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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Industrial Magistrate—

2024 WAIRC 00758

APPEAL AGAINST DECISIONS OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 22/2022 GIVEN ON
17 JULY 2023 AND 6 NOVEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2024 WAIRC 00758
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG
HEARD	:	TUESDAY, 30 JANUARY 2024
DELIVERED	:	TUESDAY, 13 AUGUST 2024
FILE NO.	:	FBA 8 OF 2023
BETWEEN	:	MINISTER FOR CORRECTIVE SERVICES Appellant AND WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Respondent

ON APPEAL FROM:

Jurisdiction	:	INDUSTRIAL MAGISTRATES COURT
Coram	:	INDUSTRIAL MAGISTRATE T KUCERA
Citation	:	[2023] WAIRC 00384; [2023] WAIRC 00867
File No	:	M 22 OF 2022

Catchwords	:	Industrial Law (WA) – <i>Department of Justice Prison Officers' Industrial Agreement 2020</i> – Entitlement to personal leave for prison officers – Alleged contravention of cl 71 of the <i>Agreement</i> in relation to sick leave claim – Meaning of clause – Principles of interpretation applied – Approach to the appeal – Whether the deferential standard or the correctness standard should apply – Correctness standard applies – Full Bench to decide for itself the correct interpretation of the <i>Agreement</i> – Appeal upheld – Decisions of the Industrial Magistrate quashed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 83 <i>Minimum Conditions of Employment Act 1993</i> (WA) <i>Oaths, Affidavits and Statutory Declaration Act 2005</i> (WA) s 11; s 12

Result	:	Appeal upheld and decisions quashed
Representation:		
Counsel:		
Appellant	:	Mr J Carroll of counsel
Respondent	:	Mr D Stojanoski of counsel and with him Mr A Ceklic of counsel
Solicitors:		
Appellant	:	State Solicitor's Office of Western Australia
Respondent	:	Slater and Gordon

Case(s) referred to in reasons:

Ammon v Colonial Leisure Group Pty Ltd [2019] WASCA 158

Australian Building and Construction Commission v Pattinson [2022] HCA 13; (2022) 274 CLR 45

Callan v Smith [2021] WAIRC 00162; (2021) 101 WAIG 1155

Holland v Jones (1917) 23 CLR 149 per Isaacs J at 153

House v The King [1936] HCA 40; (1936) 55 CLR 499

Minister for Immigration and Border Protection v SZYFW [2018] HCA 30; (2018) 92 ALJR 713

University of Wollongong v Metwally (No 2) [1985] HCA 28; (1985) 59 ALJR 481

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2024] WAIRC 00139; (2024) 104 WAIG 322

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2023] WAIRC 00867; (2023) 103 WAIG 1878

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

1 Under the *Department of Justice Prison Officers' Industrial Agreement 2020* under Part E, there are clauses at cls 70-73 that deal with personal leave for prison officers. The entitlement to personal leave is prescribed by cl 70. How personal leave is accessed, is prescribed by cl 71. The process for applying for personal leave, is set out in cl 73. For present purposes, cls 71 and 73 are relevant and they provide as follows:

71. Accessing Personal Leave

71.1 Reasonable and legitimate requests for personal leave will be approved subject to the Officer having accrued personal leave available. The Employer may allow an Officer who is unable to work to take personal leave for the following reasons:

- (a) Illness/injury leave - if the Officer is unable to work because the Officer is ill or injured.
- (b) Carer's leave - if the Officer is unable to work because the Officer is providing care or support to a member of the Officer's family who requires care or support because of an illness or injury to the member; or an unexpected emergency affecting the member. ...
- (c) Unanticipated matters of a compassionate or pressing nature - If the Officer is unable to work because the Officer must attend to unanticipated matters of a compassionate or pressing nature which have arisen without notice and require immediate attention.
- (d) Planned personal leave - If the Officer is unable to work because the Officer must attend to planned matters where arrangements cannot be organised outside of normal working hours or be accommodated by the utilisation of flexible working hours or other leave.

...

71.3 Personal leave will not be approved where an Officer is absent from work because of personal illness/injury directly caused by their misconduct.

...

73. Application for Personal Leave

73.1 An Officer will complete and lodge an application for personal leave in the manner required. The application shall clearly identify the type of personal leave requested and must be submitted during the Officer's first shift on their return to work from Personal Leave. The Officer's pay will be adjusted accordingly if the application for personal leave is not lodged within this period.

...

73.3 An application for personal leave exceeding two consecutive shifts will be supported by evidence to the satisfaction of the Superintendent.

- 73.4 Subject to subclause 73.3, the amount of personal leave granted without the production of evidence to satisfy the Superintendent will not exceed five shifts in any calendar year.
- 73.5 The minimum evidentiary requirement to satisfy the Superintendent is:
- (a) Illness/injury Leave - subject to subclause 73.3 and 73.4:
 - (i) a medical certificate from a certified medical practitioner indicating the Officer was or is unfit for work. Where the Officer is unable to obtain a medical certificate, a signed statement as per the relevant Department template will be required as an alternate.
 - (b) Nothing in this subclause prevents inquiries and recommendations being made by the Employer under clause 74 - Absenteeism Management and clause 75 - Suspected Misuse of Personal Leave Provisions
 - (c) Carer's leave - a signed statement as per the relevant Department template outlining the name of the person requiring care, the Officer's relationship to that person, the reasons for taking leave, and the estimated period of absence.
 - (d) Unanticipated matters of a compassionate or pressing nature - a signed statement as per the relevant Department template outlining the nature of the unanticipated occurrence and stipulating the relationship of the Officer to that situation.
 - (e) Planned personal leave - a signed statement as per the relevant Department template outlining the nature of the planned matter, and justifying the requirement for the Officer to take personal leave as a result.

73.6 Notwithstanding subclause 73.5, it is at the discretion of the Superintendent as to whether the evidence provided by an Officer is satisfactory, and the Superintendent may require additional evidence.

- 2 A dispute arose between the respondent and the appellant in relation to a member of the respondent, Mr Paterson. Mr Paterson is a prison officer and is a member of the respondent union. Between 1 and 3 October 2021, Mr Paterson was absent from work as he was unwell. On 4 and 5 October 2021, Mr Paterson had rostered days off. On the following three days being 6 to 8 October 2021, Mr Paterson took personal leave to care for his daughter who was also unwell. The two following days being 9 and 10 October 2021, were Mr Paterson's further rostered days off.
- 3 Mr Paterson returned to work on 11 October 2021. As is required under the *Agreement*, Mr Paterson lodged two claims for personal leave. In relation to the period 1 to 3 October 2021, Mr Paterson claimed sick leave. In respect of the period 6 to 8 October 2021, Mr Paterson claimed carer's leave. Both forms of leave are able to be taken as personal leave under the *Agreement*. For the purposes of these reasons, we will refer to Mr Paterson's claim for personal leave on the grounds of illness, as sick leave.
- 4 Both claims made by Mr Paterson were rejected by the Department of Justice. In relation to his claim for sick leave, Mr Paterson did not, because he maintained he was unable to do so, provide a medical certificate to the Department. Instead, a statutory declaration was provided. The same evidence was provided in relation to Mr Paterson's claim for carer's leave. The respondent challenged the Department's refusal to grant Mr Paterson paid leave under the disputes procedure of the *Agreement*. As a result, Mr Paterson's claim for carer's leave was allowed, but his claim for sick leave was still refused.
- 5 The respondent, on Mr Paterson's behalf, commenced proceedings under s 83 of the *Industrial Relations Act 1979* (WA) alleging that the Department failed to comply with cl 71.1 of the *Agreement* in not granting Mr Paterson payment for sick leave. Additionally, the respondent contended that the Department also failed to comply with relevant provisions of the *Minimum Conditions of Employment Act 1993* (WA) in relation to the granting of personal leave.
- 6 The respondent claimed that the relevant Superintendent and others, who dealt with Mr Paterson's sick leave claim, failed to comply with cl 71.1 of the *Agreement*, because they did not accept the statutory declaration that Mr Paterson provided, in support of his sick leave claim, as an alternative to the provision of a medical certificate.
- 7 On behalf of the appellant, it was contended at first instance that the Department had not contravened the *Agreement*. Furthermore, it was contended that the relevant provisions of the *MCE Act* had no application to Mr Paterson's circumstances, because the terms of the *Agreement* in relation to personal leave, were more beneficial than the relevant provisions of the *MCE Act*. In relation to sick leave, it was the appellant's case at first instance that the requirement to provide a medical certificate was a minimum requirement, and on the material before the Department, Mr Paterson failed to establish that he was unable to obtain one. Thus, it was contended that, in the circumstances before the Superintendent, the refusal of Mr Paterson's claim for sick leave was reasonable.

The Court's decision

- 8 The court determined that the alleged contravention of cl 71 of the *Agreement* had been made out: *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* [2023] WAIRC 00384; (2023) 103 WAIG 1454. As to the respondent's claim that the terms of the *Agreement* in relation to personal leave were less favourable than the relevant provisions of the *MCE Act*, after analysing both, his Honour rejected this proposition. In the absence of a cross-appeal, it is unnecessary to consider this issue any further.
- 9 Both Mr Paterson, the prison officer concerned, and the Superintendent of Woorooloo Prison, Superintendent Sinclair, gave evidence. Relevantly, as to Mr Paterson's evidence, his Honour found:
 - (a) On or around 25 September 2021, Mr Paterson became unwell, with symptoms of a headache and vomiting. He remained unwell until 29 September 2021;

- (b) Towards the end of the day at 4:57pm on 29 September 2021, Mr Paterson contacted his local medical practice, the Swan Medical Centre, to make an appointment for that day. None of the 16 doctors in the practice could see him until 6 October 2021;
- (c) Mr Paterson tried again on the morning of 30 September 2021 to get an appointment with his treating doctor, but he was on leave and none of the other doctors could see him until 5 October 2021. Mr Paterson did not make an appointment as he regarded it as too far away and 'he could get emergency medical assistance if his illness became worse or by this date, he would have recovered' (reasons at first instance [34] AB224);
- (d) Mr Paterson made contact with the Officer In Charge at Woorooloo Prison to advise that he would not be at work on 1 October 2021 because he was ill. He also advised to the same effect for his absences on 2 and 3 October 2021;
- (e) On 5 October 2021 Mr Paterson contacted the prison to advise that his daughter was unwell and that he would take carer's leave for 6, 7 and 8 October 2021;
- (f) On Mr Paterson's return to work on 11 October 2021, he provided two statutory declarations, one each for his claim for sick leave and for carer's leave. Superintendent Sinclair refused both of Mr Paterson's personal leave claims; and
- (g) Following a dispute resolution procedure under the *Agreement*, Mr Paterson's carer's leave application was granted, but his sick leave application remained refused.

10 As to Superintendent Sinclair's evidence his Honour found:

- (a) When prison officers take personal leave they 'book off' and are absent from work and it is not until they return to work that they make a claim for leave in the appropriate form;
- (b) In the case of Mr Paterson's personal leave applications, Superintendent Sinclair was not satisfied that Mr Paterson had complied with cls 73.5(a)(i) and 73.5(c) of the *Agreement*. Given the length of Mr Paterson's absence, Superintendent Sinclair considered that Mr Paterson did not provide a reasonable explanation for not providing a medical certificate;
- (c) When considering applications for leave, Superintendent Sinclair checks whether a pattern of applications for leave in proximity to school holidays, public holidays or rostered days off is evident. Given Mr Paterson's absences took place over the school holiday period, Superintendent Sinclair considered it reasonable for her to request a medical certificate; and
- (d) In making her decision to refuse Mr Paterson's request for sick leave, Superintendent Sinclair had regard to the 'Superintendent's Guidance Note No 4 – Personal leave', said to be aligned with the terms of the *Agreement* in relation to personal leave.

11 In light of his Honour's interpretation of the relevant provisions of the *Agreement*, the submissions made by the parties and the evidence, his Honour found and concluded:

- (a) That cl 73 of the *Agreement* as a whole provides a Superintendent with flexibility in relation to claims for personal leave;
- (b) That under cl 73.5, the minimum evidentiary requirement for sick leave is a medical certificate and in this context, this means the 'least' evidence to be provided and for a reasonable person to be 'satisfied' means they must be 'convinced' and it must 'answer sufficiently';
- (c) To construe the *Agreement* such that if the employer does not accept an officer's explanation for a failure to provide a medical certificate, then a signed statement or statutory declaration will not suffice, is an overly restrictive and pedantic approach to the interpretation of cl 73 of the *Agreement* and the Superintendent has a much broader discretion;
- (d) That Superintendent Sinclair made a number of errors in her decision to refuse Mr Paterson's sick leave application and her refusal was unreasonable;
- (e) That in all of the circumstances Mr Paterson took reasonable steps to obtain a medical certificate over the period 30 September to 2 October 2021 with the 16 doctors at the medical practice. Given Mr Paterson's prior medical history, and the impact of the COVID-19 pandemic, it was reasonable for Mr Paterson to focus his efforts on getting an appointment at the Swan Medical Centre;
- (f) On the basis of his Honour's conclusion at (e) above, the provision of a detailed statutory declaration satisfied the minimum evidentiary requirement of cl 73.5(a)(i) of the *Agreement*;
- (g) That there was no evidence that Mr Paterson was seeking to take sick leave in order to take time off over the school holiday period, such that his claim was disingenuous or was made for an improper purpose. There was nothing before Superintendent Sinclair to suggest that Mr Paterson's request was not legitimate;
- (h) In terms of evidentiary value, a statutory declaration carried considerable weight and more than the Department of Justice's requirement for a statement;
- (i) That given the period of the absence on sick leave for three days, the content of the statutory declaration deposing to Mr Paterson's condition, and the fact that Mr Paterson's wife, who witnessed the statutory declaration, is a nurse, gave weight to its content;
- (j) The content of the SGN4 Guidance Note led Superintendent Sinclair into error and it is the *Agreement* and not the Guidance Note, that is to be construed; and

- (k) On the basis of the foregoing, the appellant contravened the *Agreement* in refusing to grant Mr Paterson paid sick leave for the period 1 to 3 October 2021.
- 12 A separate penalty hearing took place and his Honour published reasons for decision on 6 November 2023: *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* [2023] WAIRC 00867; (2023) 103 WAIG 1878 (see AB278-287). Having regard to the circumstances of the contravention, and applying the relevant criteria for the imposition of a penalty under s 83 of the *Act*, as set out in *Callan v Smith* [2021] WAIRC 00162; (2021) 101 WAIG 1155 and *Australian Building and Construction Commission v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 the learned Industrial Magistrate imposed a caution on the appellant. The caution imposed was in the following terms (see AB288):

It is hereby ordered that:

...

2. In respect of the proved contravention of clause 71.1 of the *Department of Justice Prison Officers' Industrial Agreement 2020*, the respondent is cautioned from engaging in any further contraventions of any industrial instruments to which it is a party.

The appeal

- 13 The grounds of appeal are as follows:

A. Grounds relating to finding of contravention

The Industrial Magistrate erred in issuing a caution because he erred in finding a contravention was established on the following grounds:

1. In considering whether the Mr Paterson had been 'unable to obtain a medical certificate' within the meaning of clause 73.5(a)(i) of the Agreement, the Industrial Magistrate erred in law by asking the wrong question by conflating Mr Paterson's efforts to seek a medical appointment for diagnosis and treatment with the steps that might reasonably be taken by an employee in contemporary society when seeking an appointment for the purposes of obtaining a medical certificate to establish an entitlement to paid sick leave.
2. In the alternative to ground 1, if at [149] the Industrial Magistrate did not find that Mr Paterson was 'unable to obtain a medical certificate' within the meaning of clause 73.5(a)(i), the Industrial Magistrate erred in law in finding at [149] that the statutory declaration met the minimum evidentiary requirement under clause 73.5(a)(i) of the Agreement in circumstances where, on the proper construction of clause 73.5(a)(i) of the Agreement, a statutory declaration (or signed statement) can only meet the minimum evidentiary requirement under that clause if the employee is 'unable to obtain a medical certificate'.
3. In finding the claim proven, the Industrial Magistrate erred in law in finding, at [126] – [129], that clause 73.6 of the Agreement provided a Superintendent with a discretion to accept evidence to satisfy them of the requirement even where such evidence does not meet the 'minimum evidentiary requirement' provided in clause 73.5, whereas on the proper construction of 73.6 of the Agreement, the Superintendent has discretion to require additional evidence, over and above that of the 'minimum evidentiary requirements', and does not have discretion to accept evidence which is less than the 'minimum evidentiary requirements'.
4. In finding the claim proven, the Industrial Magistrate made an error of fact in finding at [147] that 'the evidence establishes that [Mr Paterson] tried daily in the period 30 September to 2 October to obtain an appointment' in circumstances where the evidence only established that Mr Paterson tried to make an appointment on 29 and 30 September.
5. In holding at [151] that Mr Paterson's request to take personal leave should have been viewed as reasonable and legitimate, the Industrial Magistrate erred by taking into account irrelevant matters, namely:
 - (a) At [156] and [161], the Industrial Magistrate considered it relevant that Ms Morris [sic] was a witness to the statutory declaration because she is a registered nurse and someone who was in a position to verify the matters described in Mr Paterson's statutory declaration, however, that matter was irrelevant because there was no evidence to establish Ms Morris [sic] in witnessing the statutory declaration was declaring that she witnessed those matters nor that she was herself declaring to the truth of Mr Paterson's declaration.
 - (b) At [170], the Industrial Magistrate considered that the Superintendent failed to have proper regard to the 'well known ... demands ... placed on the health system and [that] measures were adopted discouraging people with potential COVID symptoms from attending medical practices' in circumstances where it was never suggested that a reason for Mr Paterson not obtaining a medical certificate was because of him being discouraged from attending a medical practice due to potential COVID symptoms.
 - (c) At [171], the Industrial Magistrate considered relevant that Mr Paterson's illness coincided with a long weekend and that was a factor that needed to be considered, however, the Queen's Birthday public holiday was on 27 September 2021, and Mr Paterson sought to obtain an appointment with a general practitioner on 29 and 30 September 2021 and then sought paid personal leave for 1 to 3 October 2021. In those circumstances the public holiday was not relevant.

B. Grounds relating only to the caution issued

6. The terms of the caution issued by the Industrial Magistrate was manifestly unreasonable as there was no rational basis to:

- (a) caution the appellant not to contravene *any* industrial instrument to which the appellant is a party in circumstances where only one industrial instrument was the subject of M 22 of 2022; and
 - (b) caution the appellant from engaging in *any* contravention without there being any connection within the caution to the nature of the contravention the subject of M 22 of 2022.
7. In the alternative to ground 6, the Industrial Magistrate gave inadequate reasons to explain why the caution which he issued:
- (a) cautioned the appellant not to contravene *any* industrial instrument to which the appellant is a party rather than only the industrial instrument the subject of 22 of 2022; and
 - (b) cautioned the appellant not to engage in *any* contravention without there being any connection within the caution to the nature of the contravention the subject of M 22 of 2022.

Approach to the appeal

- 14 The learned Industrial Magistrate concluded that Superintendent Sinclair's rejection of Mr Paterson's claim for sick leave was unreasonable, in light of the terms of the *Agreement*. This conclusion begs the question as to the approach the Full Bench should adopt to the determination of the present appeal and whether the deferential standard or the correctness standard should apply. It seemed to be suggested on the respondent's written submissions that the Full Bench should only interfere if it could be demonstrated that the learned Industrial Magistrate erred in the exercise of his discretion, such that it miscarried, citing the well-known decision of the High Court in *House v The King* [1936] HCA 40; (1936) 55 CLR 499, in support.
- 15 On the other hand, the appellant, in reliance on the decision of the Court of Appeal in *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158, contended that in circumstances where the exercise of discretion as to whether evidence produced by a prison officer to support a claim for personal leave is satisfactory, and therefore 'reasonable' for the purposes of cl 71.1 of the *Agreement*, does not involve the exercise of discretion at large. It was common ground that the obligation imposed on a Superintendent acting under cls 71 and 73 of the *Agreement* is to act reasonably, in the sense that the exercise of the Superintendent's discretion should not be arbitrary or capricious.
- 16 In *Ammon*, the matter at first instance was a claim based on private nuisance, with the need to establish that the use or enjoyment of the plaintiff's land or rights conferred under it, were interfered with substantially and unreasonably: at [119]. On the appeal, an issue arose as to whether the approach in *House v The King* should apply. The Court of Appeal referred to the decision of Gageler J (as his Honour then was) in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713 at [35]-[50], in particular at [48]-[49] where his Honour observed:
- 48. The course of High Court authority since *Warren v Coombes* has accordingly proceeded on a consistent understanding of how the line of demarcation is to be drawn between those of a primary judge's conclusions which attract the correctness standard of appellate review reaffirmed in that case and those which attract the deferential standard applicable to appellate review of an exercise of judicial discretion. Without excluding the potential for other considerations to affect the standard of appellate review in a particular category of case, the understanding provides a principled basis for making at least the principal distinction.
 - 49. The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies. The resultant line is not bright; but it is tolerably clear and workable.
- 17 Returning to the issue at hand, the Court of Appeal went on to conclude on this point as follows at [128]-[129]:
- 128. Colonial's submissions that the deferential standard is applicable in the present appeal should be rejected. As Gageler J made clear in *SZVFW*, and as the High Court has recently emphasised, the deferential standard does not apply whenever minds may reasonably differ on a question or the question may be characterised as evaluative. Although the question of whether there has been a substantial and unreasonable interference with the beneficial use of Mr Ammon's land is evaluative in nature, it involves the application of a legal standard, in respect of which there is only one uniquely correct outcome. The character of the finding is more like a finding of negligence, or an *Anshun* estoppel (the touchstone of which is the question of unreasonableness), rather than the exercise of a judicial discretion.
 - 129. Adopting Gageler J's nomenclature, the correctness standard rather than the deferential standard is to be applied to an appellate review of whether, on primary facts agreed or found by the trial court, there is a substantial and unreasonable interference with the beneficial use of premises so as to constitute an actionable nuisance. That is consistent with the approach taken by this court in *Marsh* and *Southern Properties*.
- 18 The appellant submitted that analogously with *Ammon*, in this case, the decision of his Honour as to whether there was a contravention of cl 71.1 of the *Agreement*, involved, on the proper interpretation of the *Agreement*, only one correct answer. His Honour's discretion was not exercised at large, such that there were a range of possible outcomes.
- 19 We prefer the appellant's approach to this issue. The decision of the learned Industrial Magistrate, whilst involving an element of discretion in his assessment of the reasonableness of Mr Paterson's claim for sick leave, made in the context of a legal standard, that being the correct construction of the relevant provisions of the *Agreement*, leads to only one correct answer.

Accordingly, the correctness standard applies to the determination of the appeal. Insofar as the decision of the learned Industrial Magistrate turned on his interpretation of the *Agreement*, it is for the Full Bench to decide for itself, the correct interpretation.

20 To the extent that the appellant contended that the learned Industrial Magistrate erred in his interpretation of the *Agreement*, the approach to be adopted is well settled. Recently in *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* [2024] WAIRC 00139; (2024) 104 WAIG 322, the Full Bench observed at [34]:

34. There was no contest as to the relevant principles to apply in the interpretation of industrial instruments. In *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595 Smith AP (as her Honour then was) and Scott CC observed at [21] to [23]:

Interpreting an industrial agreement - general principles of interpretation

21 The approach that is to be applied when interpreting an industrial agreement is well established. This is:

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

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

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

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

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

McHugh J); **Director General v United Voice** [81]; see also **Ancor v CFMEU** 66 (Kirby J), 129 - 130 (Callinan J)).

- 23 To these principles, the following observations made by Pullin J in **Director General, Department of Education v United Voice WA** [2013] 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].

- 21 We adopt and apply that approach for present purposes.
- 22 Finally, in the respondent's written submissions, it was contended that those parts of the appellant's written submissions in Part II subparts B and C, dealing with the principles of interpretation of industrial agreements and the proper construction of cl 71 and 73 of the *Agreement*, were not part of the appellant's appeal grounds and were not issues raised at first instance. As to the latter point, it was therefore submitted that these matters were fresh points and the Full Bench should not entertain them on appeal, in reliance on **University of Wollongong v Metwally (No 2)** [1985] HCA 28; (1985) 59 ALJR 481. Whilst these matters were not pressed in oral submissions before the Full Bench, the respondent's written submissions were not abandoned and it is accordingly necessary for the Full Bench to consider them.
- 23 For the following reasons, these contentions have no merit. In the respondent's written submissions at first instance, the meaning of cl 73.5 of the *Agreement* was put in issue (see [51] at AB131). The appellant in his submissions at first instance, also put the meaning of provisions of the *Agreement* in issue (see [7] - [9]; [11]; and [13] at AB138). The appeal grounds themselves directly advert to the meaning and effect of cl 73 of the *Agreement* in grounds 1, 2 and 3. Additionally, his Honour clearly understood the centrality of the interpretation of the *Agreement* for the purposes of making his decision (see [98] - [103] reasons at first instance at AB230).

