC 131; (2018) 264 FCR 536

Reasons for Decision

1 These reasons use the abbreviations contained in the list at the end of the reasons.

2 The applicant, United Workers Union, and the respondent health service providers, are party to two industrial agreements that cover employees in the Western Australian health system:

(a) The Enrolled Nurses Agreement; and

(b) The Hospital Support Workers Agreement.

3 Both industrial agreements have clauses providing long service leave for casual employees.

4 The casual LSL clauses grant 13 weeks' paid long service leave on the completion of 10 years of continuous service and an additional 13 weeks' paid long service leave for each subsequent period of seven years of completed continuous service.

5 UWU and the HSPs are in dispute about the way service should be recognised for the purpose of long service leave under the casual LSL clauses.

6 UWU says that 'continuous service' under the casual LSL clauses includes all qualifying service with the relevant employer prior to the registration of the industrial agreements.

7 The HSPs say that 'continuous service' under the casual LSL clauses excludes service with the relevant employer prior to the registration of an industrial agreement which contained long service leave for casual employees.

8 UWU applied to the Commission for a declaration as to the true interpretation of the casual LSL clauses under s 46 of the IR Act to resolve this industrial dispute. I must decide what is the correct meaning of the phrase 'continuous service' as it is used in the casual LSL clauses.

9 This dispute about meaning arises in these circumstances: the inclusion of casual LSL clauses in these parties' industrial agreements is relatively new. Under their pre-2021 industrial agreements, no provision was made for long service leave for casual employees, so that casual employee long service leave entitlements were derived from the LSL Act.

10 The LSL Act entitlements are less generous compared with the entitlements under the post-2020 industrial agreements. In particular, the LSL Act provides long service leave of 8 2/3 weeks after 10 years' continuous service, compared with 13 weeks under the post-2020 industrial agreements for the same qualifying period.

11 If UWU is correct in its construction of the casual LSL clauses, then a casual employee who, today, has been employed for 10 or more years with a HSP will be entitled to take 13 weeks of long service leave (subject to their service otherwise qualifying as continuous service).

12 The HSPs' case appears to assume that if their construction is correct, then the same casual employee with 10 years' service with a HSP, will be entitled to take long service leave but in an amount that is less than 13 weeks: a proportion of 8 2/3 weeks for service prior to the registration of the relevant industrial agreement introducing long service leave for casual employees, and a proportion of 13 weeks for service after the registration of the relevant industrial instrument.

13 However, on my analysis, the true legal effect of the HSPs contended for construction is that a casual employee with 10 years' service with an HSP will have no entitlement to take long service leave, because pre-2021 service will not be counted as continuous service for the purpose of the long service leave entitlement.

14 My conclusion is that UWU's construction is correct.

Principles in s 46 applications

15 Section 46 of the IR Act empowers the Commission to declare the true interpretation of an industrial agreement on the application of any employer, organisation or association that is bound by it, while it is in force.

16 Her Honour Acting President Smith (as she then was) summarised the nature and purpose of s 46 in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2017] WAIRC 00830; (2017) WAIG 366 at [100]:

> From the authorities referred to above and the express provisions of s 46 and s 83 of the Act, the following principles emerge in respect of an award as defined in s 46(5):
>
> (a) The power to interpret the true meaning of an award, pursuant to the power conferred by s 46, is to enable a determination of whether ambiguity arises and to resolve it, if it does.
>
> (b) If a provision in question is capable in the ordinary sense of not having an ambiguous meaning, then consideration of the expressed or supposed intention of the provision does not fall to be considered under s 46.
>
> (c) If a provision is found to be ambiguous, the Commission acting pursuant to s 46 can embark upon a fact-finding exercise to determine the surrounding circumstances that existed when the award or industrial agreement was made. These surrounding circumstances can include ascertaining the object of the provision by:
>
> (i) inquiring into the history of the award;
>
> (ii) any established custom, practice or usage which led to the making of the award and any relevant established custom, usage and practice since the award was made.
>
> (d) If ambiguity is found and after ascertaining the true meaning of the award and declaring its effect it is found the words in the provision in question are defective, in that the words do not put into effect or reflect that meaning or it is found that the words used require amendment to give fuller effect to the true meaning, the Commission is authorised to exercise arbitral power to amend the provision.
>
> (e) The power to interpret an award or industrial agreement pursuant to s 46 of the Act is, except for the power to amend a provision in s 46(1)(b), merely declaratory and any declaration made cannot be made as an order to enforce a right.
>
> (f) The determination of whether a particular employee has an entitlement pursuant to the provisions of an award is an enforcement matter in relation to which the Industrial Magistrate has exclusive jurisdiction to determine, pursuant to the power conferred by s 83 of the Act.

17 Her Honour's summary of principle (b) drew from the statement of Olney J in ***Norwest Beef Industries Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth*** (1984) 64 WAIG 2124 at 2133.

His Honour pointed out that the first task in every case will be to determine whether words used are capable in their ordinary sense of having an unambiguous meaning. If yes, then further consideration of the expressed or supposed intention is not required, or indeed permitted.

18 Although ***Norwest Beef*** concerned the interpretation of an award, rather than an industrial agreement, the Industrial Appeal Court has held that the same approach applies to interpretation of an industrial agreement under s 46: ***Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia & Ors*** (1987) 67 WAIG 1097 at 1098.

19 When s 46 is invoked, the Commission must ascertain whether the agreement is ambiguous, and if it is, resolve the ambiguity, in other words, construe the agreement. The principles that apply to construction are well settled. They were summarised by Beech J in ***Re Harrison; Ex parte Hames*** [2015] WASC 247 at [50]:

> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
>
> (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
>
> (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation.

20 Additionally:

> The words of a clause in a written agreement are to be given the most appropriate meaning which they can legitimately bear. A court must have regard to all of the provisions of the agreement with a view to achieving harmony among them. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109-110 (Gibbs J). These propositions are applicable to instruments generally, subject to any particular rules of construction which have been developed in relation to a particular kind of provision or instrument.

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2014) 94 WAIG 1 per Buss J at [83].

21 Where the particular kind of instrument being construed is an industrial agreement:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of Wanneroo v **Holmes*** [1989] FCA 369; (1989) 30 IR 362 at 378 (French J). The interpretation "... turns on the language of the particular agreement, understood in the light of its industrial context and purpose ...": ***Amcor** Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (Holmes at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (Holmes at 378-9, citing *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a 'practical bent of mind' and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *Kucks v CSR Limited* [1996] IRCA 166; (1996) 66 IR 182 at 184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); Amcor at [96] (Kirby J).

WorkPac Pty Ltd v Skene [2018] FCAFC 131; (2018) 264 FCR 536 at [197].

The Enrolled Nurses Agreement

22 The Enrolled Nurses Agreement was registered under s 41 of the IR Act.

23 The Enrolled Nurses Agreement applies to employees engaged to work in the classifications listed in the Enrolled Nurses Award, namely enrolled nurses, advanced skill enrolled nurses and assistants in nursing.

24 At the time of registration it was estimated the Enrolled Nurses Agreement covered 3,518 employees.

25 The registration of the Enrolled Nurses Agreement had the effect of cancelling and replacing the 2020 Enrolled Nurses Agreement: cl 4.5, IR Act s 41(8).

26 The Enrolled Nurses Agreement is expressed to apply to the exclusion of the Enrolled Nurses Award, *Miscellaneous Government Conditions and Allowances Award No A4 of 1992* and the *Health Workers Community and Child Health Services Award 2000*: cl 7.

27 'Casual Employee' is defined in the Enrolled Nurses Agreement to mean an Employee engaged by the hour, with no guarantee of continual or additional employment: cl 3.8.

28 Clause 14 states:

14.1 A casual Employee will be paid a loading of 25% of the ordinary rate of pay for the class of work on and from the date of registration of this Agreement.

14.2 The minimum period of engagement of a casual Employee will be two hours on each engagement.

14.3 Casual Employees are not entitled to paid leave under this Agreement, unless a clause in this Agreement specifically provides the entitlement.

14.4 Casual Employees are entitled to not be available to attend work, or to leave work for the purposes of caring responsibilities.

14.5 Casual Health Workers may only be engaged for unplanned short term work requirements.

14.6 The Employer will take into account prior experience when determining the appropriate classification for casual Employees.

29 Various terms and conditions of the Enrolled Nurses Agreement are service related. For instance:

(a) The requirement for employer notice of termination is scaled depending on the employee's period of 'continuous service' from not more than 3 years to more than five years continuous service: cl 13.4.

(b) Some classifications are defined by reference to the number of 'years of employment' as an Enrolled Nurse, where 'year of employment' is defined by reference to 'service' which is also defined: cl 24.

(c) Rural gratuity payments are dependent on completion of two years' continuous service with the WA Country Health Service in particular localities, with 'continuous service' being defined: cl 32.

30 Most of the leave provisions of the Enrolled Nurses Agreement are also service related: 'Annual Leave' cl 40, 'Personal Leave' cl 46, 'Maternity Leave' cl 48, 'Adoption Leave' cl 48A, and 'Other Parent Leave' cl 48B all refer to 'continuous service' and/or continuous employment as a condition for the relevant leave entitlement.

31 Clause 43 deals with long service leave for employees other than casual employees. Clause 43.1 expressly excludes casual employees from the entitlement under cl 43. Relevant parts of cl 43 are reproduced below:

43. LONG SERVICE LEAVE

43.1 Long Service Leave Entitlement

Subject to the conditions of this clause all Employees, except a casual Employee will become entitled to 13 weeks' Long Service Leave after:

(a) a period of 10 years continuous service.

(b) each further period of seven years continuous service.

43.2 …

43.3 …

43.4 Service counted for Long Service Leave

(a) For the purpose of this clause 'service' means service as an Employee of a Western Australian Public Sector Employer and will be deemed to include:

(i) absence of the Employee on an Annual Leave or public holidays;

(ii) absence of the Employee on paid sick or on an approved rostered day off;

(iii) absence of the Employee on approved sick leave without pay except that portion of a continuous absence which exceeds three months;

(iv) absence of the Employee on approved leave without pay, other than sick leave but not exceeding two weeks' in any qualifying period;

(v) absence of the Employee on National Service or other military training, but only if the difference between the Employees' military pay and their civilian pay is made up or would, but for the fact that their military pay exceeds their civilian pay, be made up by their Employer;

(vi) absence of the Employee on worker's compensation for any period not exceeding six months, or for such greater period as the Employer may allow;

(vii) absence of the Employee on Long Service Leave;

(viii) absence of an Employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and

(ix) employment in the service of the Commonwealth or another State of Australia as provided in subclause 43.16.

(b) The service of an Employee will be deemed not to include:

(i) service of an Employee after the day on which they have become entitled to 26 weeks' Long Service Leave until the day on which they commence the taking of 13 weeks' of that leave;

(ii) any period of service with an Employer of less than 12 months. Provided where an Employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government Employer to another, becoming redundant or qualifying for pro rata payment in lieu of leave pursuant to subclause 43.11, such period of service will count; and

(iii) any other absence of the Employee except such absences as are included in service by virtue of subclause 43.4(a).

(c) Subject to the provisions of subclauses 43.4(a) and 43.4(b), the service of an Employee will not be deemed to have been broken:

(i) by resignation, if they resign from one Western Australian Public Sector Employer and commences with another Western Australian Public Sector Employer within one working week of the expiration of any period for which payment in lieu of Annual Leave and/or public holidays has been made by the Employer from which the Employee resigned, or, if no such payment has been made, within one working week of the day on which their resignation becomes effective;

(ii) if their employment is ended by their Employer for any reason other than serious misconduct, but only if:

(1) the Employee resumes employment with a Western Australian Public Sector Employer not later than six months from the day on which their employment ended; and

(2) payment pursuant to subclause 43.11 has not been made; or

(iii) by any absence approved by the Employer as leave whether with or without pay.

32 The casual LSL clause says:

44. LONG SERVICE LEAVE FOR CASUAL EMPLOYEES

44.1 A Casual Employee will be entitled to 13 weeks' paid Long Service Leave, taken in one continuous period, on the completion of 10 years of continuous service and an additional 13 weeks' paid Long Service Leave for each subsequent period of seven years of completed continuous service.

44.2 Payment while on Long Service Leave will be at the Casual Employee's ordinary rate of pay plus payment of the casual loading provided for at clause 14.1 of this Agreement.

44.3 On application by the Casual Employee, the Employer may approve a Casual Employee taking:

(a) Any accrued entitlement to Long Service Leave in minimum periods of one day.

(b) Double the period of Long Service Leave on half pay, in lieu of the period of Long Service Leave entitlement on normal pay, as prescribed at subclause 44.2, or half the period of Long Service Leave on double pay, in lieu of the period of Long Service Leave entitlement on normal pay.

(c) Any portion of their Long Service Leave entitlement on normal pay, as prescribed at subclause 44.2, or double such period on half pay or half such period on double pay.

44.4 A Casual Employee may, with the Employer's agreement, cash out any portion of a Long Service Leave entitlement accrued under subclause 44.1 in lieu of taking the leave.

44.5 A Casual Employee who ceases employment in the WA Health System will receive payment for any accrued Long Service Leave on termination.

Is there ambiguity?

33 The Enrolled Nurses Agreement uses the term 'continuous service' in several places. It defines 'service' for some specific clauses, but it does not define 'service' or 'continuous service' for general purposes.

34 The term 'continuous service' has a commonly understood, plain, industrial meaning derived from the combination of the ordinary common sense meaning of the two words that it comprises: 'continuous' meaning a connected and unbroken period and 'service' meaning experience performing duties for an employer: see ***Browne v Director General, Department of Water and Environmental Regulation*** [2020] WASCA 16, per Le Miere J at [119], ***Holland v UGL Resources Pty Ltd T/A UGL Resources*** [2012] FWA 3453 at [20]-[22] and McCallum, R. C, *Butterworths Employment and Law Dictionary*, (1997).

35 'Continuous service' ordinarily means a period of unbroken service to an employer by an employee.

36 In some places, the Enrolled Nurses Agreement uses the different phrase 'continuous employment'. The distinction between 'service' and 'employment' was considered by Cicchini IM in ***Jones v Barminco Pty Ltd*** (2001) 81 WAIG 1183. The issue in that case was whether annual leave accrued under the MCE Act while an employee was not at work but in receipt of workers' compensation payments. The MCE Act provided for annual leave to accrue for 'each year of service'. The learned Industrial Magistrate said at 1188-1189 (original emphasis):

> The complainant argues for the reasons previously stated that *"each year of service"* is to be read *"each year of employment"*. I respectfully disagree. The word *"service"* has been specifically used by the legislature. It is not

appropriate to substitute it with another word. *"Service"* is capable of definition and has its own particular meaning. The *CCH Macquarie Dictionary of Employment and Industrial Relations* defines *"service"* to mean:

> "the performance of duties as a servant; employment in duties or work for another."

It is apparent from the definition referred to above that the word *"service"* connotes more than the contractual relationship between the employer and employee. Indeed it expressly addresses the performance of duties and the carrying out of work. It is axiomatic that duties are not performed and an employee does not carry out work whilst on workers' compensation. Annual leave can only accrue whilst the employee is engaged in the regular performance of duties as a servant and during any consensual rest period that relates thereto. If an employee is precluded from carrying out such duties on account of injury, then during such period of incapacity the employee cannot be said to be providing a service to his or her employer notwithstanding that the employee remains within the employment relationship.

37 The HSPs have not pointed to anything in the text of the Enrolled Nurses Agreement, read as a whole, that suggests the term does not have its ordinary meaning.

38 I find nothing in the agreement, read as a whole, which tells against it having its ordinary meaning. Rather, there are several factors which favour the ordinary meaning.

39 First, the frequency of the use of the term throughout the agreement is itself an indication that the term has a plain and commonly understood meaning, and that the ordinary meaning is being invoked.

40 Second, there are instances where the ordinary meaning is expressly enlarged or qualified: cl 24, cl 32 and cl 43. This indicates that in the absence of qualification or enlargement, the term is intended to have its ordinary meaning.

41 Third, the nature of service related entitlements themselves indicate that the term is intended to have its ordinary meaning. For example, it would be industrially nonsensical for notice of termination of employment to be determined by continuous service if the term meant something other than unbroken consecutive service with the employer. If continuous service was limited to post-2020 service, the whole idea of notice of termination being linked to longevity of service is undermined.

42 Words used in an industrial agreement should be given meaning so as to operate consistently and harmoniously, with the agreement read as a whole. It would be contrary to this principle to give the term 'continuous service' its ordinary meaning for some purposes, but a different, qualified meaning in the casual LSL clause.

43 The HSPs argue that the term 'continuous service' is ambiguous. They do so, based on the genesis or history of the entitlement.

44 The HSPs demonstrate, by carefully tracking the interaction between the applicable awards, industrial agreements and the LSL Act, that casual employees had an entitlement to long service leave under the LSL Act prior to the introduction of a casual LSL clause in the 2020 Enrolled Nurses Agreement. They say, therefore:

> In that context, the purpose of introducing cl 44.1 was not to confer upon casuals a right to long service leave for the first time, rather, the purpose was to confer upon casuals an entitlement to long service leave <u>under an industrial instrument</u> for the first time such that it would replace the then existing scheme for casuals to accrue and take long service leave under the LSL Act.
>
> In that context, it is apparent that there is ambiguity as to the meaning of "service" in cl 44.1. Does the term "service" mean any and all service provided by a casual, whether before or after registration of the 2020 EN Agreement? Or does it only mean service provided on and from the date of registration of the 2020 Agreement?

45 This history is uncontroversial:

(a) The 2020 Enrolled Nurses Agreement was registered on 27 May 2021.

(b) The 2020 Enrolled Nurses Agreement contained at cl 44.1 and cl 44.2 terms relating to long service leave for casuals that are identical to the terms of cl 44.1 and cl 44.2 of the Enrolled Nurses Agreement. But the 2020 Enrolled Nurses Agreement did not include cl 44.3 and cl 44.5 which were included in the Enrolled Nurses Agreement for the first time.

(c) The 2020 Enrolled Nurses Agreement replaced the 2018 Enrolled Nurses Agreement.

(d) The 2018 Enrolled Nurses Agreement provided for long service leave at cl 43 but that clause did not apply to casual employees.

46 It is also uncontroversial that casual employees were not eligible for long service leave under any industrial agreement or award before the 2020 Enrolled Nurses Agreement, but were eligible for long service leave under the LSL Act.

47 It is legitimate to look at the history of the clause for the purpose of construing it. In ***Short v FW Hercus Pty Ltd*** [1993] FCA 51 at [7]-[8], Burchett J infused the relevant principles with a dash of charm when he said:

> [7] …Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In

literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read.

[8] That much is fairly clear. Where there is seen to be a difficulty, the court can often go to the history of the matter. A number of illustrations will be found in Nurses (South Australia) Award (Interpretation) Case (ubi supra). But an ambiguity or obscurity may not be immediately seen on the face of a document. Both the problem and its solution may appear only when the wider context from which an expression first sprang is brought to notice. Is the court then forbidden to look past the document itself that is before it?...

See also ***FreshFood Management Services Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)*** [2023] FWCFB 97.

48 However, the HSPs reliance on the history of the casual LSL clause involves a non sequitur. The conclusion that there is ambiguity does not follow from the premise. The history does not reveal some nuances of language or a problem with the ordinary meaning. The history does not reveal that the phrase now in question, 'continuous service', has historically been used to mean something other than its ordinary meaning, or that the parties had some common understanding about what the phrase meant. The history does not indicate a purpose or intent that is not apparent from the text of the agreement.

49 The HSPs say that from the date of registration of the 2020 Enrolled Nurses Agreement, employees ceased to be employees for the purposes of the LSL Act and '**ceased to be entitled to accrue long service leave under the LSL Act**'. Their submissions proceed on the basis that there was, but is no longer, an entitlement to **accrue** annual leave under the LSL Act. The HSPs treat long service leave as involving accrual as a separate and distinct element of a long service leave entitlement.

50 The question of whether accrual of long service leave is an entitlement was not fully explored or argued in this matter.

51 I observed in ***Spasojevic v Speaker of the Legislative Assembly*** [2023] WAIRC 00001; (2023) 103 WAIG 138 at [55], citing ***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], that paid leave entitlements generally involve two components: the entitlement to be absent from work and the entitlement to be paid in respect of such absence despite not rendering service. For some types of leave, there may be additional entitlements attached to the leave, such as an entitlement to be paid in lieu of taking leave, or an entitlement to leave loading.

52 The character of long service leave accrual was considered by the Industrial Court of Queensland in ***Maurice Alexander Management Pty Ltd v Sato*** [2023] ICQ 14. There, a casual employee claimed an entitlement to long service leave under the *Industrial Relations Act 1999* (Qld) (repealed) in circumstances where her employment was covered by a series of industrial agreements made under the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth) (FWA). A 2006 agreement expressly provided for casual loading to be paid 'in lieu of any entitlement to paid annual leave, paid personal leave, long service leave'. The employer argued that the payment of casual loading under the 2006 agreement meant that service while that agreement applied should not be counted as continuous service under the *Industrial Relations Act 1999* (Qld).

53 At first instance, the Industrial Commission held that there was a distinction between an entitlement to long service leave and the accrual leading to an entitlement to long service leave. Further, the entitlement to long service leave only arose after 10 years' continuous service was complete. Accordingly, the 2006 agreement did not operate to exclude service under it from the calculation of the entitlement to long service leave.

54 President Davis of the Industrial Court of Queensland disagreed with this approach, observing at [36]-[38]:

[36] As the Industrial Commissioner held, on a particular day, long service leave crystallises as a right to take leave with pay. It crystallises though because the employee has a right to have periods of service counted towards the ultimate entitlement to long service leave. The entitlement to long service leave is a right to paid leave when a specified term of service has been achieved.

[37] The casual loading is, in effect, a periodically paid sum which is designed to extinguish various "entitlements". It does that by compensating the employee with inflated pay rates to extinguish the benefit of the otherwise accruing "entitlements".

[38] Construed in that context, it is the service which is accruing and which ultimately crystallises into an entitlement to take paid long service leave. On a proper construction of clause 13.1, "the entitlement" to long service leave is the right to count service under the 2006 agreement towards an ultimate long service leave entitlement. I therefore respectfully disagree with the conclusion reached by the Industrial Commissioner and ground 2 of the appeal is made out.

55 In ***Maughan Thiem Auto Sales Pty Ltd v Cooper*** [2014] FCAFC 94; (2014) 222 FCR 1, Katzmann J recognised that where s 113(3)(a) of the FWA used the phrase 'would have entitled the employee to long service leave', the phrase had two possible meanings, the first being reference to terms that provide for an entitlement to long service leave, and the second being an entitlement that would have actually accrued. In the context of s 113 of the FWA, her Honour preferred the first meaning: [42]. That approach was cited with approval by Raper J in ***Conroy's Smallgoods v Australasian Meat Industry Employees Union*** [2023] FCAFC 59 at [29].

56 In ***Public Transport Authority of Western Australia v Yoon*** [2017] WASCA 25; (2017) 97 WAIG 249 at [59], Buss and Murphy JJ of the Industrial Appeal Court noted that what was then s 4(3) of the LSL Act recognised the distinction between a contingent entitlement not yet accrued, and an accrued entitlement, by s 4(3) of the LSL Act's use of the words 'entitled to, or eligible to become entitled to'.

57 These cases indicate that accrual of long service leave is something short of a crystalised 'entitlement', but nevertheless is capable of having some legal effect.

58 Further, s 49D of the IR Act and s 26 of the LSL Act oblige employers to keep certain employment related records, including 'the information necessary for the calculation of, and payment for, long service leave under the LSL Act or an industrial instrument': s 49D(2)(g). Clearly employers are obliged to record how long service leave is accrued.

59 But there remains a question as to whether the accrual of long service leave is an entitlement in its own right, in the sense that the HSPs use the word 'entitled'. The HSPs did not demonstrate that it was.

60 If the long service leave entitlement is untethered from the concept of accrual, the 'problem' the HSPs are seeking to fix by their contended for construction, disappears. It cannot be said that the ordinary meaning of 'continuous service' in the casual LSL clause results in a change to any entitlement when the 2020 Enrolled Nurses Agreement was registered because there is no accrual entitlement.

61 The HSPs also say that if the parties had intended the casual LSL clause to apply to pre-2021 service they could have expressly stated as much. This point does not reveal ambiguity. In any event, there is an answer to it. There is no need to expressly include pre-registration or pre-2021 service, because the plain meaning of 'continuous service' includes pre-registration service.

62 None of the other clauses in the agreement referring to 'continuous service' expressly state that service prior to registration is good service for the purpose of those clauses. The ordinary meaning is such that there is no need to.

63 The HSPs ask the Commission to give the words 'continuous service' the meaning:

> …service provided on and from the date the entitlement first appeared in an industrial instrument which applied to the casual [employee]…

64 Articulating the contended for meaning, reveals that the HSPs are not arguing for a meaning that is an alternative to the ordinary meaning. Rather, what the HSPs argue is for the ordinary meaning plus a qualification or limitation.

65 This tells me that this is not a case of ambiguity.

66 It also shows that the contended for meaning is one which the words 'continuous service' cannot properly bear. The contended for meaning is not consistent with the text the parties have chosen to use. It is not what a reasonable person reading the casual LSL clause would understand the words to mean. It is simply without any textual foothold.

67 The term is unambiguous. Because the meaning of the term is plain, no further inquiry is necessary.

68 However, even if I had been persuaded that there was ambiguity, I would nevertheless have come to the same conclusion as to meaning after considering relevant context. My reasoning is set out below.

Industrial character and purpose of industrial agreements generally

69 The legislative scheme under which the Enrolled Nurses Agreement was made is relevant context from which the objective intention of the parties can be gleaned.

70 Some of the Objects of the IR Act are:

(a) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements: s 6(ad);

(b) to ensure all agreements registered under the Act provide for fair terms and conditions of employment: s 6(ae); and

(c) to provide for the observance and enforcement of agreements: s 6(d).

71 To these ends, Part II Division 2B of the IR Act deals with the negotiation of, making, registration and effect of industrial agreements. Section 41 relevantly provides:

> **41. Industrial agreements, making, registration and effect of**
>
> (1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of any related disputes, disagreements, or questions may be made between an organisation or association of employees and any employer or organisation or association of employers.
>
> (1a) …
>
> (1b) …
>
> (2) Subject to subsection (3) and sections 41A and 49N, where the parties to an agreement referred to in subsection (1) apply to the Commission for registration of the agreement as an industrial agreement the Commission must register the agreement as an industrial agreement.
>
> (3)
>
> (4) An industrial agreement extends to and binds —
>
> (a) all employees who are employed —
>
> (i) in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and
>
> (ii) by an employer who is —
>
> (I) a party to the industrial agreement; or
>
> (II) a member of an organisation of employers that is a party to the industrial agreement or that is a member of an association of employers that is a party to the industrial agreement;

and

(b) all employers referred to in paragraph (a)(ii),

and no other employee or employer, and its scope must be expressly so limited in the industrial agreement.

(5) An industrial agreement operates —

(a) in the area specified in the agreement; and

(b) for the term specified in the agreement.

(6) Notwithstanding the expiry of the term of an industrial agreement, it continues in force in respect of all parties to the agreement, except those who retire from the agreement, until a new agreement or an award in substitution for the first-mentioned agreement has been made.

(7) At any time after, or not more than 30 days before, the expiry of an industrial agreement any party to the agreement may file in the office of the Registrar a notice in the approved form signifying the party's intention to retire from the agreement at the expiration of 30 days from the date of the filing, and, on the expiration of that period, the party ceases to be a party to the agreement.

(8) When a new industrial agreement is made and registered, or an award or enterprise order is made, in substitution for an industrial agreement (the ***first agreement***), the first agreement is taken to be cancelled, except to the extent that the new industrial agreement, award or order saves the provisions of the first agreement.

(9) To the extent that an industrial agreement is contrary to or inconsistent with an award, the industrial agreement prevails unless the agreement expressly provides otherwise.

72 These features of the Act's scheme were described by his Honour Ritter AP (as he then was) in ***Pooley v Commissioner of Police*** [2008] WAIRC 00216; 88 WAIG 310 at [49] and [57]. In those passages, his Honour relevantly pointed out:

[57] …

(a) The purpose of an industrial agreement is to prevent or resolve disputes, disagreements or questions relating to industrial matter: s 41(1)

(b) An industrial agreement operates in the area specified in the industrial agreement and for the term specified in the industrial agreement. However, an agreement becomes an industrial agreement only if and when it is registered as such by the Commission: citing *Department of Community Services* per Franklyn J at 1711 and 1712, Nicholson J at 1713. That is, an industrial agreement takes effect only from the date of its registration.

(c) An industrial agreement continues in force in respect of all parties, except those who retire from it, until a new agreement or an award in substitution for it has been made.

(d) When a new industrial agreement is made and registered, the earlier industrial agreement is cancelled, except to the extent that the new industrial agreement saves the provisions of the earlier agreement; and

(e) Section 41(9) establishes the primacy of an industrial agreement over an award.

…

73 While industrial agreements only take effect from their date of registration, the parties may agree that entitlements begin from some earlier date. The agreement will not have effect until registered, but once it is registered and effective, parties are bound by its terms, including those which impose obligations or confer rights of a retrospective nature. The IR Act does not preclude parties making industrial agreements that have some retrospective effect: ***Director General of the Ministry for Culture and Arts v The Civil Service Association of Western Australia Incorporated & Ors*** [2000] WASCA 13; (2000) 80 WAIG 453 at [38].

74 The fact that registration of an industrial agreement has the effect of cancelling a previous agreement has been described as a 'key aspect' of industrial agreements under the IR Act. Once an industrial agreement is registered, it is the only industrial agreement that governs the terms and conditions of employees covered by it: ***Pooley*** at [74]-[75].

75 The HSPs' contended for construction would do three things that are inconsistent with the scheme of the IR Act described above.

76 First, it would require recourse to earlier, cancelled industrial agreements to ascertain the point in time when a casual long service leave entitlement was introduced. A cancelled industrial agreement would effectively then determine the casual long service leave entitlement. This is contrary to the scheme which contemplates that the Enrolled Nurses Agreement operates during its term as the source of employee entitlements.

77 Second, it would undermine the primacy of Enrolled Nurses Agreement.

78 Third, it would create uncertainty about the terms and conditions that apply to casual employees in relation to their pre-2021 service because it would not be obvious to people who read the Enrolled Nurses Agreement from what date service is counted. This is the type of 'industrial anarchy' Olney J was referring to in ***Norwest Beef*** at 2133. It hinders the observance and performance of agreements.

79 UWU points to the IR Act's object of promoting equal remuneration as further statutory context supporting its contended for construction. It says in this regard that its construction puts casual employees on an equal footing to non-casual employees in

relation to long service leave entitlements. I note though, that when the IR Act refers to 'equal remuneration' it means equal remuneration for men and women for work of equal or comparable value: s 7.

80 Nevertheless, the legislative context, and the industrial character and purpose of industrial agreements, is against the construction the HSPs contend for.

The LSL Act

81 The LSL Act is also relevant statutory context for the purpose of resolving constructional issues.

82 The HSPs say that to give the phrase 'continuous service' its ordinary meaning and include pre-2021 service would be inconsistent with the scheme of the LSL Act, which is that it does not operate in tandem with another scheme for long service leave.

83 It is not in dispute that the intention of the legislature was that the LSL Act does not operate in tandem with another scheme for long service leave. This was confirmed by the Industrial Appeal Court in ***Yoon*** per Buss and Murphy JJ at [63]:

> [63] In other words, where the s 4(3) comparison results in the person being an 'employee' for the purposes of the LSL Act, and thereby entitled to leave under the LSL Act, '[t]he entitlement' under the LSL Act applies in substitution for, and satisfaction of, 'any' long service leave entitlement under the other instrument. There appears to be no dual operation intended. Section 7(1) is complemented by s 7(2), which refers to the grant of leave 'under any long service leave *scheme* and irrespective of this Act' (emphasis added). The effect of s 7(2) is that where, by virtue of s 4(3), the LSL Act applies, but, in fact, there has been a grant of leave (or a payment in lieu) under any other long service leave 'scheme', then that is taken into account in calculating the employee's entitlement to long service leave under the LSL Act as if it were long service leave taken (or payment in lieu made) under the LSL Act. Sections 7(2) and (3) indicate that when the statutory entitlement applies, it applies to the exclusion of the scheme under the other instrument. In other words, it appears that the legislature did not (objectively) intend that the two schemes should operate in tandem. On that basis, there could be no prospect of any doubling-up between the two.

84 To give the phrase 'continuous service' its ordinary meaning does not infringe the scheme as described in ***Yoon***. To the contrary, it is consistent with this scheme. It means that the only instrument that applies in determining a person's entitlement to take long service leave at a point in time after registration of the agreement is the agreement itself.

85 This is precisely how the Industrial Appeal Court contemplated the interaction between the LSL Act and other industrial instruments. At [59], the majority observed:

> …the comparison required by s 4(3) does not have its focus on the individual's employment history from time to time (as the comparison is to be undertaken irrespective of any accrual of entitlement) but, rather, on the person's entitlement as appears from the terms of the two respective instruments (the LSL Act and the other instrument).

86 The majority concluded at [61]:

> The foregoing considerations indicate that the comparison required by s 4(3) is to be made prospectively by reference to the terms of the respective instruments, rather than from time to time during the course of the employment history of a particular employee. That construction is confirmed by a consideration of s 7 of the LSL Act.

87 It is the HSPs case that commits the error of treating something under the LSL Act as being preserved, after the agreement's registration. The HSPs' case requires the LSL Act scheme to run in tandem with the scheme under the agreement, contrary to the LSL Act scheme.

88 The legal position, in accordance with what the Industrial Appeal Court said in ***Yoon,*** is that once the casual LSL clauses came into effect, the LSL Act ceased to have effect. So, if the HSPs' contended for construction was correct, the result would be that employees' pre-2021 service will count for nothing in determining their long service leave entitlements, unless an accrued entitlement was exercised pre-2021. This is obviously contrary to the agreement's objective intention given the nature and purpose of long service leave.

The Enrolled Nurses Agreement's text read as a whole

89 Ordinarily a constructional analysis should start with consideration of the agreement's text viewed as a whole, including the disputed provision's place in the agreement and the agreement's arrangement. I have left this topic to this point in my reasons because:

(a) I considered the agreement as a whole under the heading 'Is there ambiguity'; and

(b) The HSPs do not rely upon any contextual matters in support of their contended for construction.

I will just add one additional point here.

90 Clause 43 sets out certain breaks in service which are not counted as breaking continuity of service for the purpose of long service leave for employees other than casuals. It enlarges the ordinary and natural meaning of 'continuous service' by deeming that service includes periods during which the employee is not employed and periods when an employee is not performing service.

91 To give 'continuous service' its ordinary meaning in the casual LSL clause means that it has a narrower meaning, for casual long service leave purposes, compared with the provisions for other employees.

92 To narrow the meaning of 'continuous service' further, as the HSPs would do, creates an even greater gulf in long service leave conditions as between casual employees and other employees, with no apparent justification. The HSPs say that there is no need to strive for parity between casual employees and other employees because the terms and conditions for both are

different, including because casual employees receive a 25% pay loading. I agree. But parity is one thing. Anomalies are another. In my view the HSPs contended for further qualification creates an unjustifiable anomaly.

The purpose of long service leave

93 Long service leave involves 'the concept of receiving paid leave from work as a reward for an extended period of continuous service': Creighton B and Stewart A, *Labour Law*, (5th ed, 2010) at [13.128]-[13.129]. Its purpose is to reward long service, and provide respite from work for recuperative purposes: ***Yoon*** at [42].

94 This supports 'continuous service' having its ordinary meaning. The idea that the entitlement should be based on a period of continuous service that is limited based on registration of the agreement is contrary to the nature and purpose of long service leave.

The double dipping argument

95 The HSPs submit that to give the words 'continuous service' their ordinary meaning would duplicate long service leave entitlements for some casuals which is inconsistent with the objective intention of the parties and the scheme set up by the LSL Act.

96 The double-dipping argument is that, in the absence of a provision to set-off long service leave accrued or taken under the LSL Act, counting continuous service as including pre-2021 service would be to confer dual entitlements on employees who have accrued an entitlement to take long service leave pre-2021. The HSPs give the example of an employee who has 17 years of continuous service immediately prior to 27 May 2021. The HSPs say such an employee will have an enforceable entitlement to one fully accrued long service leave entitlement under the LSL Act and two fully accrued long service leave entitlements under the 2020 Enrolled Nurses Agreement.

97 The HSPs do not say how this practical outcome results.

98 Section 4A(4) of the LSL Act provides:

> This Act 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 leave.

99 It is common ground that the casual LSL clause meets the criteria in s 4A(4), so that, upon registration, casual employees covered by it ceased to be 'employees' for the purpose of the LSL Act. While ***Yoon*** addressed the effect of the now repealed s 4(3) of the LSL Act, s 4A appears to have the same intended effect, being that described at [63] in ***Yoon***: to remove any prospect of doubling up.

100 What about an employee who has been continuously employed for 17 years as at 27 May 2021, and took long service leave before 27 May 2021; would that employee have another entitlement to long service leave under the casual LSL clause?

101 The HSPs say there is nothing in the Enrolled Nurses Agreement which provides a mechanism to deduct leave already taken from the entitlement the casual LSL clause confers, and that this supports their contended for construction, because it means a casual employee will receive two lots of long service leave for the same period of service: one under the LSL Act and one under the agreement.

102 Clearly the Enrolled Nurses Agreement does not say that leave taken pre-2021 must be set-off or deducted. Maybe that is because it is so obvious, it goes without saying. No reasonable person reading the Enrolled Nurses Agreement would understand that the casual LSL clause conferred an additional entitlement to long service leave if it had been taken earlier.

103 In any event, accepting that it was not intended that the agreement provide a duplicated entitlement does not mean the parties intended that pre-2021 service not count as continuous service. If there is an unintended gap in the casual LSL clause in this regard, it may be that a term can be implied to give it business efficacy. Alternatively, the appropriate course might be to vary the clause under s 46(1)(b) to remedy the defect, to give effect to the parties' intention that there be no duplicated entitlement. It does not call for a construction of 'continuous service' which completely denies employees the benefit of pre-2021 service. It merely calls for clarity that once accrued leave has been taken in relation to a period of continuous service, the entitlement is exhausted and does not revive.

The retrospective effect argument

104 The HSPs rely on a hypothetical situation where a casual employee will be disadvantaged if the ordinary meaning of 'continuous service' is adopted.

105 Under the LSL Act, the entitlement to take long service leave is dependent on completion of a length of 'continuous employment': s 8(1). The LSL Act defines 'continuous employment': s 6. That definition includes various absences from work. Without setting out the definition in its entirety, it is easy to conclude that 'continuous employment' potentially has a broader meaning than the ordinary meaning of 'continuous service'.

106 Accordingly, a casual employee may, as at 27 May 2021, have the requisite continuous employment under the LSL Act to be entitled to take long service leave, but not have sufficient 'continuous service' to qualify under the 2020 Enrolled Nurses Agreement.

107 Such an employee will have an accrued entitlement to take long service leave one day, and no entitlement the next.

108 The HSPs say this alteration of an accrued right amounts to retrospective operation. They say that construction principles require that this effect be avoided.

109 There is no presumption that an industrial agreement does not have some retroactivity. Parties are able to agree that conditions are to begin from an earlier date: ***Director General of the Ministry for Culture and Arts*** per Anderson J at [38].

110 In any event, the effect the HSPs describe is not retrospectivity. A clause does not have retrospective effect simply because it effects existing rights and obligations. It will only have a retrospective effect if the changed position is to take effect before the agreement is registered.

111 Critically, the HSPs do not identify why this consequence is inconsistent with the parties' objective intentions when the casual LSL clause was introduced, in the known context of the LSL Act provisions. An industrial agreement can be made containing terms which may disadvantage some employees, or some employees in some circumstances, compared with their earlier terms and conditions. In this case, casual employees may lose something in the difference between 'continuous employment' and 'continuous service', but they gain a more generous period of long service leave once they qualify. That is not an industrially unsensible or unfair outcome.

112 On the flip-side of this argument, the HSPs point out that an undesired or unintended practical effect of giving 'continuous service' its ordinary meaning is that it is possible that a hypothetical employee could be overpaid. How? By taking paid long service leave on the basis of having qualified continuous employment pre-2021 when they do not have qualifying 'continuous service'.

113 To conclude that this hypothetical employee has been overpaid, would be to give the agreement retrospective effect. Because it does not have retrospective effect, this scenario involves no overpayment.

Referenced industrial instruments

114 The HSPs point out that the 2018 Enrolled Nurses Agreement expressly excluded any period that a person was paid as a casual from qualifying service for the purposes of long service leave: cl 43.4(b)(iii). They say that to give the term 'continuous service' its ordinary meaning, that is, to include pre-2021 service, has the effect of retrospectively altering the common objective intention of the parties that, at the time of the operation of the 2018 Enrolled Nurses Agreement (and prior agreements), service when paid as a casual was not good service for the purposes of long service leave under the industrial instrument.

115 The relevant question is what the intention of the parties was at the time the Enrolled Nurses Agreement was entered into, in 2022. The removal of cl 43.4(b)(iii) and the unqualified use of the term 'continuous service' in cl 44.1 objectively indicates the parties' intention in 2022 was different to their intention when the 2018 Enrolled Nurses Agreement was made.

116 As I understand it, the HSPs say the only objective intention that should be gleaned from the removal of cl 43.4(b)(iii) and the addition of cl 44.1 in the 2020 Enrolled Nurses Agreement is that the parties intended to confer an entitlement to long service leave under an industrial agreement for the first time. But of course, that is not all. The parties also intended the entitlement to be that set out in the agreement by the words used.

117 The 2018 Enrolled Nurses Agreement does not advance the HSPs contended for construction.

The Hospital Support Workers Agreement

118 There is nothing which relevantly distinguishes the Hospital Support Workers Agreement from the Enrolled Nurses Agreement which would lead me to a different conclusion as to the correct construction of its casual LSL clause.

119 It is uncontroversial that, historically, casual employees engaged under the industrial agreements, prior to the 2020 Hospital Support Workers Agreement's registration on 17 January 2021, were not eligible for long service leave under any industrial agreement or award, but were eligible to long service leave under the LSL Act.

120 The Hospital Support Workers Agreement was registered under s 41 of the IR Act.

121 At the time of registration it was estimated the agreement covered 6,307 employees: cl 5.4.

122 The registration of the Hospital Support Workers Agreement had the effect of cancelling and replacing the 2020 Hospital Support Workers Agreement: cl 5.5, IR Act s 41(8).

123 The 2020 Hospital Support Workers Agreement was registered on 17 January 2021. It contained the same clause as the Hospital Support Workers Agreement, clauses 39A.1-39A.2, conferring an entitlement for long service leave for casuals, but the Hospital Support Workers Agreement has the additional clauses 39A.3-39A.5.

124 The 2020 Hospital Support Workers Agreement replaced the 2017 Hospital Support Workers Agreement. The 2017 Hospital Support Workers Agreement provided for long service leave at cl 39, but that clause did not apply to casual employees.

125 The Hospital Support Workers Agreement is expressed to apply to the exclusion of the *Quadriplegic Centre Award, the Hospital Workers (Government) Award No. 21 of 1966*, the *Miscellaneous Government Conditions and Allowances Award No A 4 of 1992* and the *Government Services (Miscellaneous) General Agreement 2021* or its successor: cl 10.2.

126 'Casual Employee' is defined in the Hospital Support Workers Agreement to mean an Employee engaged for a period of less than 1 week: cl 3.

127 Under cl 11.5:

(a) casuals employees are paid a 25% casual loading on the ordinary rate of pay;

(b) casual contracts of employment are terminable on 1 hours' notice; and

(c) each period of casual employment stands alone and does not accrue towards entitlements under the agreement, except for long service leave under cl 39A.

128 Clause 39 deals with long service leave for employees other than casual employees. Clause 39.1 expressly excludes casual employees from the entitlement under cl 39.

129 Clause 39.3 details what service is counted as 'service' for the purpose of long service leave under that clause:

(a) For the purpose of these conditions "service" means service as an employee of a Western Australian Public Sector employer and will be deemed to include:

(i) absence of the employee on an Annual Leave or Public Holidays;

(ii) absence of the employee on paid Personal Leave or on an approved rostered day off;

(iii) absence of the employee on approved Personal Leave Without Pay except that portion of a continuous absence which exceeds 3 months;

(iv) absence of the employee on approved Leave Without Pay, other than Personal Leave but not exceeding 2 weeks in any qualifying period;

(v) absence of the employee on National Service or other military training, but only if the difference between the employee's military pay and their civilian pay is made up or would, but for the fact that their military pay exceeds their civilian pay, be made up by their employer;

(vi) absence of the employee on workers' compensation for any period not exceeding 6 months;

(vii) absence of the employee on Long Service Leave;

(viii) absence of an employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and

(ix) employment in the service of the Commonwealth or another State of Australia as provided in subclause 39.13.

(b) The service of an employee will be deemed not to include:

(i) service of an employee after the day on which they have become entitled to 26 weeks' Long Service Leave until the day on which they commence the taking of 12 weeks of that leave;

(ii) any period of service with an Employer of less than 12 months. Provided that where an employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government employer to another; becoming redundant or qualifying for pro rata payments in lieu of leave pursuant to subclause 39.9, such period of service will count; or

(iii) any other absence of the employee except such absences as are included in service by virtue of subclause 39.3(a).

(c) Subject to the provisions of clause 39.3(a) and 39.3(b), the service of an employee will not be deemed to have been broken;

(i) by resignation, if they resign from one public authority in this State within 1 working week of the expiration of any period for which payment in lieu of Annual Leave and/or Public Holidays has been made by the employer from which the employee resigned, or, if no such payment has been made, within 1 working week of the day on which their resignation becomes effective;

(ii) if their employment is ended by their Employer for any reason other than serious misconduct, but only if:

(A) the employee resumes employment with the Government not later than 6 months from the day on which their employment ended; and

(B) payment pursuant to subclause 39.9, has not been made; or

(iii) by any absence approved by the Employer as leave whether with or without pay.

130 The term 'continuous service' is not otherwise defined in the Hospital Support Workers Agreement.

131 The casual LSL clause of the Hospital Support Workers Agreement, cl 44, is in relevantly the same terms as cl 44 of Enrolled Nurses Agreement set out at [32] above. Its evolution is also the same. The parties therefore rely on their submissions in relation to the Enrolled Nurses Agreement for their construction of cl 39A.

132 For the same reasons I have set out concerning the casual LSL clause of the Enrolled Nurses Agreement, cl 39A is unambiguous. Its reference to 'continuous service' is reference to the ordinary meaning without qualification.

Conclusion: What is the true interpretation of the casual LSL clauses?

133 A reasonable person reading the casual LSL clauses would understand them to mean that unbroken service to an employer by an employee is counted for the purpose of calculating an entitlement to take long service leave. That is the ordinary, common sense meaning of continuous service, which the words bear on their face.

134 The HSPs seek for the Commission to give the words 'continuous service' the meaning '…service provided on and from the date the entitlement first appeared in an industrial instrument which applied to the casual…'. Their underlying rationale is that this meaning is fair or reasonable in light of the historical position. But that is no basis to conclude the contended for construction is the correct construction.

135 The HSPs contended for meaning is an unnatural one which the words cannot properly bear. It is a meaning that finds no textual foothold. It is not a meaning that any reasonable person reading the agreements could conjure.

136 Employees and employers reading the agreements should be able to work out what long service leave entitlement there is at a point in time, without having to go behind the agreements to the history of casual long service leave.

137 To give the words the meaning the HSPs contend for would mislead and confuse people who have to work under and apply the agreements.

138 There will be declarations:

(a) That where clause 44.1 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* refers to 'continuous service' it means a period of unbroken service to an employer by an employee.

(b) That where clause 39A.1 of the *WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2022* refers to 'continuous service' it means a period of unbroken service to an employer by an employee.

List of Abbreviations

2017 Hospital Support Workers Agreement	WA Health System - United Voice WA - Hospital Support Workers Industrial Agreement 2017
2018 Enrolled Nurses Agreement	WA Health System - United Voice - Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2018
2020 Enrolled Nurses Agreement	WA Health System – United Workers Union (WA) – Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2020
2020 Hospital Support Workers Agreement	WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2020
Casual LSL clause	Clause 44 of the Enrolled Nurses Agreement and/or Clause 39A of the Hospital Support Workers Agreement, as the context requires
Enrolled Nurses Agreement	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 Registered: 23 December 2022 Nominal Expiry Date: 6 October 2024
Enrolled Nurses Award	*Enrolled Nurses and Nursing Assistants (Government) Award*
FWA	*Fair Work Act 2009* (Cth)
Hospital Support Workers Agreement	WA Heath System – United Workers Union (WA) – Hospital Support Workers Industrial Agreement 2022 Registered: 12 December 2022 Nominal Expiry Date: 4 August 2024
HSPs	The Health Service Providers established pursuant to section 32(1)(b) of the *Health Services Act 2016* (WA) namely: (1) Child and Adolescent Health Service; (2) East Metropolitan Health Service; (3) Health Support Services; (4) North Metropolitan Health Service; (5) PathWest Laboratory Medicine WA; (6) Quadriplegic Centre; (7) South Metropolitan Health Service; (8) WA Country Health Service; and (9) Mental Health Commission, or one or more of them, as the context requires
IR Act	*Industrial Relations Act 1979* (WA)
LSL Act	*Long Service Leave Act 1958* (WA)
MCE Act	*Minimum Conditions of Employment Act 1993* (WA)
UWU	United Workers Union

2023 WAIRC 00679

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	FRIDAY, 11 AUGUST 2023
FILE NO.	APPL 5 OF 2023
CITATION NO.	2023 WAIRC 00679

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

Declaration

HAVING heard from the parties on the papers through written submissions;

AND for the reasons stated in the published reasons for decision;

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

1. THAT where clause 44.1 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* refers to 'continuous service' it means a period of unbroken service to an employer by an employee.
2. THAT where clause 39A.1 of the *WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2022* refers to 'continuous service' it means a period of unbroken service to an employer by an employee.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

NOTICES—Award/Agreement matters—

2023 WAIRC 00748

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. CICS 18 OF 2022

COMMISSION'S OWN MOTION PURSUANT TO SECTION 37D TO VARY THE *FARM EMPLOYEES' AWARD*

NOTICE is given by the Commission's Own Motion pursuant to section 37D of the *Industrial Relations Act 1979* (WA) of the Commission's intention to vary the scope of the *Farm Employees' Award.*

The proposed variations are published in the annexed table.

A copy of the application and proposed variations may be inspected at my office by appointment at 111 St Georges Terrace, Perth.

A hearing for the purpose of affording interested persons an opportunity to be heard in relation to the proposed variations will be held at the Commission, Level 18, 111 St Georges Terrace Perth on Tuesday, the 7th day of November 2023 at 10.30 am.