Consideration

Ground 1

- 24 As to this ground, the respondent submitted that the assertion of the appellant that the learned Industrial Magistrate's findings at [148] and [149] of his reasons, in light of the undisputed evidence that Mr Paterson was ill, were reasonably open. Applying the terms of cl 73.5(a)(i) of the *Agreement*, Mr Paterson tried 'very hard indeed' to obtain a medical certificate and was not able to obtain an appointment with either his usual doctor or any of the other 16 doctors at his usual medical centre until 5 October 2021 (see respondent's written submissions at [13] to [14]).
- 25 Under the heading 'Consideration - Did the Department Breach Clause 71.1 of the Agreement?' the learned Industrial Magistrate's reasons at [146] to [149] (see AB234-235) were as follows:
- 146 In relation to this, Supt Sinclair made a number of errors in the exercise of her discretion which rendered the decision to refuse Mr Paterson's personal (sick) leave application unreasonable.
- 147 I do not accept that Mr Paterson did not make a reasonable attempt to obtain a medical appointment. The evidence establishes he tried daily in the period 30 September to 2 October to obtain an appointment at a practice where at least 16 doctors worked.
- 148 In the context of the COVID pandemic and his particular medical history, it was reasonable in all of the circumstances, for him to have focused his efforts on obtaining an appointment at his usual practice, the Swan Medical Centre. If he had made a lesser effort, I may have taken a different view but the evidence establishes that despite his best efforts, he was not able to get an appointment to obtain a medical certificate.
- 149 Having concluded Mr Paterson had a reasonable explanation as to why he could not obtain a medical certificate, it is my view the provision of a detailed statutory declaration met the minimum evidentiary requirement under cl 73.5(a)(i) of the Agreement.
- 26 The respondent submitted that Mr Paterson fell ill on 25 September 2021 and remained ill over the period 26-29 September 2021. During this period, based on the learned Industrial Magistrate's findings, the respondent submitted that Mr Paterson, in not being able to get an appointment until 5 October 2021, after his scheduled return to work on 1 October 2021, meant he was 'unable' to obtain a medical certificate to support his sick leave claim, for the purposes of cl 73.5(a)(i) of the *Agreement*. Despite the appellant's contentions to the contrary, the respondent submitted that Mr Paterson was not seeking an appointment for the purposes of the diagnosis of his medical condition. It was submitted that even if this was so, this was related to his illness over the period 25-29 September 2021 and formed part of his legitimate reasons for being on sick leave.
- 27 The respondent contended that the learned Industrial Magistrate was correct to conclude that Mr Paterson had made a reasonable attempt to obtain a medical certificate, and that in light of there being no dispute that Mr Paterson was in fact ill, he

- was accordingly 'unable' to provide a medical certificate for the purposes of cl 73.5(a)(i) and the provision of a statutory declaration instead, satisfied the 'minimum evidentiary requirement' for the purposes of cl 73.5(c)(i).
- 28 It is necessary in considering this ground of appeal, to construe the relevant provisions of the *Agreement*, in cls 71 and 73, in the context of cls 71 to 73 read as a whole. Whilst it does not appear to have been considered a first instance, the starting point for the purposes of interpretation is cl 71.1. Clause 71.1 is prefaced by the words 'Reasonable and legitimate requests for personal leave will be approved ...'. The appellant posited several different possibilities as to how the word 'legitimate' in this context, should be construed. It was submitted that one meaning from the Macquarie Dictionary is 'genuine; not spurious'. Alternatively, other possible meanings include 'according to law; lawful' and 'in accordance with established rules, principles or standards'.
- 29 Consistent with the principle that language used in instruments is to be construed in context and in accordance with the text as a whole, we prefer the construction of 'Reasonable and legitimate', as being referable to established rules, principles or standards. That is, cl 71 to 73 should be read together as part of the scheme concerning personal leave. To construe these words as meaning a request for personal leave must only be 'reasonable and genuine' for example, would render the requirements of cl 73 of the *Agreement* concerning the minimum evidentiary requirements in cl 73(5), as otiose.
- 30 As was recognised by the learned Industrial Magistrate, given Mr Paterson's circumstances and the length of personal leave requested, cl 73.3 applied in this case, which required Superintendent Sinclair to be satisfied with the evidence furnished by Mr Paterson in support of his application for sick leave. It is clear that cl 73.3 is to be read together with cl 73.5, which informs and guides a Superintendent as to how the requirement in cl 73.3 is to be met. That is, the discretion of a Superintendent to be satisfied is not at large. Clause 73.5 is prefaced with the words 'The minimum evidentiary requirements to satisfy the Superintendent ...'. This is a clear reference to the satisfaction requirement in cl 73.3. That minimum evidentiary requirement is a medical certificate unless an officer is unable to obtain one.
- 31 Clause 73.5(a) is 'subject to subclause 73.3 and 73.4'. This is because these provisions of cl 73 specify in which circumstances the minimum evidentiary requirement will apply. A lesser standard applies in cases of applications for personal leave for two consecutive shifts or less at one time, or in cases where an officer has made personal leave applications that have not exceeded a total of five shifts in any year. In these circumstances, an application for personal leave without the need to produce evidence to satisfy a Superintendent, must be taken to be 'reasonable and legitimate' for the purposes of cl 71.1 of the *Agreement*.
- 32 The scheme of cl 73 then includes cl 73.6. This provides that notwithstanding the terms of cl 73.5, a Superintendent has discretion as to whether evidence provided in support of a claim by an officer is satisfactory. Second, a Superintendent may require an officer to provide additional evidence.
- 33 As a matter of construction, for the purposes of cl 73.5, 'minimum' in its ordinary sense, means '2. The least amount obtainable, allowable, usual, etcetera' (Shorter Oxford Dictionary). This qualifies how cl 73.6 is to apply, such that in the case of a claim for sick leave, the least evidence that may satisfy a Superintendent is a medical certificate. However, in appropriate circumstances, a Superintendent may require further evidence, over and above the minimum requirement of a medical certificate. Read together, in the case of a claim for sick leave to which cls 73.5 and 73.6 apply, in the usual course, a Superintendent cannot accept less than a medical certificate, and may require more evidence. This is subject to the second sentence in cl 73(5)(a)(i), dealing with the inability of an officer to provide a medical certificate, to which we now turn.
- 34 The qualification to the minimum evidentiary requirement of a medical certificate to satisfy a Superintendent, is if the officer is 'unable' to obtain a medical certificate. It is plain by cl 73.5(a)(i) that the medical certificate, in order to meet the minimum evidentiary requirements, must be from 'a certified medical practitioner'. The second requirement of the medical certificate is that it must indicate that the officer 'was or is unfit for work'. The only obligation on an officer imposed by cl 73.5(a)(i) is the attendance on a certified medical practitioner for the purposes of obtaining a medical certificate and no other purpose is required.
- 35 Under cl 73.5(a)(i) 'unable' should be given its ordinary meaning. In the Shorter Oxford Dictionary, 'unable' means '1. Not able to do something specified (chiefly of persons)... 2. Unequal to the task or need, incompetent, inefficient'. It was accepted by the appellant in the course of argument that the test of whether an officer is 'unable' to obtain a medical certificate is to be determined on the basis of an objective approach, having regard to what may be reasonable in a given case, and in all the relevant circumstances. That is, the test is not absolute.
- 36 It is also important to bear in mind that the proceedings at first instance were for the enforcement of the *Agreement*, under s 83 of the *Act*. The burden rested on the respondent to make out its case on the evidence, that firstly Mr Paterson had an entitlement to sick leave under the *Agreement* and secondly, that the entitlement was denied to him by the Department, such as to constitute a contravention of the *Agreement*.
- 37 In his evidence at first instance, Mr Paterson said that he was unsure about the cause of his illness, whether it related to his previous injury, his recent COVID-19 vaccination or something else (see [13]-[15] witness statement of Mr Paterson AB49). He telephoned the Swan Medical Centre in Midland at 4:57 pm on 29 September 2021 because he had been unwell since 25 September. He could not get through and attempted an online appointment, but could not get one with any of the 16 doctors at the medical centre until 6 October 2021. Because of this, he rang the Swan Medical Centre again early the next day on 30 September. He still could not get an appointment with his regular doctor as he was on holidays. None of the other doctors could give him an appointment until 5 October (see AB49). Mr Paterson said he did not accept this offer of an appointment as it was too far away. He also testified that at that time, he thought if his condition got any worse, he could seek emergency assistance at a hospital (see AB50).
- 38 Mr Paterson also testified that he had been treated by his regular doctor for some time, in particular for a head injury that he suffered at work in April 2019, and in relation to which, his doctor had been providing him treatment for about two years (see AB48). In his evidence in cross-examination, when asked by the appellant why he did not look beyond the Swan Medical

Centre for an appointment, Mr Paterson testified that he had an extensive medical history, which his doctor is aware of, that he had ongoing medical issues and that he felt more comfortable going to his own doctor at his own surgery (see AB161).

- 39 This evidence was generally in line with Mr Paterson's evidence in chief, but he also added that he received his COVID-19 vaccination from the same doctor that had been treating him, and the advice was to return to that surgery if there were any side effects (see AB53-54). Mr Paterson did not say in his evidence that the reason he sought an appointment was to get a medical certificate to support a claim for sick leave. On the contrary, the clear inference to be drawn from Mr Paterson's testimony as a whole is that he contacted only the Swan Medical Centre because he was seeking a diagnosis and treatment for his condition, and that his own doctor, with knowledge of his medical history, could treat him more effectively.
- 40 Additionally, the fact that there were 16 doctors at the medical centre did not mean Mr Paterson made more effort in his attempt to make an appointment on each of the occasions he telephoned on 29 and 30 September 2021. Whether there were two doctors or 16 doctors at the medical centre in our view, did not have any bearing on the lengths to which Mr Paterson went, on the evidence, to secure an appointment. He did not make any attempt to secure an appointment at any other medical centre on the evidence. There was no evidence that at the time, he was unable to do so.
- 41 Returning then to his Honour's conclusions as set out above at [25]. In light of Mr Paterson's evidence as to his preference to only seek an appointment at the Swan Medical Centre, for the reasons we have referred to above, which were accepted by his Honour in determining whether Mr Paterson was 'unable' to obtain a medical certificate, led his Honour into error. It seems clear by his Honour's reference to Mr Paterson's medical history and the COVID pandemic at [148] of his reasons, that in considering Mr Paterson's efforts in obtaining a medical certificate, he was influenced by Mr Paterson's concerns for his health more generally.
- 42 The relevant focus for the purposes of obtaining a medical certificate under cl 73.5(a)(i) of the *Agreement* is solely to evidence an officer's unfitness for work, at a time specified in the application for personal leave. Respectfully, in our view, the learned Industrial Magistrate conflated the issue of the obtaining of an appointment for the sole purpose of obtaining proof of unfitness for work, with the matters of treatment for Mr Paterson for prior and ongoing medical issues.
- 43 Had his Honour simply focused on the efforts of Mr Paterson to obtain a medical certificate simpliciter, without the distraction of the reasonableness of Mr Paterson only trying for an appointment with his treating doctor and at his regular medical centre, then this would have required a conclusion to have been reached as to whether Mr Paterson was 'unable' to do so, for the purposes of cl 73.5(a)(i) of the *Agreement*. Given that Mr Paterson made no attempt at all to seek an appointment at other than the Swan Medical Centre, this must be a relevant consideration in the circumstances to a conclusion that he was 'unable' to obtain an appointment. Had Mr Paterson made attempts to obtain an appointment at other medical centres as well, then this would, in our view, have significantly strengthened his case to put to Superintendent Sinclair that he took all reasonable steps to comply with the minimum requirement of cl 73.5(a)(i) of the *Agreement*, opening the gateway to the alternative of a signed statement in accordance with the Department template.
- 44 That Mr Paterson failed to do this, or to seek a telehealth appointment, was noted by Superintendent Sinclair in her evidence, when referring to the dispute resolution process that took place after she had refused to grant Mr Paterson his claim for sick leave (see AB101). Superintendent Sinclair also referred to Mr Paterson providing medical certificates on previous occasions when he claimed sick leave and that his statutory declaration did not provide her with any explanation as to why he could not obtain a medical certificate on this occasion.
- 45 There are further difficulties for the respondent in establishing that Mr Paterson was unable to obtain a medical certificate, and whether the actions that he took, or did not take, were reasonable in all of the circumstances, to establish a contravention of the *Agreement*. This relates to the timing of the relevant events, in the context of Mr Paterson's efforts to seek an appointment directed to seeking a diagnosis and treatment for his illness rather than being solely directed to obtaining a medical certificate for the purposes of supporting his claim for sick leave under cl 73 of the *Agreement*.
- 46 As set out at [2] - [3] above, Mr Paterson was absent from work on 1-3 October 2021, being three days in respect of which he claimed sick leave. Mr Paterson was not then rostered to work on 4 and 5 October 2021. Over the next three days, from 6-8 October 2021, Mr Paterson was rostered to work but he was absent on carer's leave, for which he was ultimately paid. The next two days, they being 9 and 10 October 2021, were Mr Paterson's rostered days off. He was next rostered on duty on 11 October 2021, on which day, in accordance with the *Agreement*, in cl 73.1, Mr Paterson was required to make his application for personal leave, which he did. Notably, it does not seem from the terms of cl 73.1, that when an application for personal leave is made, on an officer's return to duty, the evidence required under cl 73.3 in support to satisfy a Superintendent, needs to be supplied on the same day. It seems the terms of the *Agreement* contemplate that this supporting evidence may be provided at a later time.
- 47 At the time Mr Paterson contacted the Swan Medical Centre on 29 and 30 September 2021, he did not need a medical certificate because he was not rostered to work until 1-3 October 2021. Given the subsequent period of carers leave to care for his daughter, as noted, Mr Paterson's next rostered shift, on which he returned to work, was 11 October 2021. Mr Paterson's evidence, accepted by the learned Industrial Magistrate, was that the next available appointment at the Swan Medical Centre was 5 October 2021, as a result of his contact on the morning of 30 September 2021. Given at the time of the contact with the medical centre, Mr Paterson's next rostered working days, beyond 3 October 2021, were on 6-8 October 2021 inclusive, there was no reason on the evidence, that Mr Paterson could not have taken the appointment for 5 October 2021, to obtain a medical certificate evidencing his period of illness. As it turned out, the days of 6-8 October 2021 inclusive, were days on which Mr Paterson did not work because he was on carers leave.
- 48 If Mr Paterson had obtained a medical certificate at an appointment offered to him for 5 October 2021, to support his claim for sick leave, this could have accompanied his application for personal leave submitted on his return to work on 11 October 2021. This would plainly have been evidence that Superintendent Sinclair would have taken into account for the purposes of forming the level of satisfaction required, to grant the application for sick leave under the *Agreement*. This is a further reason why

Mr Paterson was not, on the evidence, reasonably unable to obtain a medical certificate for the purposes of cl 73.5(a)(i), to support his claim and to satisfy Superintendent Sinclair.

- 49 For the foregoing reasons, the learned Industrial Magistrate was in error in concluding that he did not accept that Mr Paterson did not make a reasonable attempt to obtain a medical certificate. This ground of appeal is made out.

Grounds 2 and 3

- 50 Grounds 2 and 3 are to be read together and were advanced by the appellant in the alternative to ground 1, in the event that the Full Bench did not consider that ground 1 was made out.
- 51 Ground 2 asserts ambiguity in his Honour's reasons as to whether the findings that he made at [148] that Mr Paterson was not 'able to get an appointment to obtain a medical certificate' and his conclusion at [149] that Mr Paterson 'had a reasonable explanation as to why he could not obtain a medical certificate', were not one and the same.
- 52 The appellant submitted that the differences in these two paragraphs of the learned Industrial Magistrate's reasons may have resulted from infelicitous expression and led to ambiguity. This was said because the findings may not necessarily lead to the same conclusion. One may be able to offer a reasonable explanation for not being able to do something, which will not always mean taken objectively it was unable to be done.
- 53 It is only necessary to consider this ground on the appellant's submissions, in the event that the Full Bench were to conclude that the learned Industrial Magistrate did not find Mr Paterson was unable to obtain a medical certificate. We do not consider that taken as a whole, [147] - [149] of his Honour's reasons can be read in this way. Taken together, his Honour in those passages of his reasons must be taken to have concluded that Mr Paterson was 'unable' to obtain a medical certificate for the purposes of cl 73.5(a)(i) of the *Agreement*. This is consistent with his Honour's statement earlier in his reasons at [126], recognising that cl 73.5(a)(i) requires a medical certificate to be provided for an absence in excess of two shifts, unless an officer is unable to obtain one. It is unnecessary to say anything further as to this ground.
- 54 Alternatively, had there not been a finding by the learned Industrial Magistrate that Mr Paterson was unable to obtain a medical certificate for the purposes of cl 73.5(a)(i) of the *Agreement*, but the statutory declaration (or a statement as per the Department's template) was satisfactory evidence, this would constitute an error. On the construction of cl 73 of the *Agreement* that we prefer, as set out at [28] - [35] above, it is only in circumstances where, in cases to which cl 73.5 applies, the minimum requirement of the production of a medical certificate under cl 73.5(a)(i) is unable to be met, that consideration can be given to the alternative of a statement. A Superintendent does not have a general overriding discretion under cl 73.6, to waive the requirement for a medical certificate in circumstances in which it would be necessary to produce one.
- 55 Given that ground 3 is also dependent on his Honour not concluding that Mr Paterson was unable to obtain a medical certificate, it is also unnecessary to comment further on this ground.

Ground 4

- 56 As to this ground, the appellant referred to the uncontroverted evidence of Mr Paterson that he was unwell from 25 to 29 September 2021 and by 29 September 2021, he became concerned enough to contact the Swan Medical Centre. This was by way of the telephone call at 4:57 pm. Shortly after, he made an attempt to book an online appointment but the earliest available was 6 October 2021.
- 57 The next and final successful contact by Mr Paterson with the medical centre was on the following morning on 30 September 2021 when he telephoned the centre at 8:06 am (see AB49-50). This was the only evidence of contact by Mr Paterson with the Swan Medical Centre. At [147] of his reasons, as set out at [25] above, his Honour concluded at 'The evidence establishes he tried daily in the period 30 September to 2 October 2021 to obtain an appointment at a practice where 16 doctors worked'.
- 58 The respondent accepts on its submissions that this was a factual error and that Mr Paterson only made attempts to make an appointment at the Swan Medical Centre on two occasions, they being on 29 and 30 September 2021. However, the respondent contended this error of fact was immaterial to the learned Industrial Magistrate's ultimate conclusion that Mr Paterson had been unable to obtain a medical certificate. The respondent submitted that whether Mr Paterson tried over two or three days to get an appointment to see a doctor was of no consequence as it would have made no difference. Whilst on the other hand the appellant submitted that this factual error was of significance because the only factual foundation for the conclusion that Mr Paterson made a reasonable attempt to obtain an appointment for a medical certificate, was his Honour's finding that Mr Paterson tried to do so daily from 30 September to 2 October 2021.
- 59 The submission was that this finding was therefore central to his Honour's conclusion that Mr Paterson was not able to obtain an appointment for a medical certificate, and is material. Whilst the appellant contended that the learned Industrial Magistrate's finding that Mr Paterson tried daily over 30 September to 2 October 2021 to obtain an appointment was the only factual foundation for his conclusion that Mr Paterson made a reasonable attempt, we do not consider this to be so. The learned Industrial Magistrate also plainly was influenced by the fact that the Swan Medical Centre had 16 doctors practicing at it. Whilst his Honour's reference in [147] of his reasons to the fact that 16 doctors worked at the centre, was not explained any further, reading this passage as a part of his Honour's reasons as a whole, it is open to infer, and we do infer, that his Honour placed some weight on this as part of his assessment of Mr Paterson's efforts to get an appointment with a doctor in order to obtain a medical certificate.
- 60 We therefore do not consider that the days over which Mr Paterson attempted to make an appointment, whether they were two or three, were determinative, in terms of the factual findings his Honour made. We are therefore not persuaded that such an error was so material to the learned Industrial Magistrate's conclusions, as to warrant interference with them on appeal. From the evidence, on the two days that Mr Paterson did make contact with the medical centre, on 29 and 30 September 2021, he was informed that no appointments were available until 5 or 6 October 2021. It would therefore seem unlikely that a further attempt on the next day to obtain an appointment would have been successful.

61 We are therefore not persuaded this ground of appeal is made out.

Ground 5

62 The essence of this ground is that the learned Industrial Magistrate took into account irrelevant matters in reaching his conclusion that he reached at [151] of his reasons that Mr Paterson's request to take personal leave was reasonable and legitimate. The relevant passages of his Honour's reasons for the purposes of this ground of appeal are [151]-[171] as a whole, but specifically [151], [156], [161], [170] and [171], which are as follows:

151 There is no evidence Mr Paterson was attempting to take personal leave just so he could have time off over the school holidays. Put another way, there was no evidence for the department to refuse his personal leave application on the grounds it was disingenuous or taken for an ulterior purpose. In the circumstances, his request to take personal leave ought to have been viewed as reasonable and legitimate.

...

156 I also consider the superintendent should have viewed the role of Ms Morris [sic] as a witness to his statutory declaration very differently. Rather than confining her inquiry as to whether Ms Morris [sic] was a person authorised to witness Mr Paterson's statutory declaration, there were other matters about this document Supt Sinclair ought to have turned her mind to when exercising her discretion.

...

161 Thirdly, although Ms Morris [sic] is not a medical practitioner, as a registered nurse, Ms Morris [sic] is a health professional, who is in a position to directly verify the matters described in Mr Paterson's statutory declaration.

...

170 It is well known that demands were placed on the health system and measures were adopted discouraging people with potential COVID symptoms from attending medical practices and workplaces when sick. It is my view the superintendent failed to have proper regard to these considerations.

171 Fourth, Mr Paterson lives if not just outside, but on the edge of the Perth metropolitan area. This, in addition to the timing of Mr Paterson's illness, which coincided with a long weekend and school holidays and in the midst of the pandemic, each of which adversely affected the availability of medical practitioners, although inconvenient, are factors the superintendent should have reasonably considered to Mr Paterson's benefit.

63 An issue arises as to whether [151] - [171] of his Honour's reasons formed a part of his overall conclusion that the Department did breach cl 71.1 of the *Agreement*. Whilst these paragraphs are under a separate heading entitled 'Other Matters The Department Should Have Viewed Differently' and 'Guidance Note No 4', taken collectively with his Honour's reasons when read as a whole, we consider that these paragraphs deal with the manner of the exercise of Superintendent Sinclair's discretion, in accordance with cl 73.6, and that the Superintendent's exercise of that discretion was erroneous. We therefore regard these conclusions reached by the learned Industrial Magistrate as being a part of his overall assessment as to whether there was a contravention of cl 71.1 of the *Agreement*.

64 As to subground (a) of this ground, his Honour's conclusions at [156] and [161] of his reasons regarding the role of Mr Paterson's wife Ms Morrice, in witnessing Mr Paterson's statutory declaration was seen as significant by his Honour, because as a nurse, she could attest to its content. As to this, the appellant submitted that as a witness to the statutory declaration, Ms Morrice did not attest to the truth of the content of it, and nor was there any evidence that she purported to do so when signing the statutory declaration as a witness.

65 The second point raised by the appellant in subground (b) relates to [170] of his Honour's reasons, where he referred to the well-known demands placed on the health system by the COVID-19 pandemic, and measures adopted by medical practices to discourage people from attending them when displaying COVID-19 symptoms. It was submitted by the appellant that there was no evidence to this effect before the court or Superintendent Sinclair as to these matters, and no suggestion on the respondent's case that this was a reason for Mr Paterson not being able to obtain a medical certificate to support his sick leave claim. It was further submitted that as to demands placed on the health system, by late 2021, the WA State border had been closed, with little transmission of COVID-19 in the State.

66 Insofar as reference was made to measures to discourage persons with COVID-19 symptoms from attending medical practices, the appellant contended that the health system did not abandon people displaying COVID-19 symptoms and well known measures were adopted, including telehealth, to accommodate this. It was submitted that this latter factor counted against the respondent's case at first instance, as there was no reason why Mr Paterson could not have sought a telehealth appointment at another medical practice, in order to obtain a medical certificate. The appellant therefore submitted that to take into account these factors in assessing whether Superintendent Sinclair was wrong to reject Mr Paterson's claim for sick leave, constituted an error by the learned Industrial Magistrate.

67 Subground (c) of this ground, asserted a factual error as to his Honour's conclusion regarding the occurrence of a public holiday long weekend, as a contributing factor to Mr Paterson's inability to get an appointment at the Swan Medical Centre.

68 On behalf of the respondent, it was contended that all subgrounds of this ground of appeal should be rejected. As to the allegation in subground (a), in connection with Ms Morrice signing the statutory declaration, the respondent contended that the appellant advanced no authority for the proposition put. The respondent submitted, both in its written submissions and also orally before the Full Bench, that the statutory declaration 'stands alone itself', as evidence that Mr Paterson was unwell on 1 to 3 October 2021 and was not able to attend work. The respondent contended that the findings of his Honour did not turn on whether Ms Morrice attested to Mr Paterson's state of ill health.

- 69 The difficulty the respondent faces on this point is that his Honour did place weight on the fact that Ms Morrice, in witnessing Mr Paterson's statutory declaration, was a nurse. At [156] his Honour noted that Superintendent Sinclair should not have just focused on whether Ms Morrice as a nurse, was authorised to witness a statutory declaration. This point was developed further at [161] where his Honour referred to Ms Morrice as a 'health professional, who is in a position to directly verify the matters described in Mr Paterson's statutory declaration'. These conclusions were directed to matters his Honour clearly considered Superintendent Sinclair should have had regard to, and placed greater weight on, in the exercise of her discretion under what his Honour considered her role to be in accordance with cl 73.6 of the *Agreement*.
- 70 The respondent properly conceded that there was no independent evidence before the court, or before Superintendent Sinclair, from Ms Morrice or anyone else, as to Mr Paterson's medical condition, apart from the content of his own statutory declaration. The respondent also accepted that the reference to these matters by the learned Industrial Magistrate in the above extract of his reasons, was indicative of the broad view that his Honour took as to Superintendent Sinclair's discretion under cl 73.6.
- 71 Under the *Oaths, Affidavits and Statutory Declaration Act 2005* (WA) ss 11 and 12 deal with the making of a statutory declaration. By s 12(3)(c), it is the person who makes the statutory declaration that must attest to the truth of the contents of it. This is to be done in the presence of an attesting witness, who then under s 12(5), must sign the statutory declaration. Eligible persons to do so are set out in schedule 2. A nurse is an eligible attesting witness. The statutory declaration made by Mr Paterson (see AB60), contains the signature of Ms Morrice as witnessing the truth of Mr Paterson's declaration and her profession of a registered nurse, is recorded.
- 72 The presence of Ms Morrice as a witness to Mr Paterson's statutory declaration was in that capacity only. There was no other independent evidence, by Ms Morrice or anyone else, before either Superintendent Sinclair, or before the court, attesting to Mr Paterson's state of ill health at the material time. To the extent that his Honour placed any weight on Ms Morrice being a registered nurse, and being able to attest to the veracity of Mr Paterson's state of ill health, in her capacity as a witness to the statutory declaration, his Honour erred.
- 73 As to subground (b), regarding the COVID-19 pandemic and his Honour's reference to the demands imposed on the health system by it and measures taken by medical practices to discourage persons with possible COVID-19 symptoms from attending medical practices, these matters were referred to by his Honour at [169] - [170] of his reasons.
- 74 The respondent contended that these aspects of his Honour's reasons were common ground and that there is no basis to assert that to make reference to them, meant his Honour took into account an irrelevant consideration. Furthermore, the respondent submitted that there was evidence that COVID-19 did play a role in preventing Mr Paterson getting an appointment at the Swan Medical Centre, and in this respect, reference was made to Mr Paterson's witness statement (see [18b] witness statement of Mr Paterson at AB49).
- 75 The fact of the pandemic over the course of 2020-21 is notorious and its impact on the Australian community, including pressures that it placed on the health system were, in our view, matters which his Honour was entitled to take judicial notice of: *Holland v Jones* (1917) 23 CLR 149 per Isaacs J at 153. However, there is a distinction to be drawn between the notoriety of the COVID-19 pandemic generally, and whether having regard to the circumstances of this case, it was material to the issue of whether Mr Paterson was unable to obtain a medical certificate for the purposes of cl 73.5(a)(i) of the *Agreement*. The matters to which we have referred earlier, were clearly relied on by his Honour where, in the last sentence of [170] of his reasons, he concluded that Superintendent Sinclair failed to have proper regard to them in her decision to not approve Mr Paterson's sick leave claim.
- 76 In the specific circumstances of this case, the evidence before the court was that Mr Paterson could not get an appointment at the Swan Medical Centre until either 5 or 6 October 2021, because his own treating doctor was on leave and due to the school holidays, he could not get an appointment with any of the other doctors at the practice. He was told this by the receptionist at the medical centre (see [18b] witness statement of Mr Paterson at AB49). The final sentence in [18b] in Mr Paterson's witness statement is to the effect 'this was also during the COVID-19 pandemic'. However, this was not evidence of what he was told by the medical centre. Read in the context of his statement as a whole, this was plainly Mr Paterson's own statement, which in and of itself, conflicts with his evidence in [18b] that the reason he was given by the medical centre for the lack of availability of doctors to see him, was leave and the school holidays.
- 77 Most importantly however, there was no evidence before the court or Superintendent Sinclair at the time she made her decision to refuse Mr Paterson's sick leave claim, to the effect that Mr Paterson could not get an appointment at the Swan Medical Centre, because he was discouraged from attending the medical centre due to having possible COVID-19 symptoms. The only evidence before Superintendent Sinclair, was Mr Paterson's statutory declaration which said nothing about this issue, or more generally, as to why he was not able to obtain an appointment. In the absence of any evidence to this effect, directly impacting on Mr Paterson's attempt to obtain an appointment at the Swan Medical Centre to get a medical certificate, then it was, respectfully, erroneous for the learned Industrial Magistrate to conclude at [170] that the matters there set out should have been taken into account by Superintendent Sinclair, and materially affected the exercise of her discretion to refuse Mr Paterson's sick leave claim.
- 78 Finally, as to subground (c), the appellant maintained that his Honour made a factual error in concluding at [171] that Mr Paterson's illness coincided with a long weekend. The Queen's Birthday long weekend in Western Australia in 2021 fell on Monday, 27 September 2021. This was the weekend prior to Mr Paterson's attempts to get an appointment on 29 and 30 September 2021. There was no direct evidence before the court, or that Superintendent Sinclair had these matters before her when making her decision. It appears that nothing was raised as to the Queen's Birthday long weekend by Mr Paterson with Superintendent Sinclair, as a reason he could not get an appointment at the Swan Medical Centre, or any other medical centre. As we have already noted, Mr Paterson provided no explanation at all in his statutory declaration. He simply stated he was unable to obtain a medical certificate.

79 There are difficulties in relying on matters such as the Queen’s Birthday long weekend, which occurred prior to Mr Paterson’s attempts to obtain an appointment at the Swan Medical Centre. To have regard to these sorts of matters, necessarily invites speculation as to whether such an event had any material impact on the fact of whether an appointment at the medical centre was available or not, in the absence of direct evidence that it did.

80 Therefore to the extent that his Honour took into account these three matters, which were not material in establishing whether a contravention of cl 71.1 of the *Agreement* was made out, his Honour erred. This ground of appeal is made out.

Grounds 6 and 7

81 It is unnecessary to deal with these two grounds that relate to the caution imposed by the learned Industrial Magistrate, having found that the Department contravened cl 71.1 of the *Agreement* by denying Mr Paterson his sick leave claim.

Conclusions

82 For all of the foregoing reasons, the appeal is upheld and the decisions of the learned Industrial Magistrate should be quashed.

2024 WAIRC 00776

APPEAL AGAINST DECISIONS OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 22/2022 GIVEN ON 17 JULY 2023 AND 6 NOVEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MINISTER FOR CORRECTIVE SERVICES

APPELLANT

-v-

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

RESPONDENT

CORAM

FULL BENCH

CHIEF COMMISSIONER S J KENNER

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER C TSANG

DATE

TUESDAY, 20 AUGUST 2024

FILE NO/S

FBA 8 OF 2023

CITATION NO.

2024 WAIRC 00776

Result Appeal upheld and decisions quashed

Representation

Appellant Mr J Carroll of counsel

Respondent Mr D Stojanoski of counsel and with him Mr A Ceklic of counsel

Order

THIS appeal having come on for hearing before the Full Bench on 30 January 2024, and having heard from Mr J Carroll of counsel on behalf of the appellant, and Mr D Stojanoski of counsel and with him Mr A Ceklic of counsel on behalf of the respondent, and reasons for decision having been delivered on 13 August 2024, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the appeal be and is hereby upheld.
- (2) THAT the decisions of the Industrial Magistrates Court dated 17 July 2023 and 6 November 2023 be and are hereby quashed.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

COMMISSION IN COURT SESSION—Unions—Declarations made under Section 71—

2024 WAIRC 00797

APPLICATION FOR A DECLARATION AND CERTIFICATE ISSUED UNDER SECTION 71 IN ACCORDANCE WITH SECTION 52A(2)

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WESTERN AUSTRALIAN POLICE UNION OF WORKERS	APPLICANT
	-v- (NOT APPLICABLE)	RESPONDENT
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER T KUCERA	
DATE	TUESDAY, 3 SEPTEMBER 2024	
FILE NO.	CICS 3 OF 2024	
CITATION NO.	2024 WAIRC 00797	

Result	Declaration issued
Representation	
Applicant	Mr D Stojanoski of counsel

Declaration

THIS matter having come on for hearing before the Commission in Court Session on 3 September 2024, and having heard Mr D Stojanoski of counsel on behalf of the applicant, the Commission in Court Session, being of the opinion on the evidence and matters before it, that the rules of the applicant and its counterpart federal body relating to the qualifications of persons for membership of each such body are substantially the same, and the Commission in Court Session also being of the opinion that the rules of the counterpart federal body prescribe the offices which exist in the body and that for every such office there is a corresponding office in the applicant, it is this day, 3 September 2024, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), declared as follows –

- (1) THAT the Police Federation of Australia – Western Australia Police Branch is the counterpart federal body of the applicant.
- (2) THAT in accordance with s 71(2) of the *Act* the rules of the applicant and its counterpart federal body relating to the qualifications of persons for membership are hereby taken to be the same.
- (3) THAT in accordance with s 71(4) of the *Act* the rules of the applicant and the counterpart federal body in relation to offices are hereby taken to be the same.

(Sgd.) S J KENNER,
Chief Commissioner,

By the Commission in Court Session.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2024 WAIRC 00792

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA		
CITATION	:	2024 WAIRC 00792
CORAM	:	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	:	WEDNESDAY, 14 AUGUST 2024
DELIVERED	:	FRIDAY, 30 AUGUST 2024
FILE NO.	:	M 119 OF 2023
BETWEEN	:	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION
		CLAIMANT
		AND
		QUBE PORTS PTY LTD
		RESPONDENT

CatchWords	:	INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of <i>Fair Work Act 2009</i> (Cth) - Contravention of Modern Award – Failure to pay for Closed Port Day and National Public Holidays
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) <i>Crimes Act 1914</i> (Cth) <i>Industrial Magistrate's Court (General Jurisdiction) Regulations 2005</i> (WA)
Instrument	:	<i>Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020</i> <i>Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2016</i>
Case(s) referred to in reasons:	:	<i>Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd</i> [2024] WAIRC 220 <i>Milardovic v Vemco Services Pty Ltd (No 2)</i> [2016] FCA 244; 242 FCR 492 <i>Australian Building and Construction Commissioner v Pattinson</i> [2022] HCA 13; 274 CLR 450 <i>Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)</i> [2020] FCCA 901 <i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557 <i>Heal v Sydney Flames Basketball Pty Ltd (No 2)</i> [2024] FCA 794 <i>Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)</i> [2018] FCA 480 <i>Commonwealth v Director, Fair Work Building Industry Inspectorate</i> [2015] HCA 46; 258 CLR 482 <i>Trade Practices Commission v CSR Ltd</i> [1990] FCA 762; [1991] ATPR 41-076 <i>Miller v Minister of Pensions</i> [1947] 2 All ER 372 <i>Briginshaw v Briginshaw</i> [1938] HCA 34; (1938) 60 CLR 336 <i>Sammut v AVM Holdings Pty Ltd [No2]</i> [2012] WASC 27 <i>NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission</i> [1996] FCA 1134; 71 FCR 285 <i>Kelly v Fitzpatrick</i> [2007] FCA 1080; 166 IR 14 <i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7 <i>Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith</i> [2008] FCAFC 8; 165 FCR 560 <i>Rocky Holdings Pty Ltd v Fair Work Ombudsman</i> [2014] FCAFC 62; (2014) 221 FCR 153 <i>Fair Work Ombudsman v South Jin Pty Ltd (No 2)</i> [2016] FCA 832 <i>Sayed v Construction, Forestry, Mining and Energy Union</i> [2016] FCAFC 4; 239 FCR 336 <i>Gibbs v The Mayor, Councillors and Citizens of City of Altona</i> [1992] FCA 553; 37 FCR 216
Result	:	Pecuniary penalty to be paid
Representation:		
Claimant	:	Mr K. Sneddon (of counsel)
Respondent	:	Mr R. Boothman (of counsel)

REASONS FOR DECISION

Introduction

- 1 On 29 September 2023, the claimant lodged M 119 of 2023 alleging the respondent contravened the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020* (EA 2020) as it related to Robert Sells (Mr Sells), a Variable Salaried Employee (VSE) employed at the port of Port Hedland, by failing to pay him for identified public holidays and Closed Port Days (CPD) not worked (the Claim).
- 2 The respondent initially denied the Claim.
- 3 Following a pre-trial conference, the Clerk of the Industrial Magistrates Court (IMC or Court) made programming orders to list the Claim for trial (the Programming Orders).
- 4 On 27 March 2024, the respondent applied to the IMC for the vacation of the Programming Orders where the respondent now accepted that upon a proper construction it had contravened EA 2020. There was conferral between the parties concerning dates the claimant alleged were not paid and dates the respondent maintained it had paid Mr Sells.
- 5 On 24 May 2024, the respondent lodged an amended response partially admitting the Claim where it admitted between 25 December 2017 to 25 April 2023, it did not pay Mr Sells for five public holidays not worked and seven CPD not worked.

The respondent further admitted that by failing to pay Mr Sells, it had contravened s 50 of the *Fair Work Act 2009* (Cth) (FWA).

- 6 Other dates continued to be disputed until around 30 July 2024 when the respondent admitted it had incorrectly deducted a day of annual leave from Mr Sells relevant leave balance and paid Mr Sells for the leave taken. However, what the respondent should have done was to have paid Mr Sells for seven hours at the Grade 2 cl 11 rate for a public holiday not worked and not deducted leave from his leave balance for the days not worked.
- 7 Further programming orders were made in relation to hearing and determining the claimant's application for the imposition of pecuniary penalties in respect of the admitted contraventions.
- 8 Schedule I of these reasons outlines the jurisdiction, standard of proof and practice and procedure of the IMC.
- 9 Schedule II of these reasons outlines the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the respondent's contraventions.

The Agreed Facts

- 10 The parties filed an Amended Statement of Agreed Facts on 17 June 2024 and a further Amended Statement of Agreed Facts on 1 August 2024.
- 11 The salient facts include that the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2016* (EA 2016) and EA 2020 covered and applied to the respondent and Mr Sells, as an employee of the respondent.
- 12 The claimant is an *employee organisation* with standing to commence M 119 of 2023.
- 13 The respondent is a *national system employer* and *constitutional corporation* and is engaged in the business of stevedoring.
- 14 EA 2016 and EA 2020 both provide for the employment classification of VSE and define a VSE in cl 2.1(p) as an employee 'who is irregularly engaged to work and is paid a minimum salary in accordance with cl 9.5 of this Agreement'.
- 15 Clause 33.3.2(d) of Part A of EA 2016 and EA 2020 provides a 'VSE or PVSE will be paid seven hours at the Grade 2 clause 11 rate' and cl 33.3.4(d) of Part A of EA 2016 and EA 2020 provides a 'VSE or PVSE will be paid seven hours at the Grade 2 clause 11 rate'.
- 16 Mr Sells was employed as a permanent VSE at the port of Port Hedland and entitled to the terms of EA 2016 and EA 2020.
- 17 Mr Sells did not work, was not paid, and was entitled to be paid seven hours at the Grade 2 cl 11 rate for the following public holidays:
 - 2 March 2020
 - 1 June 2020
 - 1 March 2021
 - 25 April 2021
 - 25 December 2021
 - 3 January 2022
 - 15 April 2022
 - 25 April 2022
 - 22 September 2022
 - 26 January 2023; and
 - 25 April 2023
- 18 Mr Sells took annual leave, personal leave or long service leave on other public holidays where the respondent incorrectly deducted a day of annual leave from his leave balance and paid him for the leave taken. The respondent should have paid Mr Sells for seven hours at the Grade 2 cl 11 rate for a public holiday not worked. These dates include:
 - 25 and 26 December 2017
 - 28 January 2019
 - 4 March 2019
 - 25 December 2019
 - 27 January 2020
 - 25, 26 and 28 December 2020
 - 1 and 26 January 2021
 - 5 April 2021
 - 26 December 2021
 - 1 March 2022
 - 7 March 2022; and
 - 26 December 2022

19 At the penalty hearing, the respondent's counsel informed the Court that Mr Sells had been paid the amounts owed pursuant to cl 33.3.2(d) and cl 33.3.4(d) of EA 2016 and EA 2020, and had his deducted leave credited to his leave balance.

Other Evidence

20 The claimant relies upon a witness statement signed by Mr Sells on 25 June 2024 (the Sells Statement).

21 In the Sells Statement, Mr Sells identified dates in dispute (now no longer in dispute) referred in paragraph [18] above.¹

22 The respondent relies upon an affidavit affirmed by Andrew Rattery (Mr Rattery), Operations Manager, on 31 July 2024 (the Rattery Affidavit).

23 Mr Rattery attests to being employed by the respondent as Operations Manager since December 2017. His role includes the 'safe, efficient, smooth and profitable delivery of the daily operational activity at the ports that Qube has operations at in the Pilbara region'.²

24 His inquiries reveal the respondent employs 2,025 employees and approximately 10,109 employees are employed by the respondent and related bodies corporate.³

25 The relevant Superintendent is responsible for manually uploading public holidays or CPD to Microster, the software system used by the respondent and the respondent's payroll department⁴

26 At the time of the underpayments (to presumably Mr Sells), the parties were in dispute over interpretations under EA 2016 and EA 2020 as it related to the entitlement to pay for employees not available to work on a public holiday or CPD.⁵

27 The respondent's view was that employees who were not available to work on these days were not entitled to payment, whereas the claimant's view was to the contrary.⁶

The Claimants' Submissions on Penalty

28 Both parties refer to the law in respect of the determination of an appropriate pecuniary penalty for contraventions of the FWA.

29 In summary, the claimant submits:

- the IMC is empowered to order a person to pay a pecuniary penalty the court considers appropriate if the court is satisfied the person has contravened a civil remedy provision: s 546(1) of the FWA;
- contraventions of s 50 of the FWA are contraventions of a civil remedy provision: s 539(2) of the FWA;
- the respondent has shown some contrition in making the admissions, although the admissions came late after the Claim was well advanced;
- the respondent has a history of non-compliance and has a 'habit of treating their obligations with no small measure of disdain'; and
- the respondent is a large, sophisticated, and profitable company, who should be expected to have sufficient structures in place to ensure compliance with the legislation. Ignorance is not an excuse for well-resourced employers.

30 The claimant reproduced the table presented to the Court in *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* [2024] WAIRC 220 at [38] in support of its submission that 'the [r]espondent does not have a company culture that is conducive to compliance with its obligations'.

31 Therefore, the need for specific and general deterrence is great.

32 A substantial, personal deterrent penalty is also called for as the respondent to deter future contraventions. The claimant submits a penalty of 75% of the maximum penalty, or \$70,425, is an appropriate penalty.

33 The penalties should be awarded to the claimant in accordance with the decision in *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) [No 2]* [2016] FCA 244; 242 FCR 492 [40].

The Respondent's Submissions on Penalty

34 In summary, the respondent submits:

- it contravened EA 2016 and EA 2020 where Mr Sells was on approved annual and personal leave on days designated a public holiday or a CPD, and it deducted accruals for those periods of leave instead of paying Mr Sells seven hours at the Grade 2, cl 11 rate;
- the contravention should be considered a single course of conduct for the purposes of s 557 of the FWA where the contravention arose from a breach of identical terms of EA 2016 and EA 2020;
- the parties were in dispute over the interpretation of the relevant terms of EA 2016 and EA 2020 with each party holding opposing views and the dispute resolution process was used in two other similar claims;
- while not determinative, the claimant has not adduced evidence that Mr Sells suffered prejudice because of the delay in rectifying the leave and making the correct payment;
- the maximum penalty for a contravention of s 50 of the FWA (a civil remedy provision) relevant to a body corporate is 300 penalty units or \$66,600;⁷
- there is no appreciable role for specific deterrence in this claim, where a dispute arose over the interpretation of a term of EA 2016 and EA 2020 with the parties holding opposing views. The dispute was resolved using the dispute resolution procedures in the enterprise agreements when the respondent accepted that an employee who was not available to work on a public holiday or CPD was entitled to the relevant payment;

- the time taken to resolve the dispute should not be taken as the respondent engaging in a ‘deliberate’ course of action but indicative of the respondent holding a different view to the claimant;
- following the filing of this claim, the respondent admitted the breaches at the earliest possible stage;
- the respondent had been subject to four previous findings of contraventions of the FWA (three in this Court);
- two similar claims (M 76 and M 91 of 2022) are also before the Court to determine penalty involving: the ports of Dampier and Port Hedland; similar non-payments for public holidays or CPD not worked; similar date ranges; and a dispute as to the interpretation of the same clauses;
- where the respondent employs 2,025 employees and its varying groups employs 10,000 employees, the contraventions, when viewed in perspective, ‘belies the need for specific deterrence to any appreciable degree’;
- general deterrence also has a limited role where the respondent’s contravention affected (now) three employees, and the respondent has demonstrated early and active cooperation. This is not a case where the respondent has contumeliously failed to pay employees their lawful entitlement;
- there must be some reasonable relationship between the theoretical maximum and the final penalty imposed referable to the circumstances of the conduct and the respondent. Having regard to all the circumstances, the contravention has a ‘low degree of objective seriousness’;
- the conduct was not deliberate, and the respondent never intended to escape its obligation to pay entitlements owed;
- it has apologised to Mr Sells and taken corrective action, demonstrating a willingness to learn from the proceedings and not to repeat the conduct;
- it has audited its payroll relating to the port of Port Hedland and will continue to do so to reduce future occurrences and has automated public holidays and CPD via the National Labour Centre to decrease the risk of future non-payments; and
- consistency of approach is an important consideration.

35 The respondent says that applying the principles in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (*Pattinson*), a significant penalty would be unreasonably oppressive and severe in the circumstances.

Determination On Penalty

36 The effect of s 557(1) of the FWA is that two or more contraventions of the FWA referred to in subsections (2) are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person.

In addition to the statutory course of conduct provision, it is open to the Court to consider the application of common law course of conduct principles where the contraventions contain common elements or can be said to overlap with each other... It may be appropriate for the Court to group contraventions where, if they were treated separately, this would potentially penalise a respondent twice ...⁸

37 Having regard to the parties’ submissions and to the Agreed Facts, I am satisfied that the contraventions, having been committed by the respondent against the one employee and arising from a breach of the same terms of EA 2016 and EA 2020, are properly taken to constitute a single contravention. The parties appear to accept this in their submissions.

38 The maximum penalty with respect to a contravention of s 50 of the FWA by the respondent is 300 penalty units, given the respondent is a body corporate.

39 I note the claimant seeks 75% of the maximum penalty and calculates this as \$70,425, which means the claimant’s theoretical maximum penalty is \$93,900 (based on the value of a penalty unit being \$313). The value of a penalty increased from \$275 to \$313 on 1 July 2023 via the *Crimes (Amount of Penalty Unit) Instrument 2023*, and thus the claimant’s theoretical maximum penalty is not applicable in this claim.

40 However, the respondent’s theoretical maximum penalty may also not be theoretically correct, where two of the breaches occurred between 1 January and 30 June 2023 when the value of the penalty unit was \$275. There is no doubt that most breaches occurred when the penalty unit’s value was \$222.

41 Where a contravention spans two or more penalty periods, the Court will generally apply the higher penalty unit for the purpose of determining the maximum penalty, but, when assessing the penalty, take into account whether the contravening conduct had occurred during a period or periods in which the value of the penalty unit was lower: *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 at [396] - [401] (Katzmann J) and also referred to in *Heal v Sydney Flames Basketball Pty Ltd (No 2)* [2024] FCA 794.

42 Therefore, the theoretical maximum is \$82,500, although of the 27 dates where the payment was not made, only two of those dates occurred when the penalty unit was \$275 with the remainder of the dates (approximately 92.5%) occurring when the penalty unit was \$222.

43 Therefore, the following considerations are significant in assessing the appropriate penalty in this case:

Whether the organisation has engaged in similar conduct

44 There are three similar claims before the IMC, being M 76 of 2022, M 91 of 2022 and M 119 of 2023. Arguably, the respondent has engaged in *similar conduct*, but I note that the disputes involve similar issues with two of the three claims being over a similar time period. This claim has a historical component. I also note that the claims involve the ports of Dampier and Port Hedland.

45 The claimant also refers to other claims against the respondent. In *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* 2024 WAIRC 220 at [38] (including footnote 2), I outlined claims referred to by the same claimant. At [53], I commented on the claimant's submission regarding the respondent's history of purported non-compliance. I do not resile from that comment. The difference with respect to M 76 of 2022 and M 91 of 2022 and this claim is that the respondent's contraventions extend across three employees, albeit its genesis is rooted in the same erroneous view. I am not persuaded this means the respondent is a recalcitrant contravener who displays contemptuous disregard for employment law. However, the respondent or the respondent's management should adopt a more cautious and timely approach as it relates to employee entitlements, even if invoking the dispute resolution procedure.

Whether the conduct was deliberate

46 The payments for public holidays and CPDs not worked were in issue in similar claims, M 76 of 2022 and M 91 of 2022, where employees contested the respondent's reason for non-payment and the proper construction of EA 2016 and EA 2020 was *far from certain*, such that the respondent *can be characterised as having 'taken the odds'*: *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)* [2018] FCA 480 (*Hail Creek*) at [17]. That is, in M 76 of 2022 and M 91 of 2022, in invoking the dispute resolution process, the respondent must have been aware of, and elected to, *take the risk that its conduct if not would, then might, contravene* s 50 of the FWA. This is relevant in this claim because the respondent should have been *on notice* that there was an issue at the port of Port Hedland.

47 I accept that, unlike in *Hail Creek*, there is no evidence the respondent should have had a heightened awareness of the risk it took from an erroneous construction because it had previously been found to have contravened EA 2016 or EA 2020 and had pecuniary penalties imposed: *Hail Creek* at [18].

48 However, there is no clear explanation, save for the checking of dates, why this claim was not resolved earlier when a similar issue had been admitted by the respondent in M 76 of 2022 and M 91 of 2022 at end of 2022.

49 There is no evidence that in not making the payments to Mr Sells, the respondent obtained, or sought to obtain, any financial benefit.

50 Notwithstanding this, where the construction of terms of EA 2016 and EA 2020 were squarely in issue, a more cautious and timely approach was prudent.

51 I do not necessarily conclude from the above that the conduct was to deliberately evade employee obligations. However, what is not clearly explained is the reason for the lack of consistency of approach. I resist drawing adverse inferences against the respondent because, simply, the lack of evidence all round invites speculation rather than an evidentiary basis upon which an inference should be drawn.

Corrective action

52 Mr Sells has been paid for public holidays and CPDs consistent with the obligations under EA 2016 and EA 2020 and has been credited to his leave balance the leave taken by the respondent. The respondent has automated public holidays and CPDs via its National Labour Centre reducing the risk of future repetition in respect of non-payment of these days.

Contribution and avoidance of repetition

53 The respondent has apologised and there is no evidence that indicates the apology is not genuine. The claimant accepts there has been *some* contrition by the respondent. The respondent has cooperated in the legal proceedings. However, I note my comments above, and unlike in M 76 of 2022 and M 91 of 2022 where the respondent was quick to make appropriate admissions (the delay in the proceedings being attributable to the resolution of an unrelated issue in favour of the respondent), the respondent has not provided a clear explanation for the delay in making similar admissions in this claim, beyond checking dates of payment.

The size of the entity and involvement of senior management

54 The respondent is a large business in Australia and can reasonably be expected to have in place systems that reduce the risk of underpayments to employees. True enough, mistakes can happen, and there may be differences in opinion in interpreting industrial instruments. However, it is also reasonable to infer that the respondent is well resourced and, as stated, could have sought timely advice.

Loss or damage suffered as a result

55 Mr Sell's consequential 'loss' (being the actual entitlements) is reasonable and for a time affected his leave balance, although, albeit after the proceedings commenced. There is no evidence he otherwise suffered loss or damage or prejudice.

56 While I am satisfied the contravening conduct in all circumstances is properly categorised in the low range, any discount for cooperation and contrition should be less than that in M 76 of 2022 and M 91 of 2022. A percentage discount of 20% is appropriate taking into account some contrition, rectification by the respondent and the respondent's cooperation in the proceedings.

57 Further, a discount is also appropriate where 92.5% of the contravening conduct occurred when the value of the penalty unit was \$222. I attribute a 15% discount to contravening conduct predominantly occurring in the period where a lower penalty unit value applied.⁹

58 Considering the above, specific deterrence is important in this case although the need to deter employers more generally in contraventions of the FWA and ensure the public interest in the protection of employee entitlements assumes more importance.

59 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.¹⁰ This purpose is met by imposing an 'appropriate penalty' striking a balance between oppressive severity and the need for deterrence in respect of the particular case.¹¹

- 60 Further, in certain cases a modest penalty, if any, may reasonably be thought to be sufficient to provide effective deterrence against future contraventions where, by way of example, the contravention is a ‘one-off’ result of inadvertence and not part of a deliberate strategy to circumvent the law, the person responsible for the contravention has been disciplined or counselled, there is genuine remorse, or, the contravention is unlikely to arise again having regard to the reduced risk of future contraventions.¹² This is not such a case.
- 61 For these reasons, the penalty to be applied is:

	Maximum	Penalty applied
Breach of Agreement contravention	\$82,500	
One single contravention (s 557(1) and (2)) with discount applied		\$6,000

- 62 In my view, no reduction for totality is required, where \$6,000 is an appropriate penalty ‘that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case.’¹³ This would also be consistent with the principle that the penalty must not be excessive and be just and appropriate in all the circumstances of the case.
- 63 The claimant seeks an order pursuant to s 546(3)(c) of the FWA that the penalties be paid to the claimant. An order will be made that the respondent pay the penalty of \$6,000 to the claimant.

Orders

- 64 In respect of M 119 of 2023, the respondent is to pay to the claimant a pecuniary penalty of \$6,000.

D. SCADDAN

INDUSTRIAL MAGISTRATE

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the *Fair Work Act 2009* (Cth)

Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The Industrial Magistrates Court of Western Australia (IMC or Court), being a court constituted by an industrial magistrate, is ‘an eligible State or Territory court’: s 12 of the FWA (see definitions of ‘eligible State or Territory court’ and ‘magistrates court’); *Industrial Relations Act 1979* (WA) s 81, s 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.
- [3] The civil penalty provisions identified in s 539 of the FWA include:
- Section 50 – contravention of an enterprise agreement
- [4] An ‘employer’ has the statutory obligations noted above if the employer is a ‘national system employer’ and that term, relevantly, is defined to include ‘a corporation to which paragraph 51(xx) of the [Australian] Constitution applies’: s 14, s 12 of the FWA. The obligation is to an ‘employee’ who is a ‘national system employee’ and that term, relevantly, is defined to include ‘an individual so far as he or she is employed ... by a national system employer...’: s 13 of the FWA.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

Burden and Standard of Proof

- [6] In an application under the FWA, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:
- It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “We think it more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not.
- [7] In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336:
- The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (362)
- [8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice and Procedure of the Industrial Magistrates Court of Western Australia

- [9] Subject to the provisions of the FWA, the procedure of the IMC relevant to claims under the FWA is contained in the *Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005* (WA) (IMC Regulations). Notably, regulation 35(4) of

the IMC Regulations provides the Court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

[10] In *Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (citations omitted):

The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence. [40]

Schedule II: Pecuniary Penalty Orders Under the *Fair Work Act 2009* (Cth)

Pecuniary Penalty Orders

[1] The FWA provides that the IMC may order a person to pay an appropriate pecuniary penalty if the Court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.

[2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:

December 2020	\$ 222
January 2022	\$ 222
December 2022	\$ 222
January – April 2023	\$ 275

[3] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 (*Grouped Property Services*) [388] in the following terms (omitting citations):

In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.

[4] In *Pattinson* [42], the plurality confirmed that civil penalties ‘are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions’. However, ‘insistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”’: [40], citing *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285.

[5] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.
- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- Whether the party committing the breach had cooperated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
- The need for specific and general deterrence.

[6] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 [91]).

- [7] Although these factors provide useful guidance, the task of assessing the appropriate penalty is not an exact science: *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; 258 CLR 482 [47]. The Court must ultimately fix a penalty that pays appropriate regard to the contraventions that have occurred: *Pattinson* [19]. '[A] court empowered by s 546 to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.' *Pattinson* [48].
- [8] 'Multiple contraventions' may occur because the contravening conduct done by an employer:
- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
 - (b) was done once only or was repeated; and
 - (c) was done with respect to a single employee or was done with respect to multiple employees.
- [9] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does *not* apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services Pty Ltd (No 2)* [411] (Katzmann J).
- [10] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 (2008); 165 FCR 560 [47] - [52].
- [11] Section 546(3) of the FWA also provides:

Payment of penalty

- (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
 - (a) the Commonwealth; or
 - (b) a particular organisation; or
 - (c) a particular person.
- [12] In *Milardovic v Vemco Services Pty Ltd (No 2)* [2016] FCA 244 [40] - [44], Mortimer J, in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336, summarised the law: (omitting citations)
- [T]he power conveyed by s 546(3) is *ordinarily to be exercised by awarding any penalty to the successful applicant*. ... [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons ... in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs [*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216] ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted. (original emphasis)

¹ Sells Statement at [9].

² Rafferty Affidavit at [5].

³ Rafferty Affidavit at [6].

⁴ Rafferty Affidavit at [7].

⁵ Rafferty Affidavit at [8].

⁶ Rafferty Affidavit at [8].

⁷ The value of a penalty unit at 22 December 2022 is \$222.