Any person who wishes to be heard in relation to the proposed variations should contact Chief Commissioner Kenner's Chambers by email at Chambers-Kenner@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

5 SEPTEMBER 2023

FARM EMPLOYEES' AWARD

Current Award	**Proposed Variations**
3. – AREA AND SCOPE	3. – AREA AND SCOPE
This award shall apply throughout the State of Western Australia to employees employed:-	3.1 (a) This award has effect throughout Western Australia.
(a) On farms in connection with the sowing, raising, harvesting and/or treatment of grain, fodder or other farm produce.	(b) This award also has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this award.
(b) On farms or properties in connection with the breeding, rearing or grazing of horses, cattle, sheep, pigs or deer; or	Note: For a non-exhaustive list of indicators of when an employer may be connected to the State of Western Australia, see section 3(2) of the *Industrial Relations Act 1979*. Indicators include, but are not limited to, whether the employer is: • Domiciled or resident in, or has an office or a place of business in, the State; or • Registered, incorporated or established under a law of the State; or • The holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority.
(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:-	3.2 This award extends to and binds:
(1) Any institutions declared by proclamation under the "Aboriginal Affairs Planning Authority, Act, 1972" Or	(a) employers in the farming industry; and (b) their employees employed in the classifications set out in this award; and
(2) Any of the following institutions:-	(c) the Australian Workers' Union, West Australian Branch, Industrial Union of Workers.
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.	3.3 This award also applies to: (a) employers that supply labour on an on-hire basis to host employers in the farming industry in respect of on-hire employees in classifications mentioned in this award, and those on-hire employees, while engaged in the performance of work covered by this Award; and
	(b) employers that provide group training services for apprentices and/or trainees engaged in the farming industry in respect of apprentices and/or trainees employed in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this award.
	3.4 This award does not cover employees covered by: (a) the State Research Stations, Agricultural Schools and College Workers Award 23 of 1971; (b) the Fruit Growing and Fruit Packing Industry Award R 17 of 1979; (c) the Egg Processing Award 1978;

	(d) the Dried Vine Fruits Industry Award; (e) the Poultry Breeding Farm & Hatchery Workers' Award 1976; (f) the Shearing Contractors' Award of Western Australia; (g) the Wine Industry (WA) Award 2005; and (h) the Dairy Factory Workers' Award 1982. 3.5 This award does not apply to employers and employees who are subject to the national industrial relations system. 3.6 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.
<u>4. – DEFINITIONS</u> (a) "Apprentice" means an apprentice under the *Vocational Education and Training Act 1996* (WA), or any successor legislation. (b) "Appropriate state legislation" means the *Vocational Education and Training Act 1996* (WA) or its replacement. (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. (d) "Board and lodging" means a reasonable supply and standard of food together with a reasonable standard of accommodation. (e) "Commission" means the Western Australian Industrial Relations Commission. (f) "Complying superannuation fund or scheme" means a superannuation fund or scheme: (a) that is a complying superannuation fund or scheme within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (Cth), and (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. (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	<u>4. – DEFINITIONS</u> (a) "Apprentice" means an apprentice under the *Vocational Education and Training Act 1996* (WA), or any successor legislation. (b) "Appropriate state legislation" means the *Vocational Education and Training Act 1996* (WA) or its replacement. (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. (d) "Board and lodging" means a reasonable supply and standard of food together with a reasonable standard of accommodation. (e) "Broadcare farming enterprise": • means a farming enterprise consisting of the growing of broadcare field crops as defined. • includes the rearing, management, and grazing of livestock. • means a farming enterprise which combines both; or • means a farming enterprise in addition to any of the above which grows other crops, for the purpose of crop rotation or the rearing, management, and grazing of livestock as part of a mixed farming enterprise. (f) "Broadacre field crops" means grains, seeds, grasses, silage, legumes, fibre, flowers and other crops grown as part of a broadcare mixed farming enterprise. (g) "Commission" means the Western Australian Industrial Relations Commission. (h) "Complying superannuation fund or scheme" means a

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.

(h) "Trainee" means an employee who is undertaking a traineeship.

(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).

(j) "Training contract" means a legally binding agreement between an employer, an apprentice/trainee and their legal guardian, where required, to undertake a traineeship.

(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.

(l) "Union" means The Australian Workers' Union, West Australian Branch, Industrial Union of Workers.

superannuation fund or scheme:

(a) that is a complying superannuation fund or scheme within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (Cth), and

(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.

(i) "Farming industry" means all employers and employees who are engaged in or in connection with:

(a) the management, breeding, rearing or grazing of livestock or poultry;

(b) the shearing and crutching of sheep and the classing and pressing of wool on farms;

(c) dairying;

(d) hatchery work;

(e) the sowing, raising or harvesting of broadacre field crops and other crops grown as part of a broadacre mixed farming enterprise;

(f) the treatment of land for any of these purposes; or

(g) clearing, fencing, well sinking, dam sinking or trenching on such farms or properties.

(j) "Livestock" means all animals used in primary production including fish, crustaceans and insects.

(k) "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.

(l) "Trainee" means an employee who is undertaking a traineeship.

(m) "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).

(n) "Training contract" means a legally binding agreement between an employer, an apprentice/trainee and their legal guardian, where required, to undertake a traineeship.

(o) "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) “Union” means The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers.

2023 WAIRC 00749

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. CICS 15 OF 2022

COMMISSION’S OWN MOTION PURSUANT TO SECTION 37D TO VARY THE *METAL TRADES (GENERAL) AWARD*

NOTICE is given by the Commission’s Own Motion pursuant to section 37D of the *Industrial Relations Act 1979* (WA) of the Commission’s intention to vary the scope of the *Metal Trades (General) Award*. The proposed variations which relate to scope are published in the annexed table.

A copy of the application and proposed variations may be inspected at my office by appointment at 111 St Georges Terrace, Perth.

A hearing for the purpose of affording interested persons an opportunity to be heard in relation to the proposed variations will be held at the Commission, Level 18, 111 St Georges Terrace Perth on Tuesday, the 7th day of November 2023 at 11.15 am.

Any person who wishes to be heard in relation to the proposed variations should contact Chief Commissioner Kenner’s Chambers by email at Chambers-Kenner@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

5 SEPTEMBER 2023

METAL TRADES (GENERAL) AWARD

Clause	Proposed Variations
1.2 - Arrangement	A. Delete the following words: 19. Industries B. Insert the following words under “Appendix 4 - Architectural Aluminium Fabrication Classification”: Appendix 5 - Old List Of Industries
1.3 - Area and Scope	A. Delete this clause in its entirety and insert in lieu thereof: **1.3 - AREA AND SCOPE** 1.3.1 (a) This Award applies to employers in the “metal trades and associated industries and occupations” and to all employees employed by those employers in any classification mentioned in Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL or Clause 13. - Wages of PART 2 - CONSTRUCTION WORK of this Award. (b) For the avoidance of doubt, this Award also continues to apply to all employers and employees who were previously bound by the Award prior to CICS 15/2022. Note: A list of the industries the Award previously applied to prior to CICS 15/2022 is included at Appendix 5. 1.3.2 This Award also applies to: (a) employers that supply labour on an on-hire basis to host employers in the “metal trades and associated industries and occupations” in respect of on-hire employees employed in the classifications mentioned in this Award, and those on-hire employees, while engaged in the performance of work covered by this Award; and (b) employers that provide group training services for apprentices and/or trainees in the “metal trades and associated industries and occupations” in respect of apprentices

	and/or trainees employed in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this Award. **Exclusion to scope clause** 1.3.3 This Award does not apply to: (a) employees who are on-hired to electrical contracting businesses or to employers who are engaged in the electrical contracting industry as defined under the terms of the Electrical Contracting Industry Award R 22 of 1978. (b) employers and employees who are subject to the national industrial relations system.
1.6 - Definitions and Classification Structure	A. Delete subclause 1.6.1 and insert in lieu thereof: 1.6.1 General: "Metal trades and associated industries and occupations" means the metal working and engineering and fabricating industries, including any of the following: (1) mechanical and electrical engineering. (2) smithing, welding, metal moulding, metal machining, metal pressing and stamping, boilermaking, diecasting, galvanising, tinning, steel pickling and plastic moulding. (3) casting or fabricating in synthetic resins, or similar materials and including the production of synthetic resins, powders, tablets, etc, as used in such processes. (4) tool, die, gauge and mould making. (5) porcelain enamelling, and the manufacture of porcelain enamels, oxides, glazes and similar materials. (6) electroplateware manufacturing and electroplating of all types. (7) japanning, enamelling, painting etc, of metallic articles. (8) drawing and insulation of wire for the conducting of electricity. (9) generation and distribution of electric energy. (10) production by mechanical means of industrial gases. (11) making, assembling, repairing and maintenance of vehicles and metal motor body parts. (12) making, repairing, reconditioning and maintenance of motor engines, and/or parts thereof, and of the mechanical and electrical parts including the transmission and chassis of motor cars, motor cycles and other motor driven vehicles. (13) hand and machine engraving. (14) installation of all classes and types of electrical wiring equipment and plant, and the repair and maintenance thereof.

	(15) manufacture of ceramic articles for use in the metal trades industries. (16) the manufacture, making, construction, assembling, erection, reconditioning, installation, maintenance, testing and/or repair of: (a) agricultural implements. (b) badges and name-plates (including chemical engraving). (c) bicycles. (d) bolts, nuts, screws, rivets, washers and similar articles. (e) bridges and girders. (f) bright steel bars, rods, shafting, etc. (g) electrical advertising equipment (including neon signs). (h) electrical machinery, apparatus and appliances (including valve and globe manufacturing). (i) fluorescent lighting. (j) insulation materials and articles. (k) lifts and elevators. (l) metal furniture. (m) perambulators. (n) radios, telephones and X-ray machines. (o) recording, measuring and controlling devices for electricity, fluids, gases, heat, temperature, pressure, time, etc. (p) refrigerators, stoves and ovens. (q) safe and strong-rooms. (r) scales and machines for measuring mass and equipment. (s) ships and boats. (t) ventilating and air-conditioning plant and equipment. (u) watches and clocks, including cases. (v) water fittings. (w) wet and dry batteries. (x) window frames. (17) The manufacture, making, assembly, processing, treatment, fabrication and preparation of all products made from, or containing, steel, iron, metal, sheet metal, tin, brass, copper and non-ferrous metal. (18) Making, manufacture, treatment, installation, maintenance, repair and reconditioning of any articles, part or component, whether of metal and/or other material in any of the above industries. (19) Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with the industries and work described in this clause and maintenance work generally. (20) Every operation, process, duty and function carried on or performed in or in connection with or incidental to any of the above industries.
4.9 - Traineeships	A. Delete subclause 4.9.1 and insert in lieu thereof: 4.9.1 Scope: (1) This clause shall apply to persons: (a) who are undertaking a Traineeship (as defined); and (b) who are employed in the “metal trades and associated industries” and in a classification covered by this Award.

19 - Industries	A. Delete this clause in its entirety.
Insertion of new appendix	A. Insert a new appendix after "Appendix 4 - Architectural Aluminium Fabrication Classification" as follows:

APPENDIX 5 - OLD LIST OF INDUSTRIES

ICE CREAM MANUFACTURERS AND DISTRIBUTORS
ICE MANUFACTURERS
INDUSTRIAL GAS MANUFACTURERS
INSTRUMENT MAKERS AND REPAIRERS
LABOUR HIRE INDUSTRY
LOCAL GOVERNMENT AUTHORITIES
MACHINERY MANUFACTURERS
MACHINERY MERCHANTS
MEAT EXPORTERS AND SUPPLIERS
MILK TREATMENT PLANTS
MONUMENTAL MASONS & SCULPTORS
MOTOR BODY BUILDERS
MOTOR CHASSIS ALIGNERS
MOTOR CYCLES SALES & SERVICE
MOTOR GARAGES & SERVICE STATIONS
MOTOR TYRE DEALERS, RETREADERS & MANUFACTURERS
MOTOR VEHICLE DISTRIBUTORS
NAIL MANUFACTURERS
PATTERNMAKERS
PIPE & PIPE-FITTINGS - CAST IRON - MANUFACTURERS
PIPE & PIPE-FITTINGS - CONCRETE – MANUFACTURERS
PIPE & PIPE-FITTINGS - EARTHENWARE - MANUFACTURERS
PLASTIC MOULD MANUFACTURERS
PLUMBERS & SHEETMETAL WORKERS
PRINTERS
QUARRIES
REFRIGERATOR MANUFACTURERS
REFRIGERATION REPAIRERS & SERVICES
RETAIL & WHOLESALE STORES
ROPE & CORDAGE & TWINE MANUFACTURERS
SAFE MANUFACTURERS
SAWMILLERS
SCALES - SALES & SERVICE
SCRAP METAL MERCHANTS
SEWING MACHINE DISTRIBUTORS
SPRING MAKERS
TAXI SERVICES
TILE - ROOFING - MANUFACTURERS & LAYERS
TIN MINES
TRACTOR MANUFACTURERS
TRANSFORMER MANUFACTURERS
TWO STROKE ENGINE COMPONENT PROTOTYPE
TYPEWRITER DISTRIBUTORS & SERVICES
TYRE & TUBE MANUFACTURERS
WASHING MACHINE MANUFACTURERS
WASHING MACHINE REPAIRERS & SERVICES
WELDERS
WINDOW FRAME MANUFACTURERS
WROUGHT IRON WORKERS

ABATTOIRS
ACCOUNTING MACHINE DISTRIBUTORS
ACOUSTIC MATERIAL MANUFACTURERS
AERATED WATER AND CORDIAL MANUFACTURERS
AIR CONDITIONING INSTALLATIONS
ALUMINIUM FABRICATORS
ALUMINIUM MANUFACTURERS
BALL AND ROLLER BEARING SPECIALISTS
BATTERY MANUFACTURERS
BISCUIT MANUFACTURERS
BLACKSMITHS AND FARRIERS
BOAT BUILDERS AND REPAIRERS
BOILERMAKERS
BRASS FINISHERS
BRASS AND NON-FERROUS FOUNDERS
BREWERIES
BRICK MANUFACTURERS
BUILDING CONTRACTORS
BUTTER FACTORIES
CANNERS AND FOOD PROCESSORS
CEMENT MANUFACTURERS
CHEESE FACTORIES
OLD STORAGE
CONFECTIONERY MANUFACTURERS
COPPERSMITHS
CROWN SEAL MANUFACTURERS
CYCLE MANUFACTURERS AND REPAIRERS
DAIRIES AND MILK VENDORS
DIE CASTERS
DIE MAKERS
DIE SINKERS
DIESEL ENGINE MANUFACTURERS
DOMESTIC APPLIANCES MANUFACTURERS AND REPAIRERS
DRUM MANUFACTURERS
EARTH MOVING CONTRACTORS:
EARTH MOVING EQUIPMENT DISTRIBUTORS
ELECTRIC MOTOR MANUFACTURERS AND REPAIRERS
ELECTRICAL CONTRACTORS
ELECTROPLATERS AND ANODISERS
ENGINEERS - AGRICULTURAL
ENGINEERS - AUTOMOTIVE
ENGINEERS - CONSTRUCTIONAL
ENGINEERS - DIESEL
ENGINEERS - GENERAL
ENGINEERS - INSULATION
ENGINEERS - MARINE
ENGINEERS - REFRIGERATION
ENGINEERS - STRUCTURAL
ENGRAVERS
FERTILISER MANUFACTURERS
FIBRE GLASS MANUFACTURERS
FIBROUS PLASTER MANUFACTURERS
FLOUR MILLERS
FOOTWEAR MANUFACTURERS
FORGERS
FOUNDRIES
GLASS MANUFACTURERS

INDUSTRIAL MAGISTRATE—Claims before—

2023 WAIRC 00721

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2023 WAIRC 00721
CORAM	:	INDUSTRIAL MAGISTRATE E. O'DONNELL
HEARD	:	WEDNESDAY, 26 OCTOBER 2022
DELIVERED	:	THURSDAY, 24 AUGUST 2023
FILE NO.	:	M 60 OF 2021
BETWEEN	:	AUSTRALIAN MEDICAL ASSOCIATION WESTERN AUSTRALIA **CLAIMANT** AND WESTERN AUSTRALIA COUNTRY HEALTH SERVICE **FIRST RESPONDENT** AND NORTH METROPOLITAN HEALTH SERVICE **SECOND RESPONDENT**

CatchWords	:	INDUSTRIAL LAW – Interpretation of industrial agreement – correct classification of medical practitioners – Consultant / Specialist – general practitioners
Legislation	:	*Industrial Relations Act 1979* (WA) *Health Insurance Act 1973* (Cth) *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA)
Instrument	:	*Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* *Department of Health Medical Practitioners (WA Country Health Service) AMA Industrial Agreement 2013* *WA Health System – Medical Practitioners – AMA Industrial Agreement 2016*
Case(s) referred to in reasons:	:	***Re Harrison; Ex Parte Hames*** [2015] WASC 247 ***Australasian Meat Industry Employees' Union v Coles Supermarkets Australia Pty Ltd*** [1998] FCA 166; 80 IR 208 ***Kucks v CSR Limited*** [1996] IRCA 141; 1996 IR 182
Result	:	Claim dismissed
Representation:		
Claimant	:	Ms H. Miller (of counsel) with Mr D. Stojanoski (of counsel)
Respondents	:	Mr J. Carroll (of counsel)

REASONS FOR DECISION

I Introduction

1 The Australian Medical Association (AMA) brings this claim on behalf of six doctors who submit that during their periods of employment with the Western Australia Country Health Service and the North Metropolitan Health Service (the respondents), they should have been classified as consultants under the following industrial instruments, which applied to them during those periods of employment:

a. *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (2013 Metro Agreement)

b. *Department of Health Medical Practitioners (WA Country Health Service) AMA Industrial Agreement 2013* (2013 WACHS Agreement)

c. *WA Health System – Medical Practitioners – AMA Industrial Agreement 2016* (2016 Agreement)

(Agreements).

2 One of the job classifications in the Agreements is that of "Consultant".

3 The AMA claims that notwithstanding the various Job Description Forms (JDFs) and job titles which applied to the doctors' roles with the respondents, and which classified the doctors variously as Senior Medical Practitioner or District Medical Officer (Procedural), they in fact always fell within the consultant classification during their employment. The AMA claims that this is clear when one considers:

a. The definition of "Consultant / Specialist" in the Agreements; and

b. The doctors' qualifications and the functions they carried out in their roles.

4 All six doctors have been employed for longer than 6 years in the WA public health sector, meaning all have been covered by the Agreements for longer than 6 years. In addition, all six doctors have held the qualifications which (at least in part) give rise to the claim that they were consultants for at least 6 years prior to the commencement of the claim.

5 The AMA claims that due to the misclassification of the doctors:

a. The respondents have contravened the terms of the Agreements; and

b. As a result of the contraventions, all six doctors have suffered "loss and damage".

6 The AMA claims that as the contraventions have persisted for longer than 6 years, the doctors are entitled to relief for the statutory maximum claim period of 6 years.

7 The orders sought by the AMA are set out at paragraphs 15 and 16 of its Further Amended Statement of Claim.

8 For the following reasons, the claim must be dismissed in respect of each of the six doctors.

II What are the components of the Consultant / Specialist definition?

9 The Agreements set out the classifications applicable to medical practitioners. One of those classifications is that of "Consultant".

10 There is no clause in the Agreements which sets out a list of duties to be performed by a consultant. There is only a definition of "Consultant / Specialist".

11 Each of the Agreements defines "Consultant / Specialist" as follows:

> "Consultant / Specialist" means a medical practitioner who holds the appropriate higher qualification of a University or College, recognised by the Australian Medical Council ("the AMC"), and includes a Fellow of the Australasian Chapter of Addiction Medicine, or, in exceptional circumstances to satisfy areas of unmet need, such other specialist qualification recognised by the Director General of Health and who, unless otherwise approved by the Director General of Health, is employed and practising in the specialty for which he/she is qualified.[1]

12 As a matter of English language comprehension, the task of construing that definition would appear straight forward. Leaving aside the subordinate clause pertaining to exceptional circumstances, the definition seemingly requires that to be a Consultant / Specialist, a medical practitioner must:

a. hold the appropriate higher qualification of a University or College, recognised by the Australian Medical Council (the AMC); and

b. unless otherwise approved by the Director General of Health, be employed and practising in the specialty for which he/she is qualified.

13 The AMA disagrees with this construction. It contends that the phrase, "and who, unless otherwise approved by the Director General of Health, is employed and practising in the specialty for which he/she is qualified" attaches only to the subordinate clause beginning, "or, in exceptional circumstances to satisfy areas of unmet need".

14 That construction does not make sense either as a matter of English comprehension or, more importantly, in the industrial context of the Agreements.

15 The definition sets up the first important characteristics of a Consultant / Specialist – namely:

a. A medical practitioner

b. Who holds "the appropriate higher qualification of a University or College, recognised by the Australian Medical Council".

16 It then distinguishes the situation of "exceptional circumstances to satisfy areas of unmet need", in which situation the Director General of Health may recognise some other specialist qualification (perhaps, for example, a specialist qualification equivalent to those recognised by the AMC but obtained overseas). It then requires that the Consultant / Specialist be employed and practising in the specialty for which he/she is qualified.

17 In support of their interpretation of the definition, the respondents point out[2] that the first iteration of the "Consultant" definition in an industrial agreement between the AMA and the WA public health services read as follows:

> "Consultant" means a medical practitioner who holds the appropriate higher qualification of a University or College, endorsed by the National Specialist Qualifications Advisory Committee, or, in exceptional circumstances to satisfy areas of unmet need, such other specialist qualification recognised by the Commissioner of Health, and who, unless otherwise approved by the Commissioner of Health, is employed and practising in the specialty for which he/she is qualified (emphasis added).

18 In that original definition, the use of the comma after the word "Health" denotes that the final phrase of the definition is intended to apply to any medical practitioner who possesses either type of specialist qualification as defined in the preceding phrases.

19 I am persuaded by the respondents' submission that it is unlikely that the comma was deliberately left out of subsequent agreements, with the intention of changing a fundamental part of the definition.

20 I also accept the respondents' submission that it would be "industrially absurd" for a medical practitioner with the appropriate higher qualification, but who is *not* employed and practising in the specialty for which he/she is qualified, to be nonetheless paid at the level of consultant.

21 The AMA dismisses that concern as a straw man (ts 16). It points to the JDFs pertaining to the doctors the subject of this claim, which require the doctors to be credentialed and to work within a defined scope of clinical practice. The AMA submits that this means the doctors *must*, therefore, have been employed and working within their specialty.

22 Counsel for the AMA was correct to point out that it would be problematic if a practitioner, having been credentialed for a position and having had a scope of practice defined for the role, then proceeded to work outside that scope of practice (without having sought an extension of scope). But the submission falls into error when it attempts to equate scope of practice with specialty.

23 In order to consider this issue further, given it was raised but no evidence was led at trial as to what credentialing and scope of practice are, I have informed myself to an extent on these matters.[3] I have had regard to the materials directly referenced in the following paragraphs.

24 "Scope of clinical practice" is:

> The extent of an individual practitioner's approved clinical practice within a particular organisation based on an individual's credentials, competence, performance and professional suitability and the needs and capability of the organisation to support the practitioner's scope of clinical practice.[4]

25 The determination of a practitioner's scope of clinical practice depends upon a consideration of all factors in Appendix 6 of the WA Health Department's *Credentialing and Defining Scope of Clinical Practice for Medical Practitioners Standard*.[5] Those factors include the roles and responsibilities of the position, the skill mix of the health care facility, and the Hospital or Health Service's role delineation, as defined by the current *WA Health Clinical Services Framework*.[6]

26 The Royal Australasian College of Surgeons dedicates a page on its website to the credentialing and scope of practice for surgeons. Under the heading "Specific issues – Community need", the College notes:

> Surgeons are trained within nine specialities. *Their scope of practice will* ***usually*** *be restricted within that specialty*. However there are many examples where practice within another surgical specialty is an appropriate response to community need (An example would be a rural general surgeon performing surgery on a child, where there is no paediatric surgical presence).
>
> Sub-specialisation is an increasing trend. However the scope of practice of a well-trained generalist should not be unduly constrained as a consequence.
>
> The scope of practice may differ for emergency as opposed to elective care. Emergency care will generally require a wider scope than elective care. (***emphasis*** *added*).[7]

27 I appreciate that in the case of a consultant general surgeon who has a scope of practice allowing him or her to perform surgery on children in response to community need, it is unlikely that that extended scope of practice would alter the general surgery scope of practice so much as to deprive that practitioner of consultant status, because he or she would still be predominantly employed and practising in the specialty of general surgery.

28 However, the point to be gleaned from the materials I have considered is that:

a. working within a scope of clinical practice does not necessarily equate to working within one's specialty; and

b. as unlikely as it may be, it is possible for a medical practitioner who holds an "appropriate higher qualification" to carry out an approved scope of clinical practice that fits within his or her broader experience and skills, and which fulfils the needs of a particular health service, but which does not specifically pertain to his or her specialty.

29 In that case, as the respondents point out, if the practitioner were classified as a consultant, the employer would be paying for expertise, but not having – or not predominantly having – the benefit of it.

30 Taking into account the historical "Consultant" definition which predated the "Consultant / Specialist" definition, the usual rules of English comprehension and the industrial context, I accept the respondent's submission that the possession of the "appropriate higher qualification" alone is not sufficient for a medical practitioner to be classified as a consultant under the Agreements. He or she must also be employed and practising in the specialty for which he/she is qualified.

III Is fellowship of the Royal Australian College of General Practice or the Australian College of Rural and Remote Medicine an "appropriate higher qualification"?

31 The definition of "Consultant / Specialist" in the Agreements requires that a medical practitioner hold "the appropriate higher qualification of a University or College, recognised by the Australian Medical Council ("the AMC")".

32 The AMC published a List of Australian Recognised Medical Specialties in October 2012 (AMC document).[8]

33 It appears that since that time, the responsibility for publishing the list has passed to the Medical Board of Australia (MBA). On 1 June 2018, the MBA published a List of Specialties, Fields of Specialty Practice and Related Specialist Titles (MBA document). The respondents tendered the MBA document at trial without a witness.[9]

34 For the purposes of these proceedings, I accept that the MBA document accurately reflects the current list of recognised specialties.

35 However, given the way the definition of Consultant / Specialist is worded in the Agreements, with its specific references to "the appropriate higher qualification of a University or College, recognised by the Australian Medical Council", and bearing in mind the dates of the Agreements (2013 and 2016), it seems plain that the drafters of the Agreements had in mind the AMC document when formulating that definition.

36 Both the AMC document and the MBA document identify general practice as a specialty. Further:

a. The MBA document denotes that a medical practitioner who specialises in general practice is entitled to be known as a Specialist general practitioner;

b. The AMC document identifies the Royal Australian College of General Practice (RACGP) and the Australian College of Rural and Remote Medicine (ACRRM) as the two colleges providing specialty training in general practice;

c. The AMC document identifies the qualifications that lead to recognition as a specialist in general practice – i.e., Fellowship of the Royal Australian College of General Practitioners (FRACGP) and Fellowship of the Australian College of Rural and Remote Medicine (FACRRM).

37 The AMC document is therefore useful, in that it explicitly lists the organisations that deliver the specialist qualifications and cites those qualifications (for all specialties, not just that of general practice), neatly aligning with the definition of Consultant / Specialist in the Agreements.[10]

38 During their periods of employment, the six doctors all held FRACGP, FACRRM, or both.[11]

39 The AMC document specifically refers to the RACGP and the ACRRM, and the fellowships of those colleges, as the qualifications leading to the specialty of general practice.

40 In my opinion, the word "appropriate" in the phrase "appropriate higher qualification of a University or College" pertains to the qualification recognised by the AMC that leads to specialty in a particular field of medical practice. In the case of general practice, that is either the FRACGP or the FACRRM.

41 On that basis, I find that FRACGP and FACRRM are the appropriate higher qualifications of the RACGP and ACRRM respectively, recognised by the AMC; thus fulfilling one of the requirements of the Consultant / Specialist definition.

IV Seeing the Consultant / Specialist definition in context

42 Before considering whether the six doctors fulfil the other key component of the Consultant / Specialist definition – namely, the requirement that they were employed and practising in the speciality for which they were qualified – it is necessary to consider the definition in the context of the Agreements as a whole.

(i) The principles

43 In ***Re Harrison; Ex Parte Hames*** [2015] WASC 247,[12] Beech J summarised the principles of construction applicable to instruments (generally) relevantly as follows:

> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> …
>
> (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation.
>
> These general principles apply in the construction of an industrial agreement. The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed.

(ii) Other relevant definitions

44 In oral submissions that seemingly ignored the need to construe the Agreements as a whole, counsel for the AMA eschewed the relevance of certain definitions in the Agreements, describing them variously as 'confusing and anachronistic' (ts 18) and 'arguably redundant and in any case sufficiently opaque as to their effect and meaning that they … should not form the basis for reasonable inference to exclude doctors who otherwise meet the definition of consultant … from the entitlement to consultant classification' (ts 19).

45 In furtherance of that submission, counsel described it as 'strange' that "general practitioner" should be a defined term, but not a classification (ts 19).

46 It is not strange at all. The definition of "general practitioner" is required for an understanding of other definitions – and indeed, classifications – which hinge upon that definition. For example, the definition of Health Service Medical Practitioner, which is also a classification, "includes a general practitioner (not vocationally registered)."

47 In the case of the Agreements under consideration in this case, it is insufficient to look at the Consultant / Specialist definition in isolation.

48 As the six doctors on whose behalf the claim is brought were all general practitioners, it is necessary to have regard to definitions and classifications that refer directly or indirectly to general practice. These are:

a. General Practitioner (all Agreements)

> "General Practitioner" means a medical practitioner engaged in the provision of primary, continuing whole-patient care to individuals, families and their community not being a vocationally registered general practitioner.

b. Health Service Medical Practitioner (all Agreements)

> "Health Service Medical Practitioner" means a non-specialist medical practitioner who is not in a recognised training program and who is authorised to perform duties without requiring clinical supervision by a consultant / specialist or senior medical practitioner. The classification includes a general practitioner (not vocationally registered).

c. Vocationally Registered General Practitioner (all Agreements)

> "Vocationally Registered General Practitioner" means a medical practitioner registered under section 3F of the *Health Insurance Act 1973*.

d. District Medical Officer (2013 WACHS Agreement & 2016 Agreement)

> "District Medical Officer" means a medical practitioner who does not have a recognised specialist qualification but practices without clinical supervision either in general practice or in a specialist area(s) recognised by the AMC or such other area(s) recognised by the employer as being a specialist area; and/or who clinically supervises other senior practitioners.

e. District Medical Officer (Procedural) (2013 WACHS Agreement & 2016 Agreement)

> "District Medical Officer (Procedural)" means a District Medical Officer who also undertakes on a regular and continuing basis anaesthetics, procedural surgery, obstetrics or undertakes duties in such other procedural areas as are recognised by the Employer.

f. Senior Medical Practitioner (all Agreements)

> "Senior Medical Practitioner" means a medical practitioner who does not have a recognised specialist qualification but practices without clinical supervision exclusively in a specialist area recognised by the AMC or such other area recognised by the Director General of Health as being a specialist area; and/or who clinically supervises other practitioners; and/or who has significant medical administration duties (50% as guide). Promotion to the position of Senior Medical Practitioner shall be by appointment only.

49 The latter two definitions do not refer directly to "general practice". However:

a. The definition of "District Medical Officer (Procedural)" is relevant because the "District Medical Officer (Procedural)" classification is a subset of the "District Medical Officer" classification (which does refer to general practice).

b. The definition of "Senior Medical Practitioner" is relevant by virtue of cl 26(4)(b) of each of the Agreements, which states:

> A Vocationally Registered General Practitioner who ceases to maintain Vocationally Registered Status under the *Health Insurance Act 1973* shall thereafter be classified as a Health Service Medical Practitioner or Senior Medical Practitioner as appropriate.

50 "District Medical Officer" and "District Medical Officer (Procedural)" are classifications within the WA Country Health Service for locations north of the 26˚ South Latitude.[13]

51 The definition of "District Medical Officer" has an equivalence to the definition of "Senior Medical Practitioner" in the metropolitan context because:

a. It is in almost identical wording; and

b. It falls within the ambit of "Senior Practitioner" in the relevant schedules, where "Senior Practitioner" means "a practitioner other than an Intern, Resident or Registrar",[14] and "practitioner" means "a medical practitioner employed under this Agreement".[15]

52 For those reasons, I find that "District Medical Officer" is equivalent to "Senior Medical Practitioner" for locations north of the 26˚ South Latitude.

(iii) How do the definitions inform correct classification of the doctors?

53 During their periods of employment, the six doctors:

a. were not vocationally registered general practitioners (VRGP); but

b. (without, at this juncture, determining the issue) all prima facie practised in a specialty recognised by the AMC – namely, the specialty of general practice.

54 For obvious reasons, the VRGP classification was not the correct classification for the doctors.

55 Although the Health Services Medical Practitioner (HSMP) classification "includes a general practitioner (not vocationally registered)", it was not the correct classification for the doctors because whereas a HSMP is a "non-specialist medical practitioner", the doctors were indeed specialists.

56 The doctors were classified by the respondents variously as Senior Medical Practitioner and District Medical Officer (Procedural).[16]

57 For present purposes, the relevant part of the Senior Medical Practitioner (SMP) definition is:

> [A] medical practitioner who does not have a recognised specialist qualification but practices without clinical supervision exclusively in a specialist area recognised by the AMC.

58 And the relevant part of the District Medical Officer (DMO) definition (which informs the DMO (Procedural) definition) is:

> [A] medical practitioner who does not have a recognised specialist qualification but practices without clinical supervision either in general practice or in a specialist area(s) recognised by the AMC.

59 Both classifications are for medical practitioners who do not have a "recognised specialist qualification", but who practise without clinical supervision:

a. exclusively in a specialist area recognised by the AMC (SMP); or

b. either in general practice or in a specialist area(s) recognised by the AMC (DMO).

60 The requirement to practise without clinical supervision, the presence of the SMP and DMO classifications in the Senior Doctor classifications in the Agreements and the fact that promotion to SMP "shall be by appointment only" indicate that both classifications are intended for very experienced practitioners who are highly skilled and largely autonomous in their practice.

(iv) "Appropriate higher qualification" vs "recognised specialist qualification"

61 I have already found that the FRACGP and FACRRM are "appropriate higher qualifications" for the purpose of the Consultant / Specialist definition.

62 If those qualifications are also "recognised specialist qualifications" for the purposes of the SMP and DMO classifications, then one might wonder how the doctors could have been properly classified as SMP or DMO – since those classifications are for practitioners who *do not have* "a recognised specialist qualification".

63 The use of "appropriate higher qualification" in one definition and "recognised specialist qualification" might at first blush be an instance of infelicitous language; an accidental use of two different terms that mean the same thing.

64 But the definition of VRGP is instructive in this regard, because it refers to the *Health Insurance Act 1973* (Cth) (HIA), thus:

> "Vocationally Registered General Practitioner" means a medical practitioner registered under section 3F of the *Health Insurance Act 1973*.

65 The HIA is a very significant piece of legislation for medical practitioners, since it sets out the legal basis upon which Medicare benefits are payable to them. It stands to reason that the drafters of the Agreements had in mind the HIA, given its industrial significance to medical practice.

66 That is not to say that the Agreements simply adopted wholesale the same definitions as appear in the HIA (they did not); but certain terms that appear in the Agreements may well be understood in the same way they are understood in the HIA.

(v) The vocational register

67 The vocational register for general practitioners (VR) was introduced in 1989. Inclusion on the register meant that general practitioners (GPs) qualified for higher Medicare rebates on the basis that they had a certain level of experience as a GP. Until 1995, GPs required 5 years' experience in general practice to qualify for inclusion on the register. From 1995 onwards, they required fellowship of the RACGP or ACRRM. They could maintain general registration with the MBA, but if they had fellowship, they qualified for the VR and had access to the higher Medicare rebates. GPs who were already on the register were permitted to stay on it; and those who had not applied for inclusion had a transition period in which they could apply, based on years of experience gained prior to 1995.[17]

68 Due to recent amendments to the HIA, including the repeal of s 3F, GPs must now have specialist registration with the MBA in order to access the higher Medicare rebates.

69 The VR still exists, which is why it continues to be referenced, even in the most recent AMA / WA Health industrial agreement.[18] But nobody can now join it, and specialty in general practice is recognised by specialist registration with the MBA. This requires FRACGP or FACRRM.

70 At the point in time when the Agreements were drafted, it was a requirement for inclusion on the VR that a GP possess FRACGP or FACRRM, and this had been a requirement for almost two decades.

71 As noted above, cl 26(4)(b) of each Agreement provides that:

> A Vocationally Registered General Practitioner who ceases to maintain Vocationally Registered Status under the *Health Insurance Act 1973* shall thereafter be classified as a Health Service Medical Practitioner or Senior Medical Practitioner as appropriate.

72 As a HSMP is, by definition, a "non-specialist medical practitioner", I infer that a VRGP who possesses fellowship, but ceases to maintain vocationally registered status, would be required, by virtue of the word "shall" in cl 26(4)(b) in the applicable Agreement, to be classified as SMP.

73 Given the link between cl 26(4)(b) and the SMP classification, in my view it is more probable than not that the use of the phrase "recognised specialist qualification" in the SMP definition echoes the way in which that term is understood in the HIA.

74 At all relevant times for the purposes of this case, the provisions of the HIA pertaining to recognition of a medical practitioner as a specialist specifically excluded general practice as a recognised speciality – see HIA s 3D and s 3DB.

75 I am mindful that in the HIA, the specialty of general practice is excluded *for the purposes of the HIA*, and I must be cautious about importing a meaning from a separate instrument into the Agreements.

76 However, in my view the term "recognised specialist qualification" in the definitions of SMP and DMO in the Agreements is informed by what that constitutes in the HIA. I say this because:

a. The HIA is a key piece of legislation in the industrial context of medical practice;

b. The phrases "appropriate higher qualification" in the Consultant / Specialist definition on the one hand, and "recognised specialist qualification" in the SMP and DMO definitions on the other, are so distinctly different that in my opinion they are not intended to be used interchangeably; but rather, have distinct meanings;

c. A VRGP who ceases to be on the VR *shall* be classified as HSMP or SMP – where a VRGP since 1995 has required FRACGP and FACRRM, and yet the definition of SMP is specifically for practitioners who do not possess a "recognised specialist qualification".[19]

77 Those factors together satisfy me that that definition of SMP and DMO imports the meaning of "recognised specialist qualification" from the HIA, in which instrument the qualifications of FRACGP and FACRRM are not so recognised.

78 The six doctors on whose behalf this claim is brought possess exactly the same qualifications as anybody who sought inclusion on the VR from 1995 onwards. They also, therefore, do not possess a "recognised specialist qualification". However, they do practice without clinical supervision exclusively in a specialist area recognised by the AMC – that of general practice. Those characteristics fulfil the criteria for classification as SMP and/or DMO.

79 In my opinion, the doctors have been classified in a way precisely provided for and allowed by the Agreements.

80 There has been no contravention of the Agreements.

81 I need not, therefore, go on to consider whether or not the doctors were in fact employed and practising in the specialty for which they were qualified.

V Is there scope under the Agreements for fellows of the RACGP and/or the ACRRM to be classified as consultant?

82 I have found that the six doctors do hold the "appropriate higher qualification" as that expression is used in the definition of Consultant / Specialist.

83 Consequently, in my view if they are also employed and practising in general practice – particularly in remote or rural roles that require procedural qualifications in fields such as obstetrics, surgery or anaesthetics – they may potentially make a case with the respondent employers for classification as consultants. That would be a matter of negotiation in each individual case.

VI Concluding observations

84 It is evident that general practitioners have been agitating for some time for better recognition of the enormous value they bring to the community, and especially remote communities, where they are called upon to perform tasks beyond the scope of urban practitioners. That recognition is gradually improving, with the inclusion of general practice as an AMC-approved specialty, and initiatives such as the Commonwealth rural generalist program.

85 With that recognition, it is understandable that there may be an expectation that GPs in particular roles ought to be classified as consultants.

86 But whether that is possible will always come down to what the applicable industrial agreement provides. Pertinently, Madgwick J said in ***Kucks v CSR Limited*** [1996] IRCA 141; 1996 IR 182:[20]

> "… A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award."

87 For the reasons outlined, I have found that the Agreements under consideration allowed for the doctors to be classified as consultants, but did not require it.

VII Order

88 The claim is dismissed.

E. O'DONNELL
INDUSTRIAL MAGISTRATE

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[1] Clause 8 of each of the Agreements.

[2] At para 37 of their submissions.

[3] In accordance with *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005*, reg. 35(4).

[4] Government of Western Australia, Department of Health, *Credentialing and Defining the Scope of Clinical Practice Policy* (Policy, 8 October 2019).

[5] Government of Western Australia, *Clinical Governance, Safety and Quality Policy Framework; Credentialing and Defining the Scope of Clinical Practice MP 0084/18; Credentialing and Defining Scope of Clinical Practice for Medical Practitioners Standard 2018* (Policy Framework, 2018).

[6] Ibid., Appendix 6.

[7] Royal Australasian College of Surgeons, *Credentialing and Scope of Practice for Surgeons (2014)* (Web Page, 30 June 2023) <https://www.surgeons.org/en/about-racs/position-papers/credentialing-and-scope-of-practice-for-surgeons-2014>

[8] Australian Medical Council Limited, '*List of Australian Recognised Medical Specialties'* (2012).

[9] Exhibit 10.

[10] The MBA document, on the other hand, simply lists specialties, fields of specialty practice, and the corresponding specialty titles in those fields.

[11] Agreed Facts, [12], [17], [22], [27], [33], [38].

[12] ***Re Harrison; Ex Parte Hames*** [2015] WASC 247, [50]-[51].

[13] 2013 WACHS Agreement, Schedule 2; 2016 Agreement, Schedule 3.

[14] 2013 WACHS Agreement, Schedule 2; 2016 Agreement, Schedule 3.

[15] Clause 8, 2013 WACHS Agreement & 2016 Agreement.

[16] Agreed Facts, [14], [19], [24], [30], [35], [40].

[17] Minister for Community Services and Health (Cth), 'Better Qualified GP's to Provide Improved Patient Care' (Media Release, 2 March 1989); see also Woodhouse F, 'Medicare, Mayhem and the Vocational Register – 1989 to 1996' *The History of General Practice* <https://www.racgp.org.au/FSDEDEV/media/documents/RACGP/History/Medicare-Mayhem-and-the-Vocational-Register.pdf>

[18] *WA Health System - Medical Practitioners - AMA Industrial Agreement 2022,* [2022] WAIRC 00646

[19] See also Respondents' Outline of Submissions, [41]-[43].

[20] ***Kucks v CSR Limited*** (1996) 1996 IR 182, cited with approval by Northrop J in ***Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd*** (1998) 80 IR 208.

2023 WAIRC 00732

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2023 WAIRC 00732
CORAM	:	INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD	:	WEDNESDAY, 16 AUGUST 2023
DELIVERED	:	WEDNESDAY, 16 AUGUST 2023
FILE NO.	:	M 55 OF 2022
BETWEEN	:	CAMERON TWEEDIE

CLAIMANT

AND

ZENITAS HEALTHCARE PTY LTD ACN 009 074 588

FIRST RESPONDENT

AND

APM LIFECARE TRUSCO PTY LTD

SECOND RESPONDENT

CatchWords	:	Industrial Law (WA) – *Long Service Leave Act 1958* (WA) – *Fair Work Act 2009* (Cth) – Claimant's application for leave to further amend the Amended Originating Claim and adjourn hearing of strike out application – Claimant's failure to comply with programming of strike out application – Claimant's application not supported by a minute of proposed amendments – Unable to assess whether the orders proposed will have any utility – Claimant's application dismissed – Respondent's application to strike out Amended Originating Claim – Principles applying in strike out applications – Multiple claims of transfer of business to establish continuous service for long service leave claim – Failure to detail material facts for transfer of business – Failure to detail material facts for accrual of entitlements claimed – Claim for payment in lieu of notice embarrassing – Respondent made out a proper basis to strike out Originating Claim in its entirety – Whether leave should be granted to replead Amended Originating Claim – Leave granted to re-plead annual leave and long service leave – Respondent's application granted in part

Legislation	:	*Fair Work Act 2009* (Cth) *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) *Long Service Leave Act 1958* (WA)
Case(s) referred to in reasons	:	***Byrne & Frew v Australian Airlines Ltd*** [1994] FCA 888; (1994) 47 FCR 300 ***English v Vantage Holdings Group Pty Ltd*** [2021] WASCA 47 ***Jones v Odyssey Marine Pty Ltd*** [2020] WAIRC 00118; (2020) 100 WAIG 188 ***Mohazab v Dick Smith Electronics Pty Ltd (No 2)*** [1995] IRCA 645; (1995) 62 IR 200 ***Quirk v Construction Forestry Maritime Mining and Energy Union*** [2021] FCA 1587; 398 ALR 39 ***Vantage Holdings Group Pty Ltd v Donnelly (No 4)*** [2019] WASC 398 ***Weddall v Rasier Pacific Pty Ltd*** [2023] FCA 59
Result	:	Claimant's application dismissed Respondent's application granted in part
Representation:		
Claimant	:	Ms K. Walawski (of counsel)
Respondents	:	Mr T. Lettenmaier (of counsel)

REASONS FOR DECISION

(This decision was delivered extemporaneously on 16 August 2023 and has been edited from the transcript to correct matters of grammar, add headings and include complete references.)

1 These reasons deal with two interlocutory applications heard by the Industrial Magistrate's Court on 16 August 2023: the respondents' application filed on 16 June 2023 to strike out the Amended Originating Claim and the claimant's application filed on 2 August 2023 to adjourn the hearing of the respondent's application and for leave to further amend the Originating Claim.

2 I dealt with the claimant's application first.

Claimant's Application for leave to further amend the Originating Claim

3 On 2 August 2023, which was the day that the claimant was due to file submissions in opposition to the respondents' application to strike out the Originating Claim, the claimant filed an application which effectively sought:

(a) leave to file a further Amended Originating Claim;

(b) to adjourn the respondents' strike out application, which was listed for 16 August 2023; and

(c) to program any further application to strike out which might follow.

4 Very unusually, the application was not supported by a minute of proposed Amended Originating Claim or a Substituted Originating Claim.

5 The application was supported by an affidavit sworn by Georgina Thomas on 2 August 2023. It recites various matters of procedural history, frankly acknowledging that the strike out application was filed some time ago, on 16 June 2023, and that the hearing of the strike out application was originally listed for 2 August 2023.

6 The claimant was originally due to file responsive materials on 24 July 2023, which was extended by consent to 28 July 2023.

7 Apparently, on 18 July 2023, another solicitor at Ms Thomas' firm spoke to counsel, who advised that counsel was unable to commence work on the matter until the week of 24 July 2023. Ms Thomas then met with counsel on 28 July 2023, having secured an indication from the respondents' solicitors that they would agree to a further extension to 2 August 2023 for the filing of responsive documents.

8 The outcome of Ms Thomas' meeting with counsel was not the production of the documents due to be filed on 2 August 2023, nor was it the production of any proposed Amended or Substituted Originating Claim. Rather, a letter to the respondents was produced on 31 July 2023. The letter makes comments on the strike out application to the effect that the Originating Claim may contain some deficiencies, but it discloses a cause of action, and so the claimant ought to be afforded an opportunity to re-plead his case.

9 The 31 July 2023 letter states:

> It is intended that the further amended originating claim will be delivered to cure any alleged defects and therefore avoid the need for the Strike-Out Application and a listed hearing on 16 August 2023.

10 It does not specify what pleadings were conceded to be deficient, although the claimant has again conceded today that there are deficiencies. Nor did the letter indicate how the deficiencies would be re-pleaded.

11 The letter proposed consent orders be made for leave to file a further Amended Originating Claim and vacating the hearing of the strike out application.

12 The claimant has amended the Originating Claim twice already. He has had ample time to consider the strike out application. Issues which are at the heart of the strike out application were raised at the initial hearing in March 2023. This is in the context of employment that ended in 2020 and claims that date back to 1990.

13 Because the claimant has not produced a minute of proposed further Re-Amended Originating Claim, I cannot assess whether the orders he proposed will have any utility. Indeed, the fact that no minute was produced causes me to be concerned that the claimant is realistically not in a position to file any further re-amended pleading that will aid in the efficient and expeditious resolution of this matter.

14 The claimant's affidavit in support, also emphasises the lack of conferral prior to the application to strike out being brought.

15 That doesn't change my conclusion. Conferral is a means to an end, the end being efficient case management. Conferral can do the opposite and cause costs to escalate and administration of justice to be delayed. If the letter of 31 July 2023 is illustrative of the claimant's approach to conferral, then I suspect that conferral would have achieved very little. The correspondence is vague and does no more than prolong what is unresolved. The claimant simply needs to get on with making his case understandable.

16 I therefore decline to grant leave to re-amend the Originating Claim on this application when I have no idea what the proposed amendments are and have no way of being satisfied that they will resolve the strike out application.

Respondents' Strike Out Application

17 The respondents apply for an order striking out the Amended Originating Claim in its entirety and dismissing the claim.

18 This Court has power to make an order striking out the claim. Regulation 7 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) in particular, is sufficiently broad to enable the orders that are sought to be made.

19 The principles that apply in relation to an application to strike out were recently summarised by her Honour Smith J, in ***Vantage Holdings Group Pty Ltd v Donnelly (No 4)*** [2019] WASC 398 at [60], and affirmed by the Court of Appeal in ***English v Vantage Holdings Group Pty Ltd*** [2021] WASCA 47:

…

(a) the essential functions of a pleading are to define and limit the issues for decision, to provide the basis for determining discovery and the admissibility of evidence for trial, and to ensure a fair trial by putting the other side on notice of the case it must meet;

(b) a statement of claim must not plead allegations at too high a level of generality. A pleading must be sufficiently particular to conform with one of the primary objects of pleadings, to inform the opposing party of the case that it must meet;

(c) a statement of claim must state specifically the relief or remedy claimed;

(d) the court should proceed with caution before striking out a pleading on the ground that it does not disclose a reasonable cause of action. While the court may determine a difficult question of law on such an application, it would usually be appropriate to leave the determination of such questions for trial;

(e) in alleging no reasonable cause of action:

(i) the question to be decided is not whether the facts pleaded are in themselves sufficient to give rise to a cause of action. Rather, the question is whether it would be open to the party (on its pleadings) to prove facts at the trial which would constitute a cause of action; and

(ii) 'reasonable' means reasonable according to law. If the facts pleaded conceivably give rise to relief, then the cause of action should be held to be reasonable;

(f) the mere fact that a case appears weak is not of itself sufficient to strike out the action;

(g) in considering a strike out application, it is now necessary to consider the role of pleadings in the context of case management techniques. Case management considerations are not, however, necessarily antithetical to the observance of pleading rules. The objects of O 1 r 4A and 4B of the *Rules of the Supreme Court 1971* (WA) are often promoted by a clear and precise statement of the issues for decision;

(h) provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action (or defence), and apprising the parties of the case that has to be met, the court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the court to be spent extensively debating the application of technical pleading rules that evolved in, and derive from, a very different case management environment'

(i) pleadings may be struck out on the ground that they may prejudice, embarrass or delay the fair trial of the action because they are evasive, they conceal or obscure the real questions in controversy, they are ambiguous or not reasonably intelligible, they raise immaterial or irrelevant issues, they fail to confine the issues or state the case of the party in question with reasonable particularity, or they raise a case in terms which are simply too general; and

(j) irrelevant or unnecessary pleas in a statement of claim will be struck out on the grounds that they will prejudice, embarrass or delay the fair trial of the action where the defendant must traverse the allegations and, thereby, raise false issues. (citations omitted)

20 Relevant to the Industrial Magistrates Court, this Court is not a superior court of record. While the parties are entitled to know the case put against them, the applicable court rules do not require the rules of pleading to be followed: ***Jones v Odyssey Marine Pty Ltd*** [2020] WAIRC 00118; (2020) 100 WAIG 188, per Scaddan IM.