⁸ *Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)* [2020] FCCA 901 [28] (other citations omitted).

⁹ \$66,600 is approximately 80% of the theoretical maximum and a percentage difference is attributed.

¹⁰ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41-076).

¹¹ *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 [46].

¹² *Pattinson* [46] and [47].

¹³ *Pattinson* [46].

2024 WAIRC 00789

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION	:	2024 WAIRC 00789	
CORAM	:	INDUSTRIAL MAGISTRATE D. SCADDAN	
HEARD	:	FRIDAY, 9 AUGUST 2024	
DELIVERED	:	FRIDAY, 30 AUGUST 2024	
FILE NO.	:	M 76 OF 2022, M 91 OF 2022	
BETWEEN	:	CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION	CLAIMANT
		AND	
		QUBE PORTS PTY LTD (ABN: 46 123 021 492)	RESPONDENT
CatchWords	:	INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of <i>Fair Work Act 2009</i> (Cth) – Failure to pay for Closed Port Day and National Public Holiday while on approved planned time off and personal leave	
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) <i>Industrial Magistrate's Court (General Jurisdiction) Regulations 2005</i> (WA) <i>Crimes Act 1914</i> (Cth)	
Instrument	:	<i>Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020</i> <i>Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2016</i>	
Case(s) referred to in reasons:	:	<i>Milardovic v Vemco Services Pty Ltd (Administrators Appointed) [No 2]</i> [2016] FCA 244; 242 FCR 492 <i>Australian Building and Construction Commissioner v Pattinson</i> [2022] HCA 13; 274 CLR 450 <i>Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd</i> [2024] WAIRC 220 <i>Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)</i> [2018] FCA 480 <i>Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate</i> [2015] HCA 46; 258 CLR 482 <i>Miller v Minister of Pensions</i> [1947] 2 All ER 372 <i>Briginshaw v Briginshaw</i> [1938] HCA 34; 60 CLR 336 <i>Sammut v AVM Holdings Pty Ltd [No 2]</i> [2012] WASC 27 <i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557 <i>NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission</i> [1996] FCA 1134; 71 FCR 285 <i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7 <i>Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith</i> [2008] FCAFC 8; 165 FCR 560 <i>Rocky Holdings Pty Ltd v Fair Work Ombudsman</i> [2014] FCAFC 62; (2014) 221 FCR 153 <i>Fair Work Ombudsman v South Jin Pty Ltd (No 2)</i> [2016] FCA 832 <i>Sayed v Construction, Forestry, Mining and Energy Union</i> [2016] FCAFC 4; 239 FCR 336	
Result	:	Pecuniary penalty to be paid	
Representation:			
Claimant	:	Mr L. Edmonds (of counsel)	
Respondent	:	Mr R. Boothman (of counsel)	

REASONS FOR DECISION

Introduction

1 On 21 July 2022, the claimant lodged M 76 of 2022 alleging the respondent contravened the *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2020* (EA 2020) as it related to employee, Daniel Miller (Mr Miller).

- 2 On 1 August 2022, the claimant lodged M 91 of 2022 alleging the respondent contravened the *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2016* (EA 2016) and EA 2020 as it related to employee, Rebecca Macdonald (Ms Macdonald).
- 3 On 7 December 2022, Industrial Magistrate Coleman made orders consolidating M 76 and M 91 of 2022.
- 4 Following the filing of amended statements of claim in both claims, on 23 December 2022 the respondent admitted all contraventions save for the portion of M 91 of 2022 relating to the payment of long service leave (the Disputed Claim).
- 5 The Disputed Claim was determined on the papers with Industrial Magistrate Coleman publishing her reasons for decision on 9 February 2024, dismissing the Disputed Claim.
- 6 Thereafter, programming orders were made in relation to hearing and determining the claimant's application for the imposition of pecuniary penalties in respect of the admitted contraventions in M 76 of 2022 and M 91 of 2022.
- 7 These are the reasons for decision in relation to penalty.
- 8 In relation to Mr Miller, the respondent admits it breached:
 - (a) section 50 of the *Fair Work Act 2009* (Cth) (FWA) by failing to pay him for 1 January 2022 under cl 33.3.4(d) of EA 2020 where 1 January 2022 is a Closed Port Day (CPD) and he was on approved Planned Time Off (PTO); and
 - (b) section 323 of the FWA by failing to pay him in full for the failed payment for 1 January 2022.
- 9 In relation to Ms Macdonald, the respondent admits it breached:
 - (a) section 50 of the FWA by:
 - (i) deducting a personal leave day for 25 December 2020 contravening under cl 33.3.6 of EA 2016 where 25 December 2020 is a CPD, and she was on personal leave;
 - (ii) failing to pay her for 26 and 28 December 2020 contravening, cl 33.3.2(d) of EA 2016 where 26 and 28 December 2020 are Normal Public Holidays (NPH) and she was on personal leave; and
 - (iii) failing to pay her one additional day's personal leave upon termination of her employment contravening cl 35.6.1(b) of EA 2020.
 - (b) section 323 of the FWA by failing to pay her in full for the failed payments for 26 and 28 December 2020.
- 10 The parties provided the Court outlines of written submissions and additional evidence on the payment of a pecuniary penalty.
- 11 Schedule I of these reasons outline the jurisdiction, standard of proof and practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).
- 12 Schedule II of these reasons outline the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the respondent's contraventions.

The Agreed Facts

- 13 Agreed Facts were lodged in March 2023.

M 76 of 2002 - Mr Miller

- 14 The salient facts include that EA 2020 covered and applied to the claimant, the respondent and Mr Miller, as an employee of the respondent.
- 15 The claimant is an 'employee organisation' with standing to commence M 76 of 2022.
- 16 The respondent is a 'national system employer', 'constitutional corporation' and is engaged in the business of stevedoring.
- 17 Mr Miller was employed as a permanent variable salary employee (VSE) pursuant to cl 9.5 of EA 2020. From 23 December 2021 to 1 January 2022, Mr Miller was on approved PTO. As a result, Mr Miller did not work on 1 January 2022.
- 18 However, Mr Miller should have been, but was not, paid \$234.78 (gross) for 1 January 2022 pursuant to cl 33.3.4(d) of EA 2020.
- 19 On or about 25 August 2022, the respondent paid Mr Miller \$234.78 (gross).

M 91 of 2022 - Ms Macdonald

- 20 The salient facts include that EA 2016 and EA 2020 covered and applied to the claimant, the respondent and Ms Macdonald, as an employee of the respondent.
- 21 The claimant is an 'employee organisation' with standing to commence M 91 of 2022.
- 22 The respondent is a 'national system employer', 'constitutional corporation' and is engaged in the business of stevedoring.
- 23 Ms Macdonald commenced employment with the respondent on 13 August 2008 and was employed as VSE from 25 July 2011 to 4 November 2021 when she resigned.
- 24 Ms Macdonald was on personal leave from 21 to 28 December 2020 (inclusive), of which three days coincided with public holidays on 25, 26 and 28 December 2020. Ms Macdonald did not work on public holidays.
- 25 Under EA 2016, 25 December 2020 is a CPD and 26 and 28 December 2020 are NPHs.
- 26 On or about:
 - (i) 31 December 2020, the respondent paid Ms Macdonald \$370.01 (gross);
 - (ii) 22 December 2022, the respondent paid Ms Macdonald \$458.08 (gross); and

(iii) 22 December 2022, the respondent paid Ms Macdonald \$371.01 (gross).

Other Evidence

- 27 The claimant relies upon a witness statement signed by Joel O'Brien (Mr O'Brien), Organiser of the Maritime Union of Australia Division of the claimant, on 27 June 2024 (the O'Brien Statement).
- 28 In the O'Brien Statement, Mr O'Brien summarises, and annexes, the correspondence between him and the respondent's employees concerning the payments owed to Mr Miller and Ms Macdonald¹.
- 29 Consistent with the respondent's evidence (see below), the correspondence commences with Mr Miller raising the 'missing New Year's Day' to shift manager, Bill Hutchinson (Mr Hutchinson) on 17 January 2022. Initially Mr Hutchinson indicated that he had 'sorted this out with payroll'².
- 30 Thereafter, on 28 January 2022, Mr Miller appears to have been informed by person or persons unknown that he was not getting paid for New Year's Day as he was on 'Approved PTO'³.
- 31 Consistent with the respondent's evidence, on 18 February 2022, Mr Miller escalated the issue to presumably his next line manager, Michael Kranendonk (Mr Kranendonk), where he was informed that '[i]ts the rule of – if a VSE is not available to be allocated due to taking a PTO they would not be advantaged to receive any payment'⁴. Mr Miller responded that he could not see 'that rule anywhere... I'm happy to be convinced otherwise though based on the EA'⁵.
- 32 On 18 February 2022, Mr Kranendonk informs Mr Miller '[t]his is our position, but if you are not satisfied please run this through Part A clause 49.1', the dispute resolution clause in EA 2016 and EA 2020⁶. Mr Miller responded, 'Ok will do' and 'I'll run through the process though just to be sure and have a clear outcome'⁷.
- 33 Thereafter, Mr Miller informs Mr O'Brien that he would like to take this further and that he has engaged local and State management, consistent with cl 49.1 of EA 2016 and EA 2020.
- 34 Consistent with cl 49.1, Mr O'Brien outlined the claimant's reason for why Mr Miller should be paid in accordance with EA 2020. On 30 March 2022, Mr Kranendonk provided a substantive response to Mr O'Brien's email to which Mr O'Brien responded⁸. Thereafter, the respondent invited the claimant to continue to invoke cl 49.1.
- 35 Ms Macdonald appears to have first raised an issue with respect to her leave on 8 January 2021, however, the issue relates to 24, 25 and 26 December (presumably 2020) and the taking of leave⁹. Thereafter, Mr O'Brien attaches emails from Matthew Waddell (Mr Waddell), Operational Superintendent, showing Ms Macdonald was recorded on sick leave/personal leave. There are then several emails between Mr O'Brien and Mr Waddell concerning the reimbursement of personal leave taken on a public holiday with reference to cl 33.3 of EA 2016, the parties' dispute over the entitlement, and referral to the dispute resolution procedure¹⁰.
- 36 Mr O'Brien also annexes three decisions of prior contraventions by the respondent¹¹.
- 37 At the penalty hearing, the claimant tendered a further witness statement of Mr O'Brien dated 7 August 2024 annexing iterations of EA 2016 and EA 2020. In addition, Mr O'Brien refers to 19 2020 agreements relevant to ports operated by the respondent Australia-wide with an expiry date of 30 June 2024.
- 38 The respondent relies upon an affidavit affirmed by Andrew Rattery (Mr Rattery), Pilbara Port Manager, on 30 July 2024 (the Rattery Affidavit). Mr Rattery also gave oral evidence at the penalty hearing.
- 39 Mr Rattery attests to being employed by the respondent as Pilbara Port Manager since December 2017. His role includes the 'safe, efficient, smooth and profitable delivery of the daily operational activity at the ports that Qube has operations at in the Pilbara region'¹².
- 40 His inquiries reveal the respondent employs 2,025 employees and approximately 10,109 employees are employed by the respondent and related bodies corporate¹³.
- 41 The relevant superintendent is responsible for manually uploading public holidays or CPDs to Microster, the software system used by the respondent and the respondent's payroll department¹⁴.
- 42 Mr Rattery clarified in his oral evidence that since 2022, the relevant Superintendents no longer manually upload public holidays or CPDs for Provisional Variable Salary Employees and VSEs, but this process is carried out automatically by the respondent's National Labour Centre. That is, the respondent pre-populates the payroll information reducing the prospect of future similar underpayments.
- 43 At the time of the underpayments (to presumably Mr Miller and Ms Macdonald), the parties were in dispute over interpretations under EA 2016 and EA 2020 as it related to the entitlement to pay for employees not available to work on a public holiday or CPD¹⁵.
- 44 The respondent's view was that employees who were not available to work on these days were not entitled to payment, whereas the claimant's view was to the contrary¹⁶.
- 45 Consistent with EA 2016 and EA 2020 dispute resolution clauses, Mr Miller raised the issue with his supervisor, Mr Hutchinson on 17 January 2022 and Ms Macdonald raised the issue with her supervisor, Mr Waddell on 4 January 2022¹⁷.
- 46 When the issue was not resolved, it was escalated to Mr O'Brien, an official for the claimant, and Mr Kranendonk, former WA Manager, and David Wingate, General Manager – Ports.¹⁸
- 47 The issue was resolved when the respondent accepted an employee who was not available to work on a public holiday or CPD was entitled to payment under EA 2016 or EA 2020¹⁹.

- 48 Mr Rattery asserts that he believes the dispute between the parties was isolated to a period of time relevant to M 76 and M 91 of 2022 and to another claim, M 119 of 2023, also before the IMC. Accordingly, it is his belief that the failure to pay for public holidays or CPDs (as it relates to VSEs) is not a widespread issue²⁰.
- 49 His inquiries did not reveal a deliberate effort not to pay relevant employees for public holidays or CPDs but came about because the respondent held a genuine belief it was paying relevant employees in accordance with EA 2016 and EA 2020, and resolution of the issue took some months²¹.
- 50 Mr Rattery, on behalf of the respondent, apologises to Mr Miller and Ms Macdonald and acknowledges the respondent is at fault.
- 51 Mr Rattery refers to cl 23.2 of EA 2016 and EA 2020. He states that in his experience, having regard to the size and scale of the respondent's operations, the number of errors dealt with by the respondent is relatively small²².
- 52 He further states that he has endeavoured to cooperate with the claimant and provided instructions to admit the claims at the earliest opportunity. Further, he uses his position to rectify issues at an early stage, resulting in payments on the same day, off pay cycle or in the next pay cycle²³.
- 53 In his oral evidence, Mr Rattery stated that in 2021 he instructed Mr Waddell to undertake a review at the port of Port Hedland and he found one employee who had been underpaid (a separate and unrelated issue) and arranged for that person to be paid in accordance with the relevant agreement. He understood that reviews are carried out periodically rather than investigations.
- 54 Mr Rattery also stated in his oral evidence that he was informed by line managers that the issue as it related to Mr Miller and Ms Macdonald had been resolved, and that this was generally via progression reports, which he thought occurred prior to the court case commencing.
- 55 He is aware the respondent and the claimant were engaging in discussions via the dispute resolution procedure and at the end of the discussions, the respondent paid Mr Miller and Ms Macdonald, but he could not recall when that was and accepted that it might not have been when indicated in his affidavit²⁴.

The Claimants' Submissions on Penalty

- 56 Both parties refer to the law in respect of the determination of an appropriate pecuniary penalty for contraventions of the FWA.
- 57 In summary, the claimant submits:
- the IMC is empowered to order a person to pay a pecuniary penalty the court considers appropriate if the court is satisfied the person has contravened a civil remedy provision: s 546(1) of the FWA;
 - contraventions of s 50 and s 323 of the FWA are contraventions of a civil remedy provision: s 539(2) of the FWA;
 - in respect of M 76 of 2022, Mr Miller was on approved PTO and was entitled to be paid \$234.78 for 1 January 2022. The payment was not made until 25 August 2022;
 - in respect of M 91 of 2022, Ms Macdonald was entitled to be paid an additional day of personal leave on termination of her employment for 25 December 2020 and NPH payment for 26 and 28 December 2020. On 22 December 2022, the respondent paid \$458.08 and \$372.01 to her;
 - the failure to make the payments to Mr Miller and Ms Macdonald were deliberate courses of action where the respondent was on notice on five occasions over two months. The respondent 'courted the risk' and refused to rectify the breach. It was only after the proceedings were commenced that corrective action was taken;
 - the respondent is not contrite, and the late admission and corrective action are rhetoric and a 'box ticking exercise' to satisfy the court and to avoid a more serious penalty;
 - the respondent is a large, sophisticated, and profitable company, who should be expected to have sufficient structures in place to ensure compliance with the legislation and (presumably) Agreements to which it is bound;
 - the 'underpayments' were escalated to senior levels of management; and
 - there is no evidence indicating the lessons that have been learned from previous contraventions or positive steps to ensure future compliance.

58 Therefore, the need for specific and general deterrence is great.

59 A substantial, personal deterrent penalty is also called for to deter future contraventions.

60 The penalties should be awarded to the claimant in accordance with decision in *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) [No 2]* [2016] FCA 244; 242 FCR 492 [40].

The Respondent's Submissions on Penalty

- 61 In summary, the respondent submits:
- it failed to pay an employee in recognition for public holidays not worked – 26 and 28 December 2020 in respect of Ms Macdonald (M 91 of 2022) and 1 January 2022 in respect of Mr Miller (M 76 of 2022). In respect of Ms Macdonald the respondent improperly deducted a day of personal leave for 25 December 2020 which was a CPD;
 - the payments were required pursuant to cl 33.3.2(d) of EA 2016 and EA 2020;
 - the non-compliance arose because of an *administrative oversight* and was *inadvertent* in that the claimant and the respondent were in dispute as to the interpretation of EA 2016 and EA 2020, specifically whether an employee who was not available to work on a public holiday or CPD was entitled to payment. The parties held opposing views and

utilised the dispute resolution process under the enterprise agreements. There is no evidence either party held their view unreasonably;

- the contraventions of s 50 and s 323 of the FWA should be considered a single course of conduct for the purposes of s 557 of the FWA;
- the breach is admitted both in relation to s 50 and s 323 of the FWA, the contraventions are properly categorised at the lower end of offending and a penalty 4% of the maximum is considered appropriate;
- this is not a matter in which an imposition of penalties is necessary to encourage general or specific deterrence where the parties utilised the appropriate process to resolve a dispute, and the respondent accepted its interpretation was wrong;
- the respondent admitted to the breaches at the earliest stage of the proceedings, and the respondent has already paid the monies to Mr Miller and Ms Macdonald;
- the underpayments involved reasonably modest amounts, and no evidence has been adduced of prejudice suffered by Mr Miller or Ms Macdonald;
- the respondent does not have a history of contumeliously failing to pay their employees their lawful entitlements;
- it has demonstrated remorse, cooperation and taken corrective action;
- it can otherwise be concluded that there is a culture of compliance, and the evidence does not demonstrate any systemic, wilful, or deliberate contravention of the FWA; and
- consistency is an important consideration and there is no evidence any additional financial resources would have prevented the breach.

62 The respondent says that applying the principles in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (*Pattinson*), a significant penalty would be unreasonably oppressive and severe in the circumstances.

Relevant Finding on Penalty

63 Because it was directly raised by the claimant, I make the following finding of fact as it relates to course of conduct and contrition.

64 For the following reasons, I do not accept the respondent's conduct in not making the payments to Mr Miller and Ms Macdonald was a deliberate course of conduct in the pejorative manner suggested by the claimant.

65 The respondent did not agree with Mr Miller in terms of the payment for 1 January 2022, but it had paid him for Christmas and Boxing Days, indicating that it was not looking to escape making payments for public holidays more broadly. Further, the respondent invited Mr Miller to invoke the dispute resolution process under EA 2020 if he was not satisfied with the outcome, which Mr Miller acknowledged he would do so for clarity. Thereafter, the dispute resolution process was invoked.

66 While the process took more time with Ms Macdonald, again there was no indication that the respondent was seeking to escape making payments and the initial enquiry appears to have included another issue, although this was not especially clear from the emails.

67 At no stage did the respondent try to dissuade Ms Macdonald, Mr Miller or Mr O'Brien from progressing the non-payment through the dispute resolution process or at all, notwithstanding it had a different view, albeit it is now known that view is wrong.

68 For the following reasons I accept the respondent's expression of contrition.

69 In the Rattery Affidavit, Mr Rattery apologised for the underpayments to Mr Miller and Ms Macdonald. Having the benefit of hearing Mr Rattery's oral evidence, I formed the view that he was a truthful witness, whose apology can be accepted as genuine. Consistent with the apology is the prior payment of monies owed. The respondent admitted the contraventions and has cooperated in the legal process with admitting the claim (save for the Disputed Claim which was dismissed after hearing) and the filing of a statement of agreed facts.

70 The claimant's cynical view of the respondent's apology appears to be more grounded in a prior claim based on comments made by a different Industrial Magistrate, rather than the evidence before the Court in this claim.

Determination On Penalty

71 The maximum penalty with respect to a contravention of s 50 and s 323 of the FWA by the respondent is 300 penalty units, given the respondent is a body corporate. The maximum penalty in respect of each contravention is \$66,600.

Section 557 of the FWA

72 The effect of s 557(1) of the FWA is that two or more contraventions of the FWA referred to in subsection (2) are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person. Notably, s 50 and s 323 of the FWA are referred to in s 557(2) of the FWA.

In addition to the statutory course of conduct provision, it is open to the Court to consider the application of common law course of conduct principles where the contraventions contain common elements or can be said to overlap with each other... It may be appropriate for the Court to group contraventions where, if they were treated separately, this would potentially penalise a respondent twice...

73 I am satisfied that in relation to M 76 of 2022, as it relates to Mr Miller, the contraventions of s 50 and s 323 of the FWA is a single contravention where the contravention was by the respondent and arose from the one failure by the respondent to pay him for a CPD while he was on approved PTO.

- 74 I am further satisfied that in relation to M 91 of 2022, as it relates to Ms Macdonald, the contraventions of s 50 and s 323 of the FWA is a single contravention where the contravention by the respondent arose from a failure to pay her for a CPD and NPHs while she was on personal leave.
- 75 However, if the respondent's submission extends to the contraventions being grouped as one single contravention for both employees, I don't accept this submission for the following reasons:
- (a) while not determinative, the contraventions occurred at different ports;
 - (b) while the contraventions involved the failure to pay for CPD and NPH, it involved different enterprise agreements;
 - (c) the contravention relating to Mr Miller related to the non-payment for a CPD; and
 - (d) the contravention relating to Ms Macdonald related to the non-payment for NPHs and deduction of personal leave on a CPD.

Thus, while similar and related, the course of conduct is, in my view, distinct.

- 76 Having regard to the parties' submissions, the Agreed Facts, and the parties' evidence, the following considerations are significant in assessing the appropriate penalty in this case.

Whether the organisation has engaged in similar conduct

There are three similar claims before the IMC, being M 76 of 2022, M 91 of 2022 and M 119 of 2023. Arguably, the respondent has engaged in similar conduct, but I note that the disputes involve similar issues (having regard to my comments above) with two of the three claims being over a similar time period. One of the claims has a historical component. I also note that the claims involve the ports of Dampier and Port Hedland.

The claimant also refers to other claims against the respondent. In *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* [2024] WAIRC 220 at [38] (including footnote 2), I outlined claims referred to by the same claimant. At [53], I commented on the claimant's submission regarding the respondent's history of purported non-compliance. I do not resile from that comment. The difference with respect to M 76 and M 91 of 2022 (and in due course M 119 of 2023) is that the respondent's contraventions extended across two employees (and a third employee in M 119 of 2023), albeit its genesis is rooted in the same erroneous view. I am not persuaded this means the respondent is a recalcitrant contravener who displays contemptuous disregard for employment law. However, the respondent or the respondent's management should adopt a more cautious and timely approach as it relates to employee entitlements, even if invoking the dispute resolution procedure.

Whether the conduct was deliberate

I refer to the finding above as it relates to deliberateness of conduct. However, other considerations are relevant, including that Mr Miller and Ms Macdonald contested the respondent's reason for non-payment and the proper construction of EA 2016 and EA 2020 was 'far from certain,' such that the respondent 'can be characterised as having "taken the odds":' *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)* [2018] FCA 480 (*Hail Creek*) at [17]. That is, in invoking the dispute resolution process, the respondent must have been aware of, and elected to, *take the risk that its conduct if not would, then might, contravene* s 50 of the FWA.

Unlike in *Hail Creek*, there is no *evidence* the respondent should have been on notice or have had a heightened awareness of the risk it took from an erroneous construction because it had previously been found to have contravened EA 2016 or EA 2020 and had pecuniary penalties imposed: *Hail Creek* at [18].

Further, there is no evidence that in not making the payments to Mr Miller or Ms Macdonald, the respondent obtained, or sought to obtain, any financial benefit.

Notwithstanding this, where the construction of terms of EA 2016 and EA 2020 were squarely in issue, the respondent could have adopted a more cautious approach, as stated.

Corrective action

Mr Miller and Ms Macdonald have been paid the amounts owed to them and Ms Macdonald had her personal leave credited to her balance. I also note that Ms Macdonald's payments were made almost two years after they were due, although one payment was made six days after it was due.

In terms of other corrective actions, the respondent has automated, via its National Labour Centre, NPHs and CPDs and removed manual entry by individual Superintendents. Thus, arguably, reducing the risk of future underpayments.

Contrition and avoidance of repetition

The respondent has apologised. I do not accept that the apology is not genuine for the reasons given.

The respondent has cooperated in the court process by admitting the claims and preparing agreed facts. The Disputed Claim was dismissed. A percentage discount of 30% is appropriate considering the respondent's contrition and cooperation in the proceedings and the rectification undertaken.

The size of the entity and involvement of senior management

The respondent is a large business in Australia and can reasonably be expected to have in place systems that reduce the risk of underpayments to employees. True enough, mistakes can happen, and there may be differences in opinion in interpreting industrial instruments. However, it is also reasonable to infer that the respondent is well resourced and, as stated, could have sought timely advice.

Loss or damage suffered as a result

Mr Miller's and Ms Macdonald's consequential 'loss' (being the actual entitlements) is reasonably modest and has been fully addressed, albeit after the proceedings commenced.

- 77 The contravening conduct in all circumstances is properly categorised in the low range in respect of both Mr Miller and Ms Macdonald.
- 78 Considering the above, specific deterrence is less important, but certainly not unimportant, in this case than the need to deter employers more generally in contraventions of the FWA and ensure the public interest in the protection of employee entitlements.
- 79 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.²⁵ This purpose is met by imposing an 'appropriate penalty' striking a balance between oppressive severity and the need for deterrence in respect of the particular case.²⁶
- 80 Further, in certain cases a modest penalty, if any, may reasonably be thought to be sufficient to provide effective deterrence against future contraventions where, by way of example, the contravention is a 'one-off' result of inadvertence and not part of a deliberate strategy to circumvent the law, the person responsible for the contravention has been disciplined or counselled, there is genuine remorse, or, the contravention is unlikely to arise again having regard to the reduced risk of future contraventions.²⁷ I am not satisfied that this is a case for no penalty to be applied.²⁸
- 81 For these reasons, the penalty to be applied *in each of* M 76 of 2022 and M 91 of 2022 is:

	Maximum	Penalty applied
Breach of Agreement contravention	\$66,600	
Payment in full contravention	\$66,600	
One single contravention (s 557(1) and (2)) M 76 of 2022 with 30% discount		\$3,500
One single contravention (s 557(1) and (2)) M 91 of 2022 with 30% discount		\$4,000

- 82 For the avoidance of doubt, while I accept that in each of M 76 of 2022 and M 91 of 2022 there is a single contravention under s 557 of the FWA, I do not accept that this extends to one penalty being imposed for the two claims. M 76 of 2022 and M 91 of 2022 are two separate claims, albeit there is commonality as it relates to failure to pay the entitlements. There are also relevant differences related to Ms Macdonald, which accounts for the slightly higher penalty.
- 83 In my view, no reduction for totality is required, where \$3,500 and \$4,000 are appropriate penalties 'that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case.'²⁹ This would also be consistent with the principle that the penalty must not be excessive and be just and appropriate in all the circumstances of the case.
- 84 The claimant seeks an order pursuant to s 546(3)(c) of the FWA that the penalties be paid to the claimant. An order will be made that the respondent pay the penalties of \$3,500 and \$4,000 to the claimant.

Orders

- 85 In respect of M 76 of 2022, pursuant to s 546(1) and (3) of the FWA, the respondent is to pay to the claimant a pecuniary penalty of \$3,500.
- 86 In respect of M 91 of 2022, pursuant to s 546(1) and (3) of the FWA, the respondent is to pay to the claimant a pecuniary penalty of \$4,000.