21 It is also useful to refer to Snaden's J summary in ***Weddall v Rasier Pacific Pty Ltd*** [2023] FCA 59 at paragraphs [69] - [70], about what constitutes a material fact and when a pleading is embarrassing. A 'material fact' is one the proof of which is essential to the existence of a cause of action or defence that the party seeks to advance. A pleading is 'embarrassing' to the extent that it is unintelligible, ambiguous, vague or too general so as to embarrass the opposite party who does not know what is alleged against it. Embarrassing pleadings are those which are susceptible to various meanings or contain inconsistent allegations or in which alternatives are confusingly intermixed or in which irrelevant allegations are made attempting to increase expense.

22 Finally, where extensive passages within a pleading are liable to be struck out, it is within the Court's discretion to strike out the whole of the pleading and to require that the party who authored it begin afresh.

Background and General Observations

23 In these reasons, I use the phrase 'statement of claim' as shorthand to refer to the way the claim is articulated in annexure A and annexure B of the Amended Originating Claim.

24 In short, in his statement of claim, the claimant alleges a 30-year continuous period of employment with a business known as 'LifeCare' from 5 February 1990 to 28 February 2020. From that period of continuous employment, he alleges he is entitled to:

(a) payment in lieu for accrued and untaken long service leave;

(b) payment in lieu for accrued and untaken annual leave, and

(c) payment in lieu of notice in addition to the notice of termination he was given.

25 The statement of claim comprises 29 paragraphs, which recite a history of the various working arrangements, contractual terms, and amendments to contracts during that 30-year period, followed by a bare claim for the relief in annexure B. The vast bulk of the statement of claim appears to attempt to set out material facts in relation to some elements of the claim, namely, the identity of the purported employers, the terms of the purported contracts of employment, and continuous service.

26 Nowhere, though, is there a statement of the material facts which give rise to the claimed entitlements beyond these primary matters. For instance, there's no statement concerning what leave was or was not taken so as to establish an accrued entitlement at any point in time. The statement of claim does say, unnecessarily repetitively, that on alleged transfer occasions, the claimant was not paid any accrued entitlements. But we do not know if he had any accrued entitlements to be paid. So, the fact he was not paid is a conclusion without facts to establish it.

27 The deficiencies go further. I will address them under the separate issues that arise in the proceedings.

Elements of the Long Service Leave Claim: Continuous Employment

28 Although the statement of claim does not expressly identify the source of the claim for payment in lieu of accrued long service leave, it is implicit that the claim is made pursuant to s 9(2)(c) of the *Long Service Leave Act 1958* (WA) (**LSL Act**), which provides that an employee who has completed at least 10 years of continuous employment is entitled to an amount of long service leave on termination of employment based on 8 2/3 weeks for 10 years of continuous employment.

29 There is a contest in these proceedings as to whether the claimant is or was an employee, which is the first qualification for the entitlement. That issue does not directly bear on the current application.

30 The claimant's statement of claim alleges that he was first employed by either the first or second respondents on 30 December 2016. His purported employment ended on 28 February 2020; therefore, he would not have had 10 years' continuous service with the first or second respondents in the ordinary sense of the phrase 'continuous service' to qualify for any long service leave entitlement.

31 Again, although not expressly stated, it is also implicit in the statement of claim that the claimant relies on the LSL Act's extended definition of 'continuous service' relating to transfers of business contained in s 7H of the LSL Act and that periods of purported employment with entities prior to December 2016 should count towards his period of continuous service. The statement of claim alleges that there were four transfer occasions, presumably meaning transfers of business for the purposes of s 7H of the LSL Act.

32 Section 7H, provides:

> For the purposes of this Act, on a transfer of business —
>
> (a) a transferring employee's employment before and after the transfer is taken to be a single period of continuous employment; and
>
> (b) the new employer is taken to have been the transferring employee's sole employer for the entire period.

33 Section 7E sets out when a transfer of business is deemed to occur for the purpose of s 7H:

> There is a ***transfer of business*** from an employer (the ***old employer***) to another employer (the ***new employer***) if the following requirements are satisfied —
>
> (a) the employment of an employee of the old employer has terminated;
>
> (b) within 3 months after the termination, the employee becomes employed by the new employer;
>
> (c) the work (the ***transferring work***) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
>
> (d) there is a connection between the old employer and the new employer.

34 What is a 'connection between an old employer and new employer' is defined in s 7G:

(1) There is a con***nection between the old employer and the new employer*** if, in accordance with an arrangement between them, the new employer owns or has the beneficial use of some or all of the assets (whether tangible or intangible) that —

(a) the old employer owned or had the beneficial use of; and

(b) relate to, or are used in connection with, the transferring work.

(2) There is a ***connection between the old employer and the new employer*** if, because the old employer has outsourced the transferring work to the new employer, the transferring work is performed by 1 or more transferring employees as employees of the new employer.

(3) There is a ***connection between the old employer and the new employer*** if —

(a) because the new employer had outsourced the transferring work to the old employer, the transferring work had been performed by 1 or more transferring employees, as employees of the old employer; and

(b) because the new employer has ceased to outsource the work to the old employer, the transferring work is performed by those transferring employees, as employees of the new employer.

(4) There is a ***connection between the old employer and the new employer*** if the new employer is a related body corporate of the old employer when the transferring employee becomes employed by the new employer.

35 So, to establish continuous service for each transfer occasion, the claimant must establish, relevantly:

(a) That the employment was terminated by one employer.

(b) That within three months after termination, he was employed by another employer.

(c) The work he performed for the new employer was the same or substantially the same as the work he performed for the old employer.

(d) The new employer owns or has the beneficial use of or some or all of the assets that the old employer owned or had beneficial use of.

(e) Those assets relate to or are used in connection with the transferring work.

36 The statement of claim does not specify the connection between old employers and new employers that the claimant relies upon. I am assuming that the claimant does not rely on the outsourcing, insourcing or related bodies corporate connections.

37 In paragraph 19 of their written submissions, the respondents articulate the requirements for establishing continuous service slightly differently to how I have set them out above. I do not agree with the respondents that there is a requirement for the claimant to become an employee of the 'transmittee' at the time of 'transmission of business'. Rather, the material timing is the date of termination and the date of new employment.

38 In addition to establishing continuous service, the claimant must also establish what leave was accrued in the period of continuous service, accounting for periods of leave taken, and his rate of ordinary pay at the time of termination.

First Transfer Occasion

39 Paragraphs 5 and 6 of the statement of claim deal with the first transfer occasion in these terms:

5. On or around 6 December 1999 LifeCare Corporation listed as a public company and became LifeCare Health Ltd ACN 083 519 377 ("LifeCare Health"), which entity then owned and operated the LifeCare Business.

6. Shortly prior to 6 December 1999, Claimant entered into an oral contract of employment ("Third Contract") with LifeCare Health ("First Transfer Occasion").

40 These paragraphs do not disclose material facts establishing a transfer of business. They are internally inconsistent. The first sentence says that the old employer listed, which would not involve any transfer of business at all, because the same entity continues to be the employer. The second sentence vaguely suggests a transfer of assets by its reference to the entity then owning and operating the LifeCare Business.

41 This makes the paragraphs embarrassing in the sense that they cannot sensibly be responded to, tested or tried.

42 If the paragraph is intended to suggest a transfer of assets, namely, the LifeCare Business, whatever that is, from one entity to another, then it does not disclose the following material facts:

(a) that the employment with LifeCare Corporation, being the first employer, was terminated;

(b) on what date employment with LifeCare Corporation was terminated; and

(c) the date of commencement of employment with the new employer, LifeCare Health.

43 The problem is more serious, though. It puts the date of acquisition of the LifeCare Business as 6 December 1999, but the date of an employment contract as shortly prior to that date. I note that the date of employment contract is actually not material. What is material is the date of commencement of employment, and this material fact is not stated.

44 In short, the claimant fails to detail the material facts necessary to establish a transfer of business from LifeCare Corporation to LifeCare Health. Rather, the facts that are asserted defeat the claim of a transfer of business.

45 Paragraph 5 of the statement of claim should be struck out.

46 If paragraph 5 is struck out, the proceeding paragraphs, which deal with the employment prior to 6 December 1999, are immaterial and irrelevant to the claims, so they too should be struck out.

47 The respondents seek to strike out paragraph 5 for the additional reason the allegations are factually incorrect. They rely upon historical company extracts to demonstrate that the allegations are factually incorrect.

48 This may be the basis for summary dismissal of the claim, but it is not a basis for striking out the statement of claim. In any event, it is unnecessary for me to consider this additional basis, as I would strike out paragraph 5 for the reasons I have already stated.

Second Transfer Occasion

49 Paragraph 15 attempts to set up the case for the transfer of business from LifeCare Health, then known as Independent Practitioner Network Ltd (**IPN**), to Health Network Australia Pty Ltd (**HNA**). It provides:

> 15. In or around April 2005 Health Network Australia Pty Ltd acquired from Independent Practitioner Network Ltd and commenced operating the LifeCare Business ("Second Transfer Occasion") at which time the Claimant commenced work as State Manager of the LifeCare Business pursuant to an oral contract of employment ("Fifth Contract") made with HNA Physio (WA) Pty Ltd ACN 118 112 619 (as trustee for Lifecare Physio (WA) Unit Trust), a subsidiary of Health Network Australia Pty Ltd ("HNA").

50 The paragraph suggests a transfer of assets from IPN to HNA, but it does not allege employment with HNA. It alleges employment with a different entity, HNA Physio (WA) Pty Ltd, as Trustee for the LifeCare Physio (WA) Unit Trust.

51 The following material facts for a transfer of business are missing:

(a) that the employment with IPN was terminated;

(b) the date of termination of employment with IPN;

(c) the new employer, HNA Physio (WA) Pty Ltd, owns or has the beneficial use of some or all of the assets that IPN owned or had the beneficial use of;

(d) those assets relate to or are used in connection with the transferring work; and

(e) that the work the claimant performed for HNA Physio (WA) Pty Ltd is the same or substantially the same as the work performed for the old employer, IPN, noting the claimant says he was employed by IPN as 'WA Director of Allied Health', providing coaching and operational support to franchisee business owners and managing practices, and his new employment was as State Manager with, 'similar responsibilities', but with additional property management, human resources and marketing responsibilities.

52 In fact, if the facts alleged in paragraph 15 are established, not only do they not meet the test for a transfer of business, but they also defeat it. If there is no transfer of business on this occasion, all matters concerning prior employment are irrelevant, and so paragraphs 6 to 14 should be struck too.

Third Transfer Occasion

53 The third transfer occasion is dealt with in paragraph 19 in this way:

> 19. On or around 30 December 2016, the LifeCare Business was acquired by Zenitas Healthcare Ltd CAN[sic] 009 074 588 ("Third Transfer Occasion"), at which time the Claimant commenced employment pursuant to an oral contract of employment ("Sixth Contract") with:
>
> 19.1 Zenitas HNA Trusco[sic] Pty Ltd ACN 615 300 975 and HNA Physio (WA) Pty Ltd ACN 118 112 619 as trustees for Lifecare Physio (WA) Unit Trust;
>
> alternatively
>
> 19.2 Zenitas Healthcare Ltd ACN 009 074 588.

54 At this point in time, according to the statement of claim, the claimant was employed by HNA Physio (WA) Pty Ltd as State Manager of what he calls the 'LifeCare Business'. It is clear enough that paragraph 19 alleges that either the Trustees or Zenitas Healthcare Ltd became the owner of an asset, the LifeCare Business. This claim has the problem, though, that it does not identify a termination of employment with HNA Physio (WA) Pty Ltd, or a date of employment commencing with a new employer. It is, in its current form, also deficient, because it does not identify what the LifeCare Business is, that is, how it is an asset and how that asset or any part of it was used by the new employer.

55 However, it does not have the fatal inconsistencies of the claimed first transfer occasion and the claimed second transfer occasion. There may be something salvageable.

56 I would strike this pleading out. I will consider further below, whether leave to re-plead ought to be granted in respect of this cause of action.

Fourth Transfer Occasion

57 This occasion is said to have occurred on 22 June 2018. Paragraph 21 of the statement of claim provides:

> 21. On or around 22 June 2018 the Claimant commenced employment pursuant to an oral contract ("Seventh Contract") with:
>
> 21.1 Zenitas HNA Trusco[sic] Pty Ltd ACN 615 300 975 as trustee for the Lifecare Physio (WA) Unit Trust;
>
> alternatively
>
> 21.2 Zenitas Healthcare Ltd ACN 009 074 588.
>
> ("Fourth Transfer Occasion").

58 This suffers the same defects I have identified in relation to the previous alleged transfers. It does not clearly identify what assets were transferred to whom. But more problematically, it does not reveal that there was any transfer at all. Paragraph 19 alleges the employer, as at December 2016, was Zenitas HNA Trust Pty Ltd, together with HNA Physio (WA) Pty Ltd, or alternatively, Zenitas Healthcare Limited. In other words, paragraph 21 is in the same terms, except for the removal of reference to 'HNA Trust Co Pty Ltd' as 'Trustee'. If some of the facts in paragraph 21 are established, there may be no transfer of business at all, but simply, a continuation of the same employer. If other facts in paragraph 21 are established, there may be a new contract with a new employer.

59 This means that the pleading is embarrassing and liable to be struck out. Again, I'll return to whether leave should be granted to re-plead.

Contract Particulars

60 There are problems with how the statement of claim deals with the particulars of contracts. The respondents say that there are a number of deficiencies, including:

(a) that there is ambiguity in what are the material terms of the contracts;

(b) the capacity in which individuals who purportedly entered into the contracts, being oral contracts, were acting, is not disclosed;

(c) lack of clarity as to the identity of the purported employer; and

(d) material facts giving rise to the creation of an oral contract are not stated.

61 Because I have determined that the claim should be struck out insofar as it concerns any contracts prior to April 2005, I do not need to deal with the respondents' complaints about paragraphs 1 to 14 or the first to fourth contracts.

Paragraphs 15 and 18 - The Fifth Contract and its amendments

62 First, because of my determination concerning the continuous employment point, the reference to 'acquired from Independent Practitioner Network Ltd' in paragraph 15 is irrelevant, as is the reference to the 'Second Transfer Occasion'.

63 The fifth contract is said to be between the claimant and HNA Physio (WA) Pty Ltd. Paragraph 15 alleges that HNA operated the LifeCare Business, but the claimant was employed by HNA Physio (WA) Pty Ltd as State Manager of the LifeCare Business. That is potentially confusing and unclear, but not sufficiently problematic to warrant the paragraph being struck out.

64 Paragraphs 15 and 18 also allege that the contract was made with and then amended by Lou Panaccio of HNA. This is problematic. It is not clear how Lou Panaccio had the authority to enter into a contract, or vary it, on behalf of HNA Physio (WA) Pty Ltd.

65 The respondents complain that the paragraph alleges the employment commenced in April 2005, but the contract was made in January 2005. I do not consider this to be a deficiency. It is well established that the contract of employment is distinct from the employment relationship, such that a contract can be entered into and subsist for a different period to the employment relationship: ***Byrne & Frew v Australian Airlines Ltd*** [1994] FCA 888; (1994) 47 FCR 300 and ***Mohazab v Dick Smith Electronics Pty Ltd (No 2)*** [1995] IRCA 645; (1995) 62 IR 200.

66 Paragraph 15.2 alleges that it was a material term of the contract that the claimant be paid a fixed annual salary '…with the claimant issuing monthly invoices through an entity controlled by him, Highpine Nominees Pty Ltd…'. This paragraph may be internally inconsistent. It's not clear to me how there can be both an express oral agreement to pay a salary and an express oral agreement to make payment on invoice. However, this point was not argued, and I do not propose to resolve it at this interlocutory stage.

67 I would, for these reasons, strike out the particulars in paragraphs 15.1 and 15.2 with leave to re-plead this paragraph.

68 I would also strike out paragraph 18. Aside from the problem concerning Lou Panaccio's capacity to vary the contracts, the particulars of the alleged variations are so vague that they are embarrassing. The respondents should not be required to respond to them, nor can they be properly or fairly tried. In any event, the alleged variations are immaterial to the claims.

Paragraph 19 - The Sixth Contract

69 As alluded to previously, this claim is that an employment contract was entered into between either the first respondent or the second respondent as Trustee with another entity, HNA Physio (WA) Pty Ltd.

70 The contract is said to be an oral contract entered into by conversations with Mr Justin Walter on behalf of all the potential employers. Mr Walter's capacity to enter into a contract on behalf of any of those entities is not identified. It should be.

71 The respondents also complain that the claimant does not identify how he is employed under one contract by two entities. I do not understand this to be a concern with whether there can be two concurrent employing entities. It seems there is scope in the law for such a scenario: ***Quirk v Construction Forestry Maritime Mining and Energy Union*** [2021] FCA 1587; 398 ALR 39. If this is the complaint, it is not a matter which I would determine on an interlocutory application such as the present.

72 Rather, the objection, as I understand it, is that the contract is said to be oral and entered into by conversations with one individual, Mr Walter, but resulting in a contract with two different entities concurrently. The respondents rely upon what Snaden J said at paragraphs [30] - [40] of ***Weddall*** to the effect that the failure to allege with proper precision which of the respondents is said to have employed the applicants is plainly unacceptable.

73 The problem in ***Weddall*** was that the plea was to the effect that one or more of four entities employed the applicants. His Honour described that as a rolled up, ambiguous and internally inconsistent pleading.

74 The problem with paragraph 19 is different. It is that it does not demonstrate how the particulars which are pleaded at paragraph 19.3 resulted in the formation of a contract with any of the entities that are said to have become an employer.

Having the identity of the employer in the alternative, it seems to me, is acceptable. But not particularising how a contract results with each employer is not. So that is also reason why paragraph 19 should be struck out.

Paragraph 21 - The Seventh Contract

75 This paragraph alleges an oral contract was entered into with the first respondent or alternatively, the second respondent, but that it involved no change to any material terms from the sixth contract. No material facts or particulars are given, other than that the contract was oral and made on 22 June 2019. This paragraph is, therefore, clearly liable to be struck out.

76 It is also unclear what the purpose of paragraph 21 is. As I alluded to earlier, it does not necessarily set up a transfer of business. Paragraph 23 alleges in the alternative to paragraph 21 that the claimant continued to be employed by the entities identified in paragraph 19.

77 Paragraph 23 cannot operate logically as an alternative to paragraph 21 in its current form.

78 I would strike out paragraphs 21 to 23.

Accrued Entitlements Claim

79 In various places the statement of claim says that the claimant was not paid any accrued entitlements on transfer occasions. This involves an implicit conclusion, namely, that the claimant had some accrued entitlement, without asserting the facts which give rise to the accrual of an entitlement, whether it be annual leave or long service leave. These claims are deficient and should be struck out.

The Notice Claim

80 The claim for payment in lieu of additional notice of termination is in the form of a bare assertion that the one month's notice of termination which was given to the claimant was not reasonable or lawful in all of the circumstances. Annexure B then identifies the claim as two months' salary pursuant to the *Fair Work Act 2009* (Cth) (**FW Act**), but no section is specified.

81 Section 117 of the FW Act entitles an employee to payment in lieu of notice of termination. It does not require either 'reasonable notice' or two months' notice. The claim is therefore either too general or too unintelligible or it is illogical. It basically raises a false issue and should be struck out.

82 Additionally, paragraph 17 appears to be prolix, and paragraph 24 is unintelligible and embarrassing.

Should the claimant have leave to amend the Statement of Claim?

83 The respondent has made out a proper basis to strike out the statement of claim in its entirety. Unless I grant the claimant leave to re-plead, the claim cannot survive. The respondents have asked me to strike out the claim in its entirety and dismiss the claim while conceding that to do so is an extreme step. They refer to:

(a) the multiple opportunities the claimant has had to rectify the statement of claim;

(b) the fact that the facts pleaded do not accord with public records and discovery;

(c) the lengthy period since 2010 when the claimant alleges he was first entitled to long service leave, and

(d) the difficulties the respondents have had and will continue to have in responding to the claim.

84 While the ordinary course is to grant leave to re-plead, I see no utility in granting the claimant an opportunity to re-plead his case insofar as it concerns purported employment prior to 2005. The claimant has said that in order to make these claims good, he needs access to business sale agreements from that period. Those business sale agreements are between third parties who are not parties to these proceedings. There is no indication that those documents are likely, after this lengthy period of time, to suddenly come to hand. In any event, the facts asserted by the claimant cannot be re-pleaded in a way that will disclose an arguable case of transfer of business for the purpose of the LSL Act for the reasons I have already stated.

85 Incidentally, I note that what is a transfer of employment under the FW Act for the purpose of the annual leave claim and continuous service as defined in ss 22 and 311 of the FW Act is substantively the same as the transfer of business provisions of the LSL Act. In any event, the annual leave claim does not appear, at least on the face of it, to rely on continuous employment between different employers.

86 I will, however, grant leave to re-plead the causes of action for annual leave and long service leave only, to the extent that they arise from purported continuous employment from April 2005 to February 2020. Because this is a more recent period and involves fewer contractual arrangements, I consider it reduces considerably, the prejudice which the respondents have referred to.

87 The claimant should be given leave to amend the statement of claim to state the facts giving rise to the alleged employment from April 2005 onwards, the alleged transfers of business after that time, and the alleged leave accruals, including what entitlement had accrued, why it had accrued, and in what amount it had accrued.

Orders

88 The orders will therefore be:

1. The claimant's application dated 2 August 2023 for leave to file and serve a further Amended Originating Claim and for consequential programming orders be dismissed.

2. Paragraphs 1 to 24, the words "which notice was not reasonable or lawful in all the circumstances" in para 27, the words "and did not receive any payment in respect of additional notice in lieu" in paragraph 28 and Annexure B paragraph 1(c) of the Amended Originating Claim be struck out.

3. The claimant has leave to re-plead the following paragraphs of the Amended Originating Claim:

   a. paragraphs 15, 19, and 21;

b. the facts giving rise to the alleged accrued and unused leave entitlements; and

c. Annexure B paragraph 1(a) and (b) made necessary as a consequence of order 1 by filing a Re-Amended Originating Claim by no later than 30 August 2023.

4. The respondents application for dismissal of the proceedings is dismissed.

5. The respondents file and serve any application for costs in relation to their application for orders filed on 15 June 2023, supporting affidavit and written submissions (no longer than 10 pages) by 15 September 2023.

6. If the respondents file and serve an application for costs, then the claimant file and serve any affidavit and written submissions (no longer than 10 pages) by 29 September 2023.

7. If the claimant files and serves any material in accordance with order 4, the respondents may file and serve a submission in reply (no longer than 10 pages) by 13 October 2023.

8. Subject to further order, any application for costs be determined on the papers without an oral hearing.

R COSENTINO

INDUSTRIAL MAGISTRATE

2023 WAIRC 00722

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2023 WAIRC 00722
CORAM	:	INDUSTRIAL MAGISTRATE E. O'DONNELL
HEARD	:	WEDNESDAY, 30 NOVEMBER 2022
DELIVERED	:	THURSDAY, 24 AUGUST 2023
FILE NO.	:	M 6 OF 2022
BETWEEN	:	WESTERN AUSTRALIAN PRISON OFFICERS’ UNION OF WORKERS
		CLAIMANT
		AND
		MINISTER FOR CORRECTIVE SERVICES
		RESPONDENT

CatchWords	:	INDUSTRIAL LAW – entitlement to purchased leave – requirement to consult with officers
Legislation	:	*Industrial Relations Act 1979* (WA)
Instrument	:	*Department of Justice Prison Officers’ Industrial Agreement 2020*
Result	:	Claim dismissed
Representation:		
Claimant	:	Mr D. Stojanoski (of counsel)
Respondent	:	Mr M. McIlwaine (of counsel)

REASONS FOR DECISION

1 The Western Australian Prison Officers’ Union of Workers (WAPOU) brings this claim on behalf of four of its members (officers) who, at the relevant time, were employed by the respondent as prison officers at Casuarina Prison, Bandyup Prison and Albany Prison (prisons).

2 WAPOU claims that the respondent contravened cl 138 of the *Department of Justice Prison Officers’ Industrial Agreement 2020* (Agreement), which covered the officers at the relevant time.

3 By way of remedy, WAPOU seeks a penalty pursuant to s 83(4)(a)(ii) of the *Industrial Relations Act 1979* (WA) (the Act), as well as an order of the Court aimed at preventing any further contravention, pursuant to s 83(5) of the Act.

4 For the following reasons, the claim must be dismissed.

I What did the officers seek under the Agreement?

5 The essential facts of the case are those that appear at paragraphs 2-5 of the Statement of Agreed Facts.[1] I repeat those paragraphs as follows:

6 Prior to 1 July 2021, each of the officers had entered into a purchased leave salary arrangement (PLSA) to purchase additional leave pursuant to sub-cl 138.1 of the Agreement.

7 Prior to 31 March 2021, each of the officers made an application to purchase leave "blocks" during the following "leave year", which ran from 1 July 2021 to 30 June 2022 (the leave year).

8 Each of the prisons did not offer any access to the purchased leave blocks during the leave year to the officers, or indeed to any prison officer.

9 The respondent (via the prisons) did not consult with the officers, nor with any other prison officer employed by the respondent regarding their respective applications to take purchased leave blocks during the leave year.

II What was the respondent required to do under clause 138 of the Agreement?

(i) Entry into purchased leave salary arrangements

10 Sub-clause 138.1 provides:

> An Officer may elect to enter into an arrangement whereby the Officer can purchase a block of two- or three-weeks' additional leave by agreeing to take a reduced Annualised Salary spread over a Leave Year provided the Officer has an accrued annual leave balance of less than 12 weeks.

11 Per the agreed facts, the officers elected to enter into PLSAs of the type contemplated by sub-cl 138.1, for the leave year 2021-2022.

12 It is not suggested that any of the officers had an accrued annual leave balance of 12 or more weeks at the time they elected to enter into their PLSAs. I accept WAPOU's submission that it was therefore not open to the respondent to consider granting access to the PLSAs only after considering the terms of sub-cl 138.3.

13 Nor is it suggested that any of the officers fell within the parameters of sub-cl 138.6, which means that there was no basis for the respondent to outright refuse them access to PLSAs for the leave year.

14 As it was, the respondent did not purport to consider the applications on the basis of either sub-cl 138.3 or sub-cl 138.6; rather, it accepted the applications and allowed the officers to enter into PLSAs for the 2021-2022 leave year.[2]

15 There was, therefore, no contravention of sub-cl 138.1.

(ii) Having allowed the officers to enter PLSAs, what did the respondent have to do pursuant to the Agreement?

16 Having allowed the officers to enter into PLSAs, the respondent had obligations pursuant to sub-cl 138.7 of the Agreement. That clause provides:

> Each Prison, prior to the start of the Leave Year, will determine the number of Officers who entered into a purchased leave salary arrangement and develop a leave roster. The roster should allocate this leave evenly throughout the Leave Year. Officers will be given the opportunity to nominate periods within the roster. Where more Officers than can be accommodated nominate for a particular block the Employer will decide in consultation with those Officers directly affected who is to be allocated the period. Subject to subclause 138.3, Officers will receive priority where the requested leave adjoins their existing annual leave roster.

17 The first obligation under sub-cl 138.7 is that the prisons determine the number of officers who entered into a PLSA and develop a leave roster. This must be done prior to the start of the leave year – so, in this case, prior to 1 July 2021.

18 All the other obligations in sub-cl 138.7 hinge upon the development of a leave roster. If no roster is developed:

a. The roster cannot allocate purchased leave evenly throughout the leave year (as it does not exist);

b. Officers cannot be given an opportunity to nominate leave periods in the non-existent roster;

c. There can be no consultation with officers as to who should be allocated a particular "over-subscribed" leave period, since no leave period exists to become over-subscribed.

(iii) Did the prisons develop leave rosters pursuant to cl. 138.7?

19 With respect to the development of leave rosters at the prisons, I have had regard to:

a. The Bundle of Agreed Documents;[3] and

b. The witness statement of Roderick McAteer (Mr McAteer).[4]

20 The Bundle of Agreed Documents contains emails sent by each prison to its staff about the status of PLSA applications and the likelihood of being able to accommodate purchased leave in the 2021-2022 leave year.

a. Document 1, dated 31 March 2021, was sent by Albany Regional Prison Superintendent Charlie Tuck to uniformed staff at Albany Prison.

b. Document 2, dated 1 April 2021, was sent by Casuarina Prison Manager Human Resources Jennie Urban on behalf of Superintendent James Schilo ACM JP to uniformed staff at Casuarina Prison.

c. Document 3, dated 16 July 2021, was sent by Bandyup Women's Prison Business Manager Steve Newell (Mr Newell) to uniformed staff at Bandyup Prison.

21 Document 1 (pertaining to Albany Prison) and Document 2 (pertaining to Casuarina Prison) of the Bundle of Agreed Documents both state in part:

> In considering the Prison's current operational needs and capability, a decision has been taken that the Prison is unable to accommodate approval of any purchased leave periods during the forthcoming leave year.
>
> *Should circumstances change, and it is determined that available Purchased Leave roster periods within the 2021/22 Roster can be offered*, Officers with a PLSA will be notified accordingly and provided opportunity to nominate for the

available leave period(s). The usual selection/allocation process would then be followed if there was more than one application for a particular vacant period (*emphasis added*).

22 In my opinion, the reference to the "2021/2022 Roster" in both emails is a reference to the roster as a whole, and not to a leave roster as contemplated by sub-cl 138.7.

23 The phrase, "available Purchased Leave roster periods within the 2021/2022 Roster" (emphasis added) suggests to me that purchased leave blocks in fact had been inserted into the broader 2021/2022 roster. If that is the case, then I have no difficulty finding that Albany and Casuarina Prisons had developed leave rosters in accordance with sub-cl 138.7, and that there was a possibility they still might offer blocks within those leave rosters "should circumstances change".

24 The statement of Mr McAteer,[5] with its annexures, strengthens my interpretation that the phrase "available Purchased Leave roster periods" is referring to leave blocks which had been formulated – at least by Casuarina Prison, which is where Mr McAteer worked.

25 At [9]-[26] of his statement, Mr McAteer explains the usual process for entering into a PLSA and then taking purchased leave. He sets out a process whereby Casuarina Prison (his employer for the last 28 years) always took the steps required by sub-cl 138.7. He states that the allocation of purchased leave had proceeded the same way – until, he says, 2021.

26 Mr McAteer goes on to state that in 2021, he entered into a PLSA, and that he had an accrued leave balance of less than 12 weeks. He submitted this application prior to the end of March 2021, as required by the Agreement. He states[6] that following this:

> The Department did not take any of the usual above steps, and prior to declining the purchased leave entitlement did not:
>
> a. Determine the number of Officers who entered into a purchased leave salary arrangement;
>
> b. Develop a roster allocating leave evenly throughout the Leave Year;
>
> c. Consider consulting with officers that had applied for the same purchased leave period as to who it is going to be allocated to.

27 Annexure RM-2 to Mr McAteer's statement directly contradicts what he says at paragraph 30 of his statement. Annexure RM-2 is an email dated 4 March 2021, sent by Steph Czerniak (Ms Czerniak), HR Rosters Officer at Casuarina Prison, to a large number of recipients, including Derick.McAteer@justice.wa.gov.au, a recipient who I find to be Roderick McAteer. That email states:

> Good afternoon,
>
> You have handed in a Purchase Leave application in, (sic) but not provided the dates you would like to take.
>
> Can you please give me 3 preferences of Leave dates you want to take? – I cannot send your form to head office to be processed without these dates. Can you please forward them on by 12/03/2021.
>
> The dates you can choose from are below.

28 The email then attaches a table which is clearly a leave roster for purchased leave for the 2021-2022 leave year. The leave blocks range from 02.07.21-22.07.21 through to 03.06.22-23.06.22.

29 On the basis of that evidence, I find that prior to the start of the 2021-2022 leave year (as at the date of Ms Czerniak's email, 4 March 2021), Casuarina Prison had determined the number of officers who had entered into a PLSA (the recipients of the email), had developed a leave roster which allocated the leave evenly throughout the leave year, and had given the officers the opportunity to nominate periods within the roster (the precise request that was made in the email).

30 Further, I find that in his application to enter into a PLSA dated 4 February 2021,[7] Mr McAteer himself nominated one of the purchased leave blocks allocated in the table attached to Ms Czerniak's email – namely, the block from 17/12/21-06/01/22.

31 Given that the email sent by Albany Prison to its uniformed officers on 31 March 2021 was in virtually identical terms to the one sent by Casuarina Prison one day later, and in particular because it also referred to "available Purchased Leave roster periods within the 2021/2022 Roster", I find on the balance of probabilities that Albany Prison had also determined the number of officers who had entered into a PLSA, had developed a leave roster which allocated the leave evenly throughout the leave year, and had given the officers the opportunity to nominate periods within the roster.

32 Document 3 (pertaining to Bandyup Prison) is worded differently. It states in part:

> Some staff have applied for purchased leave. These applications are currently being process (sic) and staff are receiving an email stating that your purchased leave has been approved and your credits are now available for booking.
>
> The email relates to the fact that your application has been processed and the deduction will be coming out of your salary.
>
> The Department advised the prison that overtime could not be utilised to cover purchased leave. That means that no purchased leave can be booked until there is sufficient staff to cover the staff taking purchased leave. At this point in time I am unable to advise when we will have to (sic) sufficient staff to allow staff to take purchased leave.

33 This email is essentially saying that where an officer is on a period of purchased leave, the prison, pursuant to a directive from the Department, cannot ask other officers to work overtime to cover that leave.

34 This leads me to infer that Bandyup Prison was experiencing a situation where, if they granted blocks of purchased leave, they would be relying on officers to work overtime to cover it – a situation which was not approved by the Department. This alone would then lead logically to the inference that the prison was experiencing a shortage of officers. But in fact, I do not need to infer that, because Mr Newell makes it explicit when he says:

At this point in time I am unable to advise when we will have to (sic) sufficient staff to allow staff to take purchased leave.

35 The following factors:

a. The timing of Mr Newell's email – 16 July 2021, which was after the commencement of the leave year;

b. The reference in that email to a separate email which had informed officers that 'your purchased leave has been approved and your credits are now available for booking';

c. Mr Newell's reference to the inability to use overtime to cover purchased leave – indicating that the prison had considered how it might accommodate periods of purchased leave that it had formulated; and

d. The fact that "the Department" (which I take to be a reference to the Department of Corrective Services) had specifically advised that overtime was not to be utilised to cover purchased leave – indicating that this had been posited as a solution in view of the need to allocate leave blocks that had been formulated;

together lead me to infer that Bandyup Prison in fact had, prior to the start of the leave year (i.e., prior to 1 July 2021), determined the number of officers who had entered into a PLSA, had developed a leave roster and had called for officers to nominate preferred leave blocks in that roster, as contemplated by sub-cl 138.7.

36 I therefore find that all the prisons had fulfilled several of the requirements set out in sub-cl 138.7.

37 However, per the Statement of Agreed Facts, the prisons did not then proceed to offer access to the purchased leave blocks – potentially leaving open the conclusion that they nonetheless contravened sub-cl 138.7.

III Why did the prisons not proceed to allocate purchased leave to the officers?

38 Document 1 and Document 2, referenced above, explicitly state that having regard to 'the operational needs and capability' of Albany Prison and Casuarina Prison, those prisons would be unable to accommodate approval of any purchased leave periods during the forthcoming leave year.

39 Mr Newell's references in Document 3 to having to resort to overtime to cover purchased leave, and his statement that he was unable to advise when the prison would have 'sufficient staff to allow staff to take purchased leave' equally constitute references to operational needs and capability – namely, the fact that the prison workforce would be stretched overly thin, in a way the Department would not permit, if people were to take purchased leave.

40 In those circumstances, the prisons had no capacity to offer additional leave pursuant to PLSAs, and it is clear that this is why the prisons did not go ahead and give the officers access to purchased leave blocks.

IV Was it open to the prisons to consider operational needs when declining to allocate purchased leave blocks?

41 WAPOU contends that where, as in this case, officers have been permitted to enter into PLSAs, the Agreement requires the prisons to provide purchased leave to those officers. It says this is an absolute requirement and that the Agreement does not allow the prisons to avoid it under any circumstances.

42 As I have said, I am satisfied on the balance of probabilities that the prisons *had* fulfilled the requirements of sub-cl 138.7, from the beginning of that clause up to and including giving the officers the opportunity to nominate periods with the leave roster.

43 The next task pursuant to sub-cl 138.7 is as follows:

Where more Officers than can be accommodated nominate for a particular block the Employer will decide in consultation with those Officers directly affected who is to be allocated the period (*emphasis added*).

44 As noted at paragraphs [38]-[40] above, it is clear that the prisons were experiencing a great deal of pressure on their human resources, such that they had concluded that they could not afford to allow officers to take additional leave on top of their usual quota of annual leave.

(i) How is a prison to determine whether "more officers than can be accommodated" have nominated for a particular leave block?

45 The Agreement does not set out any particular considerations that the prisons ought to take into account when determining whether a particular purchased leave block is over-subscribed, i.e., that more officers than can be accommodated have nominated for that particular block.

46 However, it is a matter of common sense that the prisons must be entitled to consider their operational needs when determining that question.

47 A situation in which overtime is coming up as a solution to cover purchased leave is self-evidently one in which resources are being stretched very thin.

48 In such circumstances, upon receiving the officers' nominations for purchased leave blocks for the 2021/2022 leave year, it was open to the prisons to find that even <u>one</u> officer who nominated for a particular block – or indeed for any block – constituted more than could be accommodated. Such a finding is entirely in keeping with sub-cl 138.7.

49 Based on the evidence of Mr McAteer, Casuarina Prison had always provided purchased leave to officers who had entered PLSAs prior to 2021/2022. In other words, Casuarina was not in the habit of ignoring the process provided for by sub-cl 138.7, and I am satisfied on the balance of probabilities that the other prisons were not in that habit either.

50 Why, then, would they suddenly want to deny entitlements to officers in the 2021/2022 leave year?

51 I infer that they did so because they could not adequately cover all the work they needed done by officers if they provided purchased leave blocks. If even one officer were granted access to a leave block, that was "more than could be accommodated" in the circumstances outlined in the emails constituting the Bundle of Agreed Documents.

52 That being the case, it would have been a pointless exercise to engage in consultation as to who should be allocated leave blocks.

53 What the prisons did do was to take the logical and fair step in the circumstances. They communicated the situation to their officers and gave them the opportunity to withdraw from their PLSAs, so as not to have to wait until the end of the 2021/2022 leave year to recoup their reduced salary. They also gave officers the option of remaining in their PLSAs, in case the situation changed, and the prisons could ultimately accommodate some purchased leave blocks.

54 As it was, the situation did not change throughout the 2021/2022 leave year and officers like Mr McAteer, who had decided to stay in their PLSAs, were refunded the amount of their reduced salary in July 2022. In the case of Mr McAteer, the refund was paid on 21 July 2022.[8]

55 There has been no contravention of cl 138.

V Conclusion

56 The respondent, via the prisons, complied with cl 138 to the extent that was practicable under all the circumstances.

57 Having determined, based on operational needs and evident resource shortages, that no officer could be accommodated in any of the purchased leave blocks, the prisons did not offer access to any blocks to any officer.

58 Having declined to offer access on the basis that none could be accommodated, the prisons did not consult with officers as to who was to be allocated any particular leave block, because such consultation would have been pointless.

59 Industrial agreements are not intended to force parties to do pointless things. It is contrary to industrial common sense that instruments should be interpreted so strictly that even where compliance with an obligation would be pointless, a party that declines to comply will be found to have contravened the agreement.

VI Order

60 The claim is dismissed.

E. O'DONNELL
INDUSTRIAL MAGISTRATE

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[1] Exhibit 1.

[2] See the emails in the Bundle of Agreed Documents (Exhibit 3), which all reference the acceptance of the officers' elections to enter into PLSAs.

[3] Exhibit 3.

[4] Exhibit 2.

[5] Exhibit 2.

[6] Exhibit 2 at [30].

[7] See Document produced by the respondent under Order 1 of 30 November 2022.

[8] Document produced by the Respondent under Order 1 of 30 November 2022.

2023 WAIRC 00725

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2023 WAIRC 00725
CORAM	:	INDUSTRIAL MAGISTRATE T. KUCERA
HEARD	:	TUESDAY, 6 JUNE 2023
DELIVERED	:	MONDAY, 28 AUGUST 2023
FILE NO.	:	M 145 OF 2022
BETWEEN	:	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
		CLAIMANT
		AND
		MINISTER FOR CORRECTIVE SERVICES
		RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Claim for overtime – Enforcement of State industrial instrument – Alleged breach of instrument – Interpretation of industrial instrument – Analysis of previous industrial agreements – Absence of Principal Officer Monday to Friday Plus Public Holidays classification – Consideration of classification definitions – Consideration of public holidays and ordinary hours of work clauses – Breach found – Claim proven
Legislation	:	*Industrial Relations Act 1979* (WA) *Prisons Act 1981* (WA) *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA)
Instrument	:	*Department of Corrective Services Prison Officers' Enterprise Agreement 2010* *Department of Corrective Services Prison Officers' Enterprise Agreement 2013* *Department of Corrective Services Prison Officers' Industrial Agreement 2016* *Department of Justice Prison Officers' Industrial Agreement 2018* *Department of Justice Prison Officers' Industrial Agreement 2020* *Prison Officers' Award*
Case(s) referred to in reasons:	:	***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1 ***The Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [***2017] WAIRC 00830 ***Target Australia Pt Ltd v Shop Distributive and Allied Employees Association*** [2023] FCAFC 66 ***WorkPac Pty Ltd v Skene*** (2018) 264 FCR 536 ***Martin Fedec v The Minister for Corrective Services*** (2017) 97 WAIG 1595 ***Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union*** (2019) 270 FCR 359 ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Quality Bakers Australia Limited*** (2003) 83 WAIG 3673
Result	:	Claim Proven
Representation:		
Claimant	:	Mr C. Fordham (of counsel)
Respondent	:	Mr R. Andretich (of counsel) as instructed by the State Solicitor's Office

REASONS FOR DECISION

1 This case involves an application by the Western Australian Prison Officers' Union of Workers (**Union**), alleging a breach of the overtime provisions of an industrial agreement, for work performed on a public holiday (**application**).

2 The claimant says its member, Maureen Harvey (**Harvey**), who works as a 'principal officer', for the Minister for Corrective Services (**Department**) at the Karnet Prison Farm (**Karnet**), should have been paid at overtime rates for work she performed on 26 September 2022, the date a public holiday was observed for the King's Birthday (**claim**).

3 The Department denies the claim and says payment for work on public holidays is included in the annual salary a principal officer receives under the *Department of Justice Prison Officers Industrial Agreement 2020* (**2020 Agreement**).

4 By way of relief, the Union seeks an order requiring the Department pay Ms Harvey the sum of $215.51, being the difference between the salary she received for working on the public holiday and the amount she would have received under cl 22.1 of the 2020 Agreement for work at overtime rates.

5 In addition, the Union also seeks the imposition of a pecuniary penalty under s 83(4) of the *Industrial Relations Act 1979* (**IR Act**) for a breach of the 2020 Agreement.

6 The issue to be decided in this matter is whether principal officers under the 2020 Agreement are entitled to be paid at overtime rates on days they are rostered to work on public holidays.

Elements of the claim

7 To succeed in the claim, the Union must establish, on the balance of probabilities, the Department has contravened an entitlement provision, which is defined under s 7 of the IR Act as a provision of an industrial agreement.

8 The entitlement provision in issue is cl 22.1 of the 2020 Agreement which relevantly provides:

> 22.1 An Officer who is required to perform Overtime, other than in accordance with subclauses 22.3, 22.4 and 22.5, shall be paid at the rate of time and a half the Officer's Hourly Annualised Rate of Pay for all Overtime hours worked.

9 'Overtime' is a term that is defined in cl 7 of the 2020 Agreement. There are three limbs to the definition, the third of which, (c), applies to Ms Harvey. By this definition, overtime means:

(c) in the case of all other Officers, all work performed by an Officer at the direction of the Employer in excess of the Officer's rostered hours of work.

10 To succeed in the claim, the Union must prove:

1. Ms Harvey worked on 26 September 2022 (**King's Birthday Public Holiday**);
2. the work Ms Harvey performed on the King's Birthday Public Holiday was in excess of her rostered hours of work; and
3. the Department directed Ms Harvey to work on the King's Birthday Public Holiday.

Parties' Evidence

11 Most, if not all of the facts in this matter, were agreed between the parties and drawn from three evidentiary sources. The first was a bundle of agreed documents. The other evidence was provided in two witness statements the parties filed.

12 The Union filed a witness statement from Ms Harvey in support of the claim. The Department filed a witness statement from Peter Vose, who is the Acting Assistant Superintendent of Operations at Karnet. (**AASO Vose**). No other witnesses were called to give evidence.

13 I have been able to prepare a summary of the facts from the materials the parties filed, which I set out in the paragraphs below.

Summary of Facts

14 Ms Harvey commenced employment with the Department as a prison officer in 2006. From 2006 until around November 2020, Ms Harvey performed shift work, mostly on 12-hour shifts. Ms Harvey worked at a number of prisons, including Casuarina, and the Pardelup Prison Farm. In 2016, Ms Harvey transferred to Karnet, where she remains employed.

15 In or around November 2020, Ms Harvey applied for a promotion and was appointed as a principal officer at Karnet. The terms of Ms Harvey's appointment are contained in a contract of employment made on 6 November 2020 (**contract**). A copy of the contract was included in the bundle of agreed documents and marked as 'exhibit C2'.

16 The contract states the date of her appointment was on 16 November 2020. The contract states her conditions of employment are otherwise regulated by the *Prisons Act 1981* and the *Department of Justice Prison Officers' Industrial Agreement 2018.*

17 Ms Harvey's hours of work are 120 over a three-week cycle. It also provides that Ms Harvey may from time to time, be required to vary her hours of work and work patterns, including from non-shift work to shift work. The contract is silent on whether Ms Harvey is required to work on public holidays.

18 When Ms Harvey commenced as a principal officer, Neville Wall, the Assistant Superintendent of Operations (**ASO Wall**) advised that she would be working eight-hour shifts, Monday to Friday, which is consistent with the working hours and the three-week cycle described in her contract.

19 ASO Wall told Ms Harvey that she would not be required to work on public holidays. From November 2020 to April 2022, Ms Harvey did not usually work on public holidays. She also received her normal salary on these days off.

20 From April to August 2022, Ms Harvey had an extended period of leave for health reasons. When she returned to work in or around August 2022, AASO Vose was in charge at Karnet.

21 AASO Vose told Ms Harvey that she would no longer be permitted to have public holidays off. Ms Harvey understood this to mean that she would be required to attend for work but would not receive any additional pay for working on a public holiday.

22 In his conversation with Ms Harvey, AASO Vose referred to an impending direction contained in a Superintendent's Guidance Note which would clarify the Department's view that principal officers are, and were at all material times, required to work on public holidays, including the pending King's Birthday Public Holiday.

23 Ms Harvey understood from her conversation with AASO Vose, that she was being directed to work on the King's Birthday Public Holiday. The parties also agreed Ms Harvey was rostered to work on this date, as set out in the posted roster dated 5 August 2022 (**roster**). A copy of the roster was admitted into evidence and marked as 'exhibit C3'.

24 On 22 September 2022 the Department issued the *Superintendent's Guidance Note 12 – Public Holidays* (**Guidance Note**). This was included in the bundle of agreed documents and marked as 'exhibit R2'.

25 The Department says it issued the Guidance Note because it did not have a consistent approach in relation to work on public holidays.

26 On 26 September 2022, Ms Harvey attended work at Karnet in accordance with the roster, which shows she was rostered to work on the King's Birthday Public Holiday. Ms Harvey was paid her usual salary for all hours worked. In other words, Ms Harvey attended for work on the public holiday and was not paid at overtime rates.

The 2020 Agreement

27 The 2020 Agreement was made between the Union and the Department.[1] It was registered on 18 December 2020 and has a nominal expiry date of 10 June 2022.[2] The 2020 Agreement applies throughout Western Australia to all Officers who are employed in the classifications set out in Schedule A – Annualised Salary (**Schedule A**).[3]

28 It is not in dispute that Ms Harvey, in her role as a principal officer at Karnet, is employed in a classification to which the 2020 Agreement applies.

29 By cl 6 (Relationship with Legislation Awards and other Agreements) the 2020 Agreement is a 'stand-alone' industrial agreement. This means it operates to the exclusion of all other industrial awards and agreements.

30 More specifically, it is intended the 2020 Agreement will cancel and replace *the Department of Justice Prison Officers' Industrial Agreement 2018* and all other predecessor industrial agreements between the parties.[4]

31 The 2020 Agreement also replaces, 'in full', *the Prison Officers Award* (**Award**). To this end, the 2020 Agreement is 'comprehensive' and purports to consolidate all relevant Award terms into the agreement.[5]

Definitions

32 In addition to the definition of 'Overtime' cl 7 contains a number of other definitions that are relevant for the purposes of determining whether Ms Harvey, as part of her rostered hours, is required to work on public holidays and be paid overtime.

33 'Annualised Salary' means the salary rate that applies to each classification as set out in Schedule A – Annualised Salaries. The Annualised Salary for Officers *working shift work* (emphasis added) shall include the Monday to Friday rate for the classification and a component in lieu of shift penalty payments, public holidays and accrued days off.[6]

34 'Classification' in cl 7 the 2020 Agreement 'means the Classifications set out in Schedule A – Annualised Salaries'.

35 Under cl 7, 'Officer' means 'an employee employed in a Classification contained in Schedule A – Annualised Salaries and includes employees engaged on a permanent, probationary, casual or fixed term basis'.

36 A 'Public Holiday' is also defined. Clause 7 relevantly provides that it 'means a day specified in cl 136 – Public Holidays'.

Ordinary hours and remuneration

37 Clause 10.2 of the 2020 Agreement states 'the basis, duration and agreed ordinary hours of work will be confirmed in writing'. On this, it is uncontroversial, the Department's issuance of a contract of employment to Ms Harvey was for the purpose of meeting this requirement under the 2020 Agreement.

38 The number of ordinary hours of work to be performed by Officers under the 2020 Agreement is dealt with under cl 19.1, which relevantly provides:

> The ordinary hours of work for Officers engaged on a full time basis will be 40 hours per week. 80 hours per fortnight or 120 hours per three weeks unless otherwise agreed by the Union and the Employer.

39 The rate of pay applicable for overtime and the circumstances under which it is paid are covered by cl 22 of the 2020 Agreement. Clause 22.1 requires an Officer to be 'paid at the rate of time and a half of the Officer's Hourly Annualised Rate of Pay for all Overtime hours worked'.

40 Part C of the 2020 Agreement deals with 'Remuneration and Pay Arrangements'. The provisions relevant to the matters at issue in this case are those set out under cl 32.1, cl 32.4 and cl 32.5 as extracted below:

> 32.1 The Annualised Salary for each Classification, including annual increments and agreed salary adjustments, is prescribed in Schedule A – Annualised Salaries.
>
> …
>
> 32.4 The Annualised Salary for Officers working Monday to Friday incorporates payment for ordinary hours of work and Easter Sunday.
>
> 32.5 The Annualised Salary for Officers working shift work incorporates the Monday to Friday rate (including Easter Sunday) for the Classification and a component in lieu of shift penalty payments, Public Holidays and Accrued Days Off. Where a total rate is used, individual component parts of penalties, allowances, and base rates should be identified.

41 What cl 32.5 makes clear is the annualised salary for Officers *working shift work* (emphasis added) specifically provides for the inclusion of a payment for work performed by those Officers on public holidays, which is included in their Annualised Salaries.

42 It is also apparent there is a difference under the 2020 Agreement in the salary received by those Officers who work shift work and those who do not.

Schedule A of the 2020 Agreement

43 Schedule A of the 2020 Agreement not only contains a list of the classifications that are covered by the Agreement, but it also sets out the salaries that are to be paid for the types of rosters to be worked.

44 By way of example, the Annualised Salaries that are to be paid to Prison Officers under Schedule A are separated into two groups; Prison Officer (Mon-Fri) and Prison Officer (Shifts).

45 Schedule A does the same in respect of a number of other classifications listed, including for Senior Officers, principal officers and for Vocational Support Officers (**VSO**). However, it also lists Annualised Salaries for a number of other classifications employed to work on other rosters.

46 Examples of the other rosters referred to in Schedule A include Annualised Salaries for VSOs (Monday – Friday plus Public Holidays), VSOs (Alternate Weekends 8 Hour) and Principal Officer (Alternate Weekends 10 Hour).

Public Holidays Under the 2020 Agreement

47 Officers' entitlements in respect of public holidays are set out under cl 136 of the 2020 Agreement.

48 The first two sub-clauses, 136.1 and 136.2, identify the ten days that are to be 'observed' as Public Holidays. It is not in dispute that where an Officer is able to observe a public holiday, the Officer is entitled to a paid absence from work, at their ordinary rate of pay.

49 The second two sub-clauses, 136.3 and 136.4, touch on the payment Officers must receive for working on a public holiday.

50 Those parts of cl 136 that are relevant to the matters at issue are set out below:

136.1 For the purposes of this Agreement the following days, or the days observed in lieu shall, be recognised as Public Holidays: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day.

…

136.2 Except where specifically provided for in this Agreement payment for work performed on all Public Holidays is included in an Officer's Annualised Salary.

136.3 Officers who work Monday to Friday and are not required to work Public Holidays will not receive the Public Holiday portion in their Annualised Salary. However, if a Public Holiday falls during such an Officer's annual leave, the Officer will receive a paid day in lieu which will be taken immediately following the annual leave, or at a time mutually acceptable to the Employer and the Officer.

Dispute Over the Interpretation of cl 136

51 One of the matters the parties are at odds over is the interpretation of two of the terms in cl 136. The first of these is the meaning of the words in cl 136.3, 'except where specifically provided for in this Agreement'.

52 The second arises out of the use of the words 'Monday to Friday and are not required to work Public Holidays' in cl 136.4.

53 The need for clarity around the use of the words used in cl 136.3 and cl 136.4 arises because under cl 136.4, Officers who are not required to work on public holidays do not receive an additional payment for, or a 'portion', in their annualised salary for working on public holidays.[7]

Union's Case

54 The Union argued that cl 136.1 of the 2020 Agreement allows Officers who are in the Monday – Friday classifications referred to in Schedule A to observe public holidays. The Union submitted that this means an Officer employed in one of these classifications is entitled to a paid absence from work.

55 The Union submitted that the 2020 Agreement does not provide for a payment in an annualised salary to principal officers for work on a public holiday because the 2020 Agreement makes no mention of, or reference to, additional remuneration for this work.

56 To this end, the Union submitted that the omission of a reference to a payment for shift penalties, public holidays and the like from cl 32.4, does not mean a component for these items is included in the annualised salary for a Principal Officer (Monday – Friday).

57 The Union argued that a payment in lieu of work on public holidays is not made to Officers in (Monday – Friday) roles (which includes Principal Officers) because it is expected that they will be able to 'observe' public holidays. This is to be contrasted with the position of Officers who perform shift work under the 2020 Agreement who will be required to work public holidays.

58 The Union submitted that under cl 7 and cl 32.5 of the 2020 Agreement, Officers who perform shift work are paid an additional component in their annualised salary, in lieu of public holidays. The Union argued the phrase 'in lieu' as it appears in cl 7 and cl 32.5, should be taken to mean that a payment is made in substitution for the observance of public holidays.

59 The Union argued the same cannot be said for Officers rostered to work Monday to Friday. This is because the 2020 Agreement contemplates that they will ordinarily be able to observe the Public Holidays referred to in cl 136.1.

60 The Union argued that cl 136.3 of the 2020 Agreement does not apply to principal officers. Rather, it only applies to Officers performing shift work and those identified in Schedule A as working Monday to Friday, plus Public Holidays.

61 It argued the purpose of cl 136.3 is to clarify that an Officer is not entitled to claim any additional amounts, merely because they are, as part of a shift roster, required to work on a public holiday, when other Officers, may be absent from work under the same roster pattern.

62 The Union submitted that cl 136.3 only applies to Officers, who because of their shift roster pattern, are unable to observe public holidays in the manner contemplated by cl 136.1.

63 The Union contended that when cl 136.1 is read together with cl 32.4, work performed on public holidays by principal officers who are employed to work Monday to Friday, is not part of their ordinary hours of work under cl 19 of the 2020 Agreement (Hours of Duty).

64 On the Union's argument, the observance of a public holiday means work that would otherwise be rostered on a public holiday is not part of the ordinary hours of work of an Officer who is a 'Monday to Friday employee' under the 2020 Agreement.

65 The Union argued that any work performed by principal officers outside their ordinary hours of work should be treated as overtime within the meaning of cl 7 and cl 21 (Requirement to Perform Overtime) even though these hours may have been rostered.

66 The Union submitted that the fact Ms Harvey was rostered to work on the King's Birthday Public Holiday, should not be determinative of whether it is treated as part of her rostered hours or as overtime.

67 The Union submitted that both the roster and the Guidance Note should be regarded as evidence the Department directed Ms Harvey to perform overtime on the King's Birthday Public Holiday.

Department's Case

68 The Department submitted that it will be clearly expressed in an industrial agreement if an employee is not required to work on public holidays and is entitled to a paid day off. To this end, the Department provided a number of examples from other public sector awards, each of which contained terms providing for the listed Public Holidays to be taken as holidays with pay.

69 The Department submitted that the 2020 Agreement, in contrast, did not contain a provision conferring a right on Officers to be absent from work on public holidays falling within their regular roster. The Department submitted that Officers are, for this reason, required to work on public holidays.

70 Referring to the definition of 'Overtime' in cl 7 of the 2020 Agreement, the Department submitted that as the work Ms Harvey performed on the King's Birthday Public Holiday was performed on a normal rostered shift, it did not fall within the definition of overtime.

71 The Department similarly referred to the definition of 'Annualised Salary' in support of its argument, which 'means the salary rate that applies to each classification set out in Schedule A – Annualised Salaries'.

72 The Department acknowledged the definition of Annualised Salary for Officers working shift work includes 'the Monday to Friday rate for the Classification and a component in lieu of shift penalty payments, public holidays and accrued days off'.[8]

73 As further support for its argument, the Department referred to and relied upon cl 32.5, cl 136.3 and cl 136.4 to say principal officers like prison officers, who work Monday to Friday, have been compensated for the work they perform on public holidays as part of their rostered hours of work in their Annualised Salaries.

74 The Department also referred to the descriptions of the various classifications in Schedule A, which it said supports the Department's view that there is nothing in the 2020 Agreement that indicates extra remuneration is to be paid to principal officers for work on public holidays.

75 The Department in its submissions acknowledged the one exception where an express payment is made to compensate Officers for work on public holidays is for the VSO classifications.

76 In Schedule A, the VSO (Monday to Friday) classifications, when compared with classifications for VSO (Monday to Friday plus Public Holidays) receive a lower annualised salary. The Department submitted that the only explanation for the difference is to compensate VSOs for their work on public holidays.

77 The Department argued that it is these specific classifications, to which the words in cl 136.3, 'except where specifically provided for in this Agreement', are intended to apply and that payment for public holidays for the balance of the classifications in Schedule A, is otherwise included in the Annualised Salaries paid to principal officers.

78 On the Department's submission, the Union cannot succeed with its claim, because work performed by Ms Harvey on public holidays forms a part of her rostered hours.

Principles for Interpreting Industrial Agreements

79 In determining whether a party has contravened or failed to comply with an entitlement provision, the Industrial Magistrate's Court is required to interpret the provisions of an industrial agreement in accordance with the principles that apply to the interpretation of industrial instruments.[9]

80 Interpreting an industrial agreement involves ascertaining what a reasonable person would have understood the parties to the agreement to mean.[10]

81 The principles for interpreting industrial agreements are well established. They were most recently summarized by a Full Court of the Federal Court of Australia in ***Target Australia Pty Ltd v Shop Distributive and Allied Employees Association*** [2023] FCAFC 66 per Bromberg J at [8].

82 Referring to ***WorkPac Pty Ltd v Skene*** (2018) 264 FCR 536 at [197] His Honour Bromberg J set out these principles as follows:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: ***City of Wanneroo v Holmes*** (1989) 30 IR 362 (***Holmes***) at 378 (French J). The interpretation "… turns on the language of the particular agreement, understood in the light of its industrial context and purpose …": ***Amcor Limited v Construction, Forestry, Mining and Energy Union*** (2005) 222 CLR 241 (***Amcor***) at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (***Holmes*** at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (***Holmes*** at 378–9, citing ***Geo A Bond & Co Ltd (in liq) v McKenzie*** [1929] AR (NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see ***Kucks v CSR Limited*** (1996) 66 IR 182 at 184 (Madgwick J); ***Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd*** [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); ***Amcor*** at [96] (Kirby J).

83 These principles are consistent with those that have been adopted and applied to the interpretation of industrial instruments by the Industrial Appeal Court.[11] They have also been cited with approval by the Full Court of the Federal Court on numerous occasions.[12]

84 In addition, the Full Bench in ***Martin Fedec v The Minister for Corrective Services*** (2017) 97 WAIG 1595 at [22] – [23] also said:

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

> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
>
> (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
>
> (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); ***Kidd v The State of Western Australia*** [2014] WASC 99 [122]; ***Red Hill Iron Ltd v API Management Pty Ltd*** [2012] WASC 323 [106] - [112]; ***Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd*** [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).
>
> These general principles apply in the construction of an industrial agreement (***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (***Amcor Ltd v Construction, Forestry, Mining & Energy Union*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); ***Director General v United Voice*** [81]; see also ***Amcor v CFMEU*** 66 (Kirby J), 129 - 130 (Callinan J)).

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

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

Evidence as to Context

85 There is sufficient ambiguity in the terms of the 2020 Agreement to warrant a consideration of the surrounding circumstances and the context in which it was negotiated. On this, context may be drawn from the series of industrial agreements that preceded the making of the 2020 Agreement.

86 There are a number of reasons I am able to rely upon the previous industrial agreements for context. Firstly, there are no other direct evidentiary sources to which I can refer about the context in which the 2020 Agreement was negotiated.

87 Neither party provided direct evidence from witnesses about the negotiations which lead to the making of the 2020 Agreement or the intended meaning of the terms they used.

88 None of the parties gave any evidence about the work performed by the various classifications under the agreement and why there is a need for them to work the different types of rosters that can be worked under the 2020 Agreement, or that are referred to in Schedule A.

89 The parties did however, albeit to an incomplete and limited extent, both refer to the industrial instruments that preceded the 2020 Agreement in their submissions and the documents they filed.

90 When having regard to the preceding industrial agreements for context it was necessary for me to review all of them, thereby ensuring the analysis is comprehensive.

91 Secondly, whether by judicial notice or pursuant to reg 35(4) of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA), I am permitted to refer decisions of the Commission which ratified these previous agreements, as an admissible extraneous evidentiary source.

92 To this end, I have traced the history and provided an analysis of, the industrial agreements that preceded the 2020 Agreement in the paragraphs that follow.

2010 Agreement

93 In order, the first of these agreements was *the Department of Corrective Services – Prison Officers' Enterprise Agreement 2010* (**2010 Agreement***)*. Counsel for the Union referred to the 2010 Agreement in his submissions.

94 The 2010 Agreement is relevant for context because it is the first in the sequence that contains classifications for principal officers.

95 Schedule A of the 2010 Agreement lists the Annualised Salaries that are payable to Officers in the classifications set out. Like Schedule A the 2020 Agreement, it separates Prison Officers into two categories; those on shift and Prison Officers (Monday – Friday).

96 Unlike the 2020 Agreement, the 2010 Agreement is to be read and interpreted wholly in conjunction with the Award. On those matters where it is silent, the 2010 Agreement relies upon the Award.

97 One such example is the composition of an annualised salary. This is provided under cl 26.1 of the Award which states:

> All Officers will be paid an annualised salary which will include a component in lieu of shift penalty payments, accrued days off, public holidays and overtime.

98 There are a number of salary classifications in Schedule A of the 2010 Agreement for Principal Officers which include those who work Monday to Friday, and Monday to Friday plus Public Holidays.

99 The salary under Schedule A of the 2010 Agreement for Principal Officers who work Monday to Friday, plus Public Holidays is higher than the salary that applies for Principal Officers (Monday – Friday).

100 This would doubtless be for the reason that Principal Officers (Monday to Friday plus Public Holidays) received additional payments for working on public holidays.

101 Like the 2020 Agreement, Schedule A of the 2010 Agreement includes classifications for VSOs (Monday – Friday) and VSOs (Monday to Friday plus Public Holidays). The VSOs in the latter category also receive a higher salary than those classified as VSOs (Monday – Friday). The additional payment they receive is to compensate them for the work they perform on public holidays.

102 There are no public holiday provisions in the 2010 Agreement. The 2010 Agreement instead relies upon cl 10 of the Award (Public Holidays), the terms of which are much the same as those that appear in cl 136 of the 2020 Agreement.

103 The only material difference between cl 10 of the Award and cl 136 of the 2020 Agreement appears in cl 10.4 which is extracted with the difference in wording highlighted below:

> 10.4 *Prison Officers (Vocational and Support) who work Monday to Friday and are not required to work public holidays will not receive the public holiday portion in their annualised salary*. However, if a public holiday falls during such an Officer's annual leave, the Officer will receive a paid day in lieu which will be taken immediately following the annual leave or at a time mutually acceptable to the Employer and employee. Such a day in lieu shall be clearly shown on the duty board…

104 Although cl 10.4 of the Award only applies to Prison Officers (Vocational and Support), it appears obvious, the difference in salaries between both principal officers and VSOs under the 2010 Agreement who are in Monday – Friday classifications and their colleagues who are in Monday to Friday, plus Public Holidays classifications, is that Officers in the latter categories receive a payment for working on Public Holidays.

105 It is therefore reasonable to conclude the reason principal officers in Monday to Friday classifications under the 2010 Agreement receive lower Annualised Salaries than those in in Monday to Friday, plus Public Holidays classifications is because they do not receive a Public Holiday 'portion' in their Annualised Salaries.

2013 Agreement and Successor Industrial Agreements

106 On Friday 27 September 2013, the 2010 Agreement was replaced by the *Department of Corrective Services Prison Officers' Enterprise Agreement 2013* (**2013 Agreement**). The 2013 Agreement had a three-year term which expired on 10 June 2016.

107 The 2013 Agreement is important as context for two reasons, firstly and unlike the 2010 Agreement, it is a stand-alone industrial agreement. To this end, cl 6 (Relationship with Agreements, Award and Legislation) of the 2013 Agreement relevantly provides:

> 6.1 This Agreement replaces in full the Department of Corrective Services Prison Officers' Enterprise Agreement 2010.
>
> 6.2 This Agreement is a comprehensive Agreement consolidating all relevant Award terms and is intended to replace in full the *Prison Officer's Award*. Notwithstanding this intention, if there is any inconsistency between this Agreement and the *Prison Officer's Award*, the terms of this Agreement will prevail.
>
> 6.3 This Agreement replaces all other registered and unregistered Agreements between the parties on matters the subject of this Agreement.
>
> 6.4 This Agreement will be read in conjunction with relevant legislation and regulations.

108 It is apparent from the wording of the 2013 Agreement, and because it is a stand-alone agreement, that much of the Award was either reproduced or incorporated into it.

109 Secondly, the 2013 Agreement is important as context because each of the industrial agreements that superseded and replaced the 2013 Agreement, including the 2020 Agreement are cast in much the same terms.

110 Following its expiry, the 2013 Agreement was, prior to the making of the 2020 Agreement, replaced by the following industrial agreements:

the Department of Corrective Services Prison Officers' Industrial Agreement 2016 (**2016 Agreement**);

the Department of Justice Prison Officers Industrial Agreement 2018 (**2018 Agreement**).

Collectively, I will refer to the 2016, 2018 and 2020 Agreements as the successor agreements.

111 As indicated, most if not all of the clauses that appear in the 2013 Agreement, are the same and repeated in the successor agreements. It is therefore reasonable to conclude the parties, for consistency, would have intended the interpretation of clauses in the Award that previously applied, to have carried over in their application of the 2013 Agreement.

112 It also follows that my conclusions regarding the correct interpretation of the 2013 Agreement would extend and apply to the construction of the successor agreements.

Remuneration and Payment Under the 2013 Agreement

113 Common to the 2013 and successor agreements is a clause headed 'Part C -Remuneration and Payment Arrangements'. It appears as cl 31 in the 2013 Agreement and is re-produced, unaltered in the 2016 and 2018 Agreements.

114 Clause 31 of the 2013 Agreement, is with one slight change, repeated in the 2020 Agreement. I will return to this variation later in these reasons.

115 In the 2013 Agreement, cl 31.1 and cl 31.2 are set out as follows:

> 31.1 The annualised rate of pay for Officers working Monday to Friday shall include only wages for ordinary hours of work.
>
> 31.2 The annualised rate of pay for Officers working shiftwork shall include the Monday to Friday rate for the Classification and a component in lieu of shift penalty payments, Public Holidays and Accrued Days Off.

116 Like the successor agreements, the 2013 Agreement has a Schedule A setting out the annualised salaries for the classifications listed and the type of rosters described. The definitions, hours of work, and overtime provisions are the same across the agreements.

117 A further feature of the 2013 Agreement that is also common to the successor agreements, is the fact there are no 'Principal Officer Monday to Friday plus Public Holidays classifications as there were under the 2010 Agreement.

Absence of a Principal Officer Monday to Friday Plus Public Holidays Classification from the 2013 Agreement

118 It is not clear why Schedule A of the 2013 Agreement does not contain a Principal Officer (Monday to Friday plus Public Holidays) classifications. This situation was repeated in the successor agreements.

119 On the Department's argument, the absence of these classifications is because the requirement for principal officers to work on public holidays under the 2013 Agreement and successor agreements was rolled into or included in their rostered hours.

120 There are however a number of reasons why I do not accept this construction. First, if the parties had intended to stipulate that principal officers were required to work on public holidays for which they would receive no additional payment, the 2013 Agreement and the successor agreements would have included express provisions to this effect.

121 Secondly, such a construction, particularly in the absence of an express provision which clarifies that principal officers working Monday to Friday are required to work on public holidays as part of their roster hours for which they would receive no additional payment, is inconsistent with cl 31.1 of the 2013 Agreement.

122 Thirdly, if principal officers were required to work on public holidays, it would follow that the annualised salaries carried over from the 2010 Agreement, to which the wage increases under the 2013 Agreement and the successor agreements were applied, would be the annualised salary rates for the Principal Officer (Monday to Friday plus Public Holidays).

123 However, this is not what happened. The rates from the 2010 Agreement for the Principal Officer (Monday to Friday) classifications, to which the wage increases were applied in the 2013 Agreement, were the Monday to Friday rates, which did not include a 'portion' for working on public holidays.

124 It is highly unlikely, the parties would, in the context of a robust and established industrial relationship, have made an agreement that would in effect require principal officers to be rostered to work on public holidays, for which they would receive no additional payment.

125 The better explanation is what the evidence points to. Principal officers would, as occurred with Ms Harvey in the period following her promotion to the role until August 2022, be entitled to paid days off for public holidays.

Clause 31.1 and the Ordinary Hours of Work

126 For those classifications in the 2013 Agreement, like VSOs or principal officers who are described in Schedule A as Monday – Friday, cl 31.1 makes it plain, their annualised salary includes only wages for ordinary hours of work.

127 Although not specifically defined in the 2013 Agreement or the successor agreements, it is generally accepted that the term 'ordinary hours of work' refers to standard hours of work referred to in an industrial agreement that are paid at ordinary rates, as opposed to additional hours (even if required, usual, regular, normal or customary) that are paid at a special or higher rate.[13]

128 In the context of the 2013 Agreement and the successor agreements as a whole, the standard or ordinary hours of work are 40 per week. This means that Officers in Monday to Friday classifications are in effect paid an annualised salary for working a 40 hour week on week days, during normal business hours.

129 It also means these Officers do not receive payment for working the shifts that attract the penalties and additional payments that work on night shifts, weekends and Public Holidays do because they do not form a part of their rostered hours.

Clause 31.1 and Payment for Work on Mondays to Fridays plus Public Holidays

130 For Officers employed in the classifications under the 2013 Agreement, who perform shift work or in other classifications such as VSOs (Monday – Friday plus Public Holidays), cl 31.1 when read together with Schedule A, similarly makes it plain these Officers receive payment for working on public holidays.

131 Counsel for the Department acknowledged in his submissions that the annualised salaries for VSO classifications in Schedule A of the 2020 Agreement, performing work Monday – Friday plus, Public Holidays are higher because they include an additional payment for work performed on these days.

132 Regarding this, counsel for the Department submitted:

> But if you go to Level 2 VSO, it specifically provides that this is a rate that gets paid extra for public holidays. I think it's a 2,3 and 4. A Level 2 VSO plus public holidays. So they get paid extra for working public holidays, which can only mean that the Level 2 VSO Monday to Friday don't, otherwise its meaningless to have that classification that refers to "Plus public holidays" (ts 21).

133 As the wording in Schedule A of the 2013 Agreement is the same in the successor agreements, it is reasonable to conclude this explanation for the difference in VSO salaries would be consistent across the agreements.

134 It is also reasonable to conclude that rather than creating an exception for VSO classifications cl 31.1 of the 2013 Agreement, required all of the Monday to Friday classifications to be treated the same.

Clause 31.1 and the Public Holiday Clause

135 Clause 10 of Award (Public Holidays) is reproduced in the 2013 Agreement as cl 132. The clause is retained in the 2020 Agreement as cl 136.

136 Under the 2013 Agreement cl 132 relevantly provides:

> 132.1 For the purposes of this Agreement the following days, or the days observed in lieu shall, be recognised as Public Holidays: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day.
>
> …
>
> 132.1 Except where specifically provided for in this Agreement payment for work performed on all Public Holidays is included in an Officer's Annualised Salary.
>
> 132.2 Officers who work Monday to Friday and are not required to work Public Holidays will not receive the Public Holiday portion in their Annualised Salary. …

137 When cl 31.1 is read together with cl 132 of the 2013 Agreement, the clear purpose of the public holidays clause is two-fold.

138 Firstly, cl 132.1 specifies the days that are to be 'observed' and taken as paid days off by those Officers who do not receive payment for public holidays as part of their annualised salaries. That is because their annualised salary only includes payment for ordinary hours of work.

139 Secondly, the clause gives meaning to words 'except where specifically provided'. In the context of the 2013 Agreement as a whole, cl 132.3 explains that an extra payment made to those Officers who work public holidays as part of their roster, which they would otherwise be paid, in addition to their wages for working ordinary hours, is included in their annualised salaries.

140 Put another way, cl 31 and cl 132 of the 2013 Agreement, when read together with Schedule A, explain why Officers performing shift work are paid more than those who are employed in Monday to Friday classifications.

141 It also explains why higher annualised salaries are paid to Officers who are in Monday to Friday plus Public Holiday classifications or in roles where they are rostered to work on weekends.

142 When interpreted this way, it follows the words under cl 132.4 'and are not required to work Public Holidays will not receive the Public Holiday portion in their Annualised Salary', are intended to describe what happens to an Officer who is only paid an annualised salary for working Monday to Friday.

143 It is reasonable to conclude the Officers in these classifications are not only entitled to have public holidays as paid days off, but they do not receive the additional payment that Officers, who are rostered to work on public holidays get in their Annualised Salaries.

144 This construction of the Public Holidays clause in the 2013 Agreement, which is repeated in the successor agreements, is preferable, because it gives each of the relevant parts of the clause, work to do and allows for a harmonious interpretation of the instrument as a whole.

Overtime and Clause 31.1 of the 2013 Agreement

145 Clause 31.1 of the 2013 Agreement, in the context of the agreement as whole, is significant for the reason that it confirms public holidays do not form a part of the rostered hours for Officers who are employed in Monday to Friday classifications.

146 While the term 'rostered hours' is not defined in the 2013 Agreement, it does contain quite extensive rostering provisions that allow shifts to be arranged on a continuous basis.

147 It seems self-evident that rostered hours are not limited to or only mean, ordinary hours for every classification under the 2013 Agreement. Even though rostered hours could include hours in addition to or other than, ordinary hours as part of a continuous rotating shift work roster, an Officer's ordinary hours because of what they are paid by way of an annualised salary could be their rostered hours too.

148 As the annualised salary for Officers in Monday to Friday classifications under the 2013 Agreement only includes *wages for ordinary hours of work* (emphasis added) it follows that where Officer is employed in a Monday to Friday classification, work on public holidays would be additional to or in excess of, an Officer's rostered hours.

149 Having reached this conclusion, it also follows that work on a public holiday, would fall within the third limb of the definition of 'Overtime' under cl 7 of the 2013 Agreement, thereby attracting the overtime payment that applies under cl 21 of the 2013 Agreement.

2016 and 2018 Agreements

150 As I have noted, the successor agreements were each cast in much the same terms as the 2013 Agreement. They each include the same terms dealing with definitions, annualised salary, hours of work, rostering and public holidays.

151 Importantly, the 2016 and 2018 Agreements both contain provisions equivalent to cl 31.1 of the 2013 Agreement.

152 Clause 31.3 of the 2016 Agreement provides:

> 31.3 The Annualised Salary for Officers working Monday to Friday only incorporates payment for ordinary hours of work.

153 Similarly, cl 32.4 of the 2018 Agreement contains the following term:

> 32.4 The Annualised Salary for Officers working Monday to Friday only incorporates payment for ordinary hours of work.

154 The general wage increases under the 2016 and 2018 Agreements for the Principal Officer (Monday to Friday) classifications, were applied to the annualised salaries for the equivalent classifications that appear in Schedule A of the 2013 Agreement.

155 Like Schedule A of the 2013 Agreement, Schedule A of both the 2016 and 2018 Agreements, does not contain classifications for Principal Officer (Monday to Friday plus Public Holidays).

156 As there is no material difference between the 2013 Agreement and the 2016 and 2018 Agreements that followed, it is reasonable to conclude the parties would have intended to apply the agreements in the same way.

157 It is therefore reasonable to conclude that a result of the consistency in wording that appears in cl 31.1 in each of these agreements, the Annualised Salaries for Principal Officers (Monday to Friday), make no express provision for work on public holidays.

158 This means work on public holidays for Principal Officers in Monday to Friday classifications, under the 2016 and 2018 Agreements, is additional to or in excess of, an Officer's rostered hours.

Clause 32.4 of the 2020 Agreement

159 The 2020 Agreement contains a provision that is similar to cl 31.1 of the 2013 Agreement. It appears as cl 32.4 and reads as follows:

> 32.4 The Annualised Salary for Officers working Monday to Friday incorporates payment for hours of work and Easter Sunday.

160 The word, 'only' which appears in the equivalent clauses of the agreements that preceded the 2020 Agreement was omitted from cl 32.4.

161 The question the change in wording raises, is whether the omission and the addition of payment for Easter Sunday was made with the intention of including public holidays in both the rostered hours and remuneration for the classification of Principal Officers (Monday to Friday).

162 I do not however accept that the parties made a conscious decision to alter its previous arrangement. I make this finding because there were no other material changes the parties made to the 2020 Agreement that lend support for this view.

163 Having undertaken an analysis of the industrial agreements the parties made prior to the 2020 Agreement, it is clear the terms dealing with definitions, Annualised Salaries, hours of work, rostering and public holidays were not changed.

164 It is doubtful the parties would have removed one word with the effect depriving Officers of 10 paid days off for public holidays without compensating them for the corresponding loss of entitlements or clarifying this change with the inclusion of an explanatory term.

165 The change in salaries between the 2018 and the 2020 Agreements do not reflect this change either. The increase in salary rates under the 2020 Agreement was as a result of the application of the $1000 per annum general wage increases and the addition of a paid day for Easter Sunday, to the annualised salary rates from the previous agreements.

166 None of the agreements I reviewed for context contain a term giving clear expression to the requirement for Principal Officers (Monday to Friday) to work on public holidays. If this is what the parties had intended, they would have included an express term to this effect.[14]

Parties Evidence Regarding Principal Officers and Public Holidays

167 Secondly, a change to the practice requiring principal officers to work on public holidays by the omission of the word 'only' from cl 34.4 of the 2020 Agreement, is not supported by the parties' evidence.

168 The evidence does not reveal that it is so obvious it went without saying, the parties had agreed that Principal Officers (Monday to Friday) would be required to work on public holidays as a result of changes made to the 2020 Agreement.

169 On the contrary, it appears to have been understood and accepted industrial practice that principal officers at Karnet, would be able to, and did, access the entitlement under cl 136.1 to paid days off for public holidays.

170 I was not assisted by the witness statement from AASO Vose. His evidence was of limited value because it was more in the nature of an opinion or a submission. Despite his previous involvement as Union delegate, he was unable to provide any direct evidence about the parties' intentions at the time the 2020 Agreement was made.

171 The assertions AASO Vose made regarding the inclusion of payments in the Annualised Salaries of Principal Officers (Monday to Friday) for working on public holidays are also contradicted by what is in cl 31.1 of the 2013 Agreement and the equivalent clauses that were repeated in the successor agreements.

172 His evidence was also contradicted by the historical analysis of the salaries that are contained in Schedule A of each of the industrial agreements that I reviewed to reach findings on the context in which the 2020 Agreement was made.

Work on Public Holidays in Excess of Rostered Hours

173 It is my view that despite the omission of the word 'only' from cl 31.1 of the 2020 Agreement, the clause should be interpreted the same way as it appears in the equivalent provisions of the 2013, 2016 and 2018 Agreements.

174 The clause when read in the context of the agreement as a whole, confirms the Annualised Salaries that appear in Schedule A for the classification of Principal Officer (Monday to Friday) is only for ordinary hours and that payment for working on public holidays is not included in those Officers' Annualised Salaries.

175 The rostered hours for a Principal Officer (Monday to Friday) are, by reason of the salary prescribed in Schedule A, the ordinary hours for that classification. An Officer who is only paid an Annualised Salary for working ordinary hours, does not receive the portion in their Annualised Salary that is referred to in cl 136.3 for working public holidays.

176 As Principal Officers (Monday to Friday) are not paid for working on public holidays, it follows these days would fall outside their rostered hours.

177 For this reason, I have concluded that public holidays do not form a part of the rostered hours for Principal Officers in Monday to Friday classifications. As a result, the work Principal Officers (Monday to Friday) perform on public holidays would fall within the definition of 'Overtime' under cl 7 of the 2020 Agreement. That is, work performed on Public Hoidays would be 'in excess of the Officer's rostered hours of work'.

178 For these reasons, I am satisfied the Union has, on the balance of probabilities, proved that Ms Harvey's work on the King's Birthday Public Holiday was in excess of her rostered hours.

Overtime at the Employers Direction

179 I am also satisfied the Union has, on the balance of probabilities has proved the Department directed Ms Harvey to work on the King's Birthday Public Holiday.

180 It is clear from the witness statement AASO Vose provided, that as early as August 2022, he had verbally made Ms Harvey aware of the requirement for her to work on the King's Birthday Public Holiday. From this evidence, I am satisfied the Department directed Ms Harvey to work on this public holiday,

181 I also accept that Ms Harvey's inclusion on the roster is evidence that she was directed to work on the King's Birthday Public Holiday. The issuance of the Guidance Note which sets out the requirement for principal officers to work on public holidays, which applied to Ms Harvey, adds further weight to this conclusion.

Conclusion

182 Having established Ms Harvey was directed to work on the King's Birthday Public Holiday, she attended work as directed and the work that she performed on this day was in excess of her rostered hours, I have concluded the Department should have paid Ms Harvey at overtime rates for working on a public holiday.

183 By not paying Ms Harvey at overtime rates for her work on the King's Birthday Public Holiday, the Department has breached cl 22.1 of the 2020 Agreement.

184 Having reached this decision, I intend to make an order under s 83 of the IR Act requiring the Department to pay the difference between the overtime rates she was entitled to receive under cl 22.1 and the wages she has already received for working on the King's Birthday Public Holiday.

185 I will also hear from the parties as to whether any further orders under s 83 of the IR Act should issue regarding the Department's breach of cl 22.1 of the 2020 Agreement.

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INDUSTRIAL MAGISTRATE

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[1] 2020 Agreement, cl 3.1 (Parties Bound by the Agreement).

[2] 2020 Agreement, cl 5.1 (Term of the Agreement) (requires decision when issued).

[3] 2020 Agreement, cl 4.1 (Area and Scope of the Agreement).

[4] 2020 Agreement, cl 6.3.

[5] 2020 Agreement, cl 6.2.

[6] 2020 Agreement, cl 7.

[7] 2020 Agreement, cl 136.4.

[8] 2020 Agreement, cl 7.

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[9] ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1. Also see ***The Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** 2017 WAIRC 00830 at [75].

[10] ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1 per Buss J at [81].

[11] ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1. Also see ***The Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** 2017 WAIRC 00830 at [75] – [80]. Also see ***Fedec v the Minister for Corrective Services*** (2017) 97 WAIG 1595 at [21].

[12] ***Target Australia Pty Ltd v Shop Distributive and Allied Employees Association*** [2023] FCAFC at [9].

[13] ***Target Australia Pty Ltd v Shop, Distributive and Allied Employees Association*** [2023] FCAFC 66 Bromberg J at [10] – [16] with whom Jackson and Feutrill agreed. Also see ***Bluescope Steel (AIS) Pty Ltd v Australian Workers Union*** (2019) 270 FCR 359 Allsop CJ at [38].

[14] ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Quality Bakers Australia Limited*** (2003) 83 WAIG 3673.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2023 WAIRC 00691

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00691
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	THURSDAY, 10 AUGUST 2023
DELIVERED	:	TUESDAY, 15 AUGUST 2023
FILE NO.	:	U 12 OF 2023
BETWEEN	:	BRENDA COURTENAY-CLACK Applicant AND ST VINCENT DE PAUL SOCIETY (WA) INCORPORATED Respondent

CatchWords	:	Unfair dismissal - Jurisdiction - National system employer - Trading corporation - Trading activities - Whether trading activities substantial - Not for profit
Legislation	:	*Australian Constitution* *Associations Incorporation Act 2015* (WA) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Result	:	Dismissed
Representation:		
Applicant	:	Mr S Stackpool (as agent) and Ms B Courtenay-Clack (in person)
Respondent	:	Ms S Masters (of counsel) and Ms H Rheinberger (of counsel)

Case(s) referred to in reasons:

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

R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc) [1979] HCA 6; (1979) 143 CLR 190

Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others [2010] FCAFC 11, (2010) 182 FCR 483

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd [1978] FCA 50; (1978) 36 FLR 134

Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1987) 67 WAIG 325

United Firefighters Union of Australia v Country Fire Authority [2015] FCAFC 1; (2015) 228 FCR 497

Reasons for Decision

1 Ms Brenda Courtenay-Clack was employed as a Retail Manager by St Vincent de Paul Society (WA) Incorporated (St Vincent de Paul Inc), from March 2019 until her dismissal on 1 February 2023 for alleged misconduct. Ms Courtenay-Clack denies that she misconducted herself and claims her dismissal was harsh, oppressive and unfair.

2 St Vincent de Paul Inc oppose Ms Courtenay-Clack's application because it says her actions leading up to the dismissal constituted a serious and clear breach of her obligations and duties and her conduct was not within the organisation's policy and values.

3 In addition, St Vincent de Paul Inc maintains that it is a national system employer for the purposes of the *Fair Work Act 2009* (Cth) (FW Act) and therefore the Western Australian Industrial Relations Commission (Commission) lacks jurisdiction to hear and determine Ms Courtenay-Clack's claim.

4 In accordance with the Western Australian Industrial Appeal Court's decision in ***Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1987) 67 WAIG 325, the Commission is unable to proceed unless satisfied that the Commission has the necessary jurisdiction to do so. It is necessary for the Commission to determine the issue of jurisdiction prior to enquiring into and dealing with the substance of Ms Courtenay-Clack's claim.

Questions to be Decided

5 The issue I must decide is whether, on an overall assessment, St Vincent de Paul Inc is a corporation, and its operations and activities have the character of trading. If I conclude that it is a trading corporation this Commission lacks jurisdiction to hear and determine the claim.

Background and Evidence

6 St Vincent de Paul Inc submitted a statutory declaration signed by the Executive Manager, Business Services and attached an extract of the Western Australian Incorporated Associations Register, a copy of the respondent's Constitution and a copy of the General Purpose Financial Reports for 2021-2022 and 2020-2021 financial years. The Executive Manager described the operations and activities of the organisation and noted the nature of the arrangements for the raising of revenue to support its activities.

7 Ms Courtenay-Clack submitted an email in response contending that the respondent was a state system employer because:

a. The 57 retail and distribution centres operate within the state of Western Australia and not the whole of Australia and St Vincent de Paul Inc is a state company;

b. St Vincent de Paul Inc state that the revenue received is essential for delivering services to the Western Australian community;

c. The organisation has a state council and not a national council;

d. St Vincent de Paul Inc's website refers to 'Here in Western Australia'; and

e. St Vincent de Paul's Inc is registered as 'St Vincent de Paul Society (WA) Incorporated' with the Government of Western Australia and refers the Commission to the 'Not for Profit Law' website which states 'Incorporation is the broad term to describe a business registered with a 'state' to become a separate legal entity'.

8 Ms Courtenay-Clack submitted that she had initially applied to Fair Work through their online portal, 'only to be told that they had no jurisdiction over my case and have forwarded it on to the WAIRC for processing'. Ms Courtenay-Clack attached to her statement a screen shot of an online enquiry made to the Fair Work Ombudsman. At the hearing Ms Courtenay-Clack stated that she had received an email from Fair Work informing her that it had referred her application to this Commission. Ms Courtenay-Clack was provided an opportunity to provide a copy of the email. No further evidence was submitted. Ms Courtenay-Clack stated that she had received an automated text message quoting the reference number for the enquiry made with the Fair Work Ombudsman however she was not able to locate the text message because of an upgrade to her phone.

9 In summary Ms Courtenay-Clack contends that the Commission has jurisdiction because St Vincent de Paul Inc only operate within the geographical confines of the state of Western Australia and therefore is not a national system employer.

Principles

10 Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the *Industrial Relations Act 1979* (WA):

> **26 Act excludes State or Territory industrial laws**
>
> (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.

11 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. A national system employer is, relevantly for the purposes of this application, a 'constitutional corporation'.

12 A constitutional corporation is defined in s 12 of the FW Act as 'a corporation to which paragraph 51(xx) of the Constitution applies'. The Australian Constitution defines, at paragraph 51(xx), constitutional corporations as 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Simply put, a constitutional corporation is either a 'foreign corporation' or a 'trading' or 'financial' corporation formed within the Commonwealth.

13 If an employer is a trading corporation it is a national system employer, then this Commission does not have jurisdiction to consider, hear or determine an unfair dismissal application.

14 In ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*** [2008] WASCA 254; (2008) 89 WAIG 243 ***(Lawrence)***, the Western Australian Industrial Appeal Court sets out the principles to be applied by the Commission when considering whether an entity is a trading corporation at [68].

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 – 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 – 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott (***589); ***Quickenden*** [52], [l01]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

15 The decision of the Court in ***Lawrence*** has been cited with approval in superior appellate court decisions (see for example ***United Firefighters Union of Australia v Country Fire Authority*** [2015] FCAFC 1; (2015) 228 FCR 497 and in ***Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others*** [2010] FCAFC 11, (2010) 182 FCR 483) (***Bankstown***)).

16 In ***Bankstown***, in recognising that the activities of the Association in that case were directed at the public good, the Full Court of the Federal Court nevertheless concluded the operations and activities were trading activities and had a commercial character. The Federal Court noted the description of the relationship between the parties in the relevant contract and its overall activities at [54].

Operations Within a Geographic Confine of a State

17 Ms Courtenay-Clack submits that St Vincent de Paul Inc conducts all of its activities within Western Australia. In addition, the sources of income of the organisation are from within Western Australia. Ms Courtenay-Clack did not refer the Commission to any precedents or authorities in support of her contentions.

18 St Vincent de Paul Inc contend that the geographic location of its activities and sources of income are irrelevant for the purposes of determining whether it is a national system employer. The relevant assessment is whether an organisation is a trading corporation and not where any trading takes place. St Vincent de Paul Inc referred the Commission to ***Lawrence***.

19 A national system employer is not defined by reference to the location of its activities, operations nor revenue sources. The FW Act defines a national system employer, relevantly for this application, as a 'constitutional corporation'. There is nothing in the meaning of national system employer that refers to the location of activities, operations, or sources of income of a constitutional corporation. There is no authority for the proposition that the location of activities, operations and sources of revenue of an employer are relevant to the assessment of whether St Vincent de Paul Inc is a constitutional corporation. Therefore, I do not accept the submissions of Ms Courtenay-Clack as correct.

20 Nevertheless, it is necessary for the Commission to satisfy itself that it has jurisdiction.

Is St Vincent de Paul Inc a Corporation?

21 I find that St Vincent de Paul Inc is an incorporated body and upon its registration as an incorporated Association under the *Association Incorporation Act 2015* (WA) on 24 March 1917, it became a corporation in accordance with that Act.

Is St Vincent de Paul Inc a Trading Corporation?

22 The second question to be determined is whether the overall activities of St Vincent de Paul Inc have the character of trading activities.

23 The 'Constitution of the St Vincent de Paul Society (WA) Incorporated' sets out the organisation is a lay Catholic, benevolent and charitable organisation whose objects are:

(a) for its Members to live the Gospel message by serving Christ in the poor with love, respect, justice, hope and joy by sharing their skills and talents, and what has been given to the Society, on a person-to-person basis with those in need;

(b) to seek to cooperate in shaping a more just, compassionate Australia and to share the Society's resources with our twinned countries;

(c) to work with and assist people in need whilst respecting their dignity, sharing our hope and encouraging them to take control of their own future;

(d) to promote informed discussion on the plight of those in need and to advocate improved services and facilities for them;

(e) to liaise with and share resources with other charitable and benevolent organisations with the objective of assisting those people in need;

(f) to follow the teaching and charism of Blessed Frederic Ozanam; and

(g) to ensure that the basic principles and The Rule of the Society are respected.

24 As in ***Bankstown***, the purpose of the organisation, however, is not necessarily determinative and an assessment of its activities and whether these have the character of trading is required.

25 To support its activities St Vincent de Paul Inc receives revenue through different sources:

(a) retail and distribution centre sales;

(b) donations and gifts;

(c) State and Commonwealth government funding which SVDP [St Vincent de Paul Inc] is required to periodically submit tenders for;

(d) fundraising appeals and events;

(e) corporate sponsorships; and

(f) specialist community services contributions.

26 St Vincent de Paul Inc expends funds on operational activities and delivery of programs and services to support vulnerable members of the Western Australian community.

27 In accordance with the principles in ***Lawrence*** it is necessary to establish whether the trading activities are sufficient to justify its categorisation as a 'trading corporation' and it is a question of fact and degree.

28 In 2021-2022 the revenue raised by St Vincent de Paul Inc was apportioned from the following sources:

(a) Fundraising represented 10% of total revenue.

(b) Government and other grant funding represented 19% of total revenue.

(c) Retail and distribution centre sales represented 52% of total revenue.

(d) Specialist Community Services Contributions represented 3% of total revenue.

(e) Other income represented 1% of total revenue.

(f) Non-operating activities, including bequests. Gain on sale of property, plant and equipment represented 4% of total revenue; and

(g) Non-recurring activities, including Jobkeeper payments, represented 9% of total revenue.

29 Ms Courtenay-Clack contended that the retail and distribution centre sales were not trading because the items that were retailed through the centres were donated and not purchased by St Vincent de Paul Inc. There is no evidence before the Commission concerning the source of the items sold through the retail and distribution centres. Ms Courtenay-Clack did not submit any evidence nor did she seek to establish this fact through the cross-examination of the witness evidence given on behalf of St Vincent de Paul Inc.

30 The meaning of trading is not limited to the sale of items previously purchased by a supplier. As established in ***Lawrence***, citing ***R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)*** [1979] HCA 6; (1979) 143 CLR 190 (***Adamson***), 'trading' is not given a narrow construction and extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services. The means by which St Vincent de Paul Inc procures items for sale through its retail and distribution centres does not detract from the trading nature of the activity conducted through the retail and distribution centres.

31 I find that the retail and distribution centre sales have the character of trading activities. That is, they have the character of commercial trade in services or elements of exchange: ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** [1978] FCA 50; (1978) 36 FLR 134 (139, 159 - 160) cited in ***Lawrence.***

32 The proportion of activities and revenue related to the retail and distribution centre sales are not slight or incidental. These activities account for at least 50% of the revenue of the organisation.

33 In ***Bankstown*** at [52] the Full Court observed that there is no bright line that determines what proportion of trading activities is substantial. The purpose of St Vincent de Paul Inc may not be commercial in nature, however, clearly the trading activities engaged in to support the operations of the organisation are not insubstantial, not trivial, insignificant, marginal, minor nor incidental.

34 Where the respondent is a not for profit organisation the correct identification of the employer and, therefore, the correct jurisdiction, is not always readily evident. See the contrasting decisions of ***Lawrence*** and that of the Full Court of the Federal Court in ***Bankstown***. In such circumstances navigating the path to the correct jurisdiction may be assisted by obtaining the expertise of a union, industrial agent or lawyer.

Conclusion

35 For these reasons I conclude that St Vincent de Paul Inc is a trading corporation. This finding reflects an overall assessment of the nature of the operations and activities on the evidence before me.

36 In concluding that St Vincent de Paul Inc is a trading corporation I must conclude that the Commission lacks the necessary jurisdiction to hear and determine this matter and dismiss the application.

2023 WAIRC 00692

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRENDA COURTENAY-CLACK

APPLICANT

-v-

ST VINCENT DE PAUL SOCIETY (WA) INCORPORATED

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE TUESDAY, 15 AUGUST 2023

FILE NO/S U 12 OF 2023

CITATION NO. 2023 WAIRC 00692

Result Application dismissed for want of jurisdiction

Representation

Applicant Mr S Stackpool (as agent) and Ms B Courtenay-Clack (in person)

Respondent Ms S Masters (of counsel) and Ms H Rheinberger (of counsel)

Order

HAVING HEARD from Mr Stackpool on behalf of the applicant and Ms Masters on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

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

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2023 WAIRC 00708

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00708
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD	:	MONDAY, 26 JUNE 2023, TUESDAY, 27 JUNE 2023, WEDNESDAY, 28 JUNE 2023, THURSDAY, 29 JUNE 2023
DELIVERED	:	FRIDAY, 18 AUGUST 2023
FILE NO.	:	B 111 OF 2022
BETWEEN	:	CHRISTOPHER FRAWLEY
		Applicant
		AND
		CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION AND ANOTHER
		Respondents

CatchWords	:	Industrial Law (WA) - s 29(1)(d) - Denied contractual benefit - Whether union organiser's elected position was employment for a fixed term - Whether dismissal at initiative of employer - Resignation - Mutal determination - Identity of employer - Assessment of damages - Mitigation - Claim dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) *Fair Work (Registered Organisations) Regulations 2009* (Cth)
Result	:	Claim dismissed
Representation:		
Applicant	:	Mr J Theodorsen as agent and Mr A Drake-Brockman as agent
Respondents	:	Mr T Dixon of counsel and Mr D Rafferty of counsel

Case(s) referred to in reasons:

Achal v Electrolux Pty Ltd (1993) 50 IR 236

Allison v Bega Valley Council [1995] NSWIRComm 175; (1995) 63 IR 68

Barclay v City of Glasgow District Council [1983] IRLR 313

Fair Work Ombudsman v Austrend International Pty Ltd [2018] FCA 171; (2018) 273 IR 439

Grout v Gunnedah Shire Council (1994) 125 ALR 355; (1994) 1 IRCR 143

Hughes v Gwynedd Area Health Authority [1978] ICR 161

Jennings v The Trustee for Alsop Gordon & Best Unit Trust t/a AGB Training [2019] FWC 638

Kestell v Davey [No 3] [2023] WASC 289

Koutalis v Pollett [2015] FCA 1165; (2015) 235 FCR 370

Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183

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

Minato v Palmer Corporation Ltd (1995) 63 IR 357

Mylan v Health Services Union NSW [2013] FCA 190

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

Quirk v Construction Forestry Maritime Mining and Energy Union [2021] FCA 1587; 398 ALR 39

Rizhao Steel Holding Group Co Ltd v Koolan Ire Ore Pty Ltd [No 2] [2010] WASC 385

Rohan v S&DH Enterprises Pty Ltd [2023] WAIRC 00076; (2023) 103 WAIG 174

The St Cecilia's College School Board v Grigson [2006] WAIRC 05293; (2006) 86 WAIG 3146

Western Excavating (EEC) Ltd v Sharp [1978] 1 All ER 713; [1978] ICR 221

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Was the CFMEUW Mr Frawley's employer as well as the CFMMEU? 22
Can the Union make an organiser's elected position redundant during the term of office? 23
Has Mr Frawley failed to mitigate his loss? 24
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Reasons for Decision

1 Mr Christopher Frawley was, but is no longer, an organiser for the **Union**[1]. He now claims that the way his employment with the Union came to an end amounts to a denial of a contractual benefit, namely, employment for a four-year fixed term. He wants the Union to compensate him for his loss of wages, resulting from this alleged breach.

2 The Union says that Mr Frawley was not contractually entitled to employment for a fixed term. The Union also says that even if he was, Mr Frawley is no longer employed because he quit on 26 July 2022 and then reached an agreement with the Union about how the termination would take effect. Therefore, there was no repudiatory conduct or breach of contract by the Union.

3 For Mr Frawley's denied contractual benefit claim to succeed, he needs to establish two vital things:

(a) that it was a term of the employment contract that the employment was for a fixed term correlating to the four-year union election cycle and that the Union could not unilaterally terminate the employment during that term (except in limited circumstances, under the Union's **Rules**[2]).

(b) that the employment was terminated at the Union's initiative in breach of the term referred to (a). This primarily involves resolving conflicting accounts of what happened between 26 July 2022 and 2 August 2022.

4 This matter involves several other contested issues which require resolution only if Mr Frawley establishes both the above two vital elements:

(a) Who is Mr Frawley's employer with liability to make good any denied benefit?