D. SCADDAN**INDUSTRIAL MAGISTRATE****Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the Fair Work Act 2009 (Cth)****Jurisdiction**

- [1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The IMC, being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': s 12 of the FWA (see definitions of 'eligible State or Territory court' and 'magistrates court'); *Industrial Relations Act 1979* (WA) s 81, s 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.
- [3] The civil penalty provisions identified in s 539 of the FWA include:
- Section 50 – contravention of an enterprise agreement; and

- Section 323 – failing to make payments in full.

- [4] An ‘employer’ has the statutory obligations noted above if the employer is a ‘national system employer’ and that term, relevantly, is defined to include ‘a corporation to which paragraph 51(xx) of the [Australian] Constitution applies’: s 14, s 12 of the FWA. The obligation is to an ‘employee’ who is a ‘national system employee’ and that term, relevantly, is defined to include ‘an individual so far as he or she is employed ... by a national system employer...’: s 13 of the FWA.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

Burden and Standard of Proof

- [6] In an application under the FWA, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

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

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

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

- [8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice and Procedure of the Industrial Magistrates Court of Western Australia

- [9] Subject to the provisions of the FWA, the procedure of the IMC relevant to claims under the FWA is contained in the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (IMC Regulations). Notably, regulation 35(4) of the IMC Regulations provides the court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

- [10] In *Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation:

The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence. [40] (citations omitted)

Schedule II: Pecuniary Penalty Orders Under the Fair Work Act 2009 (Cth)

Pecuniary Penalty Orders

- [1] The FWA provides that the IMC may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.

- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:

December 2020	\$ 222
January 2022	\$ 222
December 2022	\$ 222

- [3] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 (*Grouped Property Services*) [388] in the following terms:

In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose. (citations omitted)

- [4] In *Pattinson* [42], the plurality confirmed that civil penalties ‘are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions’. However, ‘insistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”’: [40], citing *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285.

- [5] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and

if it does the amount of the penalty' which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.
- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- Whether the party committing the breach had cooperated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
- The need for specific and general deterrence.

[6] The list is not 'a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.' (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 (*Australian Ophthalmic Supplies*) [91]).

[7] Although these factors provide useful guidance, the task of assessing the appropriate penalty is not an exact science: *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; 258 CLR 482 [47]. The Court must ultimately fix a penalty that pays appropriate regard to the contraventions that have occurred: *Pattinson* [19]. '[A] court empowered by s 546 to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.' *Pattinson* [48].

[8] 'Multiple contraventions' may occur because the contravening conduct done by an employer:

- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
- (b) was done once only or was repeated; and
- (c) was done with respect to a single employee or was done with respect to multiple employees.

[9] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 of the FWA on the payments) by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does *not* to apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services* [411] (Katzmann J).

[10] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies* [47] - [52].

[11] Section 546(3) of the FWA also provides:

Payment of penalty

- (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
 - (a) the Commonwealth; or
 - (b) a particular organisation; or
 - (c) a particular person.

[12] In *Milardovic* [40] - [44], Mortimer J, in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336, summarised the law:

[T]he power conveyed by s 546(3) is ordinarily to be exercised by *awarding any penalty to the successful applicant*. ... [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons ... in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs [*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA

553; 37 FCR 216] ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted. (original emphasis) (citations omitted)

¹ O'Brien Statement at [4] to [10] and JOB1 and JOB2.

² O'Brien Statement at JOB1.

³ O'Brien Statement at JOB1

⁴ O'Brien Statement at JOB1

⁵ O'Brien Statement at JOB1

⁶ O'Brien Statement at JOB1.

⁷ O'Brien Statement at JOB1

⁸ O'Brien Statement at JOB1.

⁹ O'Brien Statement at JOB2.

¹⁰ O'Brien Statement at JOB2

¹¹ O'Brien Statement at JOB3.

¹² Rattery Affidavit at [5].

¹³ Rattery Affidavit at [6].

¹⁴ Rattery Affidavit at [7].

¹⁵ Rattery Affidavit at [8].

¹⁶ Rattery Affidavit at [8].

¹⁷ Rattery Affidavit at [9].

¹⁸ Rattery Affidavit at [9].

¹⁹ Rattery Affidavit at [9].

²⁰ Rattery Affidavit at [10].

²¹ Rattery Affidavit at [11].

²² Rattery Affidavit at [13].

²³ Rattery Affidavit at [15].

²⁴ Rattery Affidavit at [16].

²⁵ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41-076).

²⁶ *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (*Pattinson*) [46].

²⁷ *Pattinson* [46] and [47].

²⁸ *Pattinson* [46] and [47].

²⁹ *Pattinson* [46].

2024 WAIRC 00774

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2024 WAIRC 00774
CORAM : INDUSTRIAL MAGISTRATE C. TSANG
HEARD : WEDNESDAY, 13 DECEMBER 2023,
 THURSDAY, 14 DECEMBER, 2023
DELIVERED : MONDAY, 19 AUGUST 2024
FILE NO. : M 129 OF 2022
BETWEEN : RAYMOND WEEDA

CLAIMANT

AND

SILVERHORSE TECHNOLOGIES PTY LTD

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – whether, prior to his employment with the respondent, the claimant was continuously employed by the company he remains sole director and company secretary of, such that his employment with that company is continuous with his employment with the respondent for the purposes of determining his long service leave entitlements on termination of employment with the respondent
Legislation	:	<i>Long Service Leave Act 1958</i> (WA) <i>Corporations Act 2001</i> (Cth)
Cases referred to in reasons:	:	<i>Desai v Harman & Co Pty Ltd</i> [2017] WAIRC 00742 <i>G v H</i> (1994) 181 CLR 387 <i>Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)</i> [2023] FCA 555 <i>Tweedie v Zenitas Healthcare Pty Ltd ACN 009 074 588 & Anor</i> [2023] WAIRC 00732
Result	:	Claim dismissed
Representation:		
Claimant	:	Mr S Heathcote (of counsel)
Respondent	:	Ms V Bennett (of counsel)

REASONS FOR DECISION

Background

- 1 On 27 October 2022, the claimant (**Mr Weeda**) filed an Originating Claim seeking \$53,516.57 in unpaid long service leave entitlements upon termination of his employment from the respondent (**Silverhorse**), contending:
 - (a) He was employed by Luceo Systems Pty Ltd (**Luceo**) from 1 September 2002.
 - (b) On 1 March 2014, Silverhorse acquired part of Luceo’s business and he commenced employment with Silverhorse.
 - (c) Upon his resignation from Silverhorse on 31 May 2022, Silverhorse was required to consider his employment with Luceo as continuous with his employment with Silverhorse for the purposes of calculating his long service leave entitlements under s 8(2) of the *Long Service Leave Act 1958* (WA) (**LSL Act**).
- 2 On 17 November 2022, Silverhorse filed a Response and Counterclaim, contending:
 - (a) Mr Weeda was not continuously employed by Luceo from 1 September 2002 to 28 February 2014.
 - (b) In the alternative:
 - (i) From 11 November 2001, Mr Weeda was a director of Luceo, and from November 2005, he was Luceo’s sole director.
 - (ii) From 1 March 2014 to 31 May 2022, Mr Weeda was Silverhorse’s Chief Executive Officer (**CEO**), and from 11 March 2014 to 14 June 2022, a director of Silverhorse.
 - (iii) In or around March 2014, Silverhorse requested Mr Weeda to determine Luceo’s employees’ employment liabilities, based on the employees’ service with Luceo. Mr Weeda, however, excluded himself from the information provided to Silverhorse.
 - (iv) Prior to April 2022, Mr Weeda failed to inform Silverhorse, nor did he draw Silverhorse’s attention to the fact that he was an employee of Luceo, nor advise Silverhorse that Silverhorse would have an employment liability arising from his employment with Luceo.
 - (c) By reason of the parties conducting themselves on the basis that Mr Weeda was not an employee of Luceo, or by reason of Mr Weeda’s representations to Silverhorse, Mr Weeda should be estopped from claiming that he was continuously employed by Luceo from 1 September 2002 to 28 February 2014 (**Estoppel Argument**).
 - (d) In his capacity as a director of Silverhorse, Mr Weeda owed Silverhorse a duty in both law and equity to exercise reasonable care and skill. By neglecting to inform Silverhorse prior to April 2022 that he was an employee of Luceo, or that Silverhorse would have an employment liability arising from his employment with Luceo, Mr Weeda breached:
 - (i) Section 180(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**).
 - (ii) His duty of care to Silverhorse.
 - (iii) His equitable duty to Silverhorse to exercise reasonable care and skill.
 - (e) By reason of the matters in [2(d)], if Mr Weeda is found to have been continuously employed by Luceo from 1 September 2002 to 28 February 2014, Silverhorse will suffer loss and damage amounting to \$53,516.57. Therefore, any payment to Mr Weeda should be set off against Silverhorse’s loss and damage (**Set Off Argument**).
- 3 On 13 March 2023, Mr Weeda filed Further and Better Particulars, relevantly stating:
 1. [He] commenced employment with [Luceo] in September 2002 as its Chief Technical Officer [(**CTO**)].
...

2. In November 2005, [he] took over the [CEO] role. ...
 3. The amount Luceo paid [him] varied according to Luceo's capacity to pay wages/salaries.
 4. In March 2014, [Silverhorse] became involved with Luceo following an agreement between Luceo and OGS [OGS Australia Pty Ltd, formerly Oil & Gas Solutions Pty Ltd].
 5. Broadly, Luceo contributed:
 - a. goodwill;
 - b. a licence to use Luceo's software and [sic] no cost to Silverhorse;
 - c. transfer of client relationships;
 - d. transfer of existing staff (including [himself]). ...
 7. [His] employment transferred from Luceo to Silverhorse in March 2014. He was, at that time, Silverhorse's CEO and Managing Director. ...
 8. At no point from 2004 to May 2022 (when [he] resigned) was there any interruption to [his] continuous service.
- 4 On 11 April 2023, Silverhorse filed a Reply to Mr Weeda's Further and Better Particulars, denying that Mr Weeda commenced employment with Luceo in 2002 as its CTO and that he took over the CEO role in 2005, and relevantly stating:
- 8.1 [I]f [Mr Weeda] had 'continuous employment' for the period 1 September 2002 to 31 May 2022, for purposes of the [LSL Act], which is denied:
 - 8.1.1 by operation of section 6(3) of the LSL Act, [Mr Weeda's] absences from, or interruption of employment, as referred to in subsection 6(2)(c) to (i) of the LSL Act, do not count towards [his] long service leave accrual;
 - 8.1.2 [Mr Weeda] has failed to particularise his absences from, or interruptions of employment, for purposes of section 6(3) of the LSL Act, for the period 1 September 2002 to February 2014;
 - 8.1.3 [Mr Weeda] failed to take into account his absences from, or interruptions of employment, referred to at [8.1.1] above, when calculating his long service leave accrual of 650.37 hours, as alleged at [5(c)] of [his Originating Claim], filed [27] October 2022;
- 5 On 29 May 2023, Mr Weeda filed a Response to Counterclaim, relevantly stating:
- b. [Mr Weeda] admits that he did not inform Silverhorse that it was liable to allow him to take long service leave, or that it was obliged to pay him in lieu of long service if his employment ended otherwise than because of serious misconduct – this is not a 'failure' because [he] wasn't under any kind of duty to alert Silverhorse to that matter;
 - c. [N]o estoppel arises in these circumstances because:
 - i. [Mr Weeda] did not represent to Silverhorse that he was not, at any material time, [Luceo's] employee; ...
 - iii. [Mr Weeda] did not make any representations to Silverhorse about his long service leave entitlements;
- 6 On 7 June 2023, at a Further Initial Hearing, the Court issued orders requiring:
- (a) The parties to file 'Copies of Records' containing any documents they intend to rely upon as evidence at the trial by 5 July 2023.
 - (b) The parties to file an agreed Statement of Facts by 30 June 2023.
 - (c) Mr Weeda to file any signed witness statements he intends to rely upon by 28 days prior to the date of the trial.
 - (d) Silverhorse to file any signed witness statements it intends to rely upon by 21 days prior to the date of the trial.
 - (e) The parties to file an outline of submissions they intend to rely upon by 14 days prior to the date of the trial.

The parties' evidence

- 7 Despite the Court's order at [6] above, Mr Weeda failed to file his Copies of Records. His counsel submitted that Mr Weeda ultimately complied with the Court's order at [6(a)] above when he filed his affidavit attaching the documents he intended to rely upon at the trial.
- 8 On 6 and 13 July 2023, Silverhorse filed its Copies of Records, comprising of 40 documents, including:
 - (a) Current and historical ASIC company extracts for Luceo dated 16 November 2022 and 5 July 2023: Documents 21 and 41.
 - (b) Silverhorse's annual financial reports for the financial years 2015 and 2017–2020: Documents 4–7 and 23.
 - (c) Silverhorse's annual and sick leave accruals for Graham Richardson and Steven Pearson, recording their respective commencement dates as 1 November 2010 and 9 February 2009: Document 13.

- (d) Silverhorse's long service leave accruals at 30 June 2015 for Graham Richardson, Steven Pearson and Lucy Lambelin, recording Ms Lambelin's commencement date as 28 April 2014: Document 15.
- (e) Silverhorse's long service leave records for the financial years 2015–2017 and 2020, and its annual leave accrual history report dated 31 March 2021: Documents 35–39.
- (f) Correspondence between the parties, including:
- (i) An email from Anthony Connor to Mr Weeda sent on 27 February 2014, enquiring whether Mr Weeda has received tax advice: Document 8.
 - (ii) An email from Anthony Connor to Mr Weeda and others sent on 20 March 2014, enclosing a Health & Safety Bulletin titled, '8 steps to identify a contractor': Document 10.
 - (iii) An email from Anthony Connor to Mr Weeda and others sent on 25 March 2014, in which Mr Connor states: Document 11:

I am presently finalising the irrevocable authority in relation to the existing Contracts and think within that same document we should articulate matters surrounding:

1. Quantum of employee entitlements and responsibility therefore;
 2. Assignment of leasehold premises;
 3. Contractual arrangements for Raymond – contractor or employee;
 4. The value to be attributed to the IP within Silverhorse from day one.
- (iv) An email from Anthony Connor to Mr Weeda and others sent on 18 June 2014, in which Mr Connor attaches a draft contractor's agreement and states: Document 12:
2. Draft Contractor's Agreement for Raymond. Please note;
 - a. The Service Fee must be inserted
 - b. This is a Contractor's Agreement and there are strict tax laws surrounding whether a contractor is indeed a contractor as opposed to an employee. The document contemplates the Contractor will not receive any employee benefits and will be registered for GST purposes. Also to the extent the Contractor is deemed an 'employee' as opposed to a Contractor, the Contractor must indemnify the Company for any costs incurred by the Company.
 - c. The scope of Services must be agreed.
 - d. Raymond should seek legal/ tax advice as to whether he fulfils the necessary 'control' tests that differentiates an employee from a contractor.
- (v) A letter from Mr Weeda to Paul Roberts dated 29 May 2022, stating: Document 18:

The calculation is based on the incorrect term. Please refer to Long service leave – What happens when business ownership changes? | Department of Mines, Industry Regulation and Safety (commerce.wa.gov.au). This means that the Long Service Leave should be calculated from 14/11/2001 through 31/05/2022 equating to 18.59 weeks and 706.35 hours. ...

The entitlements payout should be paid as an Eligible Termination Payment reflecting the hours summary as below:

	Weeks	Hours	Rate	Amount
Annual Leave (May payslip)		827.5538	141.3287	\$116,957.10
LSL (1/60th of continuous employment)	18.58809524	706.347619	141.3287	\$99,827.19
<i>Note: Based on continuous employment from 14/01/2001 through 31/05/2022</i>				
			Gross Total	\$216,784.29

- 9 On 10 July 2023, the parties filed an Agreed Statement of Facts, stating:

The Claimant's employment and directorship with the Respondent

11. Between 1 March 2014 and 31 May 2022, [Mr Weeda] was employed by [Silverhorse] in the role of CEO.
12. [Mr Weeda] was appointed as a director of [Silverhorse] on 11 March 2014.
13. At all material times between 11 March 2014 and 14 June 2022, [Mr Weeda] was a director of [Silverhorse].
14. Pursuant to section 180(1) of the Corporations Act, [Mr Weeda] had an obligation as a director of [Silverhorse], to exercise his powers and discharge his duties as a director with the degree of care and

diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a company in [Silverhorse's] circumstances; and
- (b) occupied the office held by, and had the same responsibilities within [Silverhorse] as [Mr Weeda].

15. As at March 2014 and during [Mr Weeda's] employment with [Silverhorse], [Mr Weeda's] employment duties included:

- (a) the architecture, design and development of [Silverhorse's] technology;
- (b) implementation and maintenance of technology for [Silverhorse's] clients;
- (c) overseeing customer satisfaction;
- (d) financial management of [Silverhorse];
- (e) recruitment;
- (f) marketing; and
- (g) sales activities.

16. In or around March 2014:

- (a) [Silverhorse] asked [Mr Weeda] to determine the employment liabilities for employees employed by [Silverhorse] who had previously been employed by Luceo, based on their continuous service with Luceo (**the Employment Liabilities**); and
- (b) [Mr Weeda] provided [Silverhorse] with details of the Employment Liabilities, which did not include any employment liability for [himself] for long service leave with Luceo.

17. In or around 2014, [Silverhorse] employed several previous employees of Luceo, that were not [Mr Weeda], and took on their Employment Liabilities based on their continuous service with Luceo.

10 On 11 September 2023, Mr Weeda filed an affidavit, stating:

(a) His employment biography includes:

Luceo Systems: (2001 – Present), Director and architect of Luceo's workflow publish [sic] technology. CTO and CEO, responsible for the development of the technology, its commercialisation (Sales), deployment, staff development and customer satisfaction.

(b) In 2002, seed capital was secured, and he was tasked with the architecture and development of the product (called Completions Connect). 'That was the point in time I became Luceo's employee. Prior to that time, Luceo had no money to employ anyone'.

(c) He was responsible for sales, ongoing development, implementation and customer satisfaction.

(d) By 2014, he was focused on growing the business to sell it. 'At that point, it was really just a good product supported by a one-man-band'.

(e) He was 'engaged as an employee (PAYG) and paid a salary from September 2002 through to March 2014'. Mr Weeda attaches a *Payment Summary Report – Individual Non Business* for the 2003 financial year and *PAYG Payment Summary – Individual Non Business* for the 2004–2014 financial years (**PAYG summaries**). The PAYG summaries state that Luceo made the following gross payments to him:

- (i) \$52,849 during the period 19 August 2002 to 30 June 2003.
- (ii) \$52,500 during the period 1 July 2003 to 30 June 2004.
- (iii) \$25,000 during the period 1 July 2004 to 30 June 2005.
- (iv) \$52,502 in the year ending 30 June 2006.
- (v) \$90,853 during the period 1 July 2006 to 30 June 2007.
- (vi) \$119,998, and a car allowance of \$7,793, during the period 1 July 2007 to 30 June 2008.
- (vii) \$189,875 during the period 1 July 2008 to 30 June 2009.
- (viii) \$186,987, and Reportable Employer Superannuation Contributions of \$16,828, during the period 1 July 2009 to 30 June 2010.
- (ix) \$253,985 during the period 1 July 2010 to 30 June 2011.
- (x) \$253,985 during the period 1 July 2011 to 30 June 2012.
- (xi) \$102,284 during the period 1 July 2012 to 30 June 2013.
- (xii) \$152,929 during the period 1 July 2013 to 30 June 2014.

(f) Under the heading 'Pre-employment discussions with Silverhorse':

25) The 60% Shareholder's CFO and lawyer (Anthony Connor) was tasked with due diligence on Silverhorse's behalf.

- 26) Silverhorse, and Mr Connor, had access to and was given a copy of Luceo's books (electronically).
 - 27) The process we had to follow to complete the agreement involved a restructure of Luceo to allow me to act on behalf of Luceo shareholders.
 - 28) I held 90% of the shares in Luceo.
 - 29) We had to devise processes to:
 - a) transfer the clients to the new entity;
 - b) employ existing staff in the new entity; and
 - c) transfer of entitlements.
 - 30) A compensatory financial transfer was made for the entitlements of the employees other than me.
 - 31) All employees were recognised as being part of an ongoing business with entitlements recognised.
 - 32) There was some consideration given to Silverhorse engaging me as an independent contractor, but that approach was abandoned in favour of direct employment.
 - 33) Silverhorse appointed me as its CEO in March 2014.
 - 34) There was no interruption to my employment. I transferred directly from Luceo to Silverhorse.
- (g) Under the heading 'Accruals and prior service':
- 38) I recall Silverhorse asking for information about leave accruals for Luceo staff that had transferred to Silverhorse.
 - 39) I responded by listing the names and accruals of the former Luceo staff, but I didn't include my own accruals in my response.
 - 40) At the time, I thought my answer properly reflected what was being asked of me.
 - 41) When Silverhorse employed those Luceo employees, money changed hands as compensation.
 - 42) I was in a different position. There'd been no payment asked of Luceo in connection with my transfer.
 - 43) I reasoned that Silverhorse had already committed to taking on liability for me because, at the time of the transfer, they knew that I'd been with Luceo from the outset and they didn't seek any compensation.
 - 44) I answered as I did because there was a transfer of business from Luceo to Silverhorse. Silverhorse knew this or at least, I assumed that they knew. I made that assumption because they must have known that my service commenced when I began working for Luceo.

11 On 27 and 28 November 2023, Silverhorse filed witness statements for Jason Lenko Antunovich (**Mr Antunovich**), Anthony Luke Connor (**Mr Connor**), and Paul William Alexander Roberts (**Mr Roberts**).

12 Mr Antunovich gave evidence that:

15. Raymond did not raise with me or ever indicate to me, during our discussions or subsequently, that he was or had been an employee of Luceo, or had any employment entitlements with Luceo that might transfer across to Silverhorse. At the time of negotiations, Raymond told me he was the owner of Luceo. Raymond also said that Luceo had some minor shareholders involved, making up around 10% of the total shareholding.
16. During my negotiations with Raymond, we discussed key Luceo employees transferring to a new entity (being Silverhorse) once it was set up, and the new entity taking on the employment entitlements of these employees that had previously been accrued at Luceo. The key Luceo employees were [Graham Richardson] and [Steven Pearson], who were programmers at Luceo at the time and helped run the technology. Raymond was not discussed as being a key transferring Luceo employee. No money was exchanged between Luceo and Silverhorse for Silverhorse assuming these liabilities. ...
19. If Raymond was an employee of Luceo and he expected his employment entitlements to transfer from Luceo to Silverhorse, I would have expected him to raise this with me as he did for the other Luceo employees because it would have been relevant to our negotiations, but he did not.
20. If Raymond had disclosed that he had employment entitlements with Luceo, especially over 10 years worth of long service leave entitlements, we might have had to structure the deal differently, as the new entity would probably have had to take those entitlements on. If I thought the new entity would have to take on such a significant entitlement, it might have changed the whole aspect of the deal going forward. It is a risk that we would have had to evaluate at that time, but it never came up, so it did

not impact the deal. ...

33. In the course of reviewing emails for preparing for this witness statement, I have read an email from Raymond to Pia Treloar dated 11 April 2014, after he had commenced with Silverhorse, in response to Pia's proposed split for Raymond's remuneration as an employee and as a director of Silverhorse. In that email, Raymond says that payment had been almost \$250K including super for base salary and about \$50K in directors' fees paid through a trust. This email is in **JLA-004**. My understanding of Raymond's response was that he was trying to minimise the tax in his remuneration arrangement with Silverhorse. I did not understand Raymond's email to mean that he had been an employee of Luceo. I was comfortable for Raymond to tell Silverhorse how he wanted his remuneration and engagement to be structured, so long the arrangement covered essential matters such as restraints and confidentiality.
- 13 The emails referenced in Mr Antunovich's witness statement [33] state the following:
- (a) Email from Ms Treloar to Mr Weeda sent 10 April 2014, 4:04pm:
- Hi Raymond,
- Further to your discussions with Jason and then further to the discussion regarding salary split between directorship and salary please see below the breakdown.
- Directorship - \$60k pa to be paid to trust
- Salary - \$190k pa inclusive super to be paid to individual
- KPI Bonus - Discretionary per the board
- Mobile - Reimbursed monthly
- Parking - Reimbursed Monthly
- Expenses - Reimbursed as required
- Please confirm this is your understanding prior to the processing of this month's payroll and for us to complete and finalise the contract and Director Agreement.
- (b) Email from Mr Weeda in reply to Ms Treloar's email, sent 11 April 2014, 8:03am:
- Hi Pia,
- Payment has been (apart from the disastrous 2012) almost \$250k inc super for base salary and about \$50k in "Director's" fees paid via our trust. Home internet, phone etc. was also included but we can leave it at the mobile.
- 14 Mr Connor gave evidence that:
24. In the course of my inspection of Luceo's documents, I did not see any employment records for Raymond, such as contracts of employment, leave records or entitlements, or anything that would indicate Raymond may be an employee of Luceo. Raymond did not tell me he was an employee of Luceo. ...
29. To ensure the IP rights could properly be granted to Silverhorse, I was involved in drafting an amended shareholders agreement for Luceo, which Raymond ultimately negotiated with Luceo's other shareholders. I spent a lot of time on the shareholders' agreement, and during that process, it never came up that Raymond may have been an employee of Luceo, nor was it referred to in Luceo's shareholders agreement. ...
40. I recall that for at least several months after March 2014, Raymond was undecided about whether he wanted to be engaged by Silverhorse as a contractor or an employee. My understanding is that there was no prior agreement between Raymond and Jason as to what capacity Raymond would join Silverhorse in. That decision was left up to Raymond. ...
42. During this period, I prepared both employment agreements and contractor agreements for Raymond. I also had various discussions with Raymond around this time about whether he wanted to be an employee or a contractor of Silverhorse. Raymond did not discuss with me any employment entitlements he may have had with Luceo during these discussions, nor was it included in the contracts I drafted. ...
44. At some time between March and June 2014, I asked Raymond what he wanted his engagement to be at Silverhorse, and I understood from that conversation that he was leaning towards being a contractor. I suggested to Raymond that he should seek tax advice on the matter because a contractor arrangement might not be right for his role at Silverhorse.
45. In around February or March 2014, Raymond was asked to provide entitlement balances from Luceo for the transferring Luceo employees. I cannot recall whether it was Pia or me who asked for these records, but I am confident that Raymond was asked as it was a material disclosure for the deal. Raymond only

provided leave balances for two Luceo programmers who were transferring to Silverhorse – Graham Richardson (**Graham**) and Steven Pearson (**Steven**). He did not provide Silverhorse with any Luceo entitlement balances for himself. There was no exchange of money for Silverhorse taking on the employment liabilities for Graham and Steven. ...

47. Raymond decided at some point after June 2014 that he wanted to be an employee of Silverhorse, rather than a contractor. This was entirely Raymond's decision.

15 Mr Roberts gave evidence that:

12. In preparation for this witness statement, I have searched for and reviewed Silverhorse and OGS's business records relating to Luceo. The Luceo documents in OGS's files include licence agreements, commercial agreements, its company constitution, its shareholders agreement and a couple of purchase orders. Within OGS's records is a copy of Luceo's 2012 annual financial report prepared by Caffarelli & Associates [**PWAR-001**], which I have reviewed. No provision for long service leave has been included in this financial report. If a company has a liability for long service leave, especially if it is significant, my experience is that this is a liability that will be referred to in the financial report.

The parties' contentions

16 On 1 December 2023, Mr Weeda filed an Outline of Submissions, contending:

- (a) A transfer of business took place between Luceo and Silverhorse, and for the purposes of long service leave, his employment with Luceo since 1 September 2002 was treated as employment with Silverhorse.
- (b) On 31 May 2022, when his employment with Silverhorse terminated, he had accumulated 19 years and 272 days of continuous employment, valued at \$91,915.59 (based on 650.37 hours of accrued long service leave multiplied by his hourly rate of \$141.3287). Of this, Silverhorse paid to him \$38,399.02.