(b) What damages result from any denied benefit? This includes consideration of these issues:

(i) Do the Union's Rules permit it to make an elected position redundant with effect during its term?

(ii) Did Mr Frawley fail to mitigate his loss?

(iii) Should the ReddiFund redundancy be deducted from the loss calculation?

Background

5 Mr Frawley commenced employment with the Union in July 2018. He had been a member of the Union for many years before that. His father was a life member.

6 The employment arrangements were relatively informal. There was no written contract of employment.

7 Mr Frawley was highly regarded by his work colleagues at the Union, and by the members at the worksites that he attended as an organiser. He was described as a nice bloke who was well-liked. He was seen as a future union leader.

8 The value the Union's leadership placed in Mr Frawley was recognised when the Western Australian Branch Secretary, Mr Mick Buchan, approached Mr Frawley to run for an elected organiser position on Mr Buchan's ticket in the Union's 2020 elections.

9 Mr Frawley was elected unopposed to one of five positions of the CFMMEU Western Australia Divisional Branch organiser commencing from 1 January 2021.

10 Visiting work sites at various locations around the Perth metropolitan area was a core part of Mr Frawley's job as an organiser. He needed to attend sites to service and recruit members, and conduct health and safety inspections. Therefore, it was important for him and all organisers to have a valid driver's licence.

11 Mr Frawley lost his driver's licence for 'DUI' while he was on leave from work in September 2021. His licence was suspended for nine months. Mr Frawley continued to work as an organiser, but changes were made to accommodate the fact he could not drive himself to sites.

12 Mr Frawley regained his licence on 13 June 2022, and regained use of a Union vehicle on 27 June 2022.

13 Things blew up a few weeks later, on Tuesday, 26 July 2022. On that day, Mr Frawley exchanged words in text messages and in person with four other Union colleagues. Who said what, and what the words meant, is contested.

14 It is not contested that Mr Frawley did not return to work after that day.

15 There was a meeting between Mr Frawley and Mr Buchan at the Kinky Lizard Café a few days later, on Friday, 29 July 2022. Mr Frawley's and Mr Buchan's versions of what was said, or not said, differ significantly.

16 Mr Frawley's last day as a Union employee was 29 July 2022.

The Commission's Denied Contractual Benefits Jurisdiction

17 Mr Frawley makes his claim under s 29(1)(d) of the *Industrial Relations Act 1979* (WA) as a claim that he has been denied a contractual benefit.

18 There is no dispute that Mr Frawley's claim is an industrial matter within s 29(1)(a) of the Act. It is a claim for a remedy for a denied contractual benefit within the terms of the employment of contract and sourced in the employment contract: ***Rohan v S&DH Enterprises Pty Ltd*** [2023] WAIRC 00076; (2023) 103 WAIG 174 at [70].

19 Employment that is terminated by the employer before the end of a fixed term in repudiation of the contract, which is not accepted by the employee, will constitute a denied contractual benefit for the purpose of s 29(1)(d): ***Perth Finishing College Pty Ltd v Susan Watts*** (1989) 69 WAIG 2307 at 2315. The denied contractual benefit is the entitlement to the full term of the employment.

20 The Commission is empowered to order payment of a monetary amount to compensate for the denied benefit: ***Watts*** and ***Matthews v Cool or Cosy Pty Ltd & Anor*** [2004] WASCA 114; (2004) 84 WAIG 2152 at [18] and [24].

21 Accordingly, Mr Frawley's claim is within the Commission's jurisdiction, and the remedy he seeks is one the Commission may order if his claim is established.

Was Mr Frawley employed for a fixed term of four years?

22 Mr Frawley's case is based on his employment contract containing an implied fixed term of four years, being the term of the elected organiser position.

23 Mr Frawley's submissions relied on what was said ***Quirk v Construction Forestry Maritime Mining and Energy Union*** [2021] FCA 1587; 398 ALR 39 at [21] and ***Mylan v Health Services Union NSW*** [2013] FCA 190 at [26] in support of the conclusion that where a person is elected to a paid position in a union, there will be a term in the resultant employment contract that the employment is for a term that is co-extensive with the term of the elected position.

24 In ***Mylan***, Buchanan J said at [26]:

> …I have no doubt that any employment which Mr Mylan may have held with the union was co-extensive with holding office in the union and depended upon that circumstance…

25 There is no dispute between the parties that:

(a) Mr Frawley's elected term was four years, pursuant to rule 38(b) of the CFMMEU's Rules; and

(b) where a person is elected to a position that is one referred to in rule 49 of the CFMMEU's Rules, there will be a term in the resultant employment contract that the employment is for a term that is co-extensive with the term of the elected office.

26 However, the Union says that the position of 'organiser' is not a position referred to in rule 49.

27 The conclusion in ***Quirk*** that the elected organisers' employment was coterminous with the elected office was based on the implicit finding that those organisers were elected to positions referred to in rule 49. Whether rule 49 applied or not does not appear to have been a live issue in the case. Rather, it appears from his Honour Perram J's reasons at [17] and [19] that the parties agreed that rule 49(a) applied to the elected organisers.

28 Similarly, in ***Mylan,*** which his Honour Perram J cited and relied upon, the respondent union accepted, for the purpose of a summary dismissal application, that Mr Mylan held employment with the Union co-extensively with holding office in it: [7].

29 The Union says that if the correct position is that rule 49 does not apply to elected organisers in the Western Australian Divisional Branch, then the basis for the implication of the term in the employment contract falls away.

30 Rule 49 provides:

> **49 – FULL TIME PAID OFFICERS**
>
> (a) A member who has been elected to any positions in a full-time capacity shall be employed full time in the service of the Divisional Branch and be paid such weekly wage as shall be determined at a properly constituted meeting of the Divisional Branch Council; provided however, that the rate fixed shall not be less than the leading hand rate in the highest major Award for carpenters in the building industry.
>
> (b) Full-time paid officers shall be under the control of the Divisional Branch Management Committee between Divisional Branch Council meetings and shall carry out all instructions of the Divisional Branch Council or Divisional Branch Management Committee in accordance with the Rules.
>
> (c) Should a full-time paid officer desire to resign they shall give one (1) month's notice in writing of his intention so to do to the Divisional Branch Management Committee.
>
> (d) A full-time paid officer shall not work for any other person, body or corporation for profit or reward, or at all, during their term of office without the sanction of the Divisional Branch Council first being obtained.
>
> (e) Should any full-time officer through illness or any other physical disability be unable to carry out the duties as prescribed by the Rules, the officer shall furnish a medical certificate to the Divisional Branch Management Committee within seven days of becoming unable to carry out the duties setting out the nature of the disability, and the duration of such incapacity so far as the same can be estimated, and before resuming duties the officer shall furnish to the Divisional Branch Management Committee a medical certificate setting out that he/she has recovered and is capable to carry out the duties in accordance with the Rules.

31 The issue in dispute is whether the position Mr Frawley was elected to was 'any position in a full-time capacity' as those words are used in clause 49(a).

32 The Union submitted that, for this rule to have the effect of requiring the Union to employ the elected person, it must be the elected position which meets the criteria of being 'any position in a full-time capacity'. The fact that a person is employed, and paid a weekly wage is a consequence of meeting the criteria, not the qualification.

33 I have no difficulty accepting the proposition that the requirement to employ comes after the election, and that the fact a person is employed is not conclusive of whether the elected position is a position referred to in rule 49.

34 The question remains, is the elected organiser position 'any position' as referred to in rule 49(a)?

35 Some support for the Union's construction that it is not, might be found in the text of the Rules. In particular, certain of the positions listed in the rules are expressly mandated as 'full-time, paid' positions: see rules 37(v), 43(b)(ii), 46(a) and 48C(5).

36 On the other hand, other positions are expressly described as 'honorary': rules 37(ii), 37(v) and 37(vi).

37 The organiser positions are described as neither full-time, nor honourary in either rule 37(iv) which establishes the position, or rule 48, which sets out organisers' duties.

38 However, rule 38 does clearly indicate that organiser positions are full-time positions. Rule 38 concerns the conduct of Divisional Branch Elections. Rule 38(ii) prohibits members from nominating for more than one 'full-time office' in any election. Rules 38(iii) and (iv) provide:

(iii) Where a member nominates for more than one full-time position the Returning Officer shall seek from the member an election as to which position the member wishes to contest.

(iv) Where no election is made by the member the Returning Officer shall treat as valid only the nomination for the more senior position.

Seniority shall be determined in the following order:-

Secretary, Assistant Secretary, President, Organiser.

39 Organiser positions are, therefore, clearly intended to be full-time positions.

40 Further, the nature of organisers' duties indicates that the position is intended to be associated with employment. Rule 48 says:

48 – (1) DUTIES OF ORGANISERS

(a) They shall be under the control and supervision of the Divisional Branch Management Committee and shall carry out their duties within the provisions of the Rules.

(b) They shall visit shops and jobs where members of the Divisional Branch and other workers eligible to join are employed and endeavour to enrol new members. They shall co-operate with all Shop and Job Stewards and District Secretaries, and carry out organisational work in any part of the State or Territory as directed by the Divisional Branch Management Committee.

(c) Nothing in this rule affects the right of an organiser elected, in accordance with the rules of the Divisional Branch, as a member of either the Divisional Branch Management Committee or the Divisional Branch Council.

…

41 It is practically essential for an organiser to be employed for Rule 48(1) to be fulfilled. The references to 'control and supervision' in particular are notions that go hand and hand with employment.

42 Organisers have no voting rights, and are not involved in the management, policy making, rule making or governance of the Union. Employment of organisers is the only practical consequence of their election.

43 The Union also submitted that organiser positions were not covered by rule 49 because:

(a) It could not have been intended that the Union is not able to remove staff, in particular organisers, but rather to be bound to continue to employ them subject only to the ability to remove them under rule 51, which involved a drawn out, complex process.

I am not persuaded by this argument.

There are mechanisms for the Union to suspend and remove elected organisers under rule 51 for a substantial breach of the rules, gross misbehaviour, gross neglect of duty or ineligibility for office.

If members elect a person to an elected organiser position, they do so in the expectation that the individual will discharge the duties set out in rule 48. To allow the Branch Secretary to remove an organiser's ability to fulfill these duties at any time undermines the democratic running of the Union as contemplated by the rules.

(b) There was no evidence that the organisers were paid a weekly wage determined by a meeting of the Divisional Branch Council, as referred to in rule 49(1).

I do not consider that this assists in understanding which positions are 'positions in a full-time capacity' in rule 49. Rather, if a person qualifies as being elected to such a position, it is then a requirement that they be paid in accordance with rule 49(a). Whether there is evidence of such payment being made does not assist in determining to whom such payment must be made.

44 For these reasons, I do not agree with the Union's construction of rule 49. Rule 49 does apply to the elected position of organiser.

45 It therefore follows that it was an implied term of Mr Frawley's employment contract that it was coterminous with the holding of his elected position as described in ***Quirk*** at [21]. In effect, his employment was for a term of 4 years, subject to the office being vacated as a result of death, resignation, retirement, dismissal or any other reason.

Was Mr Frawley's employment terminated at the Union's initiative?

46 The following facts about Mr Frawley's employment were agreed, and are relevant background.

…

6. Mr Frawley first became a member of the Construction, Forestry, Maritime, Mining And Energy Union in 2003, and became a Union delegate in around 2010.

7. Mr Frawley started work at the Union office around early July 2018. In about June 2018, Mr Buchan agreed to employ Mr Frawley as a full-time trainee Organiser.

8. Mr Buchan directed that the terms of Mr Frawley's engagement included:

a. Mr Frawley would be required to carry out the duties of an Organiser on building construction projects in and around the central business district of Perth and the surrounding metropolitan area;

b. Mr Frawley would be a trainee for 12 months, during which time he would be paid 75 per cent of the salary of a full-time Organiser;

c. If Mr Frawley successfully completes the trainee period, the First Respondent would thereafter pay Mr Frawley as a full-time Organiser on a salary equivalent to that which would be earned by a CW3 trades person under the Building and Construction General On-site Award working a 56-hour week.

9. There was no written contract of employment or letter of offer of employment.

…

23. Mr Frawley agreed with Mr Buchan that he would nominate for a position as elected organiser, and he filled out nomination forms in late 2020 and gave them to Mr Buchan.

24. In about December 2020, Mr Buchan told Mr Frawley and other members on his ticket they had all been elected unopposed, and shortly after, Mr Frawley got a notice from the Australian Electoral Commission confirming this.

25. On about 22 December 2020, Mr Frawley was elected to the office of Divisional Branch Organiser unopposed for a term of four years commencing on 2 January 2021. From that time, Mr Frawley also held a corresponding office as Organiser of the Second Respondent.

…

47 While it is agreed that Mr Frawley completed election nomination forms in late 2020, the Union's information provided under reg 138 of the *Fair Work (Registered Organisations) Regulations 2009* (Cth) to the Registered Organisations Commissioner indicated that the nomination period was from 31 August 2020 to 18 September 2020.

48 Beyond the agreed facts, there was a vast difference between Mr Frawley's version and the versions of the Union's witnesses in relation to critical discussions and events. In general, I do not find Mr Frawley to be a credible witness. Where his evidence conflicts with another witness, I prefer the other witness's evidence.

49 Mr Frawley was cagey when giving his evidence. He tended to spin things to suit his case and to dodge questions when he thought the truth might damage his case. For instance, he avoided naming a social motorcycle club he had been involved in and its bikie associates, doing so only after multiple questions were put to him. He was reticent when questioned about a job advertisement found on his mobile phone and whether he had sent it, or whether it was sent to him.

50 He also changed his evidence to correct it after giving false answers about who authored a particular email, how many jobs he had applied for, and whether words he used in a text message were commonly understood to refer to quitting.

51 Ultimately, though, it was Mr Frawley's own text messages which sunk him. Recently, in ***Kestell v Davey [No 3]*** [2023] WASC 289 at [29], her Honour Smith J noted that the most reliable indication of a person's knowledge of transactions or events is not their recollection of what was said; it is what they did and how they conducted themselves at the relevant time:

> Contemporaneous, or near contemporaneous, documents provide more valuable and revealing information than what may be flawed attempts at recollection of those facts by witnesses, in particular, those with an interest in the outcome of the litigation…

52 Mr Frawley's contemporaneous and near contemporaneous text messages are particularly revealing, as will be seen.

Tuesday, 26 July 2022

53 Mr Brad Upton was an Assistant Branch Secretary in the Union. He held an organisers meeting at the Union office at 6.00 am on 26 July 2022. During that meeting, he directed that Mr Frawley attend the East Perth Train Station to conduct a safety investigation under s 49I of the Act together with another organiser, Mr Steven Parker.

54 Without Mr Frawley knowing, Mr Upton also took Mr Parker aside and told him to 'keep an eye' on Mr Frawley during the safety investigation. Mr Upton explained that he did so because another organiser had recently told him her concerns about Mr Frawley taking a slack approach to a prior safety investigation she had done with him.

55 Whether or not Mr Upton expressly asked Mr Parker to, it was his intention that Mr Parker would report back to Mr Upton about Mr Frawley's safety investigation abilities. Mr Parker also understood this to be Mr Upton's meaning. Ultimately, Mr Upton wanted to know whether the other organiser's reported concerns had any substance before deciding whether some form of intervention or management action might be required.

56 Meanwhile, either during or just after the organisers' meeting, Mr Frawley sent the following text messages to Mr Troy Smart. Mr Smart was another Assistant Branch Secretary, and was Mr Frawley's friend.

57 Mr Frawley will go on to say that shortly after he sent this message, he discovered that he was 'under investigation' and that this discovery caused him to snap. However, the above exchange shows that Mr Frawley was unhappy before whatever discovery followed it.

58 Mr Frawley had arranged right of entries on other jobs that day. Mr Upton's direction meant he had to cancel those, and shuffle things around. Mr Upton had also declined Mr Frawley's request to take his own car to East Perth, which would have enabled him to make phone calls en route. It is understandable that he was put out by Mr Upton's direction.

59 But his text messages did not simply indicate he was put out. His words 'absolutely fucked' and 'completely fucked' show he had no residual goodwill towards the Union.

60 Mr Parker and Mr Frawley travelled together to East Perth in Mr Parker's car. The East Perth Train Station site was no more than a 5-minute drive from the Union office.

61 After entering the site, the organisers spoke to a safety advisor and walked around. Mr Frawley said he also spoke with a director of West Coast Rio, and some workers.

62 Mr Frawley and Mr Parker have vastly different views about the safety of the site, as they observed it while walking around.

63 Mr Frawley described the site as 'impeccable'. He said it was so clean you could eat off the floor.

64 Mr Parker listed several issues which he observed and considered to be unsafe, requiring action.

65 It is unnecessary for me to make any findings about whose assessment was right.

66 According to Mr Frawley, before leaving the site, he said to Mr Parker, 'Mate, do you see much more?' to which Mr Parker just looked at him and shrugged. He said again, 'Mate, what else can you see?' Mr Parker again shrugged, so Mr Frawley imitated his shrugging out of frustration, saying, 'Well what the fuck does that mean?'

67 At that point, according to Mr Frawley, Mr Parker said 'this is your investigation...I'm here to investigate you'.

68 Mr Frawley asked, 'What the fuck do you mean?' Mr Parker said, 'Brad told me to investigate you', to which Mr Frawley responded, 'Is that so' and 'Get the fuck out of here, let's go…back and sort it out'.

69 Mr Parker then told the safety advisor on site that the investigation was being put on hold before they signed out.

70 Mr Parker, on the other hand, said that after walking around, he and Mr Frawley stood in an area where they had a good overview of the site. Mr Frawley asked Mr Parker 'What's next?' He said he responded, 'Well, we need to go fix some of the issues' and pointed to a scissor lift which was visible from where they were standing. Welding screens had been placed on the scissor lift, creating a risk of the lift tipping over in the wind. Mr Parker then told Mr Frawley that he would observe Mr Frawley make the scissor lift safe. He denied he said 'investigate' or 'your investigation' but agreed that he effectively told Mr Frawley that Mr Upton had asked him to report back to him about Mr Frawley's performance.

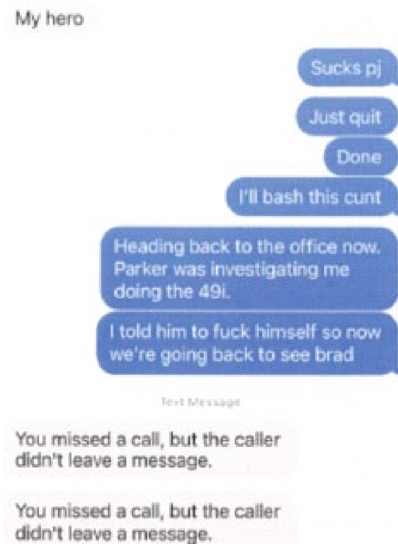
71 According to Mr Paker, Mr Frawley responded to this information by saying:

> …Like fuck you will…You can observe me fucking quitting.

72 Mr Frawley then said they should leave the site and return to the Union office.

73 Initially, Mr Frawley said that they were on site for about an hour. According to Mr Parker, they arrived at 7.10 am and left at 7.31 am, meaning that the total duration of the visit was just 21 minutes.

74 Nothing turns on the total duration of the site visit, but the departure time given by Mr Parker does accord with the time Mr Frawley sent the following text messages to Mr Smart, which he accepts he did after they had signed out at the site, before and during the trip back to the Union office. These messages were exchanged between 7.29 am and 7.33 am:



75 Mr Parker drove them back to the Union office. Their evidence was consistent in that they agreed that they drove in silence for the short trip.

76 Although Mr Parker agreed that Mr Frawley appeared to be angry and upset when he was on site, he had the impression that he had calmed down by the time they arrived at the Union office, because Mr Frawley walked in front of him, and held the door open for Mr Parker as Mr Parker walked in. He saw no signs of agitation when they were at the office.

77 It is not suggested that Mr Frawley resigned when he spoke to Mr Parker. But the Union does say that if Mr Parker's evidence is accepted, what Mr Frawley said to Mr Parker is consistent with him having resolved to resign, and therefore also consistent with Mr Upton's evidence that Mr Frawley did later resign to Mr Upton or Mr Buchan or both of them.

78 I find that Mr Frawley said to Mr Parker that he could observe Mr Frawley quitting. The messages to Mr Smart are consistent with Mr Parker's account, that is, that Mr Frawley told him that he had quit or was quitting. The messages refer to quitting and were sent within just minutes of when the discussion between Mr Frawley and Mr Parker must have occurred.

79 Mr Frawley had no plausible explanation for why he would have told Mr Smart he had quit, if that was not what he had done, or what he intended to do. He could not plausibly explain why he would lie to Mr Smart, who was his friend and confidante.

80 Mr Frawley's evidence was that when he got back to the office, he went to see Mr Upton, who was then in another official's office. He told Mr Upton he needed to have a word with him. The two then went to Mr Upton's office, where Mr Frawley said:

> …What the hell is this? Steve told me I'm under investigation…

81 He was somewhat vague about what Mr Upton's response to him was. There was some suggestion that Mr Upton told him to calm down, and denied that he had told Mr Parker to investigate him. Mr Frawley also said that Mr Upton told him to take two days off, until Mr Buchan returned from a conference in Sydney.

82 Mr Frawley firmly denied that he said anything to Mr Upton about quitting. In cross-examination, he conceded that he could not recall what Mr Upton said to him.

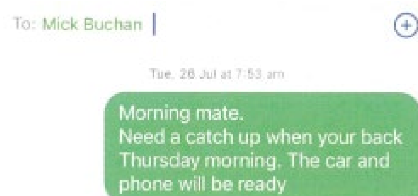
83 Mr Upton's account of the discussion was that Mr Frawley walked straight into the meeting and told him that he quit. Mr Frawley told Mr Upton that he was angry about being watched, or did not understand why he was being watched. He then said:

> …I quit…I'm not going to put up with this shit.

84 According to Mr Upton, he then referred to the fact that Mr Buchan was away and would not be back for a couple of days. Mr Frawley was already aware of this. Mr Frawley then said he would take the car and drop the keys off when Mr Buchan returned. That was the end of the conversation. Mr Frawley then left.

85 Mr Frawley said he tried to ring Mr Buchan immediately after the meeting with Mr Upton. Mr Buchan did not answer his phone. Mr Buchan was on a flight to Sydney at the time.

86 At 7.53 am, Mr Frawley sent a text message to Mr Buchan:



87 The Commission was told that in union parlance, talk of returning the car and phone was associated with not wanting to do the job. In fact, in his written submissions filed before the hearing, Mr Frawley denies he intended the text message was intended as a notice of resignation, but admitted that he:

> '…knew those words were used in the Union office as a euphemism for terminating employment'

88 In his evidence, he sought to walk back from this admission, but ultimately, he agreed that the words were 'in a round about way' another way of saying a person had quit.

89 Mr Buchan's evidence was that these words are a term used to say if organisers are not happy, they can leave the Union or quit.

90 Critically, Mr Frawley offered no alternative meaning that his words 'the car and phone will be ready' should be given. It was not suggested that the car and phone were both concurrently due for a service. Nor that the car and phone were both going to be loaned to someone else for their use. Nor that Mr Frawley no longer needed a car and phone to do his job as an organiser.

91 Mr Frawley's counsel submitted that the words were ambiguous, because they could mean that he had been sacked. But the context does not permit that possible meaning either.

92 Mr Frawley says this message was sent to Mr Buchan as a 'cry for help'. His subjective intention or understanding is irrelevant to the question of whether he did resign: ***Koutalis v Pollett*** [2015] FCA 1165; (2015) 235 FCR 370 per Rares J at [43]-[44], citing ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 at [40]. However, his evidence about his intention fortifies the conclusion that his text meant he was resigning.

93 Mr Frawley was, subjectively, hoping that Mr Buchan would react to the text. He wanted to get Mr Buchan's attention. Mr Frawley did not say what reaction he expected. But a reaction could only be elicited from a resignation. If the text could mean something less, it was unlikely that it would get Mr Buchan's attention, in the way Mr Frawley intended.

94 Mr Buchan landed in Sydney at about 10.21 am Australian Western Standard Time. After he disembarked, he received several text messages, including one from Mr Frawley and another from Mr Upton asking him to call.

95 Mr Buchan and Mr Upton both gave evidence that shortly after landing, Mr Buchan did call Mr Upton and they had a brief discussion. Mr Upton told Mr Buchan that Mr Frawley had come to see him, and had quit. While their evidence was consistent about the fact of the call, and Mr Frawley quitting, their evidence did not align about what the outcome of the call was. According to Mr Upton, Mr Buchan said he would take care of it on his return. According to Mr Buchan, he told Mr Upton that Mr Upton would have to take care of it, because he had to get to the executive meeting. It is unlikely anything turns on it, but I prefer Mr Upton's version because it is consistent with what Mr Buchan subsequently did.

96 It emerged in Mr Frawley's cross-examination that in the afternoon of 26 July 2022, after Mr Frawley had left work, a link to a job advertisement for 'experienced Formwork Carpenters' at Westforce Construction was exchanged between him and Mr Smart. Mr Frawley is a qualified carpenter with formwork experience.

97 This message came to light after the Union's counsel called for Mr Frawley to produce the phone messages between him and Mr Smart of 26 July 2022. They were not included in the messages that Mr Frawley disclosed prior to the hearing.

98 Mr Frawley insisted in cross-examination that he could not recall whether he sent the job advertisement to Mr Smart or whether Mr Smart sent it to him. It matters not. Because Mr Frawley's explanation, and the only plausible explanation, for such an exchange was that Mr Frawley was looking for other work options: in his words, 'to see what else is out there because…work had got so toxic and fucked'. Clearly Mr Frawley was thinking about moving on.

99 As to the discussion between Mr Upton and Mr Frawley, I prefer and accept Mr Upton's evidence. In addition to my general observations about Mr Frawley's credibility, I note that Mr Upton's evidence is consistent with:

(a) Mr Parker's evidence that Mr Frawley told him he was quitting, and his demand to go back to the office for that purpose.

(b) His text message sent after the discussion with Mr Frawley asking Mr Buchan to call him.

(c) Him telling Mr Buchan that Mr Frawley had quit, as corroborated by Mr Buchan.

(d) Mr Frawley's text message to Mr Buchan saying he would return the car and phone.

(e) Mr Frawley's actions that day in looking at formwork carpenter job ads.

100 Mr Frawley's version is implausible.

101 First, there is no reason for Mr Upton to have told Mr Frawley to take two days off. For instance, there is no evidence that Mr Frawley said he was not fit for work, or asked for time off. When Mr Frawley was given a chance to explain why Mr Upton would make that suggestion, he said, '…he's realised he had to cover the tracks'. That makes no sense.

102 Second, if Mr Upton had told him to take two days off and wait for Mr Buchan's return, there was no reason for Mr Frawley to then call or text Mr Buchan immediately after the meeting.

103 Third, it is inconsistent with what he was telling Mr Smart in text messages. In cross-examination Mr Frawley was given the chance to explain why he would have told Mr Smart he was quitting or had quit, but then not do so. He said that he had calmed down, because he had spoken to Mr Smart who '…talked me off the - he - he talking me into calming - pulling my head in'.

104 But he gave no account of such a conversation with Mr Smart in his evidence-in-chief, and there could not have been any opportunity for such a conversation to have occurred anyway. He was with Mr Parker in the car on the way back to the Union office, and went to find Mr Upton as soon as he arrived back at the Union office.

105 I find Mr Frawley made up this explanation.

106 I also take into account Mr Frawley's concession that he cannot recall what Mr Upton said during their discussion.

107 Accordingly, I find that on 26 July 2022, Mr Frawley told Mr Upton that he quit and would return the car when Mr Buchan returned from Sydney in two days' time. I also accept Mr Upton's evidence that he did not tell Mr Frawley to take two days off.

Mr Frawley does not work after 26 July 2022

108 Mr Frawley went home after his discussion with Mr Upton on 26 July 2022. As I have found that Mr Upton did not tell him to take two days off, this conduct is consistent with him resigning.

109 On 26 July 2022, Mr Frawley was paid for the period 22 July 2022 to 28 July 2022. The Union processed pays on a weekly basis, part in arrears and part in advance. Mr Frawley was paid as if he was going to work his ordinary hours for the entire period.

110 He did not attend work on Wednesday, 27 July 2022.

111 Mr Frawley sent an email to Mr Buchan, Mr Upton and the Union's office manager on Thursday, 28 July 2022 saying:

> After the incident that happened Tuesday morning I am still not right mentally to come in today.

112 Mr Frawley relies on this email as being consistent with his version that he had not resigned on 26 July 2022 and that Mr Upton had told him to take two days off.

113 I do not consider that this email outweighs all of the evidence against Mr Frawley. In particular, it is not contemporaneous with the events of 26 July 2022. Rather, it was sent two days later. It could equally be accounted for as:

(a) Mr Frawley considering he was within a notice period, as he had not yet met with Mr Buchan or returned the car and phone to him;

(b) Mr Frawley wanting to give a reason to avoid meeting with Mr Buchan in the office on that day;

(c) Mr Frawley seeking to stall his resignation from taking effect; and/or

(d) Mr Frawley having second thoughts about his resignation, and seeking to portray it as never happening.

114 On an unknown date, the Union's office manager recorded on the Union's payroll records that Mr Frawley had taken personal leave from 26 to 29 July 2022.

115 At 8.12 am on Thursday, 28 July 2022, Mr Buchan and Mr Frawley exchanged text messages proposing a meeting. Later that day, around 10.00 am, Mr Buchan and Mr Frawley had a telephone conversation during which Mr Buchan invited Mr Frawley to come into the Union office to meet with him. Mr Frawley told Mr Buchan that he did not want to come into the office to meet, so they arranged to meet at a café called the Kinky Lizard, the following morning.

The Kinky Lizard Café - 29 July 2022

116 The two men met at about 6.30 am at the Kinky Lizard Café. There was some small talk about football, and the executive meetings Mr Buchan had attended. Mr Frawley then told Mr Buchan what had happened the previous Tuesday: that he believed he was being investigated by Mr Parker and Mr Upton while on the East Perth Train Station site, and that he confronted Mr Upton about this afterwards.

117 Mr Frawley was again vague as to what exactly he told Mr Buchan about his meeting with Mr Upton. He said that he:

> …told him exactly what had happened with the investigation, exactly what had happened all the way through to Brad telling me to have two days off - everything - everything that was just previously stated

118 According to Mr Frawley, Mr Buchan then scoffed it off and said, 'leave it with me, I'll sort it out with the leadership' and nothing else.

119 Mr Buchan's account of the discussion at the Kinky Lizard Café was not much more illuminating or comprehensive. His evidence initially was that that after the small talk, he asked Mr Frawley what had happened, and Mr Frawley told him that he felt he was being set up, by being asked to go to the job with Mr Parker. According to Mr Buchan, he told Mr Frawley that he has 'pulled the pin', referring to the text Mr Frawley had sent him about returning the car and phone. He told Mr Frawley, 'you can't come back from that' or 'it's hard to come back from'. He said he used the analogy of a football team, saying that you've got to be a team player. He said he told Mr Frawley he would go back to the executive to 'work out how we can manage it'.

120 By 'manage it', Mr Buchan meant that he would talk to the leadership to work out how to manage his resignation to have less impact on Mr Frawley.

121 Mr Buchan indicated that Mr Frawley agreed with him, saying something to the effect of 'yeah, you know, it is what it is. I've done it now'.

122 Mr Buchan said he'd be in touch, and they then shook hands and left.

123 On further questioning about the words Mr Frawley used, Mr Buchan elaborated on what he himself had said to Mr Frawley:

> I said to Chris, "You've pulled the pin and you sent me a text to say your keys and your phone would be ready, um, it's - you know, everyone's talking about it. You've quit, be very hard to come back from that"…

124 In cross-examination it was put to Mr Buchan:

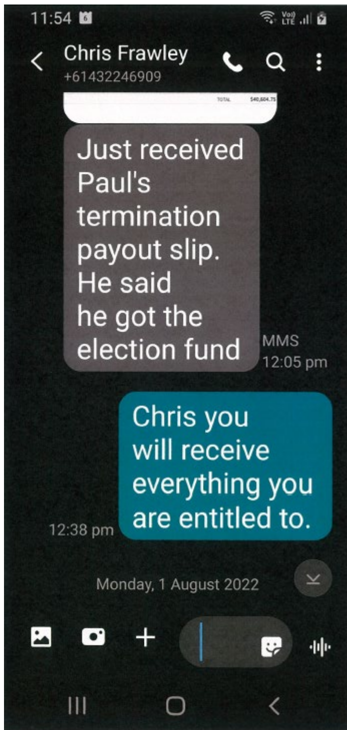
THEODORSON, MR: No one mentioned resignation or redundancy at all at that meeting?

BUCHAN, MR: ---Yes, they did. Chris did.

125 Whether Mr Buchan was suggesting Mr Frawley mentioned resignation or redundancy, or both was not clarified. Nor was there any elaboration as to what Mr Frawley allegedly said when mentioning resignation or redundancy. On Mr Buchan's account, the only mention was Mr Frawley's concession 'yeah, [I] know'.

126 Neither Mr Frawley nor Mr Buchan suggested that there was any attempt by Mr Frawley to withdraw his resignation or deny the effect of it.

127 After the meeting, at 12.05 pm, Mr Frawley sent Mr Buchan this text message:



128 The election fund refers to deductions made from pay to be put towards future union election campaigning and re-election. Mr Frawley's payslips show that $20 was deducted from his pay each pay cycle for the election fund.

129 The irresistible inference is that at the time Mr Frawley sent this message he was expecting to receive a termination payment himself. His message was intended to ensure that any such payment was maximised.

130 The message is totally inconsistent with Mr Frawley's suggestion that he left the Kinky Lizard Café meeting expecting things to go back to normal.

131 It is consistent with Mr Buchan's version of the meeting which was to the effect that he and Mr Frawley had agreed that the employment would end and Mr Buchan would speak to the leadership to see what could be done to make it beneficial to Mr Frawley.

132 At about 1.30 pm, Mr Buchan called Mr Frawley. Mr Frawley had taken the day off to attend a funeral. When he received the call, the funeral was about to start.

133 The call was brief. Mr Buchan told Mr Frawley, 'we've agreed on the redundancy'. Mr Frawley responded, 'fucking whatever' and hung up.

134 Mr Frawley initially insisted that he only messaged Mr Buchan about being paid out as referred to in [127] above, after Mr Buchan's phone call. However, after his phone was called for, and produced, he accepted that his payout was the subject of messages exchanged with Mr Buchan before 1.30 pm and before the phone call from Mr Buchan. Mr Frawley was led in re-examination to say that he might have been mistaken about the time of the funeral. But that evidence goes nowhere. He did not resile from his evidence that Mr Buchan's call was just before the funeral started, and he did not establish that the funeral started before he sent the text message.

135 Mr Frawley submits that his words 'fucking whatever' are inconsistent with someone who has just reached an agreement. Mr Frawley was at a funeral. It was not the place to engage in a fulsome discussion. The words neither affirm nor cavil with the suggestion of redundancy. They are just consistent with Mr Frawley wanting to get off the phone and get on with mourning his friend whose funeral he was attending.

136 Mr Buchan's uncontested evidence was that after the Kinky Lizard Café meeting, and before he called Mr Frawley on 29 July 2022, he had called the leadership team together and met with them at the Union office. The Union president Mr Robert Benkesser, and the assistant secretaries, Mr Upton and Mr Smart attended the meeting. Mr Buchan told them he had met with Mr Frawley; he had accepted Mr Frawley's resignation and he sought the meeting's approval to structure the

termination as a redundancy in order to assist Mr Frawley. His uncontested evidence was that there was unanimous agreement with this proposal. No one said anything to contradict anything Mr Buchan had said.

137 Mr Upton corroborated Mr Buchan's evidence about this meeting.

138 This is significant for two reasons.

139 First, it is conduct by Mr Buchan, shortly after the meeting with Mr Frawley, that is consistent with his version of what was discussed and agreed upon in the Kinky Lizard Café meeting.

140 Second, Mr Smart was present at the meeting. The fact that Mr Smart did not object to Mr Buchan's proposal or his account of Mr Frawley resigning is inconsistent with Mr Frawley's suggestions that Mr Smart had talked him out of resigning, or had some knowledge that Mr Frawley in fact, wanted to continue to work at the Union.

141 Accordingly, I find that during the Kinky Lizard Café meeting, Mr Frawley accepted that he had initiated the termination of his employment (and necessarily also the vacation of his elected office) by telling several people he had quit on 26 July 2022. He agreed to allow Mr Buchan to do what he could to ensure the employment ended in a way that was most financially beneficial to him in these circumstances. That is, he agreed to end the employment by substituting a mutual termination on terms that were financially favourable compared with him simply having resigned.

142 As a result, Mr Frawley's submissions, in the alternative, that the Union could not act on Mr Frawley's resignation without it creating a dismissal by the Union, take him nowhere. In this regard, Mr Frawley submitted that:

(a) any resignation could not be legally effective because Mr Frawley did specify any notice period; Mr Frawley relied in this regard on principles derived from ***Hughes v Gwynedd Area Health Authority*** [1978] ICR 161 at 164 and ***Grout v Gunnedah Shire Council*** (1994) 125 ALR 355; (1994) 1 IRCR 143 at 365 to the effect that inadequate notice may not terminate a contract of employment, but may constitute a repudiation which can be accepted;

(b) the Rules require an elected official to resign with 4 weeks' written notice. In the absence of written notice, a reasonable employer would seek to clarify the resignation; and

(c) there were special circumstances, namely Mr Frawley's emotional state, which meant the employer was not entitled to accept the resignation, without clarifying it or confirming it. Accordingly, acceptance of the resignation in these circumstances amounted to dismissal by the Union. Mr Frawley relied in this regard on principles in ***Barclay v City of Glasgow District Council*** [1983] IRLR 313 at [12] and [14]; ***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183; ***Minato v Palmer Corporation Ltd*** (1995) 63 IR 357 at 362-363 and ***Achal v Electrolux Pty Ltd*** (1993) 50 IR 236.

143 Mr Frawley did not resign in writing. Nor did he give notice.

144 I accept he was angry and upset when he resigned to Mr Upton. I do not need to consider whether or not he was justified in being angry and upset, either by reference to what happened on 26 July 2022 or by reference to a variety of issues he raised about how he was treated in the lead up to 26 July 2022.

145 These alternative arguments do not assist Mr Frawley, because the Union did not act on his resignation.

146 His resignation was superseded by a mutual agreement.

147 The Union waited until after Mr Buchan to hold discussions with Mr Frawley. The Union, through Mr Buchan, made enquiries of Mr Frawley about the circumstances of the resignation, when Mr Buchan met with Mr Frawley on 29 July 2022.

148 Those enquiries resulted in an agreement, the effect of which was that the employment would end.

149 This puts the case in the category of a 'mutual determination' as that phrase was used in ***Watts***. Mutual determination was described by the New South Wales Industrial Relations Commission in ***Allison v Bega Valley Council*** [1995] NSWIRComm 175; (1995) 63 IR 68 at [73]. The New South Wales Commission was determining whether there had been a dismissal at the initiative of the employer. The New South Wales Commission said:

> In order to undertake the necessary analysis it is necessary to look carefully at all the relevant facts. It is necessary to determine whether the actual determination was effectively initiated by the employer or by the employee particularly where the dynamics within a factual situation may change. For example, an employer may demand a resignation with a threat of dismissal, negotiations may then ensue and the employee may ultimately be genuinely pleased with the outcome of those negotiations to the extent that any resultant resignation may be said to be given freely and without any undue influence being brought to bear by the employer.

The Redundancy Letter

150 On 1 August 2022, at 6.36 am, Mr Buchan sent Mr Frawley a text message with an estimate of his final pay. Mr Buchan then sent Mr Frawley a list of items to be returned, and times that Mr Buchan would be in the office.

151 Mr Frawley responded, 'will see you then mate'. He then went to the Union office to return his right of entry permits and other union property.

152 Mr Buchan gave Mr Frawley a letter dated 2 August 2022. It said it was '…to confirm the outcome of our meeting on 29 July 2022…' and stated that 'After consultation…' his employment ended with effect on 29 July 2022 by reason of redundancy.

153 On the same day, Mr Frawley was paid his final pay which included pay for a 4-week notice period.

154 There is no suggestion that Mr Frawley challenged the redundancy letter in any way, until over two months later, when, on 6 October 2022, Mr Frawley sent an email to Mr Buchan. The email made the following assertions:

(a) That it was '[a]n implied term of [my contract] that the employment was concurrent with the holding of the office to which I was elected'.

(b) That the only ways the employment could be ended, under the rules and therefore the contract, were:

(i) Losing an election

(ii) All of the offices of the Union being vacated upon the appointment of an administrator to manage its affairs

(iii) Being removed from office under Rule 11; and

(iv) Resignation.

(c) The letter of 2 August 2022 advising that the employment ended by reason of redundancy was inconsistent with the Rules. In this regard, it says:

> Instead the CFMEU advised me by email on 02 August 2022 that "***the purpose of this letter is to confirm the outcome of our meeting of 29 July 2022 and what this means for you. After consultation, your employment ended with effect on 29 July 2022 by reason of redundancy. This decision is not a reflection on your performance***". (original emphasis)

155 There are 2 remarkable things about this correspondence.

156 First, the delay between the date of termination and the date it was sent, particularly given Mr Frawley's background in unionism and, his experience in dealing with members and, as he said, 'fixing disputes' and 'fixing issues' like subcontractors not being paid.

157 Second, the email says nothing about the circumstances leading to the issue of the 2 August 2022 letter. In particular, it does not refer to Mr Frawley's meeting with Mr Buchan of 29 July 2022 (other than repeating what the letter itself said).

158 It is telling that the email does not allege, for instance, that the 2 August letter did not confirm the outcome of the 29 July 2022 meeting, or that the outcome of the meeting was something different to what the redundancy letter represented. Had Mr Frawley truly been surprised by Mr Buchan's call telling him that a redundancy had been authorised, had he actually believed that the 29 July 2022 meeting was resolved on the basis that Mr Buchan was going to take care of things in a way that he could continue working, then surely, he would have said so in this email if not before.

159 These fortify my earlier conclusion that Mr Frawley's version of the 29 July 2022 meeting should not be accepted, and my conclusion that, in truth, Mr Frawley agreed to end his employment on terms that were financially favourable to him, compared to him simply resigning.

160 His agreement was not forced. It was given in a friendly, informal meeting which he had requested, at a location away from the office as he had requested. It was not given in the heat of the moment. It was not tainted by threats or pressure. It was free and autonomous.

161 In short, termination was the result of a mutual agreement to substitute Mr Frawley's resignation from his employment with an agreed termination which would be called and treated as a redundancy.

162 Throughout the process, no one expressly or directly addressed what would happen in relation to the elected office Mr Frawley held. His reference to quitting must be understood to be both resignation from employment and resignation from office, because his employment was coterminous with the holding of the office. Although not said by anyone, the effect of the agreement that was reached, was that the Union waived any requirement for Mr Frawley to vacate the elected position by written notice of resignation. This created a casual vacancy as contemplated by rule 38(cc).

Is the redundancy letter proof of a termination at the Union's initiative even if Mr Frawley agreed to it?

163 Mr Frawley said the Commission should not go behind the redundancy letter, but should accept the redundancy letter as evidence that the Union unilaterally terminated the employment for the reason of redundancy. He said that even if it is found he agreed to accept a redundancy, that agreement could not change the termination as being at the initiative of the employer. He relied upon a decision of DP Colman of the Fair Work Commission in ***Jennings v The Trustee for Alsop Gordon & Best Unit Trust t/a AGB Training*** [2019] FWC 638.

164 ***Jennings*** is distinguishable. In that case, the employer initiated a meeting with Ms Jennings and discussed with her an organisational restructure. The employer offered her an alternative position, on lower pay, telling her that if she did not accept that offer, her position was being made redundant and her employment would terminate. Several meetings followed this initial meeting, culminating in Ms Jennings refusing the offer of an alternative role, which the employer treated as her accepting a redundancy and then proceeded to terminate the employment accordingly. The Commission rejected the employer's argument that Ms Jennings had agreed to a redundancy and was not, in these circumstances dismissed.

165 The Deputy President said at [29]:

> …It was the actions of the employer in deciding that it no longer needed Ms Jennings' role that brought the employment relationship to an end….Offering Ms Jennings a choice between redundancy and an alternative role of this kind brought the employment relationship to an end. It was, to use the formation of the Court in *Mohazab*, the principal contributing factor which led to the termination of the employment relationship.

166 The same cannot be said in this case. It was not the Union's decision to make Mr Frawley's position redundant that was the principal contributing factor leading to termination. Rather it was Mr Frawley's resignation, followed by an agreement to substitute the resignation with a mutual termination, and call it a redundancy.

Can termination by mutual agreement be termination at the Union's initiative?

167 Early in these proceedings, Mr Frawley put forward an alternative case, that if he was found to have resigned, he did so because the Union's conduct left him with no choice. He relied on the 'constructive dismissal' or forced resignation line of cases following ***Western Excavating (EEC) Ltd v Sharp*** [1978] 1 All ER 713; [1978] ICR 221.

168 In closing, Mr Frawley's agent conceded that the Union's conduct in the lead up to 26 July 2022 was not repudiatory, which I understood to mean Mr Frawley was no longer pressing the alternative case. Mr Frawley relied on the prior conduct only to explain his emotional state and why his resignation ought not to have been immediately acted upon.

169 Mr Frawley's concession was properly made. The established principles relating to 'constructive dismissal' do not extend to circumstances in which an employee is willing and content to resign on terms that have been negotiated and which are satisfactory to the employee: ***Fair Work Ombudsman v Austrend International Pty Ltd*** [2018] FCA 171; (2018) 273 IR 439 at [27]-[30].

170 It is therefore unnecessary for me to decide whether or not Mr Frawley proved the prior conduct he was relying on for his alternative, constructive dismissal case.

171 In case I am wrong in concluding that Mr Frawley was not dismissed, I will address the remaining issues which the parties argued.

Was the CFMEUW Mr Frawley's employer as well as the CFMMEU?

172 Both parties agree that the CFMMEU was Mr Frawley's employer.

173 Mr Frawley says, that the CFMEUW was also Mr Frawley's employer jointly or concurrently with the CFMMEU. Mr Frawley relied on passages of ***Quirk*** in which his Honour Perram J ultimately treated the State and federal registered organisations as being joint employers. His Honour noted at [7] that although the State registered union initially strongly resisted the contention that there was joint employment '…by the end of the trial it become apparent that both sides agreed…' that the employees were jointly employed by the federal union and the State union. His Honour considered that position to be consistent with the evidence: [9].

174 The CFMEUW's Rules provide that each office in the CFMEUW may be held by the person who holds the corresponding office in the CFMMEU's Construction and General Division, Western Australian Divisional Branch: rule 16(4A). A s 71 Certificate was issued to the CFMEUW, which gives effect to that rule.

175 The CFMEUW's Rules require that elected organisers be paid a salary: rule 16(4). In other words, that the organiser be employed.

176 The evidence was that the vast majority, if not all, of Mr Frawley's duties involved organising on sites where federally registered agreements were in place, and therefore, rights of entry granted to him as an organiser for the CFMMEU were being exercised.

177 Mr Frawley's payslips were issued in the name of the CFMMEU.

178 However, it was also clear that Mr Frawley additionally exercised his rights as an authorised representative of the CFMEUW, in particular, on the occasions when he attended sites to conduct safety inspections under s 49I of the Act. He did so in that capacity, even if those sites had federal agreements in place, and the members were national system employees.

179 I am therefore inclined to the view that the CFMEUW also employed Mr Frawley.

Can the Union make an organiser's elected position redundant during the term of office?

180 The Union says that if Mr Frawley has been denied a contractual benefit, his damages should be assessed on the basis that his employment would have terminated on 14 October 2022 in any event, because the organiser position he held was abolished on that date.

181 It was an agreed fact that on 14 October 2022, a Committee of Management and Executive Meeting of the CFMMEU's Construction and General Division, WA Branch, passed a resolution to reduce the number of elected Divisional Branch organisers from five to three.

182 Immediately afterwards, a Committee of Management and Executive Meeting of the CFMEUW passed an identical resolution.

183 Mr Frawley says these resolutions were not valid to the extent that they purported to abolish elected positions during their term.

184 I agree with Mr Frawley.

185 The CFMMEU's Rule 37(iv) provides:

> Without affecting the term of office of persons holding office as Divisional Branch Officers immediately prior to the date of certification of this sub-rule, the officers of the Western Australia Divisional Branch shall, on and from 2 January, 2001, or the declaration of the election in 2000, whichever is the later, consist of the Divisional Branch President, the Divisional Branch Senior Vice President, the Divisional Branch Vice President, the Divisional Branch Secretary, two (2) Divisional Branch Assistant Secretaries, three (3) Divisional Branch Trustees, the Divisional Branch Treasurer and Divisional Branch Management Committee members, together with such number of Organisers as the Divisional Branch Management Committee **from time to time determines**. (emphasis added)

186 Other sub-clauses listing the offices of other Divisional Branches also provide for the office to include such organisers as relevant councils or management committees 'from time to time determine': see rule 37(i) or 'as may be decided': see rule 37(v).

187 Rule 37 immediately precedes rule 38, dealing with the conduct of elections. The two rules work together. Rule 37 describes the offices of each Divisional Branch, and rule 38 describes how those offices are to be filled by the conduct of an election.

188 So, when the rules permit the management committee to determine the number of organiser positions 'from time to time', this is to decide the structure of the Divisional Branch, and also to set the number of positions to be filled at the next election, and enable the election accordingly.

189 The Union argued that the rule should be read as enabling the Union to manage the number of organisers in response to a variety of situations that could arise in the management of the Union, such as organiser resignations, organisers losing their licence or the need to make positions redundant.

190 I am not persuaded this supports the Union's construction.

191 First, the Union can employ organisers that are not elected organisers. Mr Frawley was employed as an organiser before he took on an elected position. The Management Committee can fix the number of elected organiser positions, prior to an election, to ensure that it has a mix of elected and unelected organisers in such proportions as will provide it with some degree of staffing flexibility.

192 Second, the CFMMEU rules provide that if a casual vacancy occurs in any office as a result of death, resignation, retirement, dismissal or for any other reason, such vacancy may be filled by appointment by the Divisional Branch Management Committee, provided the unexpired part of the term does not exceed 12 months, or three quarters of the term of office, whichever is greater: rule 38(cc). Only if the unexpired part exceeds both these periods, is an election mandated. For a 4-year term, the requirement for an election would only arise if the unexpired part of the term is at least three years.

193 An organiser's resignation or dismissal, therefore, does not necessitate a change to the number of organiser positions. If the management committee does not want to re-fill the vacancy, it has the discretion not to, provided the unexpired part of the term is less than three years.

194 On the other hand, if the rule was understood as allowing the management committee to reduce the number of organiser positions during a term of office, this would create undesirable outcomes that are unlikely to have been the intention of the rules.

195 For instance, if the management committee were to reduce the number of organiser positions after an election, there is no mechanism in the rules to determine which organiser or organisers will cease to hold office unless the number of organisers was reduced to nil.

196 Also, the management committee could effectively undermine the democratic process by removing organiser positions if it was dissatisfied with the outcome of the election. The democratic process contemplated by the rules is that members are able to have a say via the elections about who the organisers will be. The clear intent of the rules is for members to be able to influence who the Union employs to do the work of organisers.

197 The reference to the words 'from time to time' in rule 37 allows the Management Committee to determine the number of organisers from one election to another. It means the Divisional Branch structure can change from election to election. It does not permit the structure to change within a term of office.

198 Accordingly, the purported resolution did not have the effect of making the organiser position redundant prior to the expiry of the term. It need not be taken into account in assessing damages.

Has Mr Frawley failed to mitigate his loss?

199 The monetary remedy for a denied contractual benefit of the fixed term of an employment contract is common law damages. Common law damages are intended to place the innocent party in the same situation as if the contract had been performed.

200 Damages are therefore assessed by reference to the remuneration and other benefits which would have been paid to, or received by, the employee from the date of dismissal to the end of the fixed term, subject to reductions for any financial benefits actually received and which the employee, acting reasonably, should have received within the remaining contractual period, and other contingencies: ***The St Cecilia's College School Board v Grigson*** [2006] WAIRC 05293; (2006) 86 WAIG 3146 at [100].

201 The Union says that I should find that Mr Frawley failed to mitigate his loss because he could have taken up a higher paying job using his skills as a carpenter, but chose not to do so.

202 From January 2021 until the end of his employment with the Union, Mr Frawley was paid a salary of $2,425.83 gross per week for his full-time position.

203 Sometime after 2 August 2022, and before October 2022, Mr Frawley started working for a friend at Garden Island in a safety role, but that work lasted for only a day. Mr Frawley was then out of work until October. He took a holiday with his wife during that time.

204 He got a job as a rigger with Rigsafe starting on 24 October 2022 earning $33 per hour plus overtime, travel and other allowances. He obtained this work by directly approaching an acquaintance in his football club who was a director of the business. From then until January 2023, he was earning between $957.20 to $1913 gross per week, depending on his hours and work arrangements.

205 In January 2023, Mr Frawley moved into his current position with Rigsafe as a HSE Operations Advisor on an annual salary of $101,000 or $1,942.30 gross per week. This is $483 a week less than his pay with the Union.

206 The Union has the onus of establishing Mr Frawley has failed to mitigate his loss: ***Rizhao Steel Holding Group Co Ltd v Koolan Ire Ore Pty Ltd [No 2]*** [2010] WASC 385 at [76]-[77]. The standard of reasonableness in the mitigatory principle is not an exacting one: [77].

207 The Union did not demonstrate that work was available to Mr Frawley any sooner, or that work was available at higher rates of pay. There is nothing unusual about there being a gap in time between jobs. Job searching takes time. Recruitment processes take time.

208 Nor is there anything unreasonable about Mr Frawley getting his foot in the door with a business at a lower rate of pay, while looking to progress to a better paying position.

209 I would not make any reduction of damages for failure to mitigate.

How should the ReddiFund payment be treated in assessing damages?

210 Mr Frawley's payslips show that each pay period an amount was paid in addition to salary for 'Reddifund Redundancy Contribution'. The amount was not paid to Mr Frawley, rather it was paid to a third party, who the parties referred to as 'ReddiFund'.

211 It was an agreed fact that Mr Frawley received $21,270 gross for redundancy pay from ReddiFund upon or following the end of his employment.

212 ReddiFund was described by Mr Frawley as a scheme whereby the regular weekly employer contributions accumulate and are held for the employee, and then when the employee is made redundant, they can collect that balance. He said, 'it can stay in there as long as you want it to'.

213 Mr Buchan confirmed that if Mr Frawley had not claimed the ReddiFund amount when the employment with the Union ended, those amounts would have remained in the ReddiFund account, to Mr Frawley's balance, and he would have received it eventually when being made redundant from another job.

214 The damages award is designed to place an employee in the position they would have been in if the contract had been performed. The question, then, is had the contract been performed, would Mr Frawley have received the ReddiFund payment in any event? If not, it should be deducted in the assessment of damages.

215 Neither party provided me with evidence of ReddiFund's scheme terms, demonstrating the conditions that needed to be satisfied for a person to access an account balance. Nor was there any evidence of the incidence of redundancy in the construction industry.

216 I take it that the fund is not available in circumstances where a person is dismissed for misconduct, or resigns.

217 The best I can make from the evidence is that there was a possibility that Mr Frawley would have received the ReddiFund monies at some point in time in the future if his employment ended by redundancy. It seems there was not, however, a guarantee that Mr Frawley would have been made redundant and so receive the funds. Nor is it certain when he would have received the funds.

218 Had the contract been performed, Mr Frawley would have seen through the elected term. There is no suggestion that he would have received the ReddiFund amount at the expiry of the elected term if he did not contest, or lost, a future election. In these circumstances, it is appropriate to deduct the ReddiFund amount in calculating Mr Frawley's damages. To do otherwise, would put Mr Frawley in a better position than if the contract had been performed.

219 Mr Frawley provided me with a schedule setting out the income he would have received had he continued in employment, and the income he has received since the employment ended. It calculates his damages, if the ReddiFund amount is deducted, as $105,880.57. This figure includes superannuation, annual leave and long service leave accruals. It also includes $11,049 income described as 'Red[d]iFund'. That is, it assumes that Mr Frawley would have received future ReddiFund contributions as well. The ReddiFund contributions are not amounts paid to or received by Mr Frawley. Accordingly, this amount should also be deducted from his calculations.

220 Accordingly, had Mr Frawley succeeded in showing he had been denied a contractual benefit, I would have assessed his damages in the sum of $94,831.57.

Conclusion and Orders

221 The claim will be dismissed.

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[1] In these reasons I will refer to the two respondents, being the federally registered Construction, Forestry, Maritime, Mining and Energy Union and the State registered The Construction, Forestry, Mining and Energy Union of Workers jointly and interchangeably as the Union. Whether the reference is to these organisations jointly or to one or the other of them will depend on context. Where it is important to distinguish which organisation is referred to, CFMMEU is used to refer to the federally registered union and CFMEUW is used to refer to the State registered union.

[2] CFMMEU Construction and General Division and Construction and General Divisional Branches Rules.

2023 WAIRC 00715

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CHRISTOPHER FRAWLEY

APPLICANT

-v-

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION AND ANOTHER

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO

DATE MONDAY, 21 AUGUST 2023

FILE NO/S B 111 OF 2022

CITATION NO. 2023 WAIRC 00715

Result	Claim dismissed
Representation	
Applicant	Mr J Theodorsen as agent and Mr A Drake-Brockman as agent
Respondents	Mr T Dixon of counsel and Mr D Rafferty of counsel

Order

HAVING HEARD from Mr J Theodorsen as agent and Mr A Drake-Brockman as agent on behalf of the applicant and Mr T Dixon of counsel and Mr D Rafferty of counsel on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the claim be and is hereby dismissed.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2023 WAIRC 00694

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00694
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	TUESDAY, 13 JUNE 2023
DELIVERED	:	TUESDAY, 15 AUGUST 2023
FILE NO.	:	U 27 OF 2022
BETWEEN	:	DAVID SPARROW Applicant AND SHIRE OF NORTHAM Respondent

CatchWords	:	dismissal – refusal to wear face covering – inability to enter workplace – duties cannot be done entirely remotely – refusal to comply with lawful and reasonable order – dismissal not unfair
Legislation	:	*Industrial Relations Act 1979* (WA) *Emergency Management Act 2005* (WA)
Result	:	Dismissed
Representation:		
Applicant	:	Mr D Sparrow (in person)
Respondent	:	Mr P Wittkuhn (of counsel)

Case(s) referred to in reasons:

Adami v Maison de Luxe Limited [1924] HCA 45; (1924) 35 CLR 143

Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal [2021] FWCFB 6059; (2021) 310 IR 399

Briggs v AWH Pty Ltd [2013] FWCFB 3316; (2013) 231 IR 159

Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police) [2022] WASC 272

McManus v Scott-Charlton [1996] FCA 904; (1996) 70 FCR 16

R v Darling Island Stevedoring and Lighterage Company Limited [1938] HCA 44; (1938) 60 CLR 601

Sommerville v University of Tasmania [2022] FWC 1582

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 Mr David Sparrow was employed by the Shire of Northam (the Shire) as an ICT Coordinator from 3 or 4 April 2018 until his employment ended on 14 February 2022. Mr Sparrow says his dismissal was unfair. In his *Form 2A – Unfair Dismissal*

Application Mr Sparrow stated that he did not wish to be reinstated to his former position. Mr Sparrow seeks compensation, an apology, a reference and for the senior management staff to be brought to proper account.

2 The Shire contends that Mr Sparrow refused to comply with a lawful and reasonable order to wear a face mask in compliance with relevant public health orders issued under the *Emergency Management Act 2005* (WA) and the decision to dismiss him in these circumstances was not unfair, nor harsh or oppressive.

Background and Facts

3 Mr Sparrow gave evidence on his own behalf. Mr Colin Young gave evidence on behalf of the Shire.

4 On 27 January 2022 the *COVID Restrictions (Gatherings and Related Measures) Directions (No 11)* (the Emergency Directions) became effective for the Perth and Peel regions. The Directions were issued by the Commissioner of Police and State Emergency Coordinator pursuant to ss 61, 67 and 72A of the *Emergency Management Act 2005* (WA). The Emergency Directions required the wearing of face coverings in indoor places with certain exemptions:

PART I: FACE COVERING REQUIREMENTS

Requirement to wear a face covering in certain places

6. Subject to paragraph 8, a person in the affected area must wear a face covering at all times while they are:

(a) in an **indoor space**; or

(b) at or in a residential aged care facility, or residential disability facility, whether in an **indoor space** or **outdoor space**; or

(c) at a **hospital**; or

(d) in a vehicle of any kind, including one that is being used for public transport, taxi or rideshare services.

7. A person must not, in the affected area, enter or remain:

(a) in an indoor space; or

(b) at or in a residential aged care facility, or residential disability facility, whether in an indoor space or outdoor space; or

(c) at a hospital; or

(d) in a vehicle of any kind, including one that is being used for public transport, taxi or rideshare services,

unless the person is wearing a face covering or one or more of the face covering exceptions in paragraph 8 apply to that person at that time.

Exceptions from face covering requirements

8. A person is not required to wear a face covering where:

(a) the person is within or at their **home** unless another direction requires them to wear a mask at home; or

(b) the person is attending a gathering of persons at a home, provided that the gathering is not prohibited by these directions; or

(c) the person is a child 12 years of age or under, except at any time the child is attending school in Year 7 and above; or

(d) the person is at the time attending school as a student in Year 6 or below; or

(e) the person has a physical, developmental or mental illness, injury, condition or disability which makes wearing a face covering unsuitable; or

(f) the person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication; or

(g) the nature of a person's occupation means that wearing a face covering at that time is impractical to perform that occupation or creates a risk to their health and safety; or

(h) the person needs to temporarily remove their face covering so as to enable another person to appropriately perform their occupation; or

(i) the nature of a person's work or the activity that they are engaging in means that clear enunciation or visibility of the mouth is essential; or

(j) the person is at that time consuming food, drink or medicine; or

(k) the person is asked to remove the face covering to ascertain identity; or

(l) not wearing a face covering is required for emergency purposes (other than emergency preparation or emergency preparation activities, unless another exception specified in this paragraph applies); or

(m) the person is working in the absence of others in an enclosed indoor space (unless and until another person enters that indoor space); or

(n) the person is a resident in a residential aged care facility or residential disability facility; or

(o) the person is a patient in a hospital; or

(p) the person is engaged in an activity involving swimming; or

(q) the person is running or jogging or otherwise engaged in some form of strenuous or vigorous exercise or physical activity; or

(r) the person is travelling in a vehicle and either is the sole occupant of that vehicle or is travelling in the vehicle with other persons provided that all the occupants of the vehicle are members of the same **household**; or

(s) the person is undergoing medical, dental or beauty related care or treatment to the extent that such care or treatment requires that no face covering be worn; or

(t) the person is directed by a judicial officer or tribunal member in proceedings in a court or tribunal to remove their face covering to ensure the proper conduct of those proceedings; or

(u) the person is a prisoner or detainee in a prison, detention centre or other place of custody; or

Note: Nothing in these directions affects any other power a person may have to require a prisoner or detainee to wear a face covering.

(v) not wearing a face covering is otherwise required or authorised by law; or

(w) wearing a face covering is not safe in all the circumstances,

provided that:

(x) a person is only excepted from the requirement to wear a face covering under subparagraph (e) if the person produces a medical certificate that certifies that the person has an illness, injury, condition or disability that makes wearing a face covering unsuitable:

(i) upon request by an **authorised officer**, and

(ii) if requested to do so whilst at or on any premises, by the **responsible person** for those premises or by the **staff** of the responsible person; and

(y) where a person is relying on an exception under subparagraph (f) to (w), that person resumes wearing the face covering as soon as reasonably practicable after the person no longer falls within the relevant exception.

5 The same day the Shire sent an email to all staff informing them of the requirement to wear a mask in all indoor settings.

6 The next day Mr Sparrow attended his workplace at the Shire of Northam Administration Centre and did not wear a mask.

7 On his arrival, a member of the Shire's staff informed him of the need to wear a mask. Mr Sparrow responded that he was not legally obliged to wear a mask.

8 Soon after arriving at the workplace, the Acting Chief Executive Officer met with Mr Sparrow and explained the need to wear a mask. Mr Sparrow denied that he was obliged to wear a mask and claimed to have an exemption. When he was asked to provide evidence of the exemption Mr Sparrow asserted that he was not obliged to provide a copy of the exemption. The Acting Chief Executive Officer advised Mr Sparrow that he was to either wear a mask or leave the premises immediately. Mr Sparrow was informed he could apply for leave. Mr Sparrow proposed that he work from home. The Acting Chief Executive Officer advised he was not approved to work from home.

9 Mr Sparrow left the building.

10 On 28 January 2022, later the same day, the Acting Chief Executive Officer wrote to Mr Sparrow clearly stating that masks must be worn in all indoor public settings, including the workplace and directed Mr Sparrow to wear a mask when attending the workplace:

> Please be advised that you must wear a mask when attending the workplace where this is an indoor public setting or produce a medical certificate which certifies that wearing a face covering is unsuitable.

11 On 31 January 2022, Mr Sparrow responded setting out six questions concerning the Shires' view of the legal status of the Emergency Directions and risks to health from wearing face coverings:

- Do you and the Shire of Northam exec team agree that if mandates are not law, you are all under no legal obligation require general office staff to wear masks in their usual workplace?
- Are you and the Shire of Northam exec team aware of how dangerous to health prolonged mask wearing can be, including and not limited to an increased likelihood of contracting and spreading life-threatening bacterial pneumonia?
- Will you and the Shire of Northam exec team be properly advising staff in your care of the dangers of prolonged mask wearing in their usual workplace?
- Has the Shire sought and obtained legal advice in relation to Shire employees potentially contracting and/or spreading a life-threatening illness via prolonged mask wearing in their usual workplace?
- What assurances are you and the Shire exec team currently providing to staff that, in the event of life-threatening illness being contracted and/or spread by an employee due to prolonged mask wearing, that medical expenses and compensation for loss of income (etc etc) will be provided by the Shire?
- What protections are you and the Shire exec team providing for staff to mitigate the likelihood of staff contracting and spreading life-threatening bacterial pneumonia brought on by prolonged mask wearing?

Mr Sparrow stated:

> Aside from "mandates not being law" but rather simply a voluntary contract that a mandator and mandate enter into with each other and, in this case, a contract that I, David A. Sparrow do *not* and have *not* voluntarily entered into nor currently under any legal obligation to do so, please accept the following as my exemption from any kind of unhealthy wearing of masks that increase the likelihood of me and other shire staff contracting and spreading life threatening bacterial pneumonia.

12 Mr Sparrow also stated that he would not disclose medical information, he remained available, able and willing to carry on his usual duties, was prepared to apply to work from home or an alternate agreed location where mask wearing could be avoided and he would not be applying to use any of his leave entitlements.

13 On 1 February 2022, the Acting Chief Executive Officer wrote to Mr Sparrow stating:

NOTICE OF STAND DOWN AND REQUEST TO SHOW CAUSE

> As you are aware on 27 January 2022, the State Government issued a Direction which determined that all persons must wear a mask whilst in a public place or workplace from 6pm on that said date including the Wheatbelt Region. As such you cannot lawfully enter any Shire of Northam Building unless you are wearing a mask or have a medical certificate stating that you are exempt from wearing a mask for health-related reasons.
>
> The relevant direction is the *COVID Transition (Face Covering) Directions* made on 29 January 2022 which came into operation on 12.01am on 31 January 2022. A link is https://www.wa.gov.au/system/files/2022-01/COVID-Transition-Face-Coverinq-Directions.pdf. The Shire therefore has authority to require you to produce a medical certificate as the source of evidence.
>
> I confirm that you left the Shire's premises on Friday 28 January 2022 due to your refusal to wear a mask and your perception that the Shire was unprepared to allow you to remain on the premises in breach of the State's Directions. I confirm that you were stood down without pay.
>
> You will remain on unpaid leave until close of business on Tuesday 8 February 2022 unless you return to work before that date wearing a mask and indicating that you are prepared to abide by the State government's mask-wearing directions moving forward.
>
> It is an inherent requirement of your role that you work in an indoor space, and the Shire is not reasonably able to provide you with alternative duties that avoid the need to work in an indoor space. It is not apparent to the Shire that your duties come within any of the exemptions under the State's Directions.
>
> I acknowledge that you have asserted the State's Directions to be legally invalid. The Shire does not accept this stance, however we believe that mask wearing is appropriate from an OSH perspective and I ask that you treat this letter as a direction by your employer to wear a mask at work until further advised, in the interests of public health. Employees must at common law follow lawful and reasonable directions of employers. This direction is made even independently of the State government's direction.
>
> You are invited to attend a Teams meeting at 2pm on Tuesday 8 February 2022 when an opportunity will be given to you to show cause why your employment should not be terminated in relation to the following misconduct.
>
> ***3. Conduct of Staff***
>
> ***3.1 Personal Behaviour***
>
> ***Staff will:***
>
> ***(a) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;***
>
> ***(f) At all times observe the corporate values of the organisation around conducting themselves in a Safe, Open, Accountable and Respectful manner,***
>
> ***3.4 Compliance with Lawful Orders***
>
> ***(a) Staff will comply with any lawful order given by any person having authority to make or give such an order, with any doubts as to the propriety of any such order being taken up with the supervisor of the person who gave the order and, if resolution cannot be achieved, with the Chief Executive Officer.***
>
> ***(b) Staff will give effect to the lawful policies of the Local Government, whether or not they agree with or approve of them.***
>
> Please confirm that you will attend by close of business on Monday the 7 February 2022. Should you accept this invitation you are entitled to bring along a support person to sit with you during the Teams meeting.
>
> You remain employed during the stand down period and any accrued leave can be utilised during this time. Should you use the following accrued annual leave you will continue to accrue leave entitlements as normal for those hours only. If you wish to take up other employment during the stand down period, please contact HR Manager Beverley Jones to discuss on 08 9622 6145.
>
> For current information about your workplace entitlements and obligations, including information about stand downs from work, visit the Fair Work Ombudsman Coronavirus and Australian workplace laws website at https://coronavirus.fairwork.gov.au. This includes recent updates and key links to other government bodies that may be able to support you during this time. We are aware that the pandemic and it's effects can cause angst, and we would like to

remind you that you can access the Shire of Northam confidential counselling service by contacting Claire Rowe on 0403 575 777.

Thank you for your understanding during this difficult time, I look forward to receiving your acceptance of the meeting invitation. If you have any questions or concerns in relation to this matter please contact the undersigned.

14 On 7 February 2022, Mr Sparrow emailed the members of the Shire of Northam Council, various staff and the Chief Executive Officer in response to the letter of 1 February 2022. Mr Sparrow alleged the letter contained inaccuracies and noted that his questions had not been answered and he reiterated the questions, highlighting some sections. Mr Sparrow stated that he declined to meet on the date proposed by the Acting Chief Executive Officer because it was not on a day he was usually rostered to work. Mr Sparrow stated that he was not required to be at the workplace to perform most of his duties and proposed some tasks within his current duties that he could undertake at home.

15 On 8 February 2022, the Chief Executive Officer wrote to Mr Sparrow setting out responses to his six questions and informing him of the possible consequences of Mr Sparrow's refusal to comply with the Emergency Directions:

In the circumstances, it is not necessary that you agree to or apply for that state of affairs. If you refuse to comply with the State's Direction (and the Shire's lawful and reasonable direction as an employer), then that leaves the Shire with no reasonable options but termination, short-term stand-down without pay, or (at the Shire's discretion) permitting annual leave. The Shire is under no obligation to offer the last-mentioned option, and you have not applied for it anyway. Termination has been under consideration, but as an immediate solution, short-term stand-down was the appropriate course.

It is respectfully considered that you have not shown cause why your employment should not be terminated.

Nevertheless, I am prepared to re-schedule the offered Teams meeting to Thursday 10 February at 2pm, or alternatively consider any final written submission you may wish to make by that time.

16 On 9 February 2022, Mr Sparrow again emailed the Shire of Northam Council members and the Shire Executive Management Team reiterating the response he had previously submitted with additional commentary.

17 On 14 February 2022, the Shire wrote to Mr Sparrow terminating his employment.

Was the Direction to Wear Face Coverings Lawful and Reasonable?

18 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] HCA 44; (1938) 60 CLR 601 at 621; ***Adami v Maison de Luxe Limited*** [1924] HCA 45; (1924) 35 CLR 143 at 151; ***McManus v Scott-Charlton*** [1996] FCA 904; (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.

19 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***), Allanson J 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.

20 The direction must be reasonable and lawful but need not be the 'better' direction or 'preferable direction'; a determination of what is reasonable must be assessed against factors relevant to the employment relationship. The Full Bench of the Fair Work Commission considered this in ***Briggs v AWH Pty Ltd*** [2013] FWCFB 3316; (2013) 231 IR 159 (***Briggs v AWH)*** at [8]:

The determination of whether an employer's direction was a reasonable one … does not involve an abstract or unconfined assessment as to the justice or merit of the direction. It does not need to be demonstrated by the employer that the direction issued was the preferable or most appropriate course of action, or in accordance with "best practice", or in the best interests of the parties.

21 The implied duty to obey lawful and reasonable directions was considered recently by the Full Bench of the Fair Work Commission in ***Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal*** [2021] FWCFB 6059; (2021) 310 IR 399 (***Mt Arthur Coal***) as cited in ***Sommerville v University of Tasmania*** [2022] FWC 1582 at [106]:

In summary, the duty to obey does not require a written or express term of the employment contract to that effect but, rather, the duty to follow a lawful and reasonable direction is implied into all contracts of employment. The fact that the term is implied, as opposed to being expressly written (although it often will also be expressly stated), does not affect its legal efficacy.

22 The Emergency Directions stand as valid law. The Shire cannot ignore or overturn the effect of the Emergency Directions.

23 Considering the prevailing circumstances, the Emergency Directions, and the measures of effective and efficient control including face coverings, I find the Direction to wear a face covering to be reasonable.

24 Accordingly, the Shire had a legitimate basis for implementing the policy as a measure to protect employees and others in the workplace in connection with COVID-19. The policy was an appropriate measure.

25 I find that the Direction was lawful and reasonable.

Did Mr Sparrow Refuse a Direction to Wear a Face Covering?

26 Mr Sparrow submits that he did not refuse to wear a face covering. Mr Sparrow says that on the morning of 28 January 2022, he was not requested nor directed to wear a face covering. Mr Sparrow submits that in the absence of a request or direction he cannot be found to have refused to comply with a lawful and reasonable order of his employer. In addition, Mr Sparrow asserts that even if he had been directed to wear a face covering he was not obliged to do so because he was drinking a cup of tea and covered by an exemption of the Emergency Directions.

27 Mr Sparrow focussed on the morning of 28 January 2022 when he attended work and was directed to leave the workplace because he was not wearing a mask. Mr Sparrow contends that he was not obliged to wear a mask at that time because he was drinking a cup of tea. Mr Sparrow claims this means he was exempt from wearing a mask under the Emergency Directions exemption (j). Mr Sparrow audio recorded the morning from his entering the workplace until he left the workplace. Both parties provided transcriptions of the recording. Mr Sparrow's transcription inserted references to his cup of tea. At the hearing the recording was played. It is not possible to ascertain from the audio recording whether Mr Sparrow was drinking a cup of tea or not. Mr Young's recollection was that Mr Sparrow was not drinking a cup of tea, however he said he could not be entirely certain this was the case.

28 The Shire contend that Mr Sparrow first raised the claim that he was drinking a cup of tea in May 2022. The Shire submits that had Mr Sparrow considered the relevant exemption applied he would have referred to this in his earlier communications with the Shire.

29 At the hearing Mr Sparrow's evidence was:

> …if I was drinking, then I might have a defence?---Of course you're going to say that, sir, but that was not the case, because this was, ah – ah, something a – a number of us were already doing every time we were attending meetings – Council meetings and all sorts of stuff. It was actually a regular thing for the people that I've been involved with, is whenever we went to somewhere, we would get, ah – ah – as soon as possible, make sure we have a beverage in our hand. It was part of our – our – our group to make sure that we could maintain – it was part of our fight for democracy and against tyranny. I was actually doing something that was regular and – and as I have already said, I deliberately did it as, ah – as soon as I could. In hindsight, I should've actually walked into the building with a cup of tea.

30 I do not find Mr Sparrow's evidence that he considered he was exempt because he was drinking a cup of tea to be credible. If Mr Sparrow did have a cup of tea on the morning of 28 January 2022 his own evidence indicates it was an admitted device to create a defence to avoid the requirement to wear a face covering. However, as can be adduced from the audio recording, at the meeting with the Acting Chief Executive Officer that morning he did not refer to the exemption because he was drinking at the time. Mr Sparrow's attempts to effectively retrofit the audio recording transcript with replete references to him drinking a cup of tea are an attempt to construct a defence after the fact.

31 Even so, if Mr Sparrow had been drinking a cup of tea he could have advised the Acting Chief Executive Officer that he intended to wear a face covering once he had finished his cup of tea in circumstances where he intended to comply with the Emergency Directions and the Employer Direction. I note the exemption in the Emergency Directions at (j) concerning consumption of food and drinks is qualified at (y) which states that where a person is relying on an exception under subparagraph (f) to (w), including (j), that person resumes wearing the face covering as soon as reasonably practicable after the person no longer falls within the relevant exception.

32 Furthermore, Mr Sparrow completely disregards subsequent events. In the weeks following, the Shire clearly directed Mr Sparrow to wear a face covering when attending the workplace and Mr Sparrow clearly refused to comply.

33 The Acting Chief Executive Officer's letter of 1 February 2022 provided Mr Sparrow with the opportunity to return to the workplace provided he indicated that he was prepared to comply with the requirements to wear a face covering.

34 On 7 February 2022, Mr Sparrow emailed the members of the Shire of Northam Council, various staff and the Chief Executive Officer in response to the letter of 1 February 2022. Mr Sparrow alleged the letter contained inaccuracies and noted that his questions had not been answered and he reiterated the questions, highlighting some sections. Mr Sparrow stated that he declined to meet on the date proposed by the Acting Chief Executive Officer because it was not on a day he was usually rostered to work. Mr Sparrow stated that he was not required to be at the workplace to perform most of his duties and proposed some tasks that could be undertaken within his current duties. The clear implication of Mr Sparrow's response is that he continued to decline to return to the workplace and wear a face covering.

35 I find that Mr Sparrow did refuse to follow a direction to wear a face covering.

Did Mr Sparrow Refuse to Follow a Lawful and Reasonable Direction?

36 Mr Sparrow contends that he is not obliged to provide evidence of a medical exemption from the requirement to wear a face covering. The Emergency Directions clearly state the obligations on both the Shire and on Mr Sparrow and the circumstances in which an exemption applies. I find it reasonable for the Shire to require Mr Sparrow provide a medical certificate to satisfy that he has a medical exemption from the Emergency Directions in circumstances where he relies on a medical exemption.

37 Inevitably my finding that the direction to Mr Sparrow to wear a face covering when attending the workplace was lawful and reasonable and my finding that Mr Sparrow refused to wear a face covering as directed and the fact that Mr Sparrow did not produce evidence of his medical exemption, or other exemption, means Mr Sparrow refused to follow a lawful and reasonable direction.

Was Dismissal for Refusal to Follow a Lawful and Reasonable Direction Fair?

38 The Shire submits that Mr Sparrow refused to comply with a lawful and reasonable direction to wear a face covering consistent with the Emergency Directions and in these circumstances the decision to dismiss was not harsh, oppressive nor unfair.

39 Mr Sparrow claims that the Shire did not genuinely consider the issues he raised and did not consider alternate arrangements that he proposed such as performing his duties at home. Mr Sparrow submits that in the absence of genuine consideration of these matters his dismissal was unfair.

40 It is well established that a refusal by an employee to comply with a lawful and reasonable direction will generally constitute a valid reason for dismissal as found in ***Darling***. To determine whether a dismissal is harsh, oppressive or unfair it is also necessary to consider both the substantive and procedural fairness and weigh these matters in any given case and decide whether on balance a dismissal is harsh, oppressive or unfair.

41 In this 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 (***Undercliffe***).

42 Whether a dismissal was harsh, oppressive or unfair depends on an assessment of all the relevant facts and circumstances.

43 Mr Sparrow wrote to the Shire asserting that it was obliged to accommodate him working from home in circumstances where the Shire insisted he wear a face covering when attending the workplace. The Shire considered that Mr Sparrow had mistaken their obligations for circumstances in which an employee was injured, ill or had a disability. The Shire informed Mr Sparrow it did not consider the asserted obligation in the circumstances where Mr Sparrow proposed to work from home because he was not prepared to attend without committing a breach of the Emergency Directions and he was not prepared to follow a lawful and reasonable direction of his employer.

44 Even so, it is not correct to say the Shire did not consider Mr Sparrow's proposal to work from home and concluded that it was an inherent requirement of his role to attend the workplace and that it was not reasonably able to provide him with alternate duties. Mr Young's evidence is that he discussed options such as working from home with the Chief Executive Officer, however they concluded that Mr Sparrow would not be able to perform all the duties required of him from home. At that time, it was not known when the Emergency Directions would be revoked, and the Shire did not consider it feasible for Mr Sparrow to work from home.

45 The Shire clearly set out the consequences for Mr Sparrow of not following the Emergency Directions and Mr Sparrow was provided with an opportunity to respond before a decision was taken.

46 Mr Sparrow was offered the opportunity to participate remotely in a meeting through Teams to discuss the proposal to terminate his employment and declined to do so.

47 The Shire considered the submissions Mr Sparrow emailed on 9 February 2022 before determining that he had not shown cause why his employment should not be terminated. On 14 February 2022 Mr Sparrow was dismissed.

48 The Shire did not exercise the right to terminate Mr Sparrow's employment in a manner that constitutes an abuse of that right as discussed in ***Undercliffe***.

Conclusion

49 Mr Sparrow's refusal to comply with that lawful and reasonable direction alone constituted a valid reason for his dismissal and had the consequential result that he was not ready, willing and able to fulfil the requirements of his role.

50 In all the circumstances I find that the Shire did not exercise the right to terminate his employment so harshly or oppressively as to constitute an abuse of that right.

51 For the reasons set out above I dismiss this application.

NOTE: [28] amended by Corrigendum issued 15 August 2023 ([2023] WAIRC 00704)

2023 WAIRC 00695

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID SPARROW **APPLICANT** **-v-** SHIRE OF NORTHAM **RESPONDENT**
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 15 AUGUST 2023
FILE NO/S	U 27 OF 2022
CITATION NO.	2023 WAIRC 00695

Result	Dismissed
Representation	
Applicant	Mr D Sparrow (in person)
Respondent	Mr P Wittkuhn (of counsel)

Order

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

THAT application U 27 of 2022 is dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2023 WAIRC 00704

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID SPARROW
	APPLICANT
	-v-
	SHIRE OF NORTHAM
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	(CORRIGENDUM TUESDAY, 15 AUGUST 2023)
FILE NO/S	U 27 OF 2022
CITATION NO.	2023 WAIRC 00704

CORRIGENDUM

In [28], line 1 [2023] WAIRC 00694 delete 'team' and insert 'tea' in lieu thereof.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

Dated: 15 August 2023

2023 WAIRC 00714

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAYE-ANNE MUIR
	APPLICANT
	-v-
	WUNGENING ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	FRIDAY, 18 AUGUST 2023
FILE NO.	U 49 OF 2023
CITATION NO.	2023 WAIRC 00714

Result	Order issued
Representation	
Applicant	Mrs J Muir (on her own behalf)
Respondent	Mr S Farrell (as agent)

Order

WHEREAS on 27 July 2023 the applicant filed a *Form 2 – Unfair Dismissal Application*, and on 28 July 2023 the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;

AND WHEREAS by Directions and Notices of Hearing issued on 15 August 2023, the application that the Commission accept the referral of the unfair dismissal claim out of time was listed to be heard together with the substantive application, and the matter was set down for hearing on 6 December 2023 to 8 December 2023;

AND WHEREAS on 18 August 2023 the applicant sought leave to discontinue the matter, and the respondent advised it consents to the applicant being granted leave to discontinue the matter;

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

THAT matter U 49 of 2023 be, and by this order is, discontinued by leave.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00703

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAYE-ANNE MUIR
	APPLICANT
	-v-
	WUNGENING ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	TUESDAY, 15 AUGUST 2023
FILE NO.	U 49 OF 2023
CITATION NO.	2023 WAIRC 00703

Result	Direction issued
Representation	
Applicant	Ms J Muir (on her own behalf)
Respondent	Mr S Farrell (as agent)

Direction

HAVING heard from Ms J Muir (on her own behalf) and Mr S Farrell (as agent) on behalf of the respondent, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the application that the Commission accept the referral of the unfair dismissal claim out of time be heard together with the substantive application.
2. THAT the parties file a statement of agreed facts and a bundle of agreed documents by Monday, 28 August 2023.
3. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Tuesday, 26 September 2023.
4. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Tuesday, 10 October 2023.
5. THAT the applicant file an outline of legal submissions by Tuesday, 24 October 2023.
6. THAT the respondent file an outline of legal submissions by Tuesday, 14 November 2023.
7. THAT the matter be listed for hearing on Wednesday, 6 December 2023, Thursday, 7 December 2023 and Friday, 8 December 2023.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00745

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEE WILLIAM STEVENS
	APPLICANT
	-v-
	THP PLASTERING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 12 SEPTEMBER 2023
FILE NO/S	U 40 OF 2023
CITATION NO.	2023 WAIRC 00745

Result	Application discontinued by leave
Representation	
Applicant	Mr L Stevens
Respondent	Mr J M Singh of counsel

Order

WHEREAS the applicant has advised the Commission that they wish to discontinue application U 40 of 2023 on Thursday 31 August 2023;

AND WHEREAS the respondent does not object to the appeal being discontinued;

NOW THEREFORE the Commission pursuant to its powers under the *Industrial Relations Act 1979* orders –

THAT application U 40 of 2023 be and by this order is discontinued.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2023 WAIRC 00685

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00685
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	TUESDAY, 21 MARCH 2023; WEDNESDAY, 22 MARCH 2023
DELIVERED	:	MONDAY, 14 AUGUST 2023
FILE NO.	:	U 61 OF 2022
BETWEEN	:	NICHOLAS MAHER Applicant AND ROMAN CATHOLIC BISHOP OF BUNBURY Respondent

CatchWords	:	dismissal – repudiation – requirement to be vaccinated – COVID-19 policy – inability to enter workplace because of vaccination status – duties cannot be done entirely remotely – refusal to comply with lawful and reasonable order – dismissal not unfair
Legislation	:	*Industrial Relations Act 1979* (WA) *Occupational Safety and Health Act 1984* (WA) *Privacy Act 1988* (Cth) *Work Health and Safety Act 2020* (WA)
Result	:	Dismissed
Representation:		
Applicant	:	Mr N Maher (in person)
Respondent	:	Mr I Curlewis (of counsel)

Case(s) referred to in reasons:

Adami v Maison de Luxe Limited [1924] HCA 45; (1924) 35 CLR 143

Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal [2021] FWCFB 6059; (2021) 310 IR 399

Briggs v AWH Pty Ltd [2013] FWCFB 3316; (2013) 231 IR 159

Earney v Australian Property Investment Strategic Pty Ltd [2010] VSC 621

Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police) [2022] WASC 272

Gallotti v Argyle Diamond Mines Pty Ltd trading as Argyle Diamonds (2003) 83 WAIG 919; (2003) 83 WAIG 3053

Gelagotis v Esso Australia Pty Ltd t/a Esso [2018] FWCFB 6092

JL v Haydar Family Restaurants t/a McDonalds [2003] WAIRC 09489; (2003) 83 WAIG 3303

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61; (2007) 233 CLR 115

McManus v Scott-Charlton [1996] FCA 904; (1996) 70 FCR 16

R v Darling Island Stevedoring and Lighterage Company Limited [1938] HCA 44; (1938) 60 CLR 601

Sommerville v University of Tasmania [2022] FWC 1582

Whittaker v Unisys Australia Pty Ltd [2010] VSC 9; (2010) 26 VR 668

Reasons for Decision

1 Mr Nicholas Maher was employed by the Roman Catholic Bishop of Bunbury (RCBB) as a Relationship Manager from 17 March 2008 until his employment ended on 6 April 2022.

2 Mr Maher says his termination of employment was a dismissal at the initiative of his employer and that the dismissal was unfair and he seeks reinstatement to his former position.

3 RCBB contends that Mr Maher repudiated his employment by conduct that prevented him from performing his duties and that the Diocese's acceptance of the repudiation ended Mr Maher's employment. RCBB says it did not dismiss Mr Maher.

Background and Facts

4 In January 2022, RCBB introduced a COVID-19 vaccination policy (COVID-19 policy) to apply to all workers at premises of the Diocese of Bunbury. The COVID-19 policy required all employees to have at least two COVID-19 vaccinations by 31 January 2022 and provide evidence of vaccination status or provide a valid exemption from vaccination.

5 On 24 January 2022 RCBB emailed all staff including Mr Maher, notifying him, of the COVID-19 policy requirements and attaching a copy of the policy.

6 On 25 January 2022 Mr Maher emailed the Financial Administrator stating: 'I will not be vaccinated by 31 January. Please arrange a time to discuss'.

7 The Financial Administrator responded the following day stating:

> You have shared before your thoughts on COVID-19 vaccinations.
>
> With regard to the policy, how soon after 31 January 2022 do you see yourself complying with the policy which applies to all staff?

8 On 27 January 2022 Mr Maher responded stating:

> I do not wish to meet in order to share my thoughts on the Covid-19 vaccines. I do not know why you would characterise my request for a meeting in that way. It is unfair and telling.
>
> It was rather, in direct reply to your email advising the implementation of a new workplace policy that affects me, and particularly with regard to your request for advice on my vaccination status.
>
> I have some legitimate questions about the policy and how it impacts my work and employment. For example, the policy does not clearly state what is meant by "fully vaccinated" – whether that is two shots or two shots and a booster. There are other questions too.
>
> Your refusal to meet with me and to dialogue is worrying and is a further cause of stress. The situation is anxious as it is and your refusal as my manager to meet with me to discuss is making it worse and causing me more anxiety. I would have hoped and thought that you would want to find a solution to the issues raised by the new policy that was agreeable to all. That is clearly not the case.
>
> I have made an appointment with my doctor today and will be taking the rest of the day off on sick/stress leave. I will provide you with a doctors certificate in due course should the problem persist and the doctor advise that I need additional time.

9 Mr Maher commenced sick leave on 27 January 2022 and submitted a medical certificate for the period from 27 January 2022 to 14 February 2022.

10 On 11 February 2022 the Financial Administrator wrote to Mr Maher in relation to his role and the requirement to be vaccinated as follows:

> As you know your employment contract requires you to work from the Diocesan Office to supervise staff, be available to customers and priests and visit school Principals and Bursars. Unlike other places, we have a lay customer service.

As you are aware the Policy requires that you provide to the Diocese evidence of your COVID-19 vaccination status or a valid medical exemption in order to enter the Diocesan Centre premises for work purposes.

To date, you have not however provided evidence to the Diocese that you have been vaccinated nor have a valid exemption from the Werst Australian Chief Health Officer Dr Andrew Robinson.

Accordingly, the Diocese now formally directs you not to attend the Diocesan Centre premises unless you are double vaccinated.

As a temporary measure the Diocese directs that you take annual leave from 15 February 2022 to 8 March 2022 inclusive. The purpose of this direction is to provide to you a short period to consider this letter and comply with the Policy requirements.

Hence please provide me with evidence of your vaccination status or exemption by midday on 8 March 2022.

I am available to discuss this matter with you should you wish.

11 On the same day Mr Maher responded saying:

Once again, I express my disappointment that there has been no discussion or consultation on the matter of the vaccine policy, despite my frequent requests.

I would therefore like to again request a meeting where the possibility of work from home might be discussed. As you know, we successfully navigated the running of the office during the period of lockdown in 2020, without any issues arising or concerns having been noted.

I note also that my contemporaries operating in the Melbourne office of the CDF (Relationship Managers) have been working from home for many months now and have adapted their systems (and ours) accordingly. As you know, work from home where possible has been a preferential remedy to these situations across Australia.

I would propose that for the period 15 Feb to 8 Mar inclusive, rather than forcing me to take leave, you might reconsider the work from home arrangement. If any difficulties or issues emerge in that time, further review and management can occur. Supervision of staff can occur remotely through daily teams meetings and the normal supports through phone and email.

In any case, please forward to me a copy of my employment contract, the relevant Award, and a copy of my position statement highlighting the specific duties related to 'supervision'.

John, I hope you would consider this proposal generously before other measures. You can be sure I would do whatever is necessary to satisfy any concerns you might have.

12 RCBB's letter of 11 February 2022 to Mr Maher, formally directed him to not attend the Diocese Office unless he had received two vaccines and requested that he provide evidence of his vaccination status or exemption by 8 March 2022. Mr Maher was directed to take annual leave from 15 February 2022 until 8 March 2022.

13 Subsequently Mr Maher and the Financial Administrator exchanged communications by email and met in person to discuss the COVID-19 policy and Mr Maher's request to work from home.

14 On 8 March 2022 Mr Maher requested a period of long service leave from 23 March 2022 to 8 July 2022 inclusive. Mr Maher cited RCBB's 'unreasonable refusal to consider work-from-home' and 'implied threat of the potential loss of employment' for making this request.

15 On 10 March 2022 in response to Mr Maher, the Financial Administrator emailed Mr Maher setting out several issues related to the situation and reiterated the request for evidence of Mr Maher's vaccination status or provision of an exemption by 22 March 2022.

16 On 18 March 2022 the Financial Administrator wrote to Mr Maher:

Show Cause – Inability to carry out your duties

I am writing to you about the Diocesan Policy on Vaccination Status for All Diocesan Employees.

You have been sent various communications since 18 January 2022 about the requirement that you provide to the Diocese acceptable evidence of COVID 19 vaccinations or a valid medical exemption.

Despite my latest letter dated 8 March 2022, you have still not provided evidence to the Diocese of your vaccination status nor a valid medical exemption. You have also not been able to carry out all your required duties at the Diocese because you have not satisfied the requirements to be permitted to access the workplace or customer locations. Hence, you have been required to take annual leave since 15 February 2022 until 22 March 2022.

By my letter dated 11 February 2022, emails dated 14 February 2022, 21 February 2022, meeting on 2 March 2022, and subsequent emails dated 2 March 2022 and 10 March 2022, you have been advised that working from home is not tenable.

In this context, your request for long service leave has not been approved. The leave has been requested at short notice and cannot be accommodated within the Diocese operations.

I have explained to you why it is that the Diocese requires a person in your position to carry out your duties at the Diocese workplace and at customer locations, namely, to supervise staff and meet with priests, customers, and potential customers in and outside the office. You are also required to visit schools in the Diocese and other customers and potential customers, such as Catholic Homes Inc. and cannot do that unless fully vaccinated or exempt.

It is important I again reiterate that it is a requirement that you be fully vaccinated or have a valid health exemption recorded on the Australian Immunisation Register. The Diocese is not of course directing you to be vaccinated. Whether

you are vaccinated or not is your prerogative. However, without such vaccination or exemption you have placed yourself in a position that you cannot carry out all your duties as required.

You have previously been advised that if you are unable or unwilling to comply with the Policy requirements, the Diocese will have to reassess the continuing of your employment by the Diocese.

Opportunity to respond

In view of everything stated and our communications with you, the Diocese now considers that the end of your employment is very likely.

However, before a decision regarding your employment is made, the Diocese provides you by this letter a final opportunity to respond in writing with any details you have not already, given during our meetings and communications, that you want the Diocese to take into account or reasons why the Diocese should not consider the employment at an end. For the avoidance of doubt, the Diocese has considered all of your responses and representations to date.

Your response is required by 3pm on 25 March 2022. In the period 22 to 25 March, you must not enter the Diocese workplace nor carry out any duties at home. You will be provided special paid leave in that three day period.

I appreciate that this may be a difficult time for you.

17 Mr Maher produced no proof of vaccination nor exemption to RCBB as required under the policy.

18 Mr Maher's employment ended on 6 April 2022.

Was Mr Maher Dismissed?

19 A threshold issue arises as to whether Mr Maher was dismissed on 6 April 2022 to attract the jurisdiction of the Commission under s 29(1)(b)(i) (as it then was) of the *Industrial Relations Act 1979* (WA) (IR Act). This is a jurisdictional fact necessary to be found for the Commission to further consider whether any such dismissal is harsh, oppressive or unfair: ***Gallotti v Argyle Diamond Mines Pty Ltd trading as Argyle Diamonds*** (2003) 83 WAIG 919; (2003) 83 WAIG 3053; ***JL v Haydar Family Restaurants t/a McDonalds*** [2003] WAIRC 09489; (2003) 83 WAIG 3303.

20 RCBB contends that that the employment of Mr Maher was ended because of the conduct and attitude of Mr Maher; and RCBB did not dismiss Mr Maher. RCBB says that it is open to the Commission to conclude on the evidence, based on Mr Maher's conduct, attitude and communications with RCBB in the period of October 2021 to April 2022, that Mr Maher conveyed to RCBB an intention not to comply with the policy, and thereby prevented a proper and adequate performance of his duties as Relationship Manager: ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*** [2007] HCA 61; (2007) 233 CLR 115 (***Koompahtoo)***.

21 RCBB asserts that Mr Maher was steadfastly and robustly opposed to being vaccinated against COVID-19 and despite being given additional time from 31 January 2022 to 22 March 2022 to comply with the policy to be vaccinated he chose not to do so. RCBB says that Mr Maher made it known that his view is that vaccines are 'immoral', and his refusal to have a COVID-19 vaccine was a 'matter of conscience'.

22 RCBB says Mr Maher used various strategies to avoid complying with the policy, including generally prevaricating, unavailability of professional advisers and garrulous emails. RCBB says Mr Maher attempted to solicit other employees in the Diocese office to support his anti-vaccination cause.

23 Further RCBB says Mr Maher's failure to be vaccinated prevented him from visiting schools, which at all material times, were subject to Health Directions issued by the WA State Government. It also prevented Mr Maher visiting other Catholic customers who were also subject to the Health Directions. Further, the failure to be vaccinated prevented Mr Maher from visiting these schools and other Catholic customers to raise funds, discuss loans and be provided services.

24 In all these circumstances, RCBB says Mr Maher prevented any continuation of his employment and thereby he repudiated the employment relationship.

25 RCBB refers the Commission to ***Gelagotis v Esso Australia Pty Ltd t/a Esso*** [2018] FWCFB 6092 at [119] for the test for repudiation:

> …[I]s whether the conduct of the employee is such as to convey to a reasonable person, in the position of the employer, renunciation either of the contract as a whole or of a fundamental obligation under it. The issue turns upon objective acts and omissions and not on uncommunicated intention.

26 Mr Maher does not accept that his conduct constituted a repudiation of the employment contract and asserts the employment was ended at the initiative of his employer.

27 Mr Maher submits that the letter dated 6 April 2022 notified him that his employment had been ended. Mr Maher submits that the letter was sent at the employer's initiative and is conduct consistent with a termination of Mr Maher's employment at RCBB's initiative and it follows, then, that Mr Maher was dismissed within the meaning of the IR Act.

Repudiation - Principles

28 The test for determining whether a contract has been repudiated by a party to the contract, is whether the conduct of the party, when assessed objectively, displayed an intention to no longer be bound by the contract.

29 In ***Earney v Australian Property Investment Strategic Pty Ltd*** [2010] VSC 621 at [77], Hargrave J summarises the legal principles which are to be considered when assessing whether there has been repudiation of an employment contract, as determined by Ross J in ***Whittaker v Unisys Australia Pty Ltd*** [2010] VSC 9; (2010) 26 VR 668, citing ***Koompahtoo***:

> (1) The term repudiation is used in a number of senses. Relevantly, the High Court has recently stated that repudiation:

may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It be may termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.

(2) It is not necessary to prove a subjective intention to repudiate. The test is an objective one.

(3) Whether there has been repudiation is a question of fact.

(4) Repudiation is not to be inferred lightly. It is a serious matter.

(5) Repudiation may be evidenced by a single act or by an accumulation of conduct in circumstances where no individual act on its own constitutes a repudiation.

(6) Repudiation does not bring an end to a contract. It is necessary for the innocent party to elect to accept the repudiation.

(7) Repudiatory conduct may be 'cured' by the party in breach, but only prior to the acceptance of the repudiation. Accordingly, once the innocent party has elected to terminate the contract for breach, it cannot thereafter be cured.

Consideration

30 The issue for determination is whether the employer dismissed Mr Maher. If Mr Maher was not dismissed the application under s 29(1)(b)(i) must fail. RCBB contends that Mr Maher, by his conduct, repudiated his contract of employment and that RCBB accepted the repudiation on 6 April 2022. That is, there was no dismissal and therefore, s 29(1)(b)(i) of the IR Act does not apply in these circumstances.

31 For Mr Maher to have repudiated his conduct, there must be some act (or omission) that is inconsistent with the contract of employment, and an acceptance of the repudiation. RCBB contends that the conduct relied upon was Mr Maher failing to get vaccinated and/or failing to provide proof of being exempt from the need to vaccinate, also Mr Maher's communications with RCBB and staff of RCBB concerning COVID-19 vaccines. It is submitted RCBB's letter of 6 April 2022 is the acceptance of that repudiation.

32 I find that Mr Maher did not convey to RCBB that he no longer intended to be bound by the employment contract. Mr Maher conveyed that he wished to continue to perform his duties albeit from a different location or be permitted to take leave until the requirement to be vaccinated was revoked.

33 Mr Maher conveyed his personal attitude toward the COVID-19 vaccination, a reluctance to be vaccinated and his wish to work from home.

34 Communications between Mr Maher and RCBB concerned the requirements of the policy, willingness to meet with Mr Maher, the subject matter to be discussed at a meeting with Mr Maher, the location of meetings with Mr Maher, the capacity of Mr Maher to meet, the viability of working from home, the basis of the policy, Mr Maher's opportunities to obtain a medical exemption from vaccination and leave arrangements.

35 There was no indication from RCBB that he considered Mr Maher was conducting himself in a manner which repudiated his contract of employment prior to the letter terminating his employment on 6 April 2022.