17 On 5 December 2023, Silverhorse filed an Outline of Submissions, contending:

- (a) It is accepted that the relevant part of Luceo's business was transmitted to Silverhorse for the purposes of the LSL Act, such that if Mr Weeda was an employee of Luceo prior to his employment with Silverhorse, then Silverhorse would be regarded as his employer for the entire duration of his continuous employment with both Luceo and Silverhorse.
- (b) Mr Weeda has failed to establish on the balance of probabilities, and has not provided any evidence sufficient to satisfy the Court, that:
 - (i) He was employed by Luceo.
 - (ii) His employment with Luceo commenced on 1 September 2002.
 - (iii) His employment with Luceo was continuous until his employment with Silverhorse.
 - (iv) He had no absences from work during the period after 1 September 2002 other than as provided in s 6(1) of the LSL Act.
 - (v) The periods from 1 September 2002 to 28 February 2014 during which he was absent were for reasons described in s 6(3) of the LSL Act.
- (c) Mr Weeda has never produced any of the following information or documentation as evidence of his employment status with Luceo:
 - (i) An employment contract.
 - (ii) Any documentation relating to the nature of his engagement or relationship with Luceo.
 - (iii) Payment history indicating the regular payment of a salary.
 - (iv) Workers' compensation insurance records.
 - (v) Any employment records, other than PAYG summaries (which were only produced for the first time as attachments to Mr Weeda's affidavit filed on 11 September 2023).
 - (vi) Detail of the work undertaken and reward/remuneration provided for any work undertaken for Luceo from September 2002 to February 2014.
- (d) The PAYG summaries attached to Mr Weeda's affidavit do not confirm his employment with Luceo, or the period of his employment. Instead, they only indicate that he received payment of the specified amount during each relevant financial year.
- (e) Mr Weeda's silence about being an employee of Luceo and about Silverhorse owing to him a long service leave liability prior to his employment with Silverhorse, speak against Mr Weeda having been an employee of Luceo. This includes his silence during the negotiations leading to Luceo's business being transferred to Silverhorse, and during his tenure as Silverhorse's CEO and director.
- (f) It is reasonable to infer that, had Mr Weeda been an employee of Luceo, he would have mentioned this, or provided documents to this effect, during the course of negotiations from 2013 to 2014 when he provided details of Luceo's other employees' status.
- (g) As part of the due diligence process, Mr Weeda produced a copy of Luceo's financial report for the year ended

30 June 2012. As the sole director of Luceo, Mr Weeda was responsible for ensuring employee entitlements were provisioned and that the company's financial reports and records were accurate. There is no provision for long service leave in these statements, despite Mr Weeda's claim that by 30 June 2012, he would have been an employee of Luceo for nine years and nine months. Therefore, the financial reports support either that he was not an employee of Luceo, or that he had not been an employee since 1 September 2002, or that he had exhausted his long service leave entitlements.

- (h) Mr Weeda's silence continued during the period when he was the CEO of Silverhorse, a role that required him to provide accurate financial reports to the Board, including provisioning for long service leave. Mr Weeda's silence continued even after issuing a report to the Board of Silverhorse in October 2021, which detailed a significant adjustment to Silverhorse's provision for long service leave on account of a former Luceo employee ceasing permanent employment with Silverhorse.
- (i) Mr Weeda was the sole individual who could have informed Silverhorse that he was an employee of Luceo. A reasonable person, and particularly a reasonable executive director or CEO, would have disclosed this information during the pre-transaction negotiations, or if overlooked at that time, upon realising that Silverhorse did not have an adequate provision for long service leave in its balance sheet. Mr Weeda failed to take such action.
- (j) Therefore, Mr Weeda was only a director and shareholder of Luceo. He was not an employee. He did not have continuous employment with Luceo for the period between 1 September 2002 until starting employment with Silverhorse.

The trial

18 At the trial, Mr Weeda sought and was granted leave to give further evidence that was responsive to the witness statements and Outline of Submissions filed by Silverhorse subsequent to Mr Weeda filing his affidavit. Mr Weeda gave the following further evidence:

- (a) His employment with Luceo commenced on 1 September 2002.
- (b) There were no interruptions to his employment with Luceo for any reason from 1 September 2002 to 28 February 2014.
- (c) He took annual leave but did not take personal leave.
- (d) Other than annual leave, there were no other absences.
- (e) In response to Mr Connor's witness statement [45] (at [14] above) that when requested to provide the leave balances for the transferring Luceo employees and only providing those for Mr Richardson and Mr Pearson:
 - (i) Pia Treloar (OGS' CFO supporting Mr Connor with the due diligence) understood him to be an employee of Luceo because:
 - (A) At one point, Ms Treloar asked him directly, 'Are you an employee of Luceo? What's the arrangement?'; and
 - (B) In 2014, in the period leading up to the transmittal of business, Luceo's MYOB books in electronic format were provided to Ms Treloar.
 - (ii) As OGS also used MYOB, Ms Treloar could review all of Luceo's payroll 'including mine'. When Ms Treloar requested the leave balances, she was only asking about the other employees.
- (f) In response to Mr Connor's witness statement [46] that while Mr Connor does not recall discussing the transferring Luceo employees with him, Mr Connor recalls noting down the transferring employees and that he was not one of them: (ts 16):

From my position, they – I – the understanding was there, that I was an employee of, um, Luceo this entire period. Ah, Mr Antunovich suggested I go and research alternative ways to be employed, you know, perhaps as a contractor, to minimise tax exposure. Um, I went to my accountant and, ah, she said, 'You're really only employed by one person, so there's no benefit. You should continue on the same basis that you were with Luceo'.
- (g) In response to a question from his counsel as to whether he was asked to indicate whether he was an employee of Luceo, and if so, who he provided that information to: (ts 17):

I provided that information to Pia, because she asked. Um, I can't recall exactly how the conversation went with Jason, but, um, based on the fact that he said, 'You should go look at alternative ways', I assumed he understood that I was, ah, an employee of Luceo.

19 Under cross-examination, Mr Weeda stated that:

- (a) Luceo started with himself, Andy Barnes and Matt Callahan as directors. Mr Callahan resigned as a director in March 2004 and Mr Barnes resigned as a director in November 2005. From that time, he has been the sole director of Luceo, although Mr Callahan and Mr Barnes remain shareholders.
- (b) He and his wife are joint shareholders in the majority of Luceo's ordinary shares.
- (c) When Andy Barnes was a director, Mr Barnes was responsible for the day-to-day management of Luceo.
- (d) The reference to 'one-man-band' in his affidavit [11], refers to himself. At the time, he owned 90% of the business.
- (e) He was aware Mr Connor was conducting a due diligence process on Luceo. He does not recall Mr Connor

requesting details of Luceo's employees. He thinks it was Ms Treloar who made the request.

- (f) In relation to employee liabilities, he sent an email about Mr Richardson and Mr Pearson. He gave 'access to all of the documents I had with respect to Luceo' and 'also a copy of the MYOB ... accounting file so they could research for themselves': (ts 21).
- (g) He assumes Mr Connor and Mr Antunovich knew he was employed by Luceo because 'they had a copy of the MYOB accounting system. In that system, I was treated as an employee, hence gave rise to the PAYG summaries': (ts 21).
- (h) PWAR-001, Luceo's 2012 financial report, makes no provision for long service leave. His accountant used the MYOB accounts to produce this financial report. He signed the director's declaration, and he provided a copy of this financial report to OGS during the negotiations with them.
- (i) In relation to his affidavit [30] and [41] that a 'compensatory financial transfer was made for the entitlements of the employees other than me' and '[w]hen Silverhorse employed those Luceo employees, money changed hands as compensation': Luceo paid approximately \$27,000 to 'the new entity': (ts 24).
- (j) There was no provision for the transfer of money in the MOU. The transfer occurred after the MOU was signed. He no longer recalls the reason for the transfer. The transfer did not account for his long service leave liability because 'when Pia asked about [his long service leave liability and annual leave and any other liabilities], I'd said that the new entity can take ... ownership of that, because of what I was bringing to the table'. He said this to Ms Treloar during the due diligence process: (ts 25).
- (k) The PAYG summaries for the year ended 30 June 2012 and 2013 show a reduction from \$253,985 to \$102,284 because: (ts 26):

Um, in a small business such as Luceo, we run on projects. So we had a number of projects running at that particular time. And, um, we tend to service the projects, then they come to a natural end, because they are construction and commissioning projects. And then you have to wait for the next ones to start. And because I was sales as well as technical support, I couldn't really juggle the same thing all the time, so we had ups and downs in revenue. So when there was a – you know, in good years, I paid myself what I could, and then in not so good years, I made sure that everyone else got paid and I just took what I could.

- (l) He was paid monthly, but the amount 'differed based on how the business was going': (ts 26).
- (m) As at late March 2014, he had not decided whether he wished to be employed by, or contracted to, Silverhorse: (ts 28).
- (n) From February 2014 to June 2014, he was discussing with Silverhorse whether he would be an employee or a contractor of Silverhorse: (ts 29).
- (o) He took responsibility for negotiating Silverhorse's employee contracts for Mr Richardson and Mr Pearson. He was across all of the issues for these employees: (ts 30).
- (p) In his capacity as Silverhorse's CEO, he was responsible for Silverhorse's financial management. This included presenting to the Board about Silverhorse's performance, approving financial reports, and signing annual financial reports. For the monthly reports, he would meet with Mr Roberts monthly, for a minimum of 15 minutes, to review and discuss the draft report. When reviewing the draft report, he focused on revenue and costs and ensured the tax was represented correctly. He did not bring up his long service leave liability with Mr Roberts.
- (q) During his employment as Silverhorse's CEO, he did not turn his mind to the provision for his long service leave: (ts 32).
- (r) PWAR-004 is an example of the monthly management reports he provided to the Board. The report states that it is prepared by 'Raymond Weeda / Paul Roberts' and approved by 'R Weeda'. The Balance Sheet at 31 October 2021 states, 'Provision for Long Service Leave' as \$69,338 at 31 August 2021 and \$40,583 at 30 September 2021. This reduction was due to Mr Richardson using up his long service leave entitlements: (ts 33).
- (s) This is reflected on the previous page under the heading 'Expenses Comments' as 'LSL accrual correction of \$29k'. His salary was approximately \$100,000 more than Mr Richardson's salary. Mr Richardson was employed with Luceo approximately five years after his own employment with Luceo commenced. He did not interrogate whether \$40,583 was an adequate provision for Silverhorse's long service leave obligations: (ts 34).
- (t) Caffarelli & Associates prepared Luceo's 2012 financial report. They were Luceo's and his personal accountants; he brought them in as the accountants for Silverhorse. They prepared Silverhorse's financial report for the year ended 30 June 2015 (PWAR-005). PWAR-005 does not contain a provision for long service leave. This does not mean PWAR-005 is consistent with there being no long service leave entitlement for an employee with more than 10 years of accrued continuous employment because 'you don't need to accrue for that liability. You just have to have the ability to pay it when it becomes due': (ts 35).
- (u) PWAR-005's Profit and Loss Statement states that the 'Long Service Leave' expense in 2015 was \$5,625. He is unsure but thinks this payment must have been for Mr Pearson: (ts 35).
- (v) He interrogated the breakdowns in Silverhorse's balance sheets, but not the breakdown for long service leave. In 2021, he discussed with Mr Roberts the long service leave payable to Mr Richardson upon Mr Richardson's redundancy but did not interrogate the provision for long service leave by reference to all employees including

himself.

20 Upon re-examination, Mr Weeda clarified that:

- (a) When he referred to 'one-man-band', he meant that he was personally responsible for Luceo's revenue generation, ensuring the technology functioned properly and that clients were satisfied, despite the fact that Luceo had other employees.
- (b) The statement in his Further and Better Particulars that his employment with Luceo commenced in 2004 is incorrect. The evidence given by him at the trial that his commencement date with Luceo was 1 September 2002 is correct.
- (c) In preparing Luceo's accounts with Pina Caffarelli, Luceo's accountant, he did not discuss with them whether there ought to be provisions for long service leave. Caffarelli & Associates came on board as Silverhorse's accountants at the outset. He did not have any discussion with them about the accounting rules relating to provisions.
- (d) Prior to him sending the email to Ms Treloar regarding the leave liabilities for Mr Richardson and Mr Pearson, he had the following exchange with Ms Treloar: (ts 38):

She said, 'Well, you know, what are we going to do about your liability?'

And I said, 'Well, Silverhorse just has to wear it'.

21 Under cross-examination, Mr Connor stated that:

- (a) He was involved in the due diligence that preceded Silverhorse's acquisition of some of Luceo's business. As part of the due diligence, he requested the production of employment records, which were produced to Ms Treloar.
- (b) OGS had a folder of all documents accumulated as part of the due diligence. He saw all the documents in that folder. He did not see a MYOB file, nor payroll records in that folder.
- (c) It is possible that employment records were provided that Ms Treloar saw and that he did not. He was not aware of Ms Treloar having any records that he did not have because he assumed that all documents were going into the OGS folder. It is possible that Ms Treloar saw records that are not in the folder.
- (d) Luceo's employment records were a material consideration. He was able to move forward with the due diligence without viewing the employment records personally because amongst the documents he had received from Ms Treloar was a statement of staff entitlements. He had asked Ms Treloar whether the statement was correct, and she confirmed that it was: (ts 51).
- (e) He was appointed a director of Silverhorse on 11 March 2014 and was seeing Silverhorse's financial records from that point onwards.
- (f) As a newly formed company, Silverhorse was using the pay services of a third-party supplier. There was no ability to input contractor details within the pay service. Therefore, Mr Weeda was to be employed by Silverhorse until he determined the status of his engagement.
- (g) He did not know, or have any dealings with, Mr Weeda before late 2013 and had no knowledge of Mr Weeda's working arrangement with Luceo prior to that time.

22 Under re-examination, Mr Connor stated that:

- (a) He and Mr Weeda had numerous discussions about whether Mr Weeda would be employed by, or engaged as a contractor to, Silverhorse. Mr Weeda had originally wished to be engaged as a contractor. Through his experience, he had said to Mr Weeda that there may be complications with Mr Weeda being engaged as a contractor because of the 80/20 rule and requested Mr Weeda to take independent tax advice.
- (b) He is not aware whether Mr Weeda took independent tax advice, but he did put the request for Mr Weeda to take independent tax advice in writing because of the material concerns it raised for both the company and Mr Weeda.
- (c) As a director of Silverhorse, he preferred that Mr Weeda did not create a liability for Silverhorse, which was one of his concerns if Mr Weeda was to be contracted to Silverhorse.
- (d) Mr Weeda gravitated between being employed by, and being contracted to, Silverhorse. This resulted in him preparing two different contracts: an employment contract and a contractor agreement, for Mr Weeda to then decide on his status. From memory, Mr Weeda did not decide on his status until mid-2014.
- (e) Ms Treloar did not tell him she had any other information relating to Mr Weeda's employment with Luceo. Ms Treloar did not tell him that Mr Weeda was employed by Luceo. Ms Treloar was the person at OGS who set up the employment structure for Silverhorse.

23 Under cross-examination, Mr Roberts stated that:

- (a) He became involved with Silverhorse in 2015. Prior to that time, he did not know, nor have any contact with, Mr Weeda or Luceo.
- (b) He was involved with Mr Weeda in preparing the Board report and financial reports, and on average spent 15–30 minutes with Mr Weeda discussing specific questions about the reports.

24 Under re-examination, Mr Roberts stated that:

- (a) Mr Weeda always had questions about the draft Board reports. The level of detail of Mr Weeda's questions depended on the relevant issue at the time. They often discussed the debtors.

25 At the trial, Mr Antunovich gave the following further evidence:

- (a) At the time of his negotiations on behalf of OGS with Mr Weeda for Mr Weeda to be appointed as the CEO of the new entity, his expectation and preference was for the CEO to be an employee, but he did have discussions with Mr Weeda that Mr Weeda would be able to look at different ways that would suit Mr Weeda's requirements. Mr Weeda did not express to him a preference.

26 Under cross-examination, Mr Antunovich stated that:

- (a) No payment was made for the transfer of Mr Richardson's and Mr Pearson's employment.
- (b) His first involvement with Mr Weeda, and with Luceo, was around 2013. He has no firsthand knowledge of Luceo's engagement with Mr Weeda going back to 2002.
- (c) He was responsible for bringing in Mr Connor to undertake the due diligence. He had known Mr Connor for many years and had worked with Mr Connor on a number of deals over that time and knew Mr Connor would undertake the due diligence of Luceo diligently.
- (d) He does not know whether Mr Connor saw any of Luceo's employment-related documents.
- (e) Ms Treloar was his CFO, and he had discussions with her. As part of the due diligence process, he was aware that Ms Treloar reviewed the initial contracts and the transfer of the two employees involved, including what that would entail. He could not specify the exact documents she examined. However, since Silverhorse had not yet been set up, he surmised that any documents Ms Treloar received would have been saved on OGS' server.

27 In closing submissions, counsel for Mr Weeda stated:

- (a) Evidence of whether Mr Weeda was Luceo's employee necessarily and exclusively comes from Mr Weeda. Silverhorse's evidence was that its witnesses had no knowledge of Mr Weeda's service arrangements with Luceo.
- (b) Mr Weeda's evidence was that he became an employee of Luceo on 1 September 2002 following a capital raising and Luceo becoming financially capable of employing him. After that, he worked as Luceo's most senior person, with ultimate responsibility, performing a broad role, essentially undertaking whatever needed to be done.
- (c) Mr Weeda's evidence was that Luceo's capacity to pay him rose and fell and he adjusted his earnings to fit Luceo's financial capacity, which is reflected in the PAYG summaries.
- (d) Under cross-examination, Mr Weeda gave viva voce evidence that he provided Ms Treloar with a MYOB file which contained Luceo's payroll records. Mr Weeda could have, but did not, bring the MYOB file to court.
- (e) Mr Weeda's evidence that he discussed with Ms Treloar that he was an employee of Luceo, was not raised in his affidavit. Nor was it raised at any time prior to the trial. Mr Weeda could have called Ms Treloar to give evidence about the payroll records that she looked at as OGS' CFO.
- (f) Mr Weeda made the decision that the PAYG summaries and his evidence as the only person who was there, is likely to be compelling enough.
- (g) Whilst PAYG summaries are issued to employees and others, Mr Weeda's evidence is that he was employed by Luceo and the PAYG summaries show tax being deducted from his salary.
- (h) The only person who was there, who knew and was called, was Mr Weeda, who says he was Luceo's employee. There is no evidence that contradicts that proposition.
- (i) There is no evidence that Mr Weeda behaved dishonestly.
- (j) Mr Weeda may be criticised for not disclosing his employment status to Silverhorse in the two-month window between Silverhorse being created in January 2014 and Mr Weeda commencing as its CEO in March 2014. However, Silverhorse should have known that Mr Weeda was an employee of Luceo from the comprehensive due diligence undertaken of Luceo.
- (k) The PAYG summaries and Mr Weeda's evidence are consistent with him being an employee of Luceo.
- (l) There is no evidence that proves that Mr Weeda was not an employee of Luceo.
- (m) Silverhorse's witnesses' evidence is only to the effect of what they did not know, and from that, they draw the inference that Mr Weeda was not an employee of Luceo.
- (n) Silverhorse, as Mr Weeda's employer, had the responsibility of knowing what its legal liabilities were when taking on a transferring employee. The burden of telling them was not on Mr Weeda. Unless Mr Weeda lied to them, and there is no evidence of that, then Silverhorse had every way of knowing that Mr Weeda was an employee of Luceo and no excuse for not knowing that Mr Weeda was an employee of Luceo.
- (o) It was open for Mr Weeda to attempt to produce corroborating evidence in the form of additional records from Caffarelli & Associates, or to call them to produce any records that they had to court, bearing in mind that they may have an obligation to retain records for a longer period than Luceo was required to.
- (p) Mr Weeda could have, but opted not to, take steps to bolster his case, such as producing bank statements showing he was receiving payments from Luceo and their frequency.
- (q) Mr Weeda's evidence in court was that he worked for Luceo without any interruption that would break his service or that would not count as service. There was no cross-examination on this point, so if Mr Weeda's evidence is accepted, then it should be found that his employment commenced on 1 September 2002 and continued uninterrupted and continuous until 28 February 2014.

- (r) Of relevance are the long service leave spreadsheets which are PWAR-006, PWAR-007, PWAR-009, PWAR-011, PWAR-013 and PWAR-015, noting that 'Directors are excluded'. This indicates that Mr Weeda's long service leave entitlements would not be included in these spreadsheets, as when Mr Roberts was preparing the spreadsheet he did not have regard to anyone who was also a director, as Mr Weeda was. Mr Weeda is listed on PWAR-015 with the notation 'N/A'. These documents indicate that Silverhorse was not paying attention to Mr Weeda's long service leave accruals because they were deliberately excluding him from their calculations because he was a director.
- (s) PWAR-001 (Luceo's 2012 financial report) records 'Salaries' paid during the year ended 2012 of \$524,246.52 and 2011 of \$462,531.19. These figures exceed the salaries paid to Mr Richardson and Mr Pearson (of circa \$100,000 each). The Court should infer that these figures include the salary paid to Mr Weeda.
- (t) In an email within JLA-004 (at [13(b)] above), Mr Weeda refers to receiving almost \$250,000 plus \$50,000 in director's fees (**JLA-004 Email**). Mr Weeda was not cross-examined on this email. The email on its face refers to a disastrous 2012. It is unclear whether the reference to 2012 is to a calendar or financial year.
- (u) The 2012 PAYG summary indicates Mr Weeda received a gross payment of \$253,985 which appears consistent with what he stated in the JLA-004 Email regarding his salary.
- (v) Mr Weeda's statement of his Luceo salary in the JLA-004 Email sent in March 2014 is consistent with his claim that he was a Luceo employee, consistent with Luceo's financial report, and consistent with the PAYG summaries.
- (w) In relation to Mr Weeda's statement of receiving director's fees in the JLA-004 Email but Luceo's financial report not containing any reference to him receiving director's fees, it may be that the financial report is incomplete or that Mr Weeda was mistaken about receiving director's fees. Director's fees are not salary and there is no evidence supporting Silverhorse's contention that Mr Weeda received director's fees that are included in the 'salary' category of Luceo's 2012 financial report.
- (x) Whilst Mr Weeda states in the JLA-004 Email that the director's fees were paid, Luceo's 2012 financial report does not disclose that, and there is no evidence to explain as to why they do not disclose it.

28 In closing submissions, counsel for Silverhorse stated:

- (a) If the Court finds that Luceo employed Mr Weeda from 1 September 2002 to 28 February 2014 without any interruption, then Silverhorse does not dispute the quantum of the long service leave entitlement that is claimed by Mr Weeda.
- (b) For Mr Weeda to succeed, he must establish on the balance of probabilities that he was Luceo's employee and received payments from Luceo in that capacity and not as a director, and that he was continuously employed for the period claimed within the meaning of the LSL Act.
- (c) Mr Weeda asserts that he was the only person in the position to know of his employment status with Luceo. If this assertion is correct, the fact that Mr Weeda did not bring his employment status with Luceo to Silverhorse's attention strongly suggests he was not an employee of Luceo.
- (d) However, it is incorrect to say that Mr Weeda was the only person who could know whether he was an employee of Luceo. Until 2005, there was another co-director, who remains a shareholder (Andy Barnes) who could have given evidence of Mr Weeda's employment. Similarly, there was material accessible to Mr Weeda's accountant.
- (e) Mr Weeda admitted in his Response to Counterclaim and in his affidavit that he did not inform Silverhorse that it was liable for his long service leave accrued with Luceo and that he omitted his own leave accruals in the details provided to OGS. Mr Weeda asserted at the trial for the first time, without any substantiating documents, that he provided information of his employment in the form of a MYOB file to Ms Treloar, in circumstances where:
 - (i) Mr Weeda did not provide disclosure of documents in July 2023 as required by Court order; and
 - (ii) The only documents Mr Weeda has provided in the proceedings are the PAYG summaries attached to his affidavit.
- (f) In relation to the MYOB file, Mr Connor confirmed that the process adopted during the due diligence was to save material provided by Luceo into a folder maintained by OGS. Mr Connor was unaware of Luceo having provided a MYOB file and was not told by Ms Treloar that such a file had been provided. OGS' Luceo folder does not contain a MYOB file.
- (g) Mr Weeda stated that Luceo's financial reports were prepared using the MYOB file. Luceo's 2012 financial report does not provision for any long service leave liability, which would be expected to be recorded in the financial report if the MYOB file did in fact record that Mr Weeda was an employee who was continuously employed from 1 September 2002.
- (h) The weight of evidence before the Court does not substantiate Mr Weeda's new evidence regarding the MYOB file, establishing his status as an employee.
- (i) Silverhorse had not contacted Ms Treloar with a view of asking her to give evidence in the proceedings and did not take any steps to engage with her following Mr Weeda giving new evidence at the trial about his interactions with her.
- (j) The PAYG summaries do not confirm whether payments were received by Mr Weeda in his capacity as a company director or as an employee, as the *Taxation Administration Act 1953* (Cth) provides that PAYG summaries can be used for both purposes.
- (k) Further, having located the PAYG summaries, it begs the question why historical additional employment evidence

has not been provided by Mr Weeda in the proceedings.

- (l) Mr Weeda's evidence that Luceo paid \$27,000 to the new entity for Mr Richardson's and Mr Pearson's leave liabilities is unsupported by any other evidence and directly contradicted by the evidence of Mr Connor and Mr Antunovich, and by PWAR-005 (Silverhorse's 2015 financial report), specifically PWAR-005's Profit and Loss Statement and Notes to the Financial Statements.
- (m) PWAR-016 (a balance sheet Silverhorse provided to PayPac in 2014), produced when Mr Weeda was CEO, is limited to Mr Richardson and Mr Pearson. It details Mr Richardson's and Mr Pearson's commencement dates with Luceo, as November 2010 and February 2009 respectively.
- (n) At no time during the negotiations with Mr Connor and Mr Antunovich did Mr Weeda raise his employment status with Luceo, despite being requested to provide employee details as part of the due diligence so that existing liabilities could be calculated. At no time during Mr Weeda's employment as Silverhorse's CEO, when Mr Weeda prepared Board presentations, particularly after the significant payment to Mr Richardson in 2021, and given his responsibility as Silverhorse's CEO for financial management, did Mr Weeda raise his employment with Luceo. Being a diligent CEO and experienced in business, Mr Weeda should have identified the discrepancy in Silverhorse's long service leave provisions. Silverhorse says Mr Weeda's silence reflects that Mr Weeda did not consider that he was entitled to long service leave.
- (o) Mr Weeda signed Luceo's and Silverhorse's financial reports and declared that they were a fair presentation of the company's financial position. The accounts were prepared with the assistance of Caffarelli & Associates. The lack of provision for long service leave suggests that Caffarelli & Associates knew that Mr Weeda was not an employee.
- (p) In the JLA-004 Email, Mr Weeda represents having received from Luceo in 2012 almost \$250,000 plus \$50,000 in director's fees. The PAYG summaries substantiate that Mr Weeda's representations of the amounts received from Luceo in the JLA-004 Email are inaccurate. There is also a discrepancy between Mr Weeda's assertion of receiving director's fees and Luceo's financial report (PWAR-001) which does not refer to director's fees having been paid to Mr Weeda.
- (q) The PAYG summary for 2012 refers to Mr Weeda receiving a gross payment from Luceo of \$253,985.
- (r) PWAR-001 refers to 'Employee benefits expenses' of \$570,876.58. This does not confirm Mr Weeda's status as an employee because there is no provision for other payments Mr Weeda was receiving at the time as a director, and it may be that those director's payments were incorporated within the provision for employee benefits.
- (s) The JLA-004 Email is dated 11 April 2014, after Silverhorse was established and Mr Weeda was appointed as its CEO. The JLA-004 Email is addressed to Ms Treloar and copied to Mr Antunovich. Mr Antunovich states in his witness statement [33] that by the JLA-004 Email, he understood Mr Weeda was attempting to minimise the tax on his financial arrangement with Silverhorse and did not understand Mr Weeda to mean he had been an employee of Luceo.
- (t) In the JLA-004 Email, Mr Weeda refers to having received \$300,000 from Luceo in 2012, which was an anomaly that he describes as a 'disastrous 2012'.
- (u) The 'greater emphasis' is on PWAR-001 and the lack of provision for long service leave.
- (v) Mr Weeda gave evidence at the trial that there is no legal requirement for PWAR-001 to make provision for long service leave. This flies in the face of the director's declaration that accompanies every financial report, which is that there is a fair presentation of the company's financial performance within the report.
- (w) At the time, Mr Weeda's long service leave accrual was approximately \$40,000, which would have significantly impacted Luceo's balance sheet and fair presentation of Luceo's financial performance. Particularly as PWAR-001 records that Luceo posted a loss and had accumulated losses totalling \$189,574.68 in 2012, meaning Luceo would have struggled to pay the liability had Mr Weeda terminated his employment at that time, and therefore ought to have been provisioned for in Luceo's financial report.
- (x) The evidence is that Mr Weeda did not decide to be employed by, or be engaged with, Silverhorse until June 2014. Mr Antunovich's evidence was that his preference was for a CEO to be an employee. If Mr Weeda was an employee of Luceo, he would have readily confirmed that he should be employed by Silverhorse. Mr Weeda did not confirm his intention to be an employee of Silverhorse for almost four months.
- (y) In all the circumstances, on the balance of probabilities, Mr Weeda was not Luceo's employee, and this is the reason why Mr Weeda did not raise his employment with Luceo with OGS or Silverhorse prior to his resignation from Silverhorse in April 2022.
- (z) There is a discrepancy between Mr Weeda's Originating Claim filed on 27 October 2022 and Mr Weeda's Further and Better Particulars filed on 13 March 2023 concerning the date he claims his continuous employment with Luceo commenced, which has not been adequately explained. Further, Mr Weeda has not produced any evidence to substantiate his claim that his employment with Luceo commenced on 1 September 2002.
- (aa) Mr Weeda's continuous employment was challenged during cross-examination by way of questions about the significant reduction in payments across PAYG summaries, which may indicate a break in employment. Mr Weeda stated that the difference was a result of Luceo's financial performance, without any substantiating evidence justifying his explanation.
- (bb) The weight of evidence is insufficient for the Court to determine on the balance of probabilities that Mr Weeda was continuously employed by Luceo, or that the period of that employment was continuous from 1 September 2002.