36 I find that the communications between Mr Maher and RCBB during February 2022 and March 2022 are consistent with RCBB dismissing Mr Maher because of him not being able to meet the inherent requirements of his contract of employment.

37 I find that Mr Maher was terminated by RCBB at the initiative of RCBB because in RCBB's view Mr Maher could not perform the inherent requirements of the role. Mr Maher was, therefore, dismissed.

Was Mr Maher's Dismissal Unfair?

38 Mr Maher contends that RCBB's direction concerning the COVID-19 vaccination was neither lawful nor reasonable because:

a. His contract of employment did not provide RCBB an entitlement to introduce and amend policies from time to time, and this included the introduction of a policy requiring mandatory vaccinations;

b. The scope of the relevant public health order did not apply to his position and that RCBB's rationale for introducing the COVID-19 policy was not an appropriate control measure;

c. RCBB did not consider reasonable adjustments that would have enabled him to work remotely, take leave or permit him to work at different times or on different shifts from other employees;

d. It was not possible for him to meet the timeframes for compliance with the COVID-19 policy;

e. There was no meaningful consultation prior to introducing a mandatory vaccination policy. In particular, to the extent that the Policy relied on OSH obligations, the consultation requirements under the *Occupational Safety and Health Act 1984* (WA) were not complied with;

f. The requirement to provide immunisation status, which contained sensitive health information, ignored obligations under the *Privacy Act 1988* (Cth), particularly relating to solicitation of, consent for, and safeguarding of, that information;

g. The direction to be vaccinated was developed having scant regard to the specific circumstances of the workplace; and

h. The direction to be vaccinated lacked a clear, understandable and logical basis.

39 RCBB asserts that Mr Maher was given a lawful and reasonable direction to comply with RCBB's policy and Mr Maher made no attempt to comply with the direction. RCBB says Mr Maher prevaricated and attempted to justify his anti-vaccination cause. When notified that his failure to comply would result in his employment ending, he made no attempt to comply.

What Constitutes a Reasonable and Lawful Direction?

40 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] HCA 44; (1938) 60 CLR 601 at 621; ***Adami v Maison de Luxe Limited*** [1924] HCA 45; (1924) 35 CLR 143 at 151; ***McManus v Scott-Charlton*** [1996] FCA 904; (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.

41 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***), Allanson J 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.

42 The direction must be reasonable and lawful but need not be the 'better' direction or 'preferable direction'; a determination of what is reasonable must be assessed against factors relevant to the employment relationship. The Full Bench of the Fair Work Commission considered this in in ***Briggs v AWH Pty Ltd*** [2013] FWCFB 3316; (2013) 231 IR 159 (***Briggs v AWH)*** at [8]:

> The determination of whether an employer's direction was a reasonable one … does not involve an abstract or unconfined assessment as to the justice or merit of the direction. It does not need to be demonstrated by the employer that the direction issued was the preferable or most appropriate course of action, or in accordance with "best practice", or in the best interests of the parties.

Consideration

43 Mr Maher asserts that the decision to dismiss him was not lawful and contends that the direction to be vaccinated was not reasonable and other arrangements could have been made to facilitate him to perform his duties and reduce any risk to others. Mr Maher's submissions raised several issues that I will now address.

Contract of Employment

44 Mr Maher contends that his contract of employment did not provide for his conditions of employment to be varied. Mr Maher contends that the introduction of the COVID-19 policy and the requirement to be vaccinated was a variation of his conditions of employment not permitted under his contract.

45 Mr Maher's contract of employment states:

> Conditions of Employment
>
> The general conditions of employment of the role are those contained in the attached document titled Conditions of *Employment for Employees of the Catholic Diocese of Bunbury and its Organisations* (the Diocese Conditions of Employment).
>
> The Diocese Conditions of Employment may be amended from time to time by the Diocese in a manner consistent with this agreement.
>
> This letter is intended to supplement the Diocese Conditions of Employment. In order to avoid doubt if the two documents are inconsistent in any respect, this letter prevails to the extent of the inconsistency.

46 The contract of employment included the following:

> I have read the *Conditions of Employment for Employees of the Catholic Diocese of Bunbury and its Organisations* and acknowledge it may be varied from time to time in a manner consistent with this agreement.

47 Mr Maher signed the contract of employment on 6 February 2008 at the commencement of his employment and in doing so specifically accepted that the Conditions of Employment may be varied from time to time by his acknowledgment signed by him.

48 The Conditions of Employment provided for amendments, per the following clauses:

> 24.1 These conditions of employment are to be reviewed by the Diocese at the end of every three-year period.
>
> 24.2 Amendments or variations will not be made if their effect is to disadvantage employees overall.
>
> 24.3 Variations to these conditions of employment for individual employees are permitted with prior approval from the Vicar General and Financial Administrator.

49 I find that the terms of the contract of employment provided for variations to the Conditions of Employment from time to time, provided the variation was made consistent with the Agreement. The limitation is that variations will not be made if their effect is to disadvantage employees overall. The introduction of the COVID-19 policy was not a disadvantage to employees overall.

50 Mr Maher's assertions that RCBB was not entitled to amend the conditions of employment by introducing the COVID-19 policy are incorrect.

51 Even so, the right of an employer to direct their employee is implied at common law. Employees have a duty of obedience which requires an employee to comply with any lawful and reasonable direction.

52 The implied duty to obey lawful and reasonable directions was considered recently by the Full Bench of the Fair Work Commission in ***Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal*** [2021] FWCFB 6059; (2021) 310 IR 399 (***Mt Arthur Coal***) as cited in ***Sommerville v University of Tasmania*** [2022] FWC 1582 at [106]:

> In summary, the duty to obey does not require a written or express term of the employment contract to that effect but, rather, the duty to follow a lawful and reasonable direction is implied into all contracts of employment. The fact that the term is implied, as opposed to being expressly written (although it often will also be expressly stated), does not affect its legal efficacy.

53 I find Mr Maher had a duty to follow a lawful and reasonable direction of RCBB.

Was the COVID-19 Policy an Appropriate Measure?

54 Mr Maher contends that the COVID-19 policy was not an appropriate control measure in response to the need to reduce the spread of COVID-19. In addition, Mr Maher says that the direction to be vaccinated was developed having scant regard to the specific circumstances of the workplace; and the direction to be vaccinated lacked a clear, understandable, and logical basis.

55 RCBB had then, and still has, a positive duty to ensure the health and safety of the workplace so far as is reasonably practicable. Failure to comply with this duty can have serious consequences. The duty extends to measures to eliminate or mitigate the risks of COVID-19 in the workplace.

56 Due to the COVID-19 pandemic, RCBB was required to comply with its obligations to ensure the health and safety of its workers while at work in accordance with work health and safety legislation. This included consideration of available and effective means to control the risk of COVID-19 in workplaces controlled by RCBB, and client workplaces, so far as was reasonably practicable. Considering the prevailing circumstances at the time of the introduction of the COVID-19 policy, the risks of COVID-19, and the measures of effective and efficient control including vaccination, I find the terms of the COVID-19 policy, and its introduction, to be reasonable.

57 Accordingly, RCBB had a legitimate basis for implementing the policy as a measure to protect employees and others in the workplace in connection with COVID-19. The policy was an appropriate measure.

Adjustments

58 Mr Maher argues it was unfair to dismiss him because he could have worked from home, taken leave, or be permitted to attend the workplace at different times or on different shifts from other employees.

59 Mr Maher says that he could perform his role away from the office and ought to have been permitted to work from home in circumstances where his vaccination status was deemed to be a risk by RCBB.

60 Mr Maher's contract of employment designates that the principal place of employment is the Diocese Offices. The duties of Mr Maher set out in the Position Description required contact with customers and the evidence is that this included visiting schools and meeting with school principals, bursars and finance staff. At times customers would come to the Diocese Office to meet with Mr Maher.

61 I accept that the duties of Mr Maher involved meeting people and, in some circumstances, public health orders limited visitors to persons who were vaccinated. I accept that not all of Mr Maher's duties could be performed remotely.

62 In these circumstances the direction to Mr Maher to be vaccinated was a reasonable and lawful order that fell within the scope of the contract of employment.

63 RCBB gave evidence that they had received advice concerning risks associated with remote work arrangements following a cyber-attack on Mr Maher's account and were therefore, reluctant to permit working from home arrangements. I accept that, in the circumstances, the arrangements requested by Mr Maher presented risks to RCBB's operations and it was reasonable for RCBB to be wary of permitting work from home arrangements.

64 Even if it was accepted that working from home arrangements were practicable, as in ***Briggs v AWH***, RCBB need not demonstrate there may have been better or preferable directions.

Timeframe for Compliance with Direction

65 Mr Maher contends that it was not possible for him to meet the timeframes for compliance with the COVID-19 policy.

66 Mr Maher's email to the Financial Administrator on 25 January 2022 indicates that he clearly understood that the COVID-19 policy required him to be vaccinated by 31 January 2022. Mr Maher stated he would not be able to comply with the requirement and sought a meeting to discuss.

67 There was a significant period between the first occasion he was notified of the COVID-19 policy and the requirement to be vaccinated, and the date on which his employment ended on 6 April 2022, for Mr Maher to provide evidence of his vaccination status or a valid medical exemption. I find that there was sufficient time for Mr Maher to arrange to be vaccinated with the first vaccination or obtain a valid medical exemption.

Consultation

68 Mr Maher asserts that RCBB did not properly and genuinely consider his responses, particularly the matters raised in his emails dated 28 February 2022 and 15 March 2022. Mr Maher further says that RCBB did not properly and genuinely consider the content of the discussion at the meeting of 2 March 2022.

69 Mr Maher did not expand on his submission that RCBB did not comply with the consultation requirements of the *Occupational Safety and Health Act 1984* (WA) (OSH Act). Mr Maher did not give any evidence on this element of his submissions. In these circumstances I do not find that RCBB breached the OSH Act nor its successor the *Work Health and Safety Act 2020* (WA).

70 Mr Maher points to the content of the termination letter dated 6 April 2022 and claims that the contents of the letter 'mentions but does not engage in any meaningful way with the responses of Mr Maher'. Mr Maher says that had RCBB properly considered his responses it would have reached a different conclusion.

71 Based on the evidence of the extensive correspondence between Mr Maher and the Financial Administrator, and Mr Maher and the Bishop, and an evaluation of the content of the communications; I find that there was consultation on the impact of the COVID-19 policy on Mr Maher's situation along with considerations of the operations of the organisation and the safety and wellbeing of all employees and customers.

Obligations Under the Privacy Act 1988 (Cth)

72 Mr Maher argues that the requirement to provide immunisation status, which contained sensitive health information, ignored obligations under the *Privacy Act 1988* (Cth), particularly relating to solicitation of, consent for, and safeguarding of, that information.

73 Mr Maher did not provide particulars nor expand on this issue in his evidence and submissions.

74 I accept that RCBB needed to know each of its employees' vaccination status to ensure that it could comply with its obligations under Work Health and Safety legislation to keep employees, and any persons they engaged with in the course of their employment, safe and healthy, and enquiries as to the vaccination status of employees were lawful and reasonable. There is no evidence that RCBB breached any obligations it may have had.

Did Mr Maher Refuse to Comply with a Lawful and Reasonable Direction?

75 The reason given for dismissal, as set out in the letter dated 6 April 2022, was Mr Maher's non-compliance with the COVID-19 policy.

76 Mr Maher submits that RCBB incorrectly asserts that he refused to comply with the policy.

77 It is clear from the evidence that Mr Maher did not comply with the COVID-19 policy.

78 In all of the circumstances I find that the direction to Mr Maher to provide his vaccination status or a medical exemption was lawful and reasonable.

79 I find that Mr Maher disobeyed the lawful and reasonable order of RCBB to provide his vaccination status or a medical exemption.

80 Mr Maher's refusal to comply with that lawful and reasonable direction alone constituted a valid reason for his dismissal and had the consequential result that he was not ready, willing and able to fulfil the requirements of his role.

81 In all the circumstances Mr Maher's conduct justified the termination of his employment.

82 For the reasons set out above I dismiss this application.

2023 WAIRC 00686

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES NICHOLAS MAHER

APPLICANT

-v-

ROMAN CATHOLIC BISHOP OF BUNBURY

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE MONDAY, 14 AUGUST 2023

FILE NO/S U 61 OF 2022

CITATION NO. 2023 WAIRC 00686

Result	Dismissed
Representation	
Applicant	Mr N Maher (in person)
Respondent	Mr I Curlewis (of counsel)

Order

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

THAT application U 61 of 2022 is dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2023 WAIRC 00709

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT AMOS
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	FRIDAY, 18 AUGUST 2023
FILE NO.	U 23 OF 2023
CITATION NO.	2023 WAIRC 00709

Result	Order issued
Representation	
Applicant	Mr R Amos (on his own behalf)
Respondent	Ms S Bhar

Order

WHEREAS on 8 May 2023 the applicant filed a *Form 2 – Unfair Dismissal Application* (**the Application**), and on 19 May 2023 the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;

AND WHEREAS by Directions issued on 30 June 2023 the respondent's jurisdictional objection was listed for hearing on a date to be fixed, and by Notices of Hearing issued on 18 July 2023 the matter was set down for hearing on 6 September 2023;

AND WHEREAS on 11 August 2023 the applicant advised that he did not wish to continue with the Application, on 14 August 2023 the respondent advised it has no objections to the applicant discontinuing the Application, and on 18 August 2023 the applicant sought leave to discontinue the Application;

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

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

(Sgd.) C TSANG,
[L.S.] Commissioner.

UNIONS—Matters dealt with under Section 66

2023 WAIRC 00726

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN MCCARTNEY
	APPLICANT
	-v-
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	MONDAY, 28 AUGUST 2023
FILE NO/S	PRES 14 OF 2023
CITATION NO.	2023 WAIRC 00726

Result	Order issued
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	No appearance

Order

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and there being no appearance on behalf of the respondent the Chief Commissioner, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders –

(1) An Interim Branch Executive of the AFMEPKIU is established and is constituted as follows:

(a) Steven McCartney;

(b) Glenn McLaren;

(c) Christopher Seivers; and

(d) Christopher Kirkby.

(2) While the Interim Branch Executive of the AFMEPKIU created by order 1 of this order exists, the provisions of rules 4, 5, 7, 9, 10, 11, 12, 19, 20 of the AFMEPKIU are waived or varied as the case may be to the extent that:

(a) the composition of the Administrative Committee is constituted by the Interim Branch Executive;

(b) the composition of the State Council is constituted by the Interim Branch Executive;

(c) the composition of the State Conference is constituted by the Interim Branch Executive;

(d) the Interim Branch Executive will conduct the duties of the State Officials; and

(e) there be no Technical & Supervisory Division, Printing Division, Zones or Zone Representatives, State Returning Officer, or Deputy Returning Officer.

(3) The members of the Interim Branch Executive:

(a) Shall have only one vote each being a deliberative vote.

(b) Shall not have a casting vote.

(4) If an issue is put before the Interim Branch Executive, which issue is phrased as a motion/resolution, and there is an even number of votes both for and against the motion/resolution, the motion is not to be considered defeated and the provisions of order 5 apply.

(5) In the event that there is a failure to reach agreement on any issue relating to the alteration of the rules of the AFMEPKIU, an application for a section 71 certificate, and/or the conduct of an election, which issue is phrased as a motion/resolution, required to be determined by the Interim Branch Executive, that motion/resolution shall be referred to the Registrar of the Western Australian Industrial Relations Commission who shall advise the Interim Branch Executive within 48 hours of having been referred the motion/resolution.

(6) Until further order, the Interim Branch Executive shall exercise all the powers, function and duties of the Administrative Committee, State Council, State Conference, and State Officials under the AFMEPKIU Rules, and without derogating from powers conferred the Interim Branch Executive shall:

(a) amend the Rules of the AFMEPKIU so that they sufficiently align with the AFMEPKIU's federal counterpart, the AMWU WA Branch, to enable the AFMEPKIU to obtain a section 71 certificate; and

(b) apply for a section 71 certificate.

(7) This order shall remain in effect until 30 December 2023 unless otherwise varied or revoked.

(8) The parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2023 WAIRC 00729

REFERRAL TO COMMISSION UNDER HEALTH SERVICES ACT 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIANI JADE MILLS
	APPLICANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	THURSDAY, 31 AUGUST 2023
FILE NO/S	APPL 33 OF 2023
CITATION NO.	2023 WAIRC 00729

Result	Order issued
Representation	
Applicant	Ms M Hillier of counsel
Respondent	Mr A Chapple

Order

HAVING heard from Ms M Hillier of counsel on behalf of the applicant and Mr A Chapple 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 applicant's application for an extension of time to refer a decision or finding to the Commission pursuant to s 172(4) of the *Health Services Act 2016* (WA) be determined as a **preliminary issue**.
2. THAT subject to further order, the preliminary issue be determined on the papers.
3. THAT the applicant file:
   (a) witness statements complying with Practice Note 9 of 2021 - Witness outlines and witness statements for any witnesses whose evidence she relies upon in relation to the preliminary issue;
   (b) written submissions; and
   (c) a list of any authorities relied upon;
   by no later than 21 September 2023.
4. THAT the respondent file:
   (a) witness statements complying with Practice Note 9 of 2021 - Witness outlines and witness statements for any witnesses whose evidence the respondent relies upon in relation to the preliminary issue;
   (b) written submissions; and
   (c) a list of any authorities relied upon;
   by no later than 12 October 2023.
5. THAT the applicant file any witness statements and submissions in reply to the respondent's evidence and submissions by no later than 2 November 2023.
6. THAT the parties have liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2023 WAIRC 00751

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP TRESTRAIL
	APPLICANT
	-v-
	CITY OF KARRATHA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 13 SEPTEMBER 2023
FILE NO.	B 28 OF 2023
CITATION NO.	2023 WAIRC 00751

Result	Direction issued
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr D White (of counsel)

Direction

HAVING received a minute of proposed consent order signed by counsel on behalf of the parties, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

> THAT the date by which the parties are to file a statement of agreed facts and bundle of agreed documents, stated in Direction 2 of the Directions issued on 14 August 2023 ([2023] WAIRC 00689), be extended to Thursday, 14 September 2023.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00689

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP TRESTRAIL
	APPLICANT
	-v-
	CITY OF KARRATHA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 14 AUGUST 2023
FILE NO.	B 28 OF 2023
CITATION NO.	2023 WAIRC 00689

Result	Direction issued
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr N Ellery (of counsel)

Direction

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

1. THAT application B 28/2023 be listed for hearing together with application U 28/2023.

2. THAT the parties file a statement of agreed facts and bundle of agreed documents by Monday, 11 September 2023.
3. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Tuesday, 26 September 2023.
4. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) (**respondent's evidence and documents**) by Tuesday, 10 October 2023.
5. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) in reply to the respondent's evidence and documents and an outline of legal submissions by Tuesday, 24 October 2023.
6. THAT the respondent file an outline of legal submissions by Tuesday, 7 November 2023.
7. THAT the matter be listed for hearing on Wednesday, 15 November 2023 and Thursday, 16 November 2023.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2023 WAIRC 00741

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ALAIN TRABELSI

APPLICANT

-v-

MY FOODIE BOX PTY LTD

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE FRIDAY, 8 SEPTEMBER 2023
FILE NO. B 32 OF 2023
CITATION NO. 2023 WAIRC 00741

Result Directions issued
Representation
Applicant Mr A Trabelsi
Respondent Mr B Hughes and Mrs M Hughes

Direction

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

AND WHEREAS a conciliation conference was held on Friday 8 September 2023;

HAVING heard from Mr A Trabelsi on his own behalf and Mr B Hughes and Mrs M Hughes on behalf of the respondent, the Commission, pursuant to its powers conferred under the IR Act, hereby DIRECTS –

1. THAT the parties are to provide informal discovery by 22 September 2023;
2. THAT the evidence in chief in this matter is to be adduced by way of signed witness statements which will stand as the evidence in chief of their maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission;
3. THAT the applicant file his evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021 together with any documents upon which he intends to rely by 13 October 2023;
4. THAT the respondent file its evidence in chief in the form of witness statements in the manner required by practice note 9 of 202, together with any documents upon which it intends to rely on by 3 November 2023;
5. THAT the matter be listed for a further conciliation conference not before 3 November 2023;
6. THAT there be liberty to apply on short notice.

(Sgd.) T KUCERA,
[L.S.] Commissioner.

2023 WAIRC 00693

DISPUTE RE REDUNDANCY PAYMENT AND AUTHORITY OF UNION TO ACT AS AN AUTHORITSED REPRESENTATIVE OF EMPLOYEE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES

APPLICANT

-v-

CITY OF STIRLING

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE TUESDAY, 15 AUGUST 2023
FILE NO. CR 29 OF 2023
CITATION NO. 2023 WAIRC 00693

Result Direction issued
Representation
Applicant Mr R Knox
Respondent Ms K Groves (of counsel)

Direction

HAVING heard from Mr Knox on behalf of the applicant and Ms Groves 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 parties file and serve a statement of agreed facts and the documents the parties agree are relevant to the agreed facts by no later than 4pm on 18 August 2023;
2. THAT the applicant file and serve a written outline of submissions, and a list of legislation and authorities and any outlines of witness evidence it relies on by no later than 4pm on 1 September 2023;
3. THAT the respondent file and serve a written outline of submissions and a list of legislation and authorities and any outlines of witness evidence it relies on by no later than 4pm on 15 September 2023;
4. THAT the applicant may file and serve a written outline of its response submissions to the City of Stirling's outline of submissions by no later than 4pm on 29 September 2023;
5. THAT the parties notify the Commission by no later than 4pm on 5 October 2023 whether they will need to cross-examine any of the other party's witnesses;
6. THAT the matter will be listed for hearing on 11 October 2023; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2023 WAIRC 00731

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 36/2022 GIVEN ON 14 JUNE 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MINISTER FOR CORRECTIVE SERVICES

APPELLANT

-and-

PENELOPE ANNE FAGAN

RESPONDENT

CORAM FULL BENCH
CHIEF COMMISSIONER S J KENNER
COMMISSIONER C TSANG
COMMISSIONER T KUCERA
DATE FRIDAY, 1 SEPTEMBER 2023
FILE NO/S FBA 3 OF 2023
CITATION NO. 2023 WAIRC 00731

Result	Order issued
Appearances	
Appellant	Mr D Anderson of counsel and Mr J Carroll of counsel
Respondent	Mr C Fordham of counsel

Order

HAVING HEARD Mr D Anderson of counsel and with him Mr J Carroll of counsel on behalf of the appellant and Mr C Fordham of counsel on behalf of the respondent, now therefore, the Full Bench, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders —

1. THAT leave be and is hereby granted to the appellant to amend his appeal grounds by adding a new ground 5 in the terms of his application for leave to amend filed on 28 August 2023.
2. THAT the declaration of Commissioner Emmanuel in APPL 36 of 2022 dated 11 January 2023 and deposited in the office of the Registrar on the same date be and is hereby incorporated into the appeal book as a new page 273.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2023 WAIRC 00723

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	FRIDAY, 25 AUGUST 2023
FILE NO	PSAB 7 OF 2023
CITATION NO.	2023 WAIRC 00723

Result	Order issued
Representation	(on the papers)
Appellant	Lawfield Legal Practice
Respondent	State Solicitor's Office

Order

WHEREAS on 25 May 2023, a Direction ([2023] WAIRC 00292) issued in respect of programming the appeal for hearing and determination;

AND WHEREAS on 3 August 2023, counsel for the respondent sought an extension of time to comply with the programming and requesting that amended directions be issued by consent of the parties;

AND WHEREAS no objection has been received from the appellant in relation to the request;

AND WHEREAS the Public Service Appeal Board (**Board**) has considered the request;

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

1. THAT the filing date in order 4 of ([2023] WAIRC 00292) be extended to 2 August 2023.
2. THAT the filing date in order 5 of ([2023] WAIRC 00292) be extended to 16 August 2023.
3. THAT this appeal be heard concurrently with PSAB 9 of 2023.

4. THAT the evidence received in either of this appeal and PSAB 9 of 2023 be received as evidence in the other matter.
5. THAT the appeal be listed for a 2-day hearing on Wednesday, 1 November 2023 and Thursday, 2 November 2023 at 10.00 am.

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

[L.S.]

2023 WAIRC 00724

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
SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
MR G LEE - BOARD MEMBER
MS B SKALKO - BOARD MEMBER

DATE FRIDAY, 25 AUGUST 2023

FILE NO PSAB 9 OF 2023

CITATION NO. 2023 WAIRC 00724

Result Order issued

Representation (on the papers)

Appellant Lawfield Legal Practice

Respondent State Solicitor's Office

Order

WHEREAS on 23 May 2023, a Direction ([2023] WAIRC 00290) issued in respect of programming the appeal for hearing and determination;

AND WHEREAS on 3 August 2023, counsel for the respondent sought an extension of time to comply with the programming and requesting that amended directions be issued by consent of the parties;

AND WHEREAS no objection has been received from the appellant in relation to the request;

AND WHEREAS the Public Service Appeal Board (**Board**) has considered the request;

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

1. THAT the filing date in order 4 of ([2023] WAIRC 00290) be extended to 2 August 2023.
2. THAT the filing date in order 5 of ([2023] WAIRC 00290) be extended to 16 August 2023.
3. THAT this appeal be heard concurrently with PSAB 7 of 2023.
4. THAT the evidence received in either of this appeal and PSAB 7 of 2023 be received as evidence in the other matter.
5. THAT the appeal be listed for a 2-day hearing on Wednesday, 1 November 2023 and Thursday, 2 November 2023 at 10.00 am.

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

[L.S.]

2023 WAIRC 00742

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 17 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRISTA CAROLE JEWELS BURKE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER C TSANG – CHAIR MR G LEE – BOARD MEMBER MS E HAMILTON – BOARD MEMBER
DATE	MONDAY, 11 SEPTEMBER 2023
FILE NO.	PSAB 17 OF 2023
CITATION NO.	2023 WAIRC 00742

Result	Direction issued
Representation	
Appellant	Ms T Burke (on her own behalf)
Respondent	Ms E Negus (of counsel)

Direction

HAVING heard from Ms T Burke on her own behalf and Ms E Negus (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT Direction 2 of the Directions issued on 21 August 2023 ([2023] WAIRC 00716) be vacated, and the date by which the appellant is to file any outlines of witness evidence and documents (other than those in the bundle of agreed documents), stated in Direction 3 of the Directions issued on 25 July 2023 ([2023] WAIRC 00397), be extended to Friday, 15 September 2023.
2. THAT the date by which the respondent is to file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) and a written outline of legal submissions (**Respondent's Submissions**), stated in Direction 4 of the Directions issued on 25 July 2023 ([2023] WAIRC 00397), be extended to Friday, 29 September 2023.
3. THAT the date by which the appellant is to file a written outline of legal submissions addressing the matters raised in the Respondent's Submissions, stated in Direction 5 of the Directions issued on 25 July 2023 ([2023] WAIRC 00397), be extended to Friday, 6 October 2023.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00716

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 17 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRISTA CAROLE JEWELS BURKE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER C TSANG – CHAIR MR G LEE – BOARD MEMBER MS E HAMILTON – BOARD MEMBER
DATE	MONDAY, 21 AUGUST 2023
FILE NO.	PSAB 17 OF 2023
CITATION NO.	2023 WAIRC 00716

Result	Direction issued
Representation	
Appellant	Ms T Burke (on her own behalf)
Respondent	Ms E Negus (of counsel)

Direction

HAVING heard from Ms T Burke on her own behalf and Ms E Negus (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the date by which the parties are to file a statement of agreed facts and bundle of agreed documents, stated in Direction 2 of the Directions issued on 25 July 2023 ([2023] WAIRC 00397), be extended to Friday, 25 August 2023.
2. THAT the date by which the appellant is to file any outlines of witness evidence and documents (other than those in the bundle of agreed documents), stated in Direction 3 of the Directions issued on 25 July 2023 ([2023] WAIRC 00397), be extended to Friday, 8 September 2023.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00736

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 7 FEBRUARY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK LAWN
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER C TSANG – CHAIR
	MR G BROWN – BOARD MEMBER
	MS L BRICK – BOARD MEMBER
DATE	TUESDAY, 5 SEPTEMBER 2023
FILE NO.	PSAB 18 OF 2023
CITATION NO.	2023 WAIRC 00736

Result	Direction issued
Representation	
Appellant	Mr M Lawn (on his own behalf)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr M Lawn on his own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent at the Directions Hearing on Monday, 4 September 2023, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the application to appeal out of time be heard at the same time as the appellant's appeal.
2. THAT discovery be informal and be concluded by Monday, 18 September 2023.
3. THAT the parties file a statement of agreed facts and bundle of agreed documents by Monday, 2 October 2023.
4. THAT the appellant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Monday, 16 October 2023.
5. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Monday, 30 October 2023.
6. THAT the appellant file an outline of legal submissions by Monday, 13 November 2023.
7. THAT the respondent file an outline of legal submissions by Monday, 27 November 2023.
8. THAT the matter be listed for a 1-day hearing not before Monday, 6 December 2023.
9. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00734

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 7 FEBRUARY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK LAWN
	APPELLANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER C TSANG – CHAIR
	MR G BROWN – BOARD MEMBER
	MS L BRICK – BOARD MEMBER
DATE	TUESDAY, 5 SEPTEMBER 2023
FILE NO.	PSAB 18 OF 2023
CITATION NO.	2023 WAIRC 00734

Result	Order issued
Representation	
Appellant	Mr M Lawn (on his own behalf)
Respondent	Mr M McIlwaine (of counsel)

Order

HAVING heard from Mr M Lawn on his own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent at the Directions Hearing on Monday, 4 September 2023, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the appellant have leave to amend the *Form 8B – Notice of Appeal - Government Officers, Public Service Officers* filed on 28 June 2023 by deletion of the remedies on pages 9 and 10 and the insertion in lieu thereof the remedy "Reinstatement".
2. THAT the name of the respondent be amended by deletion of the name "Department of Justice" and the insertion in lieu thereof the name "Director General, Department of Justice".

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00737

APPEAL AGAINST THE DICIPLINARY DECISION AND PENALTY GIVEN ON 12 JULY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RANIA KATAN
	APPELLANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIRPERSON
	MS B ANDERSON - BOARD MEMBER
	MR S DANE - BOARD MEMBER
DATE	WEDNESDAY, 6 SEPTEMBER 2023
FILE NO	PSAB 19 OF 2023
CITATION NO.	2023 WAIRC 00737

Result	Programming orders issued
Representation	
Appellant	Mr Stephen Hicks (of counsel)
Respondent	Mr Nick John (of counsel)

Programming Orders

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) and by consent, orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 25 October 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 she intends to rely by 8 November 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 he intends to rely by 22 November 2023;
4. THAT the appellant file written submissions by 6 December 2023;
5. THAT the respondent file written submissions by 20 December 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.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00733

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	MONDAY, 4 SEPTEMBER 2023
FILE NO	PSAB 66 OF 2022
CITATION NO.	2023 WAIRC 00733

Result	Order issued
Representation	
Appellant	Ms L Carter (on her own behalf) and Mr T Carter (representative)
Respondent	Ms E Negus (of counsel)

Order

HAVING heard from Ms L Carter and Mr T Carter (representative) on behalf of the appellant and Ms E Negus (of counsel) on behalf of the respondent at the hearing on 1 September 2023 of the respondent's application requesting discovery filed on 29 August 2023, the Public Service Appeal Board pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT by the commencement of the appeal listed for hearing on 1 September 2023, the appellant give discovery of the email and attachment with the subject line "Unfair Dismissal Application – Loanne Carter" sent by the appellant to the Western Australian Industrial Commission Registry on 15 April 2022 at 11.23am.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00730

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	FRIDAY, 1 SEPTEMBER 2023
FILE NO	PSACR 12 OF 2023
CITATION NO.	2023 WAIRC 00730

Result	Order issued
Representation	
Applicant	Ms D Larson
Respondent	Ms E Negus of counsel

Order

HAVING heard from Ms D Larson on behalf of the applicant and Ms E Negus of counsel on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the *Order* issued on 20 July 2023 ([2023] WAIRC 00390) be vacated.
2. THAT the parties be granted leave to adduce expert medical evidence.
3. THAT the applicant file outlines of witness evidence for each lay witness whose evidence the applicant seeks to rely upon by no later than 31 August 2023. Witness outlines should comply with Practice Note 9 of 2021.
4. THAT the applicant file any expert medical evidence which the applicant seeks to rely upon by no later than 22 September 2023.
5. THAT the respondent file outlines of witness evidence for each lay witness whose evidence the respondent seeks to rely upon and any expert medical evidence the respondent seeks to rely upon by no later than 13 October 2023. Witness outlines should comply with Practice Note 9 of 2021.
6. THAT the applicant file a written outline of its submissions by no later than 27 October 2023.
7. THAT the respondent file a written outline of its submissions by no later than 10 November 2023.
8. THAT the matter be matter be listed for a hearing of 5 days duration on dates to be fixed, not before 10 November 2023.

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

[L.S.]

2023 WAIRC 00752

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP TRESTRAIL
	APPLICANT
	-v-
	CITY OF KARRATHA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 13 SEPTEMBER 2023
FILE NO.	U 28 OF 2023
CITATION NO.	2023 WAIRC 00752

Result	Direction issued
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr D White (of counsel)

Direction

HAVING received a minute of proposed consent order signed by counsel on behalf of the parties, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

THAT the date by which the parties are to file a statement of agreed facts and bundle of agreed documents, stated in Direction 2 of the Directions issued on 14 August 2023 ([2023] WAIRC 00690), be extended to Thursday, 14 September 2023.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00690

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP TRESTRAIL
	APPLICANT
	-v-
	CITY OF KARRATHA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 14 AUGUST 2023
FILE NO.	U 28 OF 2023
CITATION NO.	2023 WAIRC 00690

Result	Direction issued
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr N Ellery (of counsel)

Direction

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

1. THAT application U 28/2023 be listed for hearing together with application B 28/2023.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by Monday, 11 September 2023.
3. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Tuesday, 26 September 2023.
4. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) (**respondent's evidence and documents**) by Tuesday, 10 October 2023.
5. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) in reply to the respondent's evidence and documents and an outline of legal submissions by Tuesday, 24 October 2023.
6. THAT the respondent file an outline of legal submissions by Tuesday, 7 November 2023.
7. THAT the matter be listed for hearing on Wednesday, 15 November 2023 and Thursday, 16 November 2023.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00728

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IDA PALALOI
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	THURSDAY, 31 AUGUST 2023
FILE NO.	U 33 OF 2023
CITATION NO.	2023 WAIRC 00728

Result	Direction issued
Representation	
Applicant	Ms I Palaloi (on her own behalf)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Ms I Palaloi on her own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), herby directs –

1. THAT discovery be informal and be concluded by Wednesday, 13 September 2023.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by Wednesday, 11 October 2023.
3. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Wednesday, 25 October 2023.
4. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) and an outline of legal submissions (**Respondent's Submissions**) by Wednesday, 8 November 2023.
5. THAT the applicant file an outline of legal submission addressing the matters raised in the Respondent's Submissions by Wednesday, 22 November 2023.
6. THAT the matter be listed for a 2-day hearing not before Wednesday, 29 November 2023.
7. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00727

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IDA PALALOI
	APPLICANT
	-v-
	DIRECTOR GENERAL
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	THURSDAY, 31 AUGUST 2023
FILE NO.	U 33 OF 2023
CITATION NO.	2023 WAIRC 00727

Result	Order issued
Representation	
Applicant	Ms I Palaloi (on her own behalf)
Respondent	Mr M McIlwaine (of counsel)

Order

HAVING heard from Ms I Palaloi on her own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), herby orders –

THAT the name of the respondent be amended by the deletion of the name "Director General" and the insertion in lieu thereof the name "Director General, Department of Education".

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00718

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRUDI RIDGE
	APPLICANT
	-v-
	MORRGUL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	TUESDAY, 22 AUGUST 2023
FILE NO.	U 52 OF 2023
CITATION NO.	2023 WAIRC 00718

Result	Direction issued
Representation	
Applicant	Ms T Ridge
Respondent	Mr T Noonan

Direction

HAVING heard from Ms T Ridge on her own behalf and Mr T Noonan on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the question of whether the respondent is a *national system employer* pursuant to s 14(1)(a) of the *Fair Work Act 2009* (Cth) (**jurisdictional issue**) be determined as a preliminary issue.
2. THAT the respondent file any witness statements and legal submissions relevant to the jurisdictional issue by Monday, 11 September 2023.
3. THAT the applicant file any responsive witness statements and legal submissions relevant to the jurisdictional issue by Tuesday, 26 September 2023.
4. THAT subject to further order, the jurisdictional issue be determined on the papers.
5. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Disability Services Commission (Social Trainers) CSA Agreement 2022 PSAAG 12/2023	10/08/2023	Disability Services Commission	Civil Service Association of Western Australia Incorporated	Commissioner T B Walkington	Agreement registered
Electorate and Research Employees CSA Agreement 2022 PSAAG 7/2023	18/08/2023	The President of the Legislative Council and the Speaker of the Legislative Assembly	The Civil Service Association of Western Australia Incorporated	Commissioner C Tsang	Agreement registered
Public Transport Authority Salaried Officers Industrial Agreement 2022 PSAAG 8/2023	10/08/2023	Public Transport Authority of Western Australia	Western Australian Municipal, Administrative, Clerical and Services Union of Employees, The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees	Commissioner T Kucera	Agreement registered
Shire of Bridgetown-Greenbushes Outside Works Staff Enterprise Bargaining Agreement 2023 AG 19/2023	22/08/2023	Local Government, Racing And Cemeteries Employees Union (WA)	Shire Of Bridgetown-Greenbushes	Chief Commissioner S J Kenner	Agreement registered
Western Australia Police Force Industrial Agreement 2022 PSAAG 13/2023	22/08/2023	Western Australia Police Force	WA Police Union of Workers	Commissioner T Emmanuel	Agreement registered

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PUBLIC SERVICE APPEAL BOARD—

2023 WAIRC 00720

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 16 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DEBBIE-LEE BARRINGTON

APPELLANT

-v-

GOVERNING COUNCIL OF CENTRAL REGIONAL TAFE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G THOMPSON – BOARD MEMBER
MS R BARROW – BOARD MEMBER

DATE WEDNESDAY, 23 AUGUST 2023

FILE NO PSAB 13 OF 2023

CITATION NO. 2023 WAIRC 00720

Result	Order issued
Representation	
Appellant	Mr A Ceklic (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Order

WHEREAS on 7 June 2023 the appellant filed a *Form 8B – Notice of Appeal - Government Officers, Public Service Officers*, and on 30 June 2023 the respondent filed a *Form 4 – Response*;

AND WHEREAS by Directions issued on 4 August 2023 and Notices of Hearing issued on 16 August 2023, the appeal was set down for hearing on 22 and 23 November 2023;

AND WHEREAS on 23 August 2023 the appellant sought leave to discontinue the appeal, and the respondent advised it agrees to the discontinuance of the appeal by leave;

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 matter PSAB 13 of 2023 be, and by this order is, discontinued by leave.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00681

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 23 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00681
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR G LEE - BOARD MEMBER MR N CINQUINA - BOARD MEMBER
HEARD	:	TUESDAY, 15 NOVEMBER 2022
DELIVERED	:	FRIDAY, 11 AUGUST 2023
FILE NO.	:	PSAB 24 OF 2022
BETWEEN	:	LLOYD OSBORNE Appellant AND DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES Respondent

CatchWords	:	Public Service Appeal Board – failure to prosecute – appeal dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) *Industrial Relations Commission Regulations 2005* (WA) *Public Sector Management Act 1994* (WA)
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr L Osborne (in person)
Respondent	:	Ms E Negus (of counsel)

Case(s) referred to in reasons:

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

Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27; (1987) 61 ALJR 393

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

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

Reasons for Decision

1 The Public Service Appeal Board (Board) dismissed this appeal on 15 November 2022 pursuant to s 27(1) of the *Industrial Relations Act 1979* (WA) (IR Act) for the following reasons.

2 Mr Lloyd Osborne was employed by the Director General, Department of Communities (the Department) as a Secure Care Worker Level 3.2 at the Kath French Secure Care facility from 29 October 2019. Mr Osborne had been employed on a fixed term contract which was due to expire on 31 March 2022.

Background to Matters Appealed

3 On 12 January 2022 Mr Osborne was advised allegations had been made against him and he would receive written notification of all the allegations in the near future and the Department's Integrity, Intelligence & Professional Standards Unit would assess the allegations and determine whether to conduct a disciplinary investigation, he was directed to not attend the workplace. Mr Osborne was suspended on full pay on 12 January 2022.

4 In the Director General's *Form 4 - Response*, it is reported that Mr Osborne attended an informal work function and that an attendee reported to the Department that Mr Osborne had assaulted multiple attendees at the function. Further, at some time prior to 4 February 2022 Mr Osborne was charged with breaching a violence restraining order.

5 On 25 January 2022 Mr Osborne attended an interview for Secure Care Worker permanent pool positions and was notified on 23 February 2022 that he had been successful in being added to the Level 3 pool.

6 Subsequently Mr Osborne was informed that he would not be offered any further fixed term contracts because he was currently suspended.

7 On 7 February 2022, the Department's A/Assistant Director General wrote to Mr Osborne stating:

> I have become aware that you may have committed acts which constitute breaches of discipline under Section 80 of the Public Sector Management Act 1994 (the Act). Specifically, it was reported that you may have committed acts of family domestic violence towards or in the presence of your family.
>
> I have been advised that you were provided with verbal advice of your suspension on full pay by Dr Penny Wakefield, on 12 January 2021.
>
> I have since become aware of allegations that you may have displayed inappropriate behaviour towards work colleagues on 22 January 2022, and that you have also been charged with breaching a violence restraining order. The nature of the allegations against you will be fully particularised and forwarded to you in due course, in order to enable you to respond.

8 In this letter, Mr Osborne was notified that his suspension on full pay continued, and he was invited to submit reasons why the suspension should not continue.

9 On 10 February 2022, the Department received a response from Mr Osborne.

10 On 22 February 2022, the Department wrote to Mr Osborne and advised him that his suspension on full pay would continue.

11 In his *Form 8B - Notice of Appeal,* Mr Osborne states that he attended the Midland Police Station on 25 March 2022. An interview occurred and afterwards he was told that the allegations would not be pursued.

12 The Department continued to pay Mr Osborne until 31 March 2022 when his fixed term contract ended.

13 Mr Osborne appeals the decision to not extend his fixed term contract and seeks the Board adjust the decision by ordering that the Director General issue a fixed term contract or offer permanent appointment from the Secure Worker Level 3 pool and he be returned to work with immediate effect.

14 The Department opposes the appeal because it says the Board does not have jurisdiction to determine the matters referred in the notice of appeal. The Department submits that it did not make a decision under s 78(1)(b) of the *Public Sector management Act 1994* (WA) (PSM Act) to take disciplinary action. The Department contends that the decision to not offer any further employment after the expiry of Mr Osborne's fixed term contract does not constitute a dismissal and therefore is not a decision to take disciplinary action.

Conduct of Case

15 On 9 May 2022 the parties were notified by email that the matter was listed for a Directions Hearing on 20 June 2022. The appellant did not appear at the Directions Hearing. The respondent's representative attended. The Board's Associate attempted to contact the appellant by telephone however the phone call was declined and there was no option to leave a voicemail.

16 On 23 June 2022 the Board's Associate emailed the parties noting the appellant did not appear at the Directions Hearing and sought an explanation. The email advised the parties that the Board were of a view that the respondent's jurisdictional objection ought to be heard and determined as a preliminary issue. The jurisdictional objection was set out in the respondent's *Form 4 - Response* filed on 22 April 2022. The Board provided a Minute of Proposed Directions for the parties' consideration. The appellant was requested to advise of his views to progressing this appeal and issuing the Minute of Proposed Directions.

17 On 28 June 2022 the Board's Associate emailed the appellant noting that the Board were not in receipt of a response to the earlier email of 23 June 2022 and requested the appellant advise of his intentions in progressing this application.

18 On 29 June 2022 the Board's Associate called Mr Osborne and spoke with him. Mr Osborne advised that he had not received any correspondence and stated that the email address he had provided in his application was an address he used infrequently, and he provided an alternate email address.

19 On 30 June 2022 the Board's Associate emailed the appellant, using the recently provided alternate email, enclosing the four emails he had said that he had not seen.

20 On 22 July 2022 the Board's Associate emailed the parties:

> Mr Osborne, I note the Board have not received a reply from yourself and the dates in the Minute of Proposed Directions have passed. If you wish to continue with this application, please provide the Board with a response to my emails below and attached.
>
> The Board have instructed me to prepare a further Minute of Proposed Directions for the parties' consideration. Kindly advise your views to issuing the Minute of Proposed Directions? Please do this via return email to myself and by no later than 4pm on **27 July 2022**.

21 On 27 July 2022 the Board's Associate twice attempted to contact the appellant by telephone, there was no answer and no option to leave a voice message.

22 On 28 July 2022 the Board issued the Directions and provided these to the appellant by email and post.

23 On 8 August 2022 the respondent invited the Board to exercise its powers to dismiss the appeal for lack of prosecution given the lack of communication from Mr Osborne.

24 On 9 August 2022 the Board sought Mr Osborne's views on the proposal to dismiss the appeal for want of prosecution. No response has been received.

25 On 18 August 2022 the Board notified the parties of a hearing listed on 15 November 2022 for the appellant to advise of his intentions to progress his application and show cause why his application ought not be dismissed in the circumstances. Mr Osborne was notified that failure to attend the hearing may result in the appeal being dismissed. The notice was emailed and posted to Mr Osborne.

Question to be Decided

26 The Board must decide whether to dismiss application PSAB 24 of 2022 because by failing to prosecute his appeal the appellant has demonstrated that he does not have sufficient interest in the matter.

The Law

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

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing of it discontinued, as the case may be;

28 In ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project*** (2000) 80 WAIG 3162, the Full Bench set out the principles to consider when deciding whether to dismiss an application for want of prosecution. They include the length of the delay, the explanation for the delay, the hardship to the applicant if the application is dismissed, the prejudice to the respondent if the action is allowed to proceed, and the conduct of the respondent in the litigation.

29 A party is entitled to invoke the Commission's jurisdiction and prima facie expect it to be exercised: ***Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia*** [1987] HCA 27; (1987) 61 ALJR 393 per Deane J at 399. However, it is beyond doubt that the Commission has the power under s 27(1)(a) of the IR Act to dismiss or refrain from further hearing a matter at any stage of proceedings if it is satisfied that the requirements set out in s 27(1)(a) of the IR Act are met. That power is broad and should be exercised with caution: ***Magyar v Department of Education*** [2019] WAIRC 00781; (2019) 99 WAIG 1595 [13]-[15], applying the reasoning in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2017] WAIRC 00830; (2017) 97 WAIG 1689 at [137]-[139]. The Board adopts the approach set out in these matters.

Should this Application be Dismissed?

30 The Board has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: Section 27(1)(d) of the IR Act. Service on Mr Osborne was effected by leaving the notice at, or sending it by pre-paid post to, Mr Osborne's usual or last known place of abode: Regulation 24(2)(d) of the *Industrial Relations Commission Regulations 2005* (WA) (IR Regulations).

31 Alternatively, service was effected on Mr Osborne by sending the notice of hearing as an attachment to an email, sent to the email address that Mr Osborne had provided to the Board, in accordance with r 25(3) of the IR Regulations.

32 We are satisfied that Mr Osborne has been duly served with notice of these proceedings and the Board may proceed with the hearing in his absence.

33 There has been a relatively long delay in the context of this application and there has been no explanation for that delay. There is no evidence of hardship to Mr Osborne if his application is dismissed; and there is nothing before the Board to suggest the respondent's conduct in the matter has in any way contributed to Mr Osborne's failure to prosecute his application.

34 The onus rests with a party initiating proceedings to prosecute those proceedings diligently. Where the Board requires advice to be provided within given time frames for the purpose of the matter being dealt with expeditiously, it is not the role of the Board to continue to pursue parties to ascertain the status of matters. It is the responsibility of the appellant to progress the appeal. Mr Osborne has not met the onus which falls to him and has not pursued this matter appropriately.

35 In the circumstances, the Board found that Mr Osborne has not prosecuted his appeal and ordered that the appeal be dismissed under s 27(1)(a) of the IR Act.

2023 WAIRC 00682

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 23 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LLOYD OSBORNE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T B WALKINGTON - CHAIR
	MR G LEE - BOARD MEMBER
	MR N CINQUINA - BOARD MEMBER
DATE	FRIDAY, 11 AUGUST 2023
FILE NO	PSAB 24 OF 2022
CITATION NO.	2023 WAIRC 00682

Result	Appeal dismissed
Representation	
Appellant	No appearance
Respondent	Ms E Negus (of counsel)

Order

HAVING convened a Show Cause Hearing on 15 September 2022 and there being no appearance on behalf of the appellant, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT appeal PSAB 24 of 2022 is dismissed.

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

[L.S.]

2023 WAIRC 00738

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 2 JUNE 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW TRAN
	APPELLANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T KUCERA - CHAIRPERSON MR K SNEDDON - BOARD MEMBER MR M GOLESWORTHY - BOARD MEMBER
DATE	THURSDAY, 7 SEPTEMBER 2023
FILE NO	PSAB 16 OF 2023
CITATION NO.	2023 WAIRC 00738

Result	Application discontinued by leave
Representation	
Appellant	Mr M Tran
Respondent	Ms A Carter and Ms J van den Herik

Order

WHEREAS the appellant advised the Public Service Appeal Board (**Board**) that they wish to discontinue appeal PSAB 16 of 2023 on 25 August 2023;

AND WHEREAS the respondent does not object to the appeal being discontinued;

NOW THEREFORE the Board pursuant to its powers under the *Industrial Relations Act 1979* orders –

THAT appeal PSAB 16 of 2023 be and by this order is discontinued.

(Sgd.) T KUCERA,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00670

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 15 JULY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00670
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIRPERSON MS B ANDERSON - BOARD MEMBER MR D BARRATT - BOARD MEMBER
HEARD	:	TUESDAY, 2 MAY 2023, WEDNESDAY, 17 MAY 2023
DELIVERED	:	THURSDAY, 10 AUGUST 2023
FILE NO.	:	PSAB 62 OF 2022
BETWEEN	:	PIA STEELE Appellant AND THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE Respondent

CatchWords	:	Public Service Appeal Board – Dismissal – Mandatory vaccination – Appellant unable to perform full scope of duties because of vaccination status – Appellant disobeyed a reasonable lawful order – Dismissal not unfair
Legislation	:	*Industrial Relations Act 1979* (WA) s 26(1)(a), s 80I *Industrial Relations Act 1988* (Cth) *Public Sector Management Act 1994* (WA) s 80, s 80A, s 82A, s 78 *Public Health Act 2016* (WA)
Result	:	Application dismissed
Representation:		
Appellant	:	Ms D Larson (of counsel) Mr R Sumner (as agent)
Respondent	:	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

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

Heller-Bhatt v Director General, Department of Communities [2022] WAIRC 00719; (2022) 102 WAIG 1457

Ronald David Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Qantas Airways Ltd v Christie [1998] HCA 18; (1998) 193 CLR 280

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).

2 Ms Steele was employed as a Level 4 Senior Community Engagement Officer (**SCEO**) with the Registry of Births, Deaths and Marriages, Department of Justice (**Registry**) from October 2008 until 15 July 2022 when she was dismissed by the Director General, Department of Justice.

3 The Director General took disciplinary action because Ms Steele did not follow a lawful order to be vaccinated against COVID-19 or show evidence of an exemption by 4 February 2022 (**Employer Direction**). The Director General says that Ms Steele was required to attend remote Aboriginal communities. This meant that she was subject to directions issued by the Chief Health Officer and was required to be vaccinated or be exempt from vaccination.

4 Ms Steele maintains the Employer Direction did not apply to her because her position changed after the Registry was restructured. To the extent that the Employer Direction relied on the Chief Health Officer's directions, Ms Steele says that she was led to believe the SCEO role did not require travel to remote Aboriginal communities. As such, there was no breach of discipline as intrastate travel was not an inherent requirement of her position. In circumstances where Ms Steele suffered stress and anxiety from the pandemic and the potential side effects of being vaccinated, and there was a lack of clarity about her new duties, Ms Steele says her dismissal was harsh, oppressive and unfair. Ms Steele seeks reinstatement to her position or a similar position, payment of lost salary and continuity of service-related benefits.

5 The Director General says that regardless of the change in Ms Steele's job description, travel to remote communities remained a part of her duties, along with attending hospitals and schools. In light of her duties and the Chief Health Officer's directions, the Employer Direction was lawful and reasonable, and the failure to comply amounted to a breach of discipline. The contravention meant Ms Steele was unable to fulfil the whole range of her duties at the Registry.

What the Board must decide

6 An appeal of this type is heard de novo: ***Harvey v Commissioner for Corrections, Department of Corrective Services*** [2017] WAIRC 00728; (2017) 97 WAIG 1525.

7 Given Ms Steele denies that she disobeyed or disregarded a lawful order, the Board must decide, based on the evidence and arguments before it, whether:

a. the Employer Direction was a reasonable lawful order;

b. Ms Steele committed a breach of discipline by disobeying or disregarding a lawful order; and

c. the Board should adjust the decision to dismiss.

8 As the Board chaired by Emmanuel C set out in ***Heller-Bhatt v Director General, Department of Communities*** [2022] WAIRC 00719; (2022) 102 WAIG 1457:

> Part 5 of the *Public Sector Management Act 1994* (WA) (**PSM Act**) applies to public service officers and other prescribed employees in relation to any suspected breach of discipline for disobeying or disregarding a lawful order.
>
> By s 80 of the PSM Act, an employee who disobeys or disregards a lawful order commits a breach of discipline and is liable to disciplinary action. Section 80A provides that 'disciplinary action' includes a reprimand, fine, transfer, reduction in remuneration or classification and dismissal. Section 82A sets out how an employing authority deals with a disciplinary matter.
>
> Section 78 of the PSM Act enables an employee who is aggrieved by a decision to take disciplinary action to appeal against that decision to the Board. The Board is a constituent authority of the Commission and exercises jurisdiction

under the IR Act in hearing and determining such appeals. Under s 80I of the IR Act, the Board may 'adjust' the matters referred to in s 80I(1).

Section 26(1)(a) of the IR Act applies to the Board's exercise of its jurisdiction. It requires the Board to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms [8] – [11].

Background

9 The following background is not in dispute.

10 Ms Steele has worked for the Registry since around 2008. She has regularly attended Open Days in her role as a Level 4 Project Officer since 2016. Open Days are an initiative of what is now known as the Aboriginal Justice Unit. At least twice a month, a Project Officer would travel to remote Aboriginal communities to 'take services to the community.' This work was shared between Ms Steele and her colleague, Ms Susan Apina, who was also a Level 4 Project Officer.

11 In around late 2020 or early 2021, Ms Steele's manager, Mr Rohan Quinn, explained to staff including Ms Steele that a restructure of the Registry would increase staff and expand service delivery to different community groups. Following the restructure, there would be two Level 2 administrative support staff, two Level 3 Project Officers responsible for attending Open Days and one Level 5 Manager. The Level 4 Project Officer roles would become Level 4 SCEOs and be involved in engagement, networking and liaising. Ms Steele was unhappy about the proposed restructure, particularly because she wanted to continue to do work in remote communities.

12 In around September 2021, Ms Steele and Ms Apina met with the Registrar of Births, Deaths and Marriages (**Registrar**) and Mr Quinn (**September Meeting**) where they discussed the proposed restructure. During the meeting, Ms Steele experienced a transient global amnesia episode.

13 The Registry was restructured in 2021. Ms Steele and Ms Apina became Level 4 SCEOs, with the Job Description Form for that role (**SCEO JDF**) becoming effective in September 2021.

14 The SCEO JDF states:

Key Role Statement

The Community Engagement Team identifies and analyses community needs and trends to develop responsive, innovative and practical policies and programs that deliver Registry services to key stakeholders and diverse community groups.

The Senior Community Engagement Officer is the key liaison point for internal and external stakeholders and community groups of diverse backgrounds, cultures and minority groups. The incumbent cultivates, develops and maintains effective relationships and networks with key stakeholders, including Aboriginal communities, funeral directors, celebrant associations, other public sector agencies and not-for-profit associations.

Job Related Requirements

- Plans, coordinates and schedules Registry related educational service delivery and support programs, and undertakes intrastate travel to deliver these programs throughout the metro and regional areas of Western Australia

…

15 Intrastate travel is also listed under 'Special requirements/equipment' in the SCEO JDF.

16 Between September 2021 and January 2022, under powers granted to him by the *Public Health Act 2016* (WA), the Western Australian Chief Health Officer (**CHO**) issued various directions including (**CHO Directions**):

a. *Health Worker (Restrictions on Access) Directions (No 3)*, given 22 September 2021 (**Health Worker CHO Directions**);

b. *Remote Aboriginal Community Worker (Restrictions on Access) Directions*, given 8 December 2021 (**Remote Community Worker CHO Directions**); and

c. *Education Worker (Restrictions on Access) Directions (No 4)*, given 22 December 2021.

17 The effect of those CHO Directions is that:

a. Ms Steele had to be partially vaccinated against COVID-19 by 1 January 2022 and fully vaccinated by 1 February 2022 to access remote Aboriginal communities;

b. Ms Steele had to be partially vaccinated against COVID-19 by 1 January 2022 and fully vaccinated by 31 January 2022 to access schools; and

c. Ms Steele had to be partially vaccinated against COVID-19 by 1 December 2021 and fully vaccinated by 1 January 2022 to access health care facilities, hospitals and ancillary buildings.

18 In a letter dated 31 January 2022, the Director General issued a direction to Ms Steele to be vaccinated against COVID-19 unless exempt and to provide evidence of vaccination or exempt status by 4 February 2022.

19 The Director General wrote that: '[u]nder the [CHO] Directions, employees providing Government services where they work in or attend Remote Aboriginal Communities must be fully vaccinated' and 'as an employee required to attend Remote Aboriginal Communities as an essential requirement of your position [you] are required to have been fully vaccinated against COVID-19 before 31 January 2022 (or be exempt from the requirement to be vaccinated).'

20 Ms Steele did not get vaccinated or provide evidence of exemption.

21 In a letter dated 8 March 2022, the Director General advised Ms Steele that she was in breach of the Employer Direction.

22 The Director General wrote again to Ms Steele on 13 May 2022 to advise that disciplinary proceedings had commenced in response to allegations that she had disobeyed or disregarded a lawful order to be partially vaccinated, or provide evidence of vaccination or exemption by 4 February 2022. Ms Steele was found to have committed two breaches of discipline and was dismissed on 15 July 2022.

23 The Remote Community Worker CHO Directions were revoked on around 15 June 2022, and were no longer in effect when Ms Steele was dismissed.

Was the Employer Direction a lawful order?

Evidence

24 Ms Steele gave evidence. She also called her former colleague Ms Apina to give evidence. Ms Apina held the role of Senior Community Engagement Officer until she resigned in October 2022.

25 Ms Alison Jackson, Mr Rohan Quinn and Ms Cherena Thompson gave evidence for the Director General. Ms Jackson is the Registrar. Mr Quinn is the Manager of Registry Services and Ms Thompson is the Manager of Community Engagement.

Ms Steele

26 Ms Steele gave evidence about how Open Days were established and funded, as well as what they involved. Ms Steele explained that she loved doing that work. She found it challenging and rewarding.

27 Ms Steele gave evidence about being unhappy about the proposed restructure. She remembers saying to Mr Quinn during the conversation set out at [12]: '[y]ou're – you're taking my job away' and 'I wanted to go to the communities'. Because of her travel commitments, Ms Steele was only able to attend one of a series of presentations the Department had organised to communicate details of the restructure to staff. Ms Steele said she received the SCEO JDF in August 2021 and her change in role was formally recorded on the human resources system in mid-September 2021. Ms Steele still travelled to remote communities in November 2021. She did not notice a change in her duties in November or December 2021. The effect of Ms Steele's evidence was that the restructure was not well-handled and it was unclear what her day-to-day duties would involve.

28 Ms Steele gave evidence that she thought the CHO Directions would not apply to her, because her job no longer required travel to remote communities. However Ms Steele also gave evidence that she was told her new role would still involve going out to communities and travelling, but it was not apparent to Ms Steele that there would be budget for that.

29 Ms Steele's evidence was that when she received the Employer Direction to be vaccinated by 31 January 2021, she still thought that the Employer Direction did not apply to her because she was no longer travelling to remote communities. Ms Steele said that she asked Registrar Jackson about whether the Employer Direction applied to her. In effect, Ms Steele's evidence was that Registrar Jackson told her that the Employer Direction did apply to Ms Steele, because the key role statement from Ms Steele's previous JDF was in the SCEO JDF.

30 In cross-examination, Ms Steele:

a. confirmed that she had provided informal feedback to Mr Quinn about the draft JDF before it was formalised;

b. said that she did not remember what was discussed at the September Meeting because she experienced a transient global amnesia episode. She could not remember being reassured by Registrar Jackson that she would still attend remote Aboriginal communities in her new role. Ms Steele said: '[n]o, I – I mean, she might have said that. I – I really can't remember';

c. agreed that she and Ms Apina were the most obvious candidates to train new staff to attend Open Days;

d. agreed that she could potentially be required to attend hospitals as part of the liaison aspect of the SCEO role;

e. said the chance she would travel in her new role was remote, because she was not given a budget. Further, Ms Steele said she thought it was highly unlikely that she would travel to a remote Aboriginal community under her new JDF;

f. said that she understood from the SCEO JDF that she would not need to attend remote communities anymore, but eventually Ms Steele conceded that the SCEO JDF allowed for travel to remote Aboriginal communities;

g. eventually conceded that it was part of her SCEO role to be involved in education and education programs, including in remote Aboriginal communities if budget allowed for that;

h. eventually conceded that intrastate travel could include travel to remote Aboriginal communities;

i. conceded that she would not be able to fulfill all her duties (for example by travelling to a remote Aboriginal community) unless she was vaccinated; and

j. said that she was stressed because she did not want to be vaccinated. She took personal leave because she was so stressed about the situation.

31 When asked in re-examination whether Ms Steele would have been more willing to consider being vaccinated if she thought she was still going to visit remote communities, in effect Ms Steele said that she looked into other types of vaccinations (such as Novovax), but they were also 'getting a bad rap.'

Ms Apina

32 Broadly Ms Apina's evidence about the restructure was consistent with that of Ms Steele.

33 Ms Apina gave evidence that at the meeting referred to in [12] above, Mr Quinn explained that the restructure would mean that Ms Steele and Ms Apina would no longer go to Open Days. Instead that responsibility would be given to the two new Level 3

positions. Mr Quinn said that Ms Steele and Ms Apina would do community engagement work, including liaising with hospitals, ministers of religion and community agencies such as RUAH. Ms Apina gave evidence that she understood that there would be some travel in her new role, but not to Open Days. Ms Apina said twice that the new role would probably involve attending hospitals.

34 Ms Apina gave evidence about a meeting she had with her new manager, who outlined the new duties of the Level 4 SCEO role, as well as the Level 2 and 3 duties.

35 Generally, Ms Apina gave evidence about the restructure process being unclear and lacking in consultation.

36 The effect of Ms Apina's evidence was that she was vaccinated, but on her doctor's advice in March 2022 she began working from home. Ms Apina gave evidence that in August 2022 she was asked to return her corporate credit card because she was no longer required to travel. In cross-examination Ms Apina confirmed that her corporate credit card had expired when she returned it and she no longer needed a corporate credit card.

37 In cross-examination Ms Apina:

a. agreed that she had signed the draft JDF for her new role before it was finalised, saying she had 'only browsed it';

b. agreed that the SCEO JDF provided that the role required intrastate travel to deliver education service delivery and support programs;

c. said she was not sure whether her work with hospitals had to be inside hospitals;

d. said she did not think it would be possible to provide education and engagement through the medical services in remote Aboriginal communities;

e. was reluctant to agree that increased education services would lessen the need for Open Days;

f. conceded that she was not responsible for the allocation of the budget; and

g. denied that she could not perform all her duties by working from home. In effect Ms Apina said she could do any training over video.

38 Ms Apina was cross-examined about the September Meeting. She could not recall what was discussed at that meeting before Ms Steele experienced the medical episode. She said she could not remember if Mr Quinn said that the Level 3s would be the people primarily attending Open Days, but that Mr Quinn did say that the Level 4 SCEOs would educate stakeholders in the community.

39 Ms Apina denied that she and Ms Steele were told that:

a. their position would still be required to attend some Open Days;

b. they would be required to at least provide backfill to the Level 3 Officers; and

c. they would leave the office and engage with the community out in the community.

40 Ms Apina resigned in October 2022 and later discovered that her position had been abolished.

Registrar Jackson

41 Registrar Jackson gave evidence about the restructure. She explained that it was necessary to meet changing community needs and increased demand for services. The two Level 3 Community Engagement Officer roles would attend events in regional and metropolitan areas, while the two Level 4 SCEO roles were to develop relationships and partnerships with stakeholders including non-for-profits, development commissions, the Department of Communities, job seeker agencies, hospitals and schools in the Kimberley and Pilbara. Registrar Jackson said the Level 4 SCEO role would involve hospital education in regional and metropolitan areas, particularly in the regions. Engagement with stakeholders would occur in person and from Perth. Registrar Jackson gave evidence about the benefits of face-to-face interactions, particularly for Aboriginal and Torres Strait Islander community groups.

42 Registrar Jackson gave evidence that the Level 4 SCEO role would still attend Open Days, although less frequently than the Level 3 roles, and the Level 4 SCEOs would perform the education and engagement part of their role on either side of the Open Days when they could arrange meetings with relevant stakeholders.

43 Registrar Jackson said that at the September Meeting she reassured Ms Steele that she would still have the opportunity to travel to Open Day events across the State in her new role, albeit less frequently than Ms Steele and Ms Apina had been doing. Registrar Jackson gave evidence that Ms Steele enjoyed attending Open Days and was good at doing so.

44 In cross-examination Registrar Jackson:

a. maintained that the Level 4 SCEOs would attend Open Days and do community engagement, as well as to cover leave periods for Level 3s;

b. maintained that she and others had told Ms Steele that Ms Steele would be required to attend remote communities as part of her new role;

c. confirmed that there was budget for Ms Steele to travel to Open Days in the Level 4 SCEO role, although she could not remember discussing that with Ms Steele;

d. said no Level 4 SCEO attended Open Days in 2022, because Ms Apina was working from home for medical reasons and Ms Steele was not working at the Registry; and

e. conceded it was not essential that all engagement be done face-to-face and agreed that Ms Steele had been able to complete some (though not all) of her duties while working from home.

Ms Thompson

45 Ms Thompson gave evidence that there was capacity for the Level 4 SCEO positions to attend Open Days when Level 3s were not able to. The effect of her evidence was that it was preferable that:

a. Level 3s be trained in how to do Open Days by attending those Open Days with a Level 4 SCEO; and

b. Level 4 SCEOs engage in face-to-face with community stakeholders, including in remote Aboriginal communities.

46 Ms Thompson was asked about Exhibit A1, a handwritten document of notes taken of a meeting she had with Ms Apina. Ms Thompson explained that the document was a preliminary list of items her team would be responsible for following the restructure. In re-examination she described the document as a guide she developed to facilitate a discussion with Ms Apina. Ms Thompson said the document was not a finalised list of her team's new duties.

47 Ms Thompson confirmed that the Registry attended schools during Open Days and that she had no knowledge of budget for travel.

Mr Quinn

48 Mr Quinn has worked for the Director General for over 40 years and for the Registry since 2010. He manages teams across the Registry, including the team managed by Ms Thompson.

49 Mr Quinn gave evidence about the restructure, including staff consultation and communication. He explained that the Level 4 SCEO position was responsible for proactive and broad community engagement and education across Western Australia. Mr Quinn acknowledged that Ms Steele and Ms Apina had the knowledge and experience to perform that work.

50 Mr Quinn gave evidence that he went through the draft version of the SCEO JDF with Ms Steele and Ms Apina, and asked them to provide him with feedback on the draft.

51 Mr Quinn's evidence was:

a. he made it clear to Ms Steele and Ms Apina that in the Level 4 SCEO role they would still be required to travel in order to provide education and support to communities across the State;

b. when Ms Steele raised her concerns with him (formally and informally) about not being able to do Open Days, he reassured Ms Steele that even though it would no longer be her primary role to attend events, there would still be opportunities for her to travel; and

c. Level 3s would do core Registry work at Open Days, while Level 4 SCEOs would provide community outreach at Open Days.

52 In cross-examination, Mr Quinn maintained that he told Ms Steele that there would be opportunities for her to attend remote communities from time to time in her Level 4 SCEO role. Mr Quinn acknowledged that Ms Steele's medical episode affected her memory of the September Meeting, but he said that would not have affected her understanding of the restructure, because it was not the first discussion they had had about the changes to her role. In effect, in re-examination Mr Quinn said he was confident that the intent of the SCEO role was made clear to Ms Steele.

<u>Ms Steele's submissions</u>

53 In essence Ms Steele submits that the Employer Direction was not a lawful order because the Remote Community Worker CHO Directions were not relevant to her role. Following the restructure, Ms Steele understood that her SCEO position was Perth-based and the Level 3 positions would travel to Open Days. Ms Steele argues that if Level 4 SCEOs were expected to travel, the calendar would have set out as much and it did not. In closing, counsel for Ms Steele said: '[s]o the respondent has said that they told Ms Steele that she'd be attending remote communities, but they've not said how often that would be, how this would be affected by COVID, how much Perth and other regional travel there would be, or how this would be funded.'

54 In disputing that the Employer Direction was lawful, Ms Steele argues that assessing the reasonableness of the Employer Direction must take into account the 'significant pressure applied to employees to surrender bodily integrity' and 'the circumstances of the direction for vaccination need to be assessed against the need for vaccination'.

55 Ms Steele acknowledges that the SCEO JDF provides for some travel but says that does not necessarily mean that travel to remote communities is an inherent part of the role. Ms Steele argues that travel to remote communities must be an inherent part of Ms Steele's role in order for the Employer Direction to be a lawful order. She says ***Qantas Airways Ltd v Christie*** [1998] HCA 18; (1998) 193 CLR 280 holds that a task is an inherent requirement if it is essential to the position or the position would not be the same without it. She says the evidence shows that responsibility for attending Open Days transferred to the Level 3 roles and there was no budget for the Level 4 SCEOs to travel to remote communities. Ms Steele says that travel to remote communities was not a duty of the Level 4 SCEO role and therefore not an inherent requirement of the position. She says the Employer Direction 'cannot be lawful if there was never going to be any travel to a remote community. Undertaking intrastate travel is not the same as attending Open Days.'

56 Ms Steele submits that the evidence of the Director General's witnesses shows that there was a lack of clarity about the day-to-day duties of Ms Steele's new role. As such, it was reasonable for Ms Steele to have been confused about that matter.

57 Ms Steele's submissions focussed on what Ms Steele considered was poor consultation and communication with staff about the detail of what their new roles would involve on a day-to-day basis. The effect of Ms Steele's submission is that it was reasonable for Ms Steele to have concluded that the CHO Directions (and accordingly, the Employer Direction) did not apply to her as a result of this poor consultation and communication.

58 Ms Steele's counsel seemed to accept that the CHO Directions that applied to hospitals applied to Ms Steele, but argued that it was not clear exactly what Ms Steele would have been required to do at a hospital, and potentially she could have done the work remotely.

The Director General's submissions

59 The Director General argues that Ms Steele and Ms Apina were poor witnesses because they did not answer the questions put to them, they gave reluctant or tailored evidence and their answers sought to assist Ms Steele's case. The Director General says where there is a conflict on key issues the Director General's witnesses should be preferred. Their evidence was not challenged in cross-examination.

60 The Director General submits that the Employer Direction was lawful and reasonable because:

a. if attending remote Aboriginal communities falls within the scope of an employee's duties, then it is lawful and reasonable to be vaccinated so that the employee can attend those places, even if travel is rare;

b. the evidence showed that it was part of Ms Steele's duties to attend remote Aboriginal Communities, schools and hospitals (all of which are covered by CHO Directions) for stakeholder education and engagement;

c. the employer can decide how employees perform their duties, including facilitating face-to-face engagement with communities; and

d. any confusion about the restructure was not caused by the Department. Ms Steele had opportunities to discuss the changes to her role with her manager. She was assured that she would continue to attend remote communities.

61 The Director General says that remote Aboriginal communities, schools and hospitals were subject to the CHO Directions.

62 The Director General argues that even if travel to remote Aboriginal communities was rare, it would still be a sufficient basis to establish the lawfulness and reasonableness of the Employer Direction. Ms Steele was required to comply with the Employer Direction and her failure to comply was a breach of discipline. The Director General says that just because something does not occur often or regularly does not make it non-essential to the role and not an inherent requirement. In any event, the Director General submits that whether or not travel was an inherent requirement is not the point. The point is that travel to remote communities was part of the scope of duties.

63 The Director General submits that the CHO Directions were reasonable and lawful at the time they were made. If the Director General wanted Ms Steele to travel to remote communities, she needed to be fully vaccinated in order to do so. By not being vaccinated, Ms Steele created a situation where she was unable to travel.

64 Further, the Director General submits that Ms Steele would have been required by the Health Worker CHO Directions to be vaccinated to do community education and engagement in hospitals. When the various CHO Directions were introduced, the Government indicated that they could be in place for two years. The Director General may reasonably have wanted staff to attend hospitals and health care facilities at some point during that period.

65 The Director General disputes Ms Steele's confusion regarding the scope and responsibilities of her position. He says that senior staff made clear to Ms Steele that she would continue to attend remote Aboriginal communities after the restructure took effect. Further, any confusion that the appellant held regarding her role was not confusion caused by the Director General, and not based on beliefs reasonably held by Ms Steele.

66 The Director General argues that it is lawful and reasonable to issue the Employer Direction so that Ms Steele could lawfully perform all of her duties in light of the CHO Directions.

Consideration

67 The Board in ***Heller-Bhatt*** held:

> It is not in dispute that CHO directions that are in force stand as valid law. The Board cannot ignore or overturn the effect of CHO directions [85].

And [93] – [95]:

> 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.
>
> 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.

68 We respectfully adopt his Honour's reasoning and that of the Board in ***Heller-Bhatt***, and apply their reasoning in this matter.

69 The Board must view Ms Steele's conduct in the context of the employment relationship as a whole, considering matters including the employment contract, her JDF, the effect of the CHO Directions, the nature of the Department's 'business' and the position held by Ms Steele.

70 The most significant fact in dispute on the evidence is whether travel to remote Aboriginal communities was within the scope of duties for the SCEO role. This involves considering whether Ms Steele was told that she would still travel to remote Aboriginal communities in the SCEO role.

71 To the extent of inconsistency in the testimony, the Board prefers the evidence of the Director General's witnesses. This is because, unlike Ms Steele and Ms Apina, the evidence of Registrar Jackson, Ms Thompson and Mr Quinn was neither disturbed nor undermined in cross-examination. Further, the Director General's witnesses all had good recollection of events.

72 Ms Apina frequently contradicted herself and at times her recollection was poor. At times Ms Apina and Ms Steele were reluctant to answer questions in cross-examination. Understandably, Ms Steele cannot recall the September Meeting because of the medical event she experienced. She rightly conceded that Registrar Jackson may have told her that she would still travel to remote Aboriginal communities. Critically, Ms Steele's own evidence was that Registrar Jackson told her that the new role would still involve going out to communities and travelling. We accept that there was budget for the SCEO role to travel to Open Days. Finally, Ms Steele eventually conceded that she would not be able to fulfill all of her duties if she was not vaccinated.

73 In our view, the principle in ***Qantas Airways Ltd v Christie*** is not relevant to this matter. That case was about the proper construction of the word 'inherent' in the *Industrial Relations Act 1988* (Cth). That is not in issue in these proceedings. Nor does this matter, in the circumstances, hinge on the quality of the consultation in relation to the restructure. It was apparent from their evidence that Ms Steele and Ms Apina considered that consultation and communication in relation to the restructure was poorly handled. But the Board cannot make findings in relation to that. In any event, even if the restructure was poorly handled, for the reasons that follow the Board finds that the Employer Direction was a lawful order.

74 In our view, the issue in this matter is whether travel to remote Aboriginal communities falls within the scope of Ms Steele's duties. The evidence clearly shows that it does.

75 It is not in dispute that the role required travel around the State. The JDF says as much and we are satisfied on the evidence that it does, including to enable face-to-face engagement with stakeholders in the community. Whether the travel to remote Aboriginal communities was weekly or less frequently, it was clearly well within the scope of duties, particularly so given:

a. the need to train new Level 3s in how to run Open Days;

b. community engagement and education;

c. the need to attend stakeholder meetings; and

d. the benefit of face-to-face engagement with Aboriginal and Torres Strait Islander stakeholders.

76 We are also satisfied that Ms Steele's role required her to attend schools and hospitals, which also required her to be vaccinated to comply with the CHO Directions in relation to schools and hospitals.

77 Taking into account Ms Steele's employment contract, position, JDF, the nature of the Department's 'business' and the effect of the CHO Directions, the Board finds that the Employer Direction involved no illegality, fell within the scope of the contract of service and was reasonable in the circumstances. The Employer Direction was a reasonable, lawful order.

Did Ms Steele commit a breach of discipline by disobeying or disregarding a lawful order?

78 Ms Steele argues that she did not commit a breach of discipline because the Employer Direction was not a lawful order.

79 Ms Steele appears to submit that even if travel to remote communities was an inherent part of Ms Steele's role, the Director General failed to adequately explain this to Ms Steele.

80 While not expressly stated, Ms Steele's written submissions seem to imply either that:

a. the Employer Direction was not a lawful order because it was the Director General's fault that Ms Steele concluded that the Employer Direction did not apply to her; or

b. even if the Employer Direction was a lawful order, failing to comply with the Employer Direction was not a breach of discipline because it was the Director General's fault that Ms Steele concluded that the Employer Direction did not apply to her.

81 The Director General says the evidence shows that Ms Steele committed a breach of discipline by disobeying or disregarding a lawful order.

Consideration

82 Ms Steele gave evidence that she did not receive a COVID-19 vaccination or exemption. She submitted that she did not get vaccinated because she was concerned about the side effects of the vaccine, and further, because she believed the Employer Direction no longer applied to her due to the change in her role to Level 4 SCEO position.

83 As set out above, the Board considers that the Employer Direction was a reasonable, lawful order.

84 In our view, the evidence shows that Ms Steele was told numerous times that she would be required to travel to remote Aboriginal communities. She was also told that the Employer Direction applied to her. There was no reasonable basis for Ms Steele to conclude that the Employer Direction did not apply to her. Further, it was clear from Ms Steele's evidence that she was not simply confused about whether she needed to be vaccinated in order to perform her duties. Ms Steele was not willing to be vaccinated in any event.

85 Ms Steele did not comply with the Employer Direction. We find that Ms Steele disobeyed or disregarded a lawful order because she was not vaccinated and did not provide evidence of exemption by 4 February 2022.

86 Clearly disobeying or disregarding a lawful order amounts to a breach of discipline. Accordingly, Ms Steele committed a breach of discipline by disobeying or disregarding a lawful order.

Should the Board adjust the decision to dismiss?

87 Ms Steele asks the Board to adjust the decision to dismiss 'so that [she] is reinstated to her former position or a similar one without loss of payment of salary as from 18 March 2022 to date and no loss of benefits or continuity of service.'

88 In effect Ms Steele says that the disciplinary action is based on the Director General's failure to communicate, which is harsh and unreasonable. Further, Ms Steele argues that the penalty is harsh and oppressive given:

a. the unique circumstances of the COVID-19 pandemic;

b. the lack of clarity around Ms Steele's role and her expectation that she would not be attending remote communities on a regular basis. In particular, the Director General did not explain to Ms Steele how the CHO Directions would apply;

c. Ms Steele's otherwise good service for 14 years;

d. Ms Steele is the sole provider for her family;

e. Ms Steele is close to retirement age and future employment may be difficult to find; and

f. the Remote Community Worker CHO Directions were lifted days before her dismissal.

89 Ms Steele submits that the Director General could have chosen to impose a reprimand or improvement action. In the circumstances, Ms Steele argues that there should be no penalty.

90 The Director General argues that no evidence was led in support of any argument about the disciplinary approach taken by other public sector agencies. Accordingly there is no evidential foundation for the Board to find that Ms Steele has been unfairly treated in comparison to employees in a similar position in other government agencies.

91 He says that Ms Steele intentionally and wilfully did not obey a lawful direction and that conduct meant she was unable to perform the full range of her duties for the period of the disobedience. Such conduct plainly warrants dismissal: ***Heller-Bhatt***.

92 In effect, the Director General argues that it is incorrect to say Ms Steele's case was unique and she was an employee with otherwise good service who faced the unique circumstances of dealing with the COVID-19 pandemic. Many employees faced those precise circumstances in light of the public health directions leading to the Employer Direction to be vaccinated.

93 The Director General says that in light of Ms Steele's duties and the CHO Directions, the Employer Direction was lawful and reasonable. The failure to comply amounted to a breach of discipline and meant Ms Steele could not fulfil the whole range of her duties for the period of non-compliance. In those circumstances, dismissal was not unfair.

94 The Director General argues the appeal should be dismissed.

Consideration

95 There is no evidence before the Board in relation to how employees of other government agencies were treated. The Board cannot make a finding that Ms Steele was unfairly treated in comparison to employees in a similar position in other government agencies.

96 Ultimately the Board has concluded that travel was an important part of Ms Steele's role. The Director General was entitled to require her to travel around the State, including to work in remote Aboriginal communities, in schools and in hospitals. At the time the Employer Direction was made, Ms Steele was not able to work in those places because of the CHO Directions in force. Failing to comply with the Employer Direction meant that Ms Steele was unable to perform some of the duties of her role in accordance with her engagement for the period of non-compliance. We consider that in those circumstances, dismissal was not unfair.

97 The Board accepts that Ms Steele loved the work she had been doing, and in particular her work with remote communities. It was obvious on the evidence that Ms Steele was very good at, and passionate about, that work. We accept that Ms Steele's dismissal has had a significant impact on her. We have considered the matters at [88], but in all the circumstances of the matter the Board is not persuaded that we should adjust the decision to dismiss. Given that at least between February and June 2022 Ms Steele could not travel to remote Aboriginal communities, or attend schools and hospitals, we do not consider that the decision to dismiss Ms Steele was harsh, oppressive or unjust. It was not an abuse of the employer's right to dismiss in the sense discussed in ***Ronald David Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385.

Conclusion

98 Application PSAB 62 of 2022 is dismissed.

2023 WAIRC 00671

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 15 JULY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PIA STEELE
	APPELLANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIRPERSON
	MS B ANDERSON - BOARD MEMBER
	MR D BARRATT - BOARD MEMBER
DATE	THURSDAY, 10 AUGUST 2023
FILE NO	PSAB 62 OF 2022
CITATION NO.	2023 WAIRC 00671

Result	Application dismissed
Representation	
Appellant	Ms D Larson (of counsel)
	Mr R Sumner (as agent)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Ms D Larson (of counsel) and Mr R Sumner (as agent) 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), orders –

THAT application PSAB 62 of 2022 be, and by this order is, dismissed.

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

[L.S.]

2023 WAIRC 00674

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 26 APRIL 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00674
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR G LEE - BOARD MEMBER MS N PYNE - BOARD MEMBER
HEARD	:	THURSDAY, 23 MARCH 2023
DELIVERED	:	THURSDAY, 10 AUGUST 2023
FILE NO.	:	PSAB 37 OF 2022
BETWEEN	:	STAN MATVEEV Appellant AND DEPARTMENT OF COMMUNITIES Respondent

CatchWords	:	Public Service Appeal Board – appeal against decision to terminate employment – whether the appellant committed a serious offence – consideration of appellant's criminal conviction – dismissal proportionate in the circumstances – appeal dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) *Medicines and Poisons Act 2014* (WA) *Public Sector Management Act 1994* (WA)
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr S Matveev (in person)
Respondent	:	Mr M McIlwaine (of counsel)

Case(s) referred to in reasons:

Gaudet v Commissioner Ian Johnson Department of Corrective Services [2013] WAIRC 00032; (2013) 93 WAIG 279

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

Reasons for Decision

1 Mr Stan Matveev was employed by the Director General, Department of Communities (the Department) from 17 April 2007 until his dismissal on 26 April 2022. Immediately prior to his dismissal, the appellant was a Level 5 Area Manager.

2 The respondent dismissed the appellant pursuant to s 92 of the *Public Sector Management Act 1994* (WA) (PSM Act) because the appellant had been convicted of a serious offence. The Department considered that alternative sanctions did not adequately mitigate the risk to the respondent in maintaining the appellant's employment and the conduct of the appellant was incompatible with employment as a public officer.

3 The appellant contends that the decision to dismiss him is not proportionate to the misconduct and that the respondent did not consider the circumstances of his offence. The appellant seeks reinstatement with the Department.

Background

4 The parties filed a Statement of Agreed Facts (SOAF) and a Bundle of Agreed Documents (Agreed Documents). The appellant declined an opportunity to give evidence and submitted that he relied on the SOAF and the Agreed Documents.

5 In January 2021 as part of his role as an Area Manager, the appellant attended a house owned by the Department where a deceased client had previously resided. When at the house the appellant took possession of some of the deceased client's medications and then stored some of them in his drawer at the Narrogin Office of the Department.

6 On 16 February 2021, WA Police Officers executed a search warrant at the Department's Narrogin Office. As a result of this search warrant WA Police located and seized the following medication from the appellant's office drawer:

a. 4 x boxes (each containing 28 tablets) of tramadol 100 milligram tablets with the name of 'Mark Williams' prescribed on the box;

b. 24 tramadol 50 milligram tablets in a loose blister pack;

c. 9 kapanol or morphine sulphate 20 milligram tablets in a loose blister pack; and

d. 18 tramadol 200 milligram tablets in a loose blister pack.

7 On 17 February 2021 the appellant participated in a video recorded interview with WA Police in relation to the medications seized from his drawer on 16 February 2021.

8 Sometime after this video recorded interview, the appellant was charged with one count of being in possession of a Schedule 4 Poison (tramadol) without a valid excuse, contrary to s 14(4) of the *Medicines and Poisons Act 2014* (WA) (MP Act) and one count of being in possession of a Schedule 8 Poison (morphine sulphate) without valid excuse, contrary to s 14(4) of the MP Act.

9 On 16 August 2021 the Assistant Director General of the Department wrote to the appellant and informed him that he intended to suspend him from the workplace on full pay and provided the appellant with an opportunity to comment on this proposal.

10 On 3 December 2021, after a criminal trial, the appellant was convicted of the charges in the Albany Magistrates Court. The Court imposed a global fine of $1,500 and granted a spent conviction order. The transcript of the sentencing hearing is part of the Agreed Documents.

11 On 29 December 2021 the Director General of the Department wrote to the appellant informing him that because of his convictions, the Department had found that the appellant had committed a breach of discipline pursuant to s 92 of the PSM Act and that he was proposing to dismiss him as a result. The appellant was provided with an opportunity to respond to this proposed action.

12 On 4 January 2022 the appellant provided a written response to the Director General's dismissal proposal.

13 On 26 April 2022 the Director General of the Department wrote to the appellant and confirmed that he was dismissing him from his employment.

What Must the Board Decide?

14 The parties agree that the appellant was convicted of a serious offence, and it is not in dispute that the Department had authority to impose disciplinary action and did so by dismissing the appellant.

15 The appeal before the Public Service Appeal Board (Board) is a hearing de novo: ***Raxworthy v The Authority for Intellectually Handicapped Persons*** (1989) 69 WAIG 2266. The question for the Board is whether the Department's decision to dismiss the appellant should be adjusted in the circumstances of this matter.

Principles to be Applied

16 Section 92 of the Public PSM Act concerns employees convicted of serious offences:

> **Employee convicted of serious offence, powers as to**
>
> (1) Despite the Sentencing Act 1995 section 11, if an employee is convicted or found guilty of a serious offence, the employing authority may take disciplinary action or improvement action, or both disciplinary action and improvement action, with respect to the employee.
>
> (2) Before any disciplinary action or improvement action is taken with respect to an employee under this section, the employee must be given an opportunity to make a submission in relation to the action that the employing authority is considering taking.
>
> (3) If an employee is dismissed under this section, for the purposes of sections 58(4) and 59(1) the employee is taken to have been dismissed for breach of discipline.

17 Disciplinary action is defined in s 80A of the PSM Act:

> **80A. Terms used**
>
> In this Division —
>
> *disciplinary action*, in relation to a breach of discipline by an employee, means any one or more of the following —
>
> (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;
>
> …

18 Serious offence is defined in s 80A of the PSM Act:

> …
>
> *serious offence* means —
>
> (a) an indictable offence against a law of the State (whether or not the offence is or may be dealt with summarily), another State or a Territory of the Commonwealth or the Commonwealth; or
>
> (b) an offence against the law of another State or a Territory of the Commonwealth that would be an indictable offence against a law of this State if committed in this State (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or
>
> (c) an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this State if committed in this State (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or
>
> (d) an offence, or an offence of a class, prescribed under section 108.

19 As observed in ***Gaudet v Commissioner Ian Johnson Department of Corrective Services*** [2013] WAIRC 00032; (2013) 93 WAIG 279 (***Gaudet***) all the circumstances of the offending and the employment need to be considered [24]:

> Moreover, it should also be observed that the combined effect of ss 80A and 92 of the PSM Act are such that there is no presumption that dismissal will be the only outcome of an employee being convicted of a serious offence. Section 92 contemplates that the employing authority may take disciplinary action or improvement action or both, as a consequence of an employee being convicted of a serious offence. Plainly, in our view, all of the circumstances of the offending and of the employment need to be weighed in the balance in the employer's ultimate decision as to what action to take.

Was the Department's Decision Lawful and Valid?

20 Section 92 of the PSM Act provides that the Department may take disciplinary action or improvement action if an employee is convicted or found guilty of a serious offence. It is not disputed that the appellant was convicted of serious offences as defined

in the PSM Act. The Board finds that the Department can rely on the appellant's conviction to take disciplinary action and there was no requirement to investigate.

21 Before taking any disciplinary or improvement action there is a requirement prescribed by s 92(2) of the PSM Act that an employing authority give an employee an opportunity to make submissions in relation to the action that an employing authority is considering taking. The appellant was given an opportunity to make submissions regarding the proposal to dismiss him and did so by letter dated 4 January 2022. The Department also met with the appellant on 28 February 2022 to provide the appellant an opportunity to comment on the proposal to dismiss him.

22 The Board finds that the Department's decision to dismiss was lawfully and validly made consistent with s 92 of the PSM Act.

Was the Decision to Dismiss Proportionate?

23 The appellant submits the Board review the dismissal decision on the basis that it was disproportionate. The Board understands the appellant contends that the Department purportedly did not have a policy in place for how to dispose of the medications and that he believed he was doing the right thing by removing a risk from the property and storing them in his office drawer.

24 The appellant submits that he did not intend 'anything nefarious' and did not have 'malintent' by taking and storing the medication in his drawer at the Narrogin Office. The appellant says he disposed of the nonprescription medications he had taken however he believed he ought not throw away schedule 4 or schedule 8 medications in the same way. The appellant says the Department does not have any policies or guidelines on the method of disposal of schedule 4 and schedule 8 medications. The appellant says there needs to be a process in place to determine what happens in these circumstances. The appellant submits that if there had been a policy that stated that medications found on either an abandoned property or a deceased estate should be taken to the chemist at the first available opportunity, he would have done that.

25 The Department submits that the reasons for the appellant keeping the medication is a key issue. The Department says that based on the Magistrate Court's findings it is unreasonable to infer that the appellant retained the medications for the purpose of safely disposing of them. The Department contends that the Board may infer that the appellant decided to store the medication for a purpose other than the safe disposal and did so away from the knowledge of the Department. These circumstances results in the destruction of the necessary trust and confidence to maintain an employment relationship.

26 The Department contend that, irrespective of his intentions, the appellant was careless and negligent by storing the medications in his office drawer where others could access them, failing to keep a record of the storage and failing to speak to a more senior staff member before storing the medication.

27 The Board considers the sentencing remarks of Magistrate Scaddan in December 2021 cast doubt upon the appellant's stated rationale for storing the medication:

> Therefore, I do not accept, and I reject the accused's [the appellant] suggestion that it was more likely – more than likely or there was every chance he would take the found medications to a pharmacist or pharmacy.
>
> …
>
> I do not accept the submission by the accused that he was merely tardy about the delivering of the tramadol and morphine sulphate to a chemist.

28 The Board are not convinced by the appellant's statements that he did not know what he ought to do with the medications. The appellant's submissions to the Magistrate indicate that he did know that he could or should take them to a chemist but had not yet done so before the Police searched his office. The appellant was able to differentiate between types of medications he took from the deceased client's estate and disposed of some whilst retaining others. The appellant's submissions that the lack of a policy specifically addressing the disposal of the medications found at a deceased client's estate meant he did not know what he ought to do is not credible. The appellant did not record the medications and the storage of them in his drawer. However, the appellant does not dispute that he did place other items of value into Departmental storage.

29 The appellant contends that he is not remorseful because he was unaware that he was breaking the law and the Department did not have a policy concerning the proper disposal of medications found at abandoned or deceased estates to guide him. The appellant says everything that employees do in the course of their work is set out in policy and guidelines.

30 The appellant submits that he would have contravened the *Department of Health – Disposal of Medicines* policy if he had disposed of the medications in line with the Department's *Housing Authority Abandoned Goods and Documents* procedure. However, the appellant acted contrary to the Department of Health document by both throwing some medications away, presumably in the rubbish, and placing other medications in his office drawer where others could access them.

31 The doubt over the credibility of the appellant's explanations concerning the reasons he retained the medications, without recording them and properly storing them until he could determine how to dispose of them, and the appellant's complete lack of remorse and insight into his conduct has consequences for the employment relationship. In these circumstances the Board cannot have trust and have confidence that the appellant can conduct himself appropriately if he was reinstated.

32 The Board has considered all the circumstances of the offending and of the employment, like ***Gaudet***, and has concluded that the Department's decision to dismiss should not be adjusted.

Conclusion

33 For the reasons set out above the Board will dismiss the appeal.

2023 WAIRC 00675

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 26 APRIL 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STAN MATVEEV
	APPELLANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T B WALKINGTON - CHAIR
	MR G LEE - BOARD MEMBER
	MS N PYNE - BOARD MEMBER
DATE	THURSDAY, 10 AUGUST 2023
FILE NO	PSAB 37 OF 2022
CITATION NO.	2023 WAIRC 00675

Result	Appeal dismissed
Representation	
Appellant	Mr S Matveev (in person)
Respondent	Mr M McIlwaine (of counsel)

Order

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

THAT appeal PSAB 37 of 2022 is dismissed.

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

[L.S.]

NOTICES—Union Matters—

2023 WAIRC 00747

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Level 17, 111 St Georges Terrace, Perth

Ph: (08) 9420 4444

Application No. CICS 8 of 2023

APPLICATION FOR ORDER PURSUANT TO SECTION 72A(2) OF THE INDUSTRIAL RELATIONS ACT 1979 FOR THE RIGHT OF AN ORGANISATION TO REPRESENT THE INDUSTRIAL INTERESTS OF PARTICULAR CLASSES OF OUTSIDE EMPLOYEES EMPLOYED BY THE CITY OF ROCKINGHAM

NOTICE is given that an application has been made to the Commission in Court Session by The Construction, Forestry, Mining and Energy Union of Workers pursuant to section 72A of the *Industrial Relations Act 1979* (WA). The Construction, Forestry, Mining and Energy Union of Workers seeks an order of the Commission in Court Session pursuant to section 72A(2)(b) of the *Industrial Relations Act 1979* (WA) that, if there is a finding made in CICS 5 of 2023 to the effect that The Construction, Forestry, Mining and Energy Union of Workers does not have the right to represent the industrial interests of outside employees employed in the enterprise of the City of Rockingham, that The Construction, Forestry, Mining and Energy Union of Workers has the right to represent specified classes of outside employees, being carpenters, painters, and plant operators, employed in the enterprise of the City of Rockingham.

This matter will be listed for hearing before the Commission in Court Session on a date to be fixed, which is not to be before the expiration of 30 days from the day on which this notice is first published.

This application may be inspected by appointment at Level 17, 111 St Georges Terrace, Perth by any interested person without charge.

Pursuant to regulation 73(2) of the *Industrial Relations Commission Regulations 2005* (WA), any person who wishes to be heard in relation to this application must lodge an application on a *Form 1A – Multipurpose Form* at least 10 days before the hearing of the section 72A application and set out in detail the grounds on which the person claims sufficient interest to be heard in relation to this

application. A *Form 1A – Multipurpose Form* is available on the Commission's website at www.wairc.wa.gov.au under Applications and Forms.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]
11 AUGUST 2023

WORK HEALTH AND SAFETY ACT—Matters dealt with

2023 WAIRC 00757

APPLICATION TO EXTEND A DEADLINE FOR MAKING A DECISION PURSUANT TO SECTION 82A OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	WORKSAFE COMMISSIONER
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 13 SEPTEMBER 2023
FILE NO/S	WHST 7 OF 2023
CITATION NO.	2023 WAIRC 00757

Result	Order issued
Representation	
Applicant	Ms A Sukoski (of counsel)
Respondent	Ms H Harper (as agent)

Order

WHEREAS on 11 September 2023, the Civil Service Association of Western Australia Incorporated (**Union**) asked the WorkSafe Commissioner (**Regulator**) to appoint an inspector under s 82(1) of the *Work Health and Safety Act 2020* (WA) (**WHS Act**) to resolve an issue at the Zoological Parks Authority (**Perth Zoo**);

AND WHEREAS the matter the Union referred to the Regulator raises concerns in relation to:

(a) amending and disposing of work health and safety records;

(b) coercive and misrepresentative conduct;

(c) inadequate and faulty work health and safety reporting systems; and

(d) Work Groups disallowed elected representation;

AND WHEREAS under s 82(3) of the WHS Act, an inspector must make a decision resolving the issue no later than two days after the day on which the request that an inspector be appointed is made;

AND WHEREAS on 11 September 2023, the Regulator applied to the Work Health and Safety Tribunal (**Tribunal**) under s 82A of the WHS Act to set a new deadline;

AND HAVING HEARD at the hearing on 13 September 2023 from Ms A Sukoski (of counsel) on behalf of the Regulator and Ms H Harper (as agent) on behalf of the Union;

AND WHEREAS the Perth Zoo confirmed that it had complied with the Tribunal's request to notify all affected workers about the hearing and their opportunity to be heard about the Regulator's application for a new deadline. The Perth Zoo provided the Tribunal the email it sent to all of its employees at 2.16pm on 12 September 2023 attaching a document prepared by the Tribunal titled 'Information for workers affected by the issue'. The Perth Zoo also confirmed that it had displayed that document in a suitable, prominent place in the workplace where it would be seen by affected workers. In those circumstances, the Tribunal is satisfied that affected workers were notified of the hearing and had an opportunity to be heard about the Regulator's application for a new deadline, but no affected worker or their representative sought to be heard;

AND WHEREAS the Perth Zoo did not attend the hearing;

AND WHEREAS the Regulator says the new deadline is necessary because the coercion issues raised in relation to s 108 of the WHS Act are serious, attract a criminal penalty and require more time to consider. Further, the Regulator must:

(a) speak with many workers and management representatives;

(b) seek production of various documents;

(c) review documents and information obtained; and

(d) consider whether there have been any breaches, and if so consider any appropriate enforcement action;

AND WHEREAS in those circumstances the Regulator says that a new deadline of 8 November 2023 is appropriate to allow the inspector to properly consider the Union's referral and make a decision resolving the issue;

AND WHEREAS on 12 September 2023 the Regulator provided the Tribunal, the Union and the Perth Zoo a copy of its Investigation Plan. The Investigation Plan details what needs to be done each week for eight weeks in order for the inspector to make a decision resolving the issue, including obtaining and reviewing documents, interviewing Health and Safety Representatives, workers and members of management, inspecting sites, identifying any breaches of the WHS Act and considering any appropriate enforcement action;

AND WHEREAS the Union does not oppose the Regulator's application for a new deadline of 8 November 2023 and says it supports a timeframe that allows WorkSafe to conduct a proper investigation of the issues;

AND WHEREAS in setting a new deadline that the Tribunal considers to be practicable, the Tribunal must evaluate the facts and circumstances of the case in question;

AND WHEREAS the Tribunal has considered the Union's request to the Regulator. The Union represents close to 60 members that it says are affected by the issue. The Union's request to the Regulator raises a number of potentially complex matters and its concerns appear to the Regulator to relate to alleged breaches of ss 47, 61, 70, 104 and 108 of the WHS Act. The Tribunal is satisfied that the investigator will need to interview many people, seek and consider documents and information, and consider any possible breaches and appropriate enforcement action;

AND WHEREAS the parties to the issue have had an opportunity to be heard and no party to the issue opposed the Regulator's application for a new deadline;

AND WHEREAS in all the circumstances of this application before it, the Tribunal considers that a new deadline of 8 November 2023 is practicable;

NOW THEREFORE the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA), orders –

THAT an inspector make a decision resolving the issue by 8 November 2023.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2023 WAIRC 00755

APPLICATION TO EXTEND A DEADLINE FOR MAKING A DECISION PURSUANT TO SECTION 82A OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES WORKSAFE COMMISSIONER

APPLICANT

-v-

COMMUNITY & PUBLIC SECTOR UNION CIVIL SERVICE ASSOCIATION OF WA

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE WEDNESDAY, 13 SEPTEMBER 2023

FILE NO/S WHST 7 OF 2023

CITATION NO. 2023 WAIRC 00755

Result Order issued

Representation

Applicant Ms A Sukoski (of counsel)

Respondent Ms H Harper (as agent)

Order

WHEREAS this is an application to the Work Health and Safety Tribunal under the *Work Health and Safety Act 2020* (WA);

AND WHEREAS at a hearing on Wednesday, 13 September 2023 the parties asked the Work Health and Safety Tribunal to amend the name of the respondent to 'The Civil Service Association of Western Australia Incorporated';

AND HAVING heard from the parties, the Work Health and Safety Tribunal considers the name of the respondent should be amended;

NOW THEREFORE the Work Health and Safety Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA) and the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to 'The Civil Service Association of Western Australia Incorporated.'

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.