Consideration

Issues for determination

- 29 By the trial, Silverhorse were no longer pursuing the Estoppel Argument (at [2(c)] above) or the Set Off Argument (at [2(e)] above).
- 30 Further, given Silverhorse's concession in its Outline of Submissions regarding the transmission of business from Luceo to Silverhorse (at [17(a)] above), the parties agreed the remaining issues for determination are those set out in Silverhorse's Outline of Submissions [17]. Namely, that for Mr Weeda's claim to succeed, he needs to establish, on the balance of probabilities, that from 1 September 2002 to 28 February 2014:
- (a) He was Luceo's employee; and
 - (b) He had continuous employment with Luceo, with no absences from, or interruption to, his employment that would not count towards his period of employment with Luceo under the LSL Act.

Relevant principles

- 31 There was no dispute with Silverhorse's Outline of Submissions [5] and [18] that:
- (a) The Court will need to decide, on the balance of probabilities, whether Mr Weeda was an employee of Luceo: *Desai v Harman & Co Pty Ltd* [2017] WAIRC 00742 [26].
 - (b) In addition to establishing continuous service, Mr Weeda must also establish what leave was accrued in the period of continuous service, accounting for any periods of leave taken, particularly long service leave: *Tweedie v Zenitas Healthcare Pty Ltd* [2023] WAIRC 00732 [38].
- 32 There was also no dispute that as it was Mr Weeda's claim, he had the onus of satisfying the Court as to the establishment of his claim.
- 33 In *G v H* (1994) 181 CLR 387 (*G v H*), 391–392, Brennan and McHugh JJ stated:
- [W]hen a court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had to that party's ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response. As Mason CJ, Deane and Dawson JJ explained in *Weissensteiner v The Queen*:
- [I]t has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. (footnotes omitted)
- 34 In *G v H*, 402, Deane, Dawson and Gaudron JJ stated:
- [I]t is well settled that, in the course of the ordinary processes of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his or her power to provide or give evidence on some issue, declines to do so. Thus, for example, there may sometimes be an inference in civil cases that the evidence, if called, would not assist that party's case. And there may sometimes be an inference in criminal cases of 'guilty knowledge', in the sense of knowledge that the evidence cannot be explained in a way that is consistent with innocence. They are inferences that are to be drawn, if at all, in accordance with strict legal reasoning. In other cases, the failure to give evidence may result in more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence. (footnotes omitted)
- 35 Besanko J in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555 [122]–[124] summarised the decisions relevant to the question of whether a court could be satisfied to the relevant standard from the evidence that was before the court:
- 122 In *Ho v Powell* [2001] NSWSCA 168; (2001) 51 NSWLR (*Ho v Powell*) Hodgson J (with whom Beazley JA agreed) made the following two points. First, Lord Mansfield's maxim in *Blatch v Archer* (1774) 1 Cowp 63 at 65; (1774) 98 ER 969 at 970 that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted, may affect the assessment of matters which are relevant to whether the limited material before the Court is an appropriate basis on which to reach a reasonable decision. Secondly, the principle in *Jones v Dunkel* is a particular application of Lord Mansfield's maxim. Hodgson JA said the following (at [14]–[16]):
- 14 There is a long-standing controversy whether the civil standard of proof requires a numerical probability in excess of 50 per cent (see *Davies v Taylor* [1974] AC 207 at 219), or belief amounting to reasonable satisfaction (see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362). My own opinion is that the resolution of the controversy involves recognition that,

in deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision. I discussed this in some detail in an article published at (1995) 69 ALJ 731 (D H Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-finding').

- 15 In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so: cf. 69 ALJ at 732-3, 736, 740. As stated by Lord Mansfield in *Blatch v Archer* (1774) 1 Cowp. 63 at 65 (98 ER 969 at 970): '... [A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'. See also *Azzopardi v The Queen* (2000) 75 ALJR 931 at 935 [10]; 179 ALR 349 at 353 [10].
- 16 The case of *Jones v Dunkel* (1959) 101 CLR 298 is a particular application of this principle. That case itself related to a situation where there was evidence supporting an inference against a party, and that party did not give or call evidence, which that party was plainly in a position to have given or called, in order to explain or contradict the material presented. In my opinion, a similar principle applies where a person bearing the onus of proof does not give or call evidence which that person is plainly in a position to give or call; and unless some explanation is given of this failure, the tribunal of fact is entitled to infer that this evidence would not have assisted that person's case: cf. *Commercial Union Insurance Co. of Australia Limited v Fercom Pty Limited* (1991) 22 NSWLR 389.
- 123 In *Coshott v Prentice* [2014] FCAFC 88; (2014) 221 FCR 450 (*Coshott v Prentice*), the Full Court of this Court referred with approval to Lord Mansfield's maxim and the observations of Hodgson JA in *Ho v Powell* (at [80]) and went on to say the following (at [81]–[82]):
- 81 Thus, where the evidence relied upon by a party bearing the onus of proof does not itself clearly discharge the onus, the failure by that party to call or give evidence that could cast light on a matter in dispute is relevant to determining whether the onus is being discharged: *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371 (Dixon CJ); *Shalhoub v Buchanan* [2004] NSWSC 99 at [71] (Campbell J). This principle is therefore wider than that in *Jones v Dunkel* (1959) 101 CLR 298. As Austin J in *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 explained at 93 [440], '[w]hereas *Jones v Dunkel* reinforces an inference drawn against the party who has not called evidence, to the effect that the evidence would not have assisted that party's case, *Blatch v Archer* leads either to the drawing of such an inference, or to some other assessment of the weight of evidence, unfavourable to the party against whom the principle is applied.' (emphasis in original)
- 82 In short, the Coshott parties bore the onus of proving the trust over Robert's interest but failed to call or give evidence explaining the documents and transactions on which they rely. Yet Robert, in particular, was in the best position to explain them. This cannot be ignored when weighing the limited evidence they relied upon to support their case with all the other evidence which tended to undermine it.
- 124 In Heydon JD, *Cross on Evidence* (13th ed, LexisNexis Australia, 2021), the learned author states (at [1215]):

Lord Mansfield CJ's maxim is wider than the rule in *Jones v Dunkel* because the rule is available against a party not bearing the onus of proof. But the maxim is also available against a party bearing that onus – in permitting a conclusion that uncalled evidence would not have helped the case of a party not calling it, or permitting inferences against the party to be more strongly drawn, or assisting in deciding whether the party bearing the onus has discharged it.

The legislation

- 36 Mr Weeda's employment with Silverhorse ended on 31 May 2022. Therefore, the version of the LSL Act applicable to the calculation of his long service leave entitlements at that time was the version current from 14 April 2022 to 19 June 2022.
- 37 Mr Weeda's employment with Luceo ended on 28 February 2014. Therefore, the version of the LSL Act applicable to the calculation of his long service leave entitlements at that time was the version current from 11 September 2010 to 21 December 2021.
- 38 Section 8 and s 9(2) of each version of the LSL Act is identical and provides that an employee is entitled to 8 ½ weeks of long service leave after 10 years of continuous employment, and to payment of a pro-rated amount of long service leave on termination of employment after seven years of continuous employment.
- 39 Mr Weeda claims to have been continuously employed by Luceo from 1 September 2002 to 28 February 2014, a period of 11 years and six months.

Assessment of the documentary evidence

- 40 In terms of the documentary evidence, Silverhorse places great emphasis on PWAR-001 not containing any provision for long service leave as substantiating its contention that Mr Weeda was not a Luceo employee.
- 41 In essence, Silverhorse is asking the Court to draw an inference about Mr Weeda's employment based on PWAR-001. This necessitates a thorough examination of PWAR-001 and the related documents, in accordance with reg 35(4) of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA), which follows.
- 42 PWAR-001 is Luceo's financial report for the year ended 30 June 2012. Mr Weeda contended that his employment with Luceo commenced on 1 September 2002. The period from 1 September 2002 to 30 June 2012 is nine years and 10 months.
- 43 PWAR-001 comprises of the following:
- (a) Compilation Report.
 - (b) Balance Sheet.
 - (c) Income Statement.
 - (d) Detailed Profit and Loss Statement.
 - (e) Notes to the Financial Statements.
 - (f) Director's Declaration.
 - (g) Statement of Financial Ratios.
- 44 The Compilation Report was completed by Pina Caffarelli of Caffarelli & Associates, Chartered Accountants. In it, Mr Caffarelli states:

My responsibility

On the basis of information provided by the director, I have compiled the accompanying special purpose financial statements in accordance with the significant accounting policies adopted as set out in Note 1 to the financial statements and APES 315: *Compilation of Financial Information*.

My procedures use accounting expertise to collect, classify and summarise the financial information, which the director provided, in compiling the financial statements. My procedures do not include verification or validation procedures. No audit or review has been performed and accordingly no assurance is expressed.

The special purpose financial statements were prepared exclusively for the director. I do not accept responsibility to any other person for the content of the special purpose financial statements.

- 45 The Compilation Report is for the financial year ending 30 June 2012 and is dated 14 February 2013. Therefore, the version of *APES 315: Compilation of Financial Information* applicable to PWAR-001 is the version issued in July 2008 and revised in November 2009 (**APES 315**).
- 46 APES 315 states that:
- (a) It is issued by the Accounting Professional & Ethical Standards Board Limited (**APESB**).
 - (b) Members in Public Practice (such as Mr Caffarelli) shall follow the mandatory requirements of APES 315 when they undertake Professional Services (such as accounting services) that are Compilation Engagements (such as an engagement to compile Luceo's financial report).
 - (c) The following are mandatory standards for Members in Public Practice:
 - (i) Familiarity with relevant Professional Standards and guidance notes when providing Professional Services and compliance with the fundamental principles outlined in the Code (*APES 110 – Code of Ethics for Professional Accountants*).
 - (ii) When undertaking a Compilation Engagement:
 - (A) Compliance with s 100 of *APES 110 – Introduction and Fundamental Principles*.
 - (B) Compliance with public interest obligations in accordance with s 100 of *APES 110*.
 - (C) Maintaining professional competence and taking due care in the performance of work in accordance with s 130 of *APES 110 – Professional Competence and Due Care*.
 - (D) Ensuring the engagement is conducted in accordance with APES 315 and all applicable Professional Standards, laws and regulations.
 - (E) Compliance with *APES 205 – Conformity with Accounting Standards*.
 - (F) Consideration of whether the Compiled Financial Information (which includes Financial Statements) is appropriate in form and content and free from obvious material misstatements.
- 47 The version of *APES 110 – Code of Ethics for Professional Accountants* at [46(c)(i)] and [46(c)(ii)(A)]–[46(c)(ii)(C)] above applicable to PWAR-001 is the version compiled as at December 2011 (**APES 110**).
- 48 APES 110 states that:
- (a) It is issued by the APESB.
 - (b) Members (such as Mr Caffarelli) must comply with APES 110 when providing Professional Services (which

includes accountancy services).

(c) The following are mandatory standards for Members:

(i) Section 110.2:

110.2 A Member shall not knowingly be associated with reports, returns, communications or other information where the Member believes that the information:

- (a) Contains a materially false or misleading statement;
- (b) Contains statements or information furnished recklessly; or
- (c) Omits or obscures information required to be included where such omission or obscurity would be misleading.

When a Member becomes aware that the Member has been associated with such information, the Member shall take steps to be disassociated from that information.

(ii) Section 130.1 and s 130.4:

130.1 The principle of professional competence and due care imposes the following obligations on all Members:

- (a) To maintain professional knowledge and skill at the level required to ensure that clients or employers receive competent Professional Service; and
- (b) To act diligently in accordance with applicable technical and professional standards when providing Professional Services.

130.4 Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

49 The version of *APES 205 – Conformity with Accounting Standards* at [46(c)(ii)(E)] above applicable to PWAR-001 is the version issued in December 2007 (**APES 205**).

50 APES 205 states that:

- (a) It is issued by the APESB.
- (b) Members (such as Mr Caffarelli) shall follow the mandatory requirements of APES 205 when they prepare, present, audit, review or compile Financial Statements (such as PWAR-001),
- (c) The following are mandatory standards for Members:
 - (i) Familiarity with relevant professional standards and guidance notes when performing professional work and compliance with the fundamental principles outlined in APES 110.
 - (ii) When preparing, presenting, auditing, reviewing or compiling Special Purpose Financial Statements (such as PWAR-001):
 - (A) Compliance with public interest obligations in accordance with s 100 of APES 110.
 - (B) Ensuring requisite professional knowledge and skill in the performance of professional work in accordance with s 130 of APES 110.

51 As outlined at [46(c)(ii)(D)] above, Mr Caffarelli was obliged to ensure that PWAR-001 was prepared according to all applicable Professional Standards, laws and regulations.

52 In terms of laws, s 296(1) and s 297 of the Corporations Act states:

296 Compliance with accounting standards and regulations

(1) The financial report for a financial year must comply with the accounting standards.

297 True and fair view

The financial statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the company, registered scheme, registrable superannuation entity or disclosing entity; and
- (b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 296 for a financial report to comply with accounting standards.

Note: If the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 295(3)(c).

53 The Corporations Act defines ‘accounting standards’ as those made by the Australian Accounting Standards Board (**AASB**).

54 The accounting standards made by the AASB that require the provisioning for long service leave in financial reports include:

- (a) AASB 1046 Director and Executive Disclosures by Disclosing Entities dated January 2004 (**AASB 1046**); and
 - (b) AASB 119 Employee Benefits with compilation date 31 December 2018 (**AASB 119**).
- 55 AASB 1046 applied at the time PWAR-001 was prepared. However, AASB 1046 only imposed the obligation to provision for long service leave on a 'disclosing entity that is required to prepare financial reports in accordance with Part 2M.3 of the Corporations Act' and there is no suggestion that Luceo was such an entity.
- 56 AASB 119 is discussed further at [78]–[82] below. However, AASB 119 has a compilation date of 31 December 2018 and did not apply at the time PWAR-001 was prepared.
- 57 Therefore, as at the date that PWAR-001 was prepared, it does not appear that any accounting standard made by the AASB imposed an obligation for PWAR-001 to provision for long service leave where a long service leave liability existed.
- 58 While it is true that there was no explicit positive obligation under an accounting standard issued by the AASB at the relevant time, I do not agree with Mr Weeda's argument that there was no obligation for PWAR-001 to provision for long service leave where a long service leave liability existed.
- 59 I consider such a contention to run contrary to the obligations on those preparing financial reports to ensure that they:
- (a) Comply with all applicable laws, including s 297(a) of the Corporations Act which requires financial statements and notes for a financial year to give a true and fair view of the financial position and performance of the company: [46(c)(ii)(D)] above.
 - (b) Are appropriate in form and content and free from obvious material misstatements: [46(c)(ii)(F)] above.
 - (c) Do not contain any materially false, misleading or reckless statement or omission: [48(c)(i)] above.
 - (d) Are prepared diligently and carefully: [48(c)(ii)] above.
- 60 Furthermore, I find Mr Weeda's argument to be inconsistent with the Director's Declaration he made on 14 March 2013, in which he stated that PWAR-001 'present[s] fairly [Luceo's] financial position as at 30 June 2012 and its performance of the year ended on that date'. This declaration implies a certain level of accuracy and completeness in the financial reporting, which would be compromised if a significant liability, such as his long service leave, was not properly accounted for.
- 61 For the reasons outlined at [58]–[60] above, I agree with Silverhorse's contention that the lack of provisioning for Mr Weeda's long service leave in PWAR-001 weighs against a finding that he was, at the relevant time, an employee of Luceo with an imminent entitlement to long service leave.
- 62 PWAR-001 states 'Employee benefits expenses' of \$503,043.81 in 2011 and \$570,876.58 in 2012. During closing submissions, counsel for Mr Weeda submitted that: (ts 87):
- So you should take from that that at least in 2011/2012 there were considerable moneys going out of Luceo to pay salaries and that that expenditure is not explained by the other employees that you've been asked about and that Mr Weeda gave evidence about. The conclusion we say the inference you should draw from that is that extra salary is at least in part probably Mr Weeda.
- 63 On 11 April 2014, Mr Weeda stated via email to Ms Treloar that apart from a 'disastrous 2012', he had received almost \$250,000 inclusive of superannuation plus approximately \$50,000 in director's fees from Luceo: [13(b)] above.
- 64 PWAR-001 makes no reference to Luceo paying director's fees in the financial years ending 2011 and 2012.
- 65 Further, the PAYG summaries do not support Mr Weeda's statement that other than in the 'disastrous 2012' that he was paid amounts of approximately \$300,000 from Luceo in other years.
- 66 Apart from the PAYG summaries, Mr Weeda did not present any documentary evidence to support his claim that he was an employee who received a salary during his time with Luceo. This issue will be revisited later in these reasons for decision. At this point, it is relevant to note that, given the inconsistencies outlined at [63]–[65] above in Mr Weeda's description of the amounts he received from Luceo, and given that Mr Weeda did not clarify, nor provide any other evidence to support or explain PWAR-001 stating 'Employee benefits expenses' of \$503,043.81 in 2011 and \$570,876.58 in 2012, I am unable to accept Mr Weeda's counsel's submission that these 'Employee benefits expenses' support Mr Weeda having been a Luceo employee in receipt of a salary from Luceo.
- 67 The parties agreed that Caffarelli & Associates prepared Luceo's 2012 financial report (PWAR-001), and Silverhorse's 2015 financial report (PWAR-005), and that neither report made any provision for Mr Weeda's long service leave on the respective Balance Sheets.
- 68 On Mr Weeda's claim that he commenced employment with Luceo on 1 September 2002, at 30 June 2015, the financial year covered by PWAR-005, Mr Weeda would have been employed for a total period of 12 years and 10 months.
- 69 PWAR-005's Profit and Loss Statement states a 'Long Service Leave' expense of \$5,626 in 2015 and a nil expense in 2014.
- 70 Mr Weeda stated in cross-examination that he understood the long service leave expense in 2015 to relate to Mr Pearson: [19(u)] above.
- 71 On the basis that Mr Pearson commenced employment with Luceo on 9 February 2009 (at [8(c)] above), Mr Pearson would have been employed for a period of six years and four-plus months from 30 June 2015. It is, therefore, unclear why Silverhorse made a long service leave payment to Mr Pearson in the 2015 financial year.
- 72 PWAR-005's Notes to the Financial Statements state a 'Provision for Long Service Leave' of \$23,695 in 2015 and a nil amount in 2014. Mr Roberts explains in his witness statement [46]–[51] that the figure of \$23,695 has been calculated from Silverhorse's long service leave spreadsheet (PWAR-006).

- 73 Page 1 of PWAR-006 records the length of service as at 30 June 2015 for Mr Richardson (4.6 years), Mr Pearson (6.3 years) and Ms Lambelin (1.2 years). Page 4 of PWAR-006 (page 3 of the Long Service Leave Template) records 'Non Current Liability – Provision for Long Service Leave' of \$23,695.
- 74 I note that although Mr Richardson, Mr Pearson and Ms Lambelin would not be entitled to a payment for long service leave until they completed at least seven years of continuous employment, PWAR-005 includes a provision for their long service leave.
- 75 Mr Roberts states in his witness statement [52] that Mr Weeda's long service leave liability is not included in PWAR-006, he was likely the one to have included the note on page 1 of PWAR-006 which states, 'Directors excluded', but he cannot recall why this note excluding directors was included in PWAR-006.
- 76 On Mr Weeda's assertion, at the time of PWAR-005, he had been employed for a total period of 12 years and 10 months.
- 77 Under cross-examination, Mr Weeda accepted that PWAR-005 did not make any provision for his long service leave. He did not accept that this was because he had no entitlement to long service leave at this time. He stated that, 'you don't need to accrue for that liability. You just have to have the ability to pay it when it becomes due': (ts 35).
- 78 I note that PWAR-005 and PWAR-001 differ by PWAR-005 including a section titled, 'Employee Benefits'. Under this section, it is stated that PWAR-005 has been prepared in compliance with AASB 119:
- Employee benefits are presented as current liabilities in the balance sheet if the company does not have any unconditional right to defer settlement of the liability for at least one year after the reporting date regardless of the classification of the liability for measurement purposes under AASB 119.
- 79 As noted at [56] above, AASB 119 has a compilation date of 31 December 2018. However, it also provides that it may be applied for annual periods beginning from 1 January 2014:
- This compiled Standard applies to annual periods beginning on or after 1 January 2019 but before 1 January 2021. Earlier application is permitted for annual periods beginning on or after 1 January 2014 but before 1 January 2019. It incorporates relevant amendments made up to an including 23 March 2018.
- 80 Therefore, it appears to me that PWAR-005 making provision for Mr Richardson's, Mr Pearson's and Ms Lambelin's long service leave is consistent with PWAR-005 having been prepared in accordance with AASB 119.
- 81 By PWAR-005 adopting AASB 119, and contrary to Mr Weeda's contention at [77] above, I find that if Mr Weeda had an entitlement to long service leave at the time PWAR-005 was prepared that PWAR-005 should have provisioned for this liability.
- 82 I find that it is inconsistent with AASB 119 for PWAR-005 to provision for Mr Richardson's, Mr Pearson's and Ms Lambelin's long service leave but not provision for Mr Weeda's long service leave.
- 83 Mr Weeda agrees that Cafferelli & Associates were both Luceo's and his personal accountant, and that he arranged for Cafferelli & Associates to prepare Silverhorse's 2015 financial report: [19(t)] above.
- 84 Silverhorse submitted that, if Mr Weeda was an employee of Luceo, this would be a fact known to Mr Caffarelli: [28(o)] above. Silverhorse submitted that the fact that PWAR-005 made no provision for Mr Weeda's long service leave in these circumstances means Mr Weeda had no pre-Silverhorse accrual to long service leave because he was not an employee of Luceo.
- 85 The difficulty with Silverhorse's submission is that the long service leave provision in PWAR-005 appears to have been taken from the calculation in PWAR-006, and PWAR-006 excludes Mr Weeda because he was a Silverhorse director.
- 86 There is no dispute that by mid-2014 Mr Weeda had agreed to being a Silverhorse employee. Silverhorse contends that Mr Weeda's start date for long service leave purposes is 1 March 2014. Yet PWAR-006 includes Ms Lambelin with a start date of 28 April 2014, two months after Mr Weeda's start date with Silverhorse, but excludes Mr Weeda.
- 87 Reviewing the financial reports and the 'Long Service Leave Template' for subsequent years, reveals that the figure for the 'Provision Long Service Leave' in the financial reports is the same as the 'Long Service Leave Template' calculation for that year, as follows:
- (a) The provision of \$14,745 in 2016 and \$19,486 in 2017 in the financial report for 2017 (PWAR-008) is the same figure as the calculations in PWAR-007 and PWAR-009;
 - (b) The provision of \$25,527 in the 2018 financial report (PWAR-010) is the same figure as the calculation in PWAR-011;
 - (c) The provision of \$34,296 in the 2019 financial report (PWAR-012) is the same figure as the calculation in PWAR-013;
 - (d) The provision of \$47,495 in the 2020 financial report (PWAR-014) is the same figure as the calculation in PWAR-015.
- 88 Each of PWAR-007, PWAR-009, PWAR-011, PWAR-013, and PWAR-015 include the long service leave calculations for employees who commenced with Silverhorse after Mr Weeda, but do not include a long service leave calculation for Mr Weeda. This inconsistency was not adequately explained.
- 89 I note that PWAR-005's Compilation Report states that the directors are solely responsible for the reliability, accuracy and completeness of the information in PWAR-005. I further note that the financial reports for subsequent years contain a similar statement regarding the responsibility of the directors in relation to the information contained in the financial report.

- 90 Given this, and given my finding at [81] above that PWAR-005 should have provisioned for Mr Weeda's long service leave along with the long service leave provisioning of the other Silverhorse employees, it may have been open for Silverhorse to argue that Mr Weeda as its CEO and director who signed the Director's Declaration in PWAR-005 should have ensured PWAR-005, as well as the financial reports for subsequent years, provisioned for his long service leave and the fact that these documents did not make such provision supports its contention that he was not a Luceo employee.
- 91 However, given the matters at [85]–[88] above, I do not find that PWAR-005 supports Silverhorse's submissions, as it seems more likely that PWAR-005 does not provision for Mr Weeda's long service leave because of his exclusion from PWAR-006.
- 92 Therefore, I am unable to agree with Silverhorse's submissions at [84] above, and in particular the submission that PWAR-005 supports its contention that Mr Weeda was not a Luceo employee because Mr Caffarelli was aware of the status of Mr Weeda's engagement with Luceo and Mr Caffarelli prepared PWAR-005 without provisioning for Mr Weeda's long service leave.

Assessment of the witness evidence

When did Mr Weeda commence employment with Luceo?

- 93 The filed documents and evidence reveal the following inconsistencies in the date Mr Weeda contends he commenced employment with Luceo:
- (a) In the email Mr Weeda sent to Mr Roberts on 29 May 2022, Mr Weeda states his long service leave entitlement 'should be calculated from 14/11/2001 through 31/05/2022' and his long service leave entitlement is '[b]ased on continuous employment from 14/01/2001 through 31/05/2022': [8(f)(v)] above.
 - (b) In the Originating Claim filed on 27 October 2022, Mr Weeda states he was employed by Luceo from 1 September 2002: [1(a)] above.
 - (c) In the Further and Better Particulars filed on 13 March 2023, Mr Weeda states he commenced employment with Luceo in September 2002, and '[a]t no point from 2004 to May 2022 (when [he] resigned) was there any interruption to [his] continuous service': [3] above.
 - (d) The PAYG summary for the period ending 30 June 2003 attached to Mr Weeda's affidavit filed on 11 September 2023 refers to Mr Weeda receiving \$52,849 from Luceo in the period from 19 August 2002 to 30 June 2003.
- 94 In relation to the discrepancies at [93(c)] above, Mr Weeda gave evidence at the trial that his employment with Luceo commenced on 1 September 2002 and that the reference to 2004 in the Further and Better Particulars was in error: [18(a)] and [20(b)] above.
- 95 In relation to the discrepancy at [93(d)] above, Mr Weeda's counsel submitted that the period in which payments commenced going back to August 2002, and not September, potentially reflects pay cycles: (ts 13). No evidence was led, and no challenge was mounted, in relation to this submission. Whilst I find the explanation plausible, I do not consider anything turns on it and therefore make no findings as to whether the PAYG summary states an earlier payment date than the contended employment commencement date because of pay cycles.
- 96 No evidence was led, or submissions made, in relation to the discrepancies at [93(a)] above. As Mr Weeda's purported commencement date with Luceo is stated by him two times but inconsistently in the same email, it is plausible that one of the dates is a typographical error. That is, Mr Weeda had intended to consistently state that his employment commenced either on 14 November 2001 (his first reference to his commencement date), or on 14 January 2001 (his second reference to his commencement date).
- 97 However, which date (whether 14 November 2001 or 14 January 2001) is the correct and intended reference was not explained at the trial. It needs to be noted that both dates are inconsistent with Mr Weeda's subsequent contention in these proceedings that his employment with Luceo commenced on 1 September 2002. This is a matter I will return to later in these reasons for decision.

Was there a transfer of funds from Luceo to Silverhorse?

- 98 Whether money was exchanged between Luceo and Silverhorse for Silverhorse assuming the leave liabilities for Mr Richardson and Mr Pearson is disputed. Mr Weeda contends that Luceo transferred \$27,000 for this purpose: [19(i)] above. Both Mr Connor and Mr Antunovich dispute this in their witness statements: Mr Connor's witness statement [45] at [14] above and Mr Antunovich's witness statement [16] at [12] above. Mr Antunovich's evidence was not disturbed on cross-examination: (ts 66).
- 99 I prefer the evidence of Mr Connor and Mr Antunovich for the following reasons.
- 100 Their evidence is consistent with the MOU and PWAR-005 making no reference to Luceo making a transfer to Silverhorse.
- 101 The parties provided extensive evidence regarding the negotiations that led to Silverhorse and Luceo entering into the MOU and the preparation of the Shareholders Agreement and Deed of Licence. In none of these documents or in any of the correspondence that has been tendered, is there any mention of Luceo making a transfer of funds to Silverhorse for any reason, let alone for the reason of Silverhorse assuming the leave liabilities for Mr Richardson and Mr Pearson.
- 102 I note in particular that the transfer of funds from Luceo to Silverhorse is not mentioned in Mr Weeda's Further and Better Particulars.
- 103 For the reasons outlined at [99]–[102] above, I am therefore not convinced that there was a transfer of funds from Luceo to Silverhorse, whether to compensate Silverhorse for assuming the leave liabilities for Mr Richardson and Mr Pearson, or for any reason.

What did the request for Mr Weeda to provide Luceo's employee liabilities entail?

104 In the Agreed Statement of Facts [16] filed on 10 July 2023, the parties agreed that:

- (a) Silverhorse asked Mr Weeda to ‘determine the employment liabilities for employees employed by [Silverhorse] who had previously been employed by Luceo, based on their continuous service with Luceo (**the Employment Liabilities**)’: [16(a)] at [9] above.
- (b) Mr Weeda provided Silverhorse ‘with details of the Employment Liabilities, which did not include any employment liability for [himself] for long service leave with Luceo’: [16(b)] at [9] above.

105 In Mr Weeda’s affidavit filed on 11 September 2023, he:

- (a) Agreed that Silverhorse asked ‘for information about leave accruals for Luceo staff that had transferred to Silverhorse’: [38] at [10(g)] above.
- (b) Stated that he included the accruals for Mr Richardson and Mr Pearson but not himself because:
 - (i) He thought his answer ‘properly reflected what was being asked of me’: [39]–[40] at [10(g)] above.
 - (ii) ‘I made that assumption because [Silverhorse] must have known that my service commenced when I began working with Luceo’: [44] at [10(g)] above.

106 Silverhorse says that Mr Weeda was requested to provide the employee entitlements for all transferring employees: Mr Connor’s witness statement [45] at [14] above. Further, Silverhorse submits that, taking into account the request and Mr Weeda’s deliberate exclusion of himself from the information presented, supports its contention that Mr Weeda was not a Luceo employee: [17(f)] above.

107 It is not in dispute that Mr Weeda was cognisant that the transferring employees’ leave liabilities were a significant consideration in the due diligence process. Additionally, it is not disputed that Mr Weeda was aware that Silverhorse was obliged to and did capture and recognise Mr Richardson’s and Mr Pearson’s commencement dates with Luceo for all purposes related to their transferring employment: [9] above.

108 Given the matters in [107] above, I am unable to accept Mr Weeda’s contention that, based on the due diligence undertaken of Luceo, Silverhorse knew or ought to have known that he was a Luceo employee prior to his employment with Silverhorse. Accepting Mr Weeda’s contention would mean accepting that Silverhorse acquired knowledge during the due diligence that Mr Weeda was a Luceo employee and chose to treat his leave entitlements differently from those of Mr Richardson and Mr Pearson at the time each of them transitioned from Luceo to Silverhorse. This appears implausible, especially considering Mr Weeda’s concession that the due diligence undertaken on Luceo was comprehensive.

109 Mr Weeda stated for the first time at the trial that:

- (a) He told Ms Treloar that he was an employee of Luceo; and
- (b) Luceo’s MYOB records, recording him as being on Luceo’s payroll, was provided to Ms Treloar during the due diligence process.

110 I note that the new evidence at [109] above is in direct contradiction to Mr Weeda’s assertion in his Response to Counterclaim, where he admitted that he did not inform Silverhorse that it was liable for the long service leave he accrued with Luceo: [5] above.

111 Further, by the new evidence at [109] above, Mr Weeda is effectively seeking the Court to infer that following his disclosure to Ms Treloar, who at the relevant time was OGS’ CFO assisting Mr Connor with the due diligence on the transaction involving Luceo, that Ms Treloar acted in the following manner:

- (a) She did not inform Mr Connor (or anyone else at OGS or Silverhorse, including OGS’ CEO, Mr Antunovich, whom she reported to) that Mr Weeda had disclosed to her that he was a Luceo employee as part of the due diligence that Mr Connor was overseeing.
- (b) She did not save Luceo’s MYOB file to the OGS folder of Luceo documents relevant to the due diligence.
- (c) She denied Mr Connor and Silverhorse the opportunity to have Mr Weeda’s commencement date with Luceo documented in the draft employment contract and/or draft contractor agreement that Silverhorse issued to Mr Weeda.
- (d) She denied Mr Connor and Silverhorse the opportunity to record Mr Weeda’s commencement date for long service leave purposes.

112 By the new evidence at [109] above, Mr Weeda is essentially requesting the Court to accept that at the time of the due diligence, Silverhorse, knowing that it had an obligation to recognise a transferring employee’s commencement date and therefore leave entitlements, and having been diligent in their recognition of these for Mr Richardson and Mr Pearson:

- (a) Was aware that Mr Weeda was a Luceo employee and thus it had the same obligations regarding his leave entitlements as it had in relation to Mr Richardson’s and Mr Pearson’s leave entitlements; and
- (b) Decided to ignore his commencement date and treat him differently from Mr Richardson and Mr Pearson.

113 This seems unlikely, given Silverhorse’s demonstrated diligence in recognising the leave entitlements for transferring employees.

114 As evident from the Response filed on 17 November 2022, Silverhorse’s case centred on its argument that prior to April 2022, Mr Weeda did not inform, nor bring to Silverhorse’s attention, that he was an employee of Luceo: [2(b)(iv)] above.

115 As outlined at [32]–[35] above, the onus is on Mr Weeda to establish his case.

116 Mr Weeda had ample opportunity to retract his admission in the Response to Counterclaim filed on 29 May 2023 that he did

not inform Silverhorse that it was liable for the long service leave he accrued with Luceo. This was possible through the Agreed Statement of Facts filed on 10 July 2023, in his affidavit filed on 11 September 2023, and in his Outline of Submissions filed on 1 December 2023. Mr Weeda could have stated that, contrary to his previous admission in the Response to Counterclaim, that he informed Silverhorse through Ms Treloar that he had been a Luceo employee.

117 Additionally, Mr Weeda could have called upon, or summonsed, Ms Treloar to attend the trial to provide evidence and testimony regarding his discussions with her and of the MYOB file he says was produced to her.

118 Since Mr Weeda did not take the steps available to him as outlined in [116]–[117] above, I am not persuaded that Mr Weeda made the disclosures to Ms Treloar that he claims to have made in [109] above.

The status of Mr Weeda's engagement with Silverhorse

119 Mr Connor's evidence in his witness statement was that:

- (a) Mr Weeda was undecided whether to be engaged as an employee or contractor of Silverhorse, but the decision was for Mr Weeda to make: [40] at [14] above.
- (b) As a consequence of Mr Weeda's indecision, he prepared both a draft employment contract and a draft contractor agreement for Mr Weeda: [42] at [14] above.
- (c) When he spoke with Mr Weeda between March and June 2014, he understood Mr Weeda was leaning towards being a contractor, and he suggested Mr Weeda take tax advice because he had concerns about Silverhorse's CEO being engaged as a contractor: [44] at [14] above.
- (d) Mr Weeda decided, after June 2014, that he wanted to be an employee of Silverhorse: [47] at [14] above.

120 Mr Connor's evidence was not disturbed on cross-examination.

121 In re-examination, Mr Connor's evidence was that: [22(c)]–[22(d)] above:

- (a) As a Silverhorse director, his personal preference was for Mr Weeda not to be engaged as a Silverhorse contractor as he was concerned this would create a liability for Silverhorse; and
- (b) Mr Weeda gravitated between being a Silverhorse employee and a Silverhorse contractor, but ultimately decided in mid-2014 to be a Silverhorse employee.

122 Mr Antunovich's evidence at the trial was that: [25] above:

- (a) His expectation and personal preference was for Mr Weeda to be employed by Silverhorse as its employee, however, he discussed with Mr Weeda the possibility of Mr Weeda being engaged in a manner that would suit Mr Weeda's needs. Mr Weeda did not express a preference to him regarding how he wished to be engaged.

123 Mr Weeda accepted under cross-examination that: [19(m)]–[19(n)] above:

- (a) As at late March 2014, he had not decided whether he wished to be employed or contracted to Silverhorse; and
- (b) From February to June 2014, he was discussing with Silverhorse whether he would be an employee or contractor to Silverhorse.

124 Silverhorse argues that Mr Weeda's indecision regarding whether to be an employee or contractor of Silverhorse contradicts Mr Weeda's contention that he was a Luceo employee. Silverhorse argues that if Mr Weeda was truly a Luceo employee, he would have readily committed to being employed by Silverhorse as its employee. However, Mr Weeda did not confirm his intention to be employed by Silverhorse until June 2014: [28(x)] above.

125 There is no dispute that Mr Weeda did not commit to being employed by Silverhorse until June 2014. Consequently, I concur with Silverhorse's submission that Mr Weeda's hesitation between being employed or being contracted to Silverhorse weighs against his claim to being a Luceo employee. If Mr Weeda had been engaged as a contractor to Silverhorse, as Mr Connor testified Mr Weeda was leaning towards, it would have meant that any long service leave entitlement existing at that time would not have transferred to Silverhorse.

Assessment of Silverhorse's submission that Mr Weeda has not proved his claim

126 As outlined at [32]–[35] above, Mr Weeda bears the onus of establishing his case, namely, that for LSL Act purposes, he was continuously employed by Luceo from 1 September 2002 to 28 February 2014.

127 The only documentary evidence Mr Weeda has provided to establish his entitlement to long service leave are the PAYG summaries. These were produced as attachments to his affidavit filed on 11 September 2023.

128 By this time, Silverhorse had filed the following documents:

- (a) Silverhorse's Response, which outlined Silverhorse's case that Mr Weeda was not continuously employed from 1 September 2002 to 28 February 2014: [2(a)] above.
- (b) Silverhorse's Reply to Mr Weeda's Further and Better Particulars, which stated a denial that Mr Weeda was continuously employed from 1 September 2002 to 31 May 2022: [4] above.
- (c) Silverhorse's Copies of Records, which included Silverhorse's leave accruals and financial reports and the correspondence exchanged with Mr Weeda which Silverhorse intended to rely upon at the trial to contradict Mr Weeda's assertion that he was a Luceo employee: [8] above.

129 From the documents at [128] above, it is clear that Mr Weeda was put on notice that Silverhorse intended to argue that he was not a Luceo employee. Given this, and as submitted by Silverhorse's counsel, it is reasonable to question why Mr Weeda has not produced any additional evidence in these proceedings, especially considering that he did manage to locate the PAYG summaries.

- 130 In its Outline of Submissions filed on 6 December 2023, Silverhorse submitted that: [17(c)]–[17(d)] and [17(j)] above:
- (a) The PAYG summaries do not confirm that Mr Weeda was an employee of Luceo for the entire period.
 - (b) Mr Weeda did not produce any of the following evidence or documents establishing his employment with Luceo:
 - (i) An employment contract.
 - (ii) Any documentation relating to the nature of his relationship with Luceo.
 - (iii) Payment history indicating regular payment of salary.
 - (iv) Workers' compensation insurance records.
 - (v) Employment records.
 - (vi) Details of work undertaken and reward/remuneration for work undertaken.
 - (c) Given Mr Weeda's conduct at the time, Silverhorse's case was that Mr Weeda was only a director and shareholder of Luceo.
- 131 From Silverhorse's Outline of Submissions, it is evident that Mr Weeda was on notice that Silverhorse intended to argue that the PAYG summaries alone would be insufficient to substantiate his claims and that his assertion of being a Luceo employee would be challenged based on his inability to produce other evidence or documentation confirming his employment with Luceo. Additionally, if Mr Weeda was unable to produce such evidence, Silverhorse intended to argue that Mr Weeda was only a Luceo director and shareholder, rather than an employee.
- 132 This is a particularly pertinent point, given Mr Weeda's acknowledgement that PAYG summaries do not, in and of themselves, establish an employment relationship, as they are issued to employees and non-employees.
- 133 Mr Weeda could have provided additional material to support his assertion that he was a Luceo employee from 1 September 2002. Mr Weeda had ample time between receiving Silverhorse's Outline of Submissions and the trial to produce such further evidence.
- 134 Relevantly, at the trial, Mr Weeda sought and was given leave to give further evidence that was responsive to the witness statements and Outline of Submissions filed by Silverhorse.
- 135 Mr Weeda could have, but did not, present the following documents to support his case:
- (a) Tax returns, which may have shown deductions consistent with employment, as opposed to expenses consistent with other arrangements.
 - (b) Bank statements, which may have shown regular monthly payments, consistent with salary payments.
 - (c) Superannuation records, which may have shown compulsory employer contributions consistent with employment.
- 136 As acknowledged by his counsel, Mr Weeda:
- (a) Could have, but did not, bring the MYOB file he says he produced to Ms Treloar to court: [27(d)] above.
 - (b) Could have called Ms Treloar to give evidence about the Luceo payroll records that he says she sighted as OGS' CFO: [27(e)] above.
 - (c) Could have attempted to produce corroborating evidence from Caffarelli & Associates or called them to produce records to court: [27(o)] above.
 - (d) Chose to rely on his own evidence and the PAYG summaries: [27(f)] above.
- 137 However, contrary to Mr Weeda's evidence provided by affidavit, in the witness box and through the PAYG summaries, the overwhelming evidence tendered by Silverhorse is that:
- (a) At the critical time of the due diligence and the provision of the leave entitlements for Mr Richardson and Mr Pearson, Mr Weeda did not raise the issue of his employment status with Luceo and long service leave entitlements for himself; and
 - (b) At no time during his employment with Silverhorse as its CEO and as a director, from 1 March 2014 until his resignation in 2022, did Mr Weeda raise the issue of his employment status with Luceo. Particularly when Mr Weeda agreed that as a Silverhorse director he was bound by s 180(1) of the Corporations Act to exercise his powers and discharge his duties as a director with care and diligence: Agreed Statement of Facts [14] at [9] above.
- 138 The Court is unable to make any findings regarding the Estoppel Argument and the Set Off Argument. However, if it were the case that Mr Weeda had a long service leave entitlement, his failure to raise this with Silverhorse prior to his resignation could arguably give rise to a claim by Silverhorse that he breached his duties as its CEO and director. Consequently, I accept Silverhorse's submission that Mr Weeda's silence about a long service leave entitlement casts doubt on his claim that he had such an entitlement prior to his commencement with Silverhorse that was transferable to Silverhorse.
- 139 The evidence presented by Silverhorse does not prove that Mr Weeda was not an employee of Luceo, nor does it need to. Instead, it raises significant doubts about Mr Weeda's claim that he was a Luceo employee for the entire period from 1 September 2002 onwards, particularly in light of his conduct from 2014 until 2022, during which period he did not raise the issue of his long service leave entitlement with Silverhorse.
- 140 Mr Weeda first stated to Silverhorse that he was a Luceo employee in his email to Mr Roberts on 25 May 2022. As noted at [93(a)] above, in this email, Mr Weeda states two different employment commencement dates (14 January 2001 and 14 November 2001), both of which pre-date the date he stated at the trial was his commencement date (1 September 2002). These inconsistencies weigh against a finding that Mr Weeda commenced employment with Luceo on 1 September 2002.

141 Balancing the weight of Silverhorse's evidence casting doubt on Mr Weeda's claim against the inconclusive PAYG summaries, the inconsistencies in Mr Weeda's purported employment commencement date with Luceo, and my findings at [118] above regarding Mr Weeda's evidence relating to Ms Treloar, I cannot be satisfied that Mr Weeda commenced employment with Luceo on 1 September 2002.

142 Given my findings at [61], [66], [103], [108], [118], [125] and the matters at [126]–[141] above, and applying the principles at [33]–[35] above, I am not satisfied that Mr Weeda has discharged the onus on him to establish his claim that he was continuously employed by Luceo from 1 September 2002 to 28 February 2014, thereby entitling him to a long service leave payment from Silverhorse for this period upon the termination of his employment with Silverhorse.

Conclusion

143 For the preceding reasons, I find that Mr Weeda has not established his claim for long service leave entitlements.

144 Accordingly, Mr Weeda's claim will be dismissed.

C. TSANG

INDUSTRIAL MAGISTRATE

STAY OF OPERATION OF DECISIONS/ORDERS—Application for

2024 WAIRC 00781

A STAY OF OPERATION OF THE ORDER IN MATTER NUMBER M 17 OF 2024 WHICH IS THE SUBJECT OF FBA
15 OF 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DELIA GAVRIL

APPLICANT

-v-

DIRECTOR GENERAL DEPARTMENT OF EDUCATION, WA

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

MONDAY, 26 AUGUST 2024

FILE NO/S

PRES 9 OF 2024

CITATION NO.

2024 WAIRC 00781

Result

Order issued

Representation

Applicant

Ms E Alvarez as agent

Respondent

Mr J Carroll of counsel

Order

HAVING heard from Ms E Alvarez as agent on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the application be and is hereby dismissed.
2. THAT the costs of this application be reserved to be determined by the Full Bench in FBA 15/2024.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2024 WAIRC 00779

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RANJEET SINGH

APPLICANT

-v-

A & KF SERVICES PTY LTD

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

WEDNESDAY, 21 AUGUST 2024

FILE NO/S

B 44 OF 2024

CITATION NO.

2024 WAIRC 00779

Result	Order issued
Representation	
Applicant	Mr A Dzieciol
Respondent	No appearance

Order

WHEREAS the applicant on 14 June 2024 filed a *Form 3 - Contractual Benefit Claim*, (**application**) in which he alleged that he was a denied a benefit to which he was entitled, under a contract of employment that he had with the respondent, being;

- i. wages in the total amount of \$3,969 for work performed (**contractual payments**); plus
- ii. interest payable on the contractual payments from the date the wages were due;

AND WHEREAS the respondent failed to file a *Form 3A - Employer Response to a Contractual Benefit Claim* within the time prescribed by the *Industrial Relations Commission Regulations 2005*;

AND WHEREAS the respondent failed to provide unavailable dates to attend a conciliation conference;

AND WHEREAS the parties were directed by way of a Notice of Listing, to attend a hearing on 14 August 2024 to show cause why the application should not be decided in the applicant's favour (**show cause hearing**);

AND WHEREAS the respondent did not appear at the show cause hearing;

AND WHEREAS I indicated during the show cause hearing, that I was, by reason of the respondent's non-attendance, minded to make orders, requiring the respondent to pay \$3969 plus interest (**orders**);

AND WHEREAS before making the orders I asked the Applicant's representative to provide particulars on the amount of interest he says the respondent should be ordered to pay (**interest calculations**);

AND WHEREAS the Applicant's representative in an email dated 14 August 2024, provided the interest calculations to the Commission;

AND WHEREAS the respondent in an email from the Commission dated 14 August 2024, was by close of business Friday 16 August 2024, afforded an opportunity to;

- i. comment on or object to the Applicant's interest calculations; and
- ii. to advise why the Commission should not make an order for the payment of interest in addition to the contractual payments;

AND WHEREAS the respondent did not respond to the Commission's email;

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

1. THAT the respondent pay the applicant the sum of \$3969, within 14 days of the date of this order.
2. THAT the respondent pay the applicant interest in the sum of \$179.93, within 14 days of the date of this order.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2024 WAIRC 00770

CONTRACTUAL BENEFIT CLAIM

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION RUSSEL MOLIN	APPLICANT
	-v- ALITO ADVISORS PTY LTD	
CORAM	COMMISSIONER T EMMANUEL	RESPONDENT
DATE	THURSDAY, 15 AUGUST 2024	
FILE NO/S	B 39 OF 2024	
CITATION NO.	2024 WAIRC 00770	
Result	Order issued	
Representation Applicant	On his own behalf	
Respondent	Mr D O’Haire as agent	

Order

WHEREAS a conference was held in application B 39 of 2024 on 14 August 2024;

AND WHEREAS the respondent admits that it owes the applicant a total of \$15,212.68 (net) in respect of denied contractual benefits;

AND WHEREAS to resolve application B 39 of 2024, the respondent offered to pay the applicant the following settlement sum:

- a. \$5,050.54 (net) by electronic funds transfer by 4 September 2024; and
- b. \$10,162.14 (net) by electronic funds transfer by 25 September 2024;

in exchange for the applicant discontinuing his application within two business days of receiving the \$15,212.68 (net) that the respondent owes the applicant;

AND WHEREAS the applicant accepted the respondent’s offer;

AND WHEREAS the parties asked the Commission to make consent orders reflecting their agreement to settle application B 39 of 2024;

NOW THEREFORE, the Commission orders by consent that -

1. The respondent pay the applicant \$5,050.54 (net) by electronic funds transfer by close of business on 4 September 2024.
2. The respondent pay the applicant \$10,162.14 (net) by electronic funds transfer by close of business on 25 September 2024.
3. The applicant discontinue application B 39 of 2024 within two business days of receiving the \$15,212.68 (net) owed to the applicant by the respondent.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

CONFERENCES—Matters referred—

2024 WAIRC 00803

DISPUTE RE REDUNDANCY PAYMENT AND AUTHORITY OF UNION TO ACT AS AN AUTHORITISED REPRESENTATIVE OF EMPLOYEE

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2024 WAIRC 00803
CORAM	: COMMISSIONER T B WALKINGTON
HEARD	: WEDNESDAY, 11 OCTOBER 2023
DELIVERED	: MONDAY, 9 SEPTEMBER 2024
FILE NO.	: CR 29 OF 2023
BETWEEN	: WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND CITY OF STIRLING Respondent

Catchwords : Industrial law (WA) – Redundancy – Suitable Alternate Employment – Severance Payment – Arbitral Power – Judicial Power

Legislation : *Industrial Relations Act 1979* (WA)
Fair Work Act 2009 (Cth)

Result : Findings made

Representation:

Applicant : Mr R Knox

Respondent : Ms Groves (of counsel)

Case(s) referred to in reasons:

Australian Chamber of Manufacturers and Derole Nominees Pty Ltd – Clothing Trades Award 1982(1) [1990] 140 IR 123

Australia Limited t/a Alliance Catering [2016] FWC 4505

Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australia Branch v Eures (Australia) Pty Ltd [2003] 83 WAIG 4157

Broadlex Services Pty Ltd v United Worker’ Union [2020] FCA; 296 IR 425

Cranswick v Burswood Resort (Management) Limited [2003] 84 WAIG 887

Crewe and Sons Pty Ltd v AMWSU (1989) 69 WAIG 2623

St Michael’s School v The Independent Schools Salaried Officers’ Association of Western Australia, Industrial Union of Workers [2000] 80 WAIG 2839

The Civil Service Association of Western Australia Incorporates v Director General as the Employing Authority, Department of Justice [2023] 104 WAIG 11

United Voice WA v The Director General, Department of Education (2015) 95 WAIG 13

United Voice WA v The Minister for Health in His Incorporated Capacity Under s.7 of the Hospitals and Health Services Act 1927 as the Hospitals Formerly Comprised in the Metropolitan Health Service Board [2012] 93 WAIG 261

Reasons for Decision

Introduction

1 The Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**Union**) applied pursuant to s 44 of the *Industrial Relations Act 1979* (WA) (**the IR Act**) for assistance to resolve a dispute with the City of Stirling (**City**) concerning the eligibility of their member for a severance payment in circumstances where their member’s job had been abolished.

2 Following a compulsory conference before the Western Australian Industrial Relations Commission (**the Commission**), the dispute between the parties remained unresolved. The issues in dispute were referred for hearing and determination under s 44(9) of the *IR Act*:

‘Where... any question, dispute, or disagreement in relation to an industrial matter has not been settled by agreement between all of the parties, the Commission may hear and determine that question, dispute or disagreement and may make an order binding only the parties in relation to whom the matter has not been so settled.’

3 The s 44(9) memorandum of referral, in this matter drafted and agreed between the parties, sets out the questions to be answered:

Entitlement to redundancy payment

1. Is the role of Community Patrol Officer, suitable alternative employment under cl 10.4 of the City of Stirling Inside Workforce Agreement 2019?

2. If the answer to question 1 is ‘yes’, is Ms Cerinich entitled to:

- a) reject an offer of suitable alternative employment made under cl 10.4 of the City of Stirling Inside Workforce Agreement 2019; and
- b) be paid a redundancy payment under cl 10.7 of the City of Stirling Inside Workforce Agreement 2019?

3. If the answers to question 2 is ‘yes’, does section 80BE(2) of the *Industrial Relations Act 1979* (WA) apply so as to give the Western Australian Industrial Relations Commission the power under cl 10.7.5 of the City of Stirling Inside Workforce Agreement 2019 to vary the applicable redundancy package the Respondent is required to pay to Ms Cerinich under clause 10.7.1?

4. If the answer to question 1 is ‘no’, is Ms Cerinich entitled to a redundancy payment under clause 10.7 of the City of Stirling Inside Workforce Agreement 2019?

Application of cl 6

5. During what period did cl 6 of City of Stirling Inside Workforce Agreement 2019 apply to Ms Cerinich as an employee affected by the Respondent’s decision to restructure the Respondent’s Community Safety Business Unit?

Appointment of representative under cl 6.7

6. Was Mr Knox appointed as Ms Cerinich's representative pursuant to cl 6.7 of the City of Stirling Inside Workforce Agreement 2019 and if so, from when?

Rights of representative under cl 6.7

7. What rights, if any, does Mr Knox have as Ms Cerinich's representative under cl 6.7 of the City of Stirling Inside Workforce Agreement 2019?
8. Did the Respondent interfere with, impair or prevent Ms Cerinich from exercising her right to be represented under cl 6.7 of the City of Stirling Inside Workforce Agreement 2019?

Other rights relating to representation of Ms Cerinich

9. If Mr Knox was not at any time appointed as Ms Cerinich's representative under cl 6.7 of the City of Stirling Inside Workforce Agreement 2019, did the Western Australian Municipal, Administrative, Clerical and Services Union of Employees have a right under the City of Stirling Inside Workforce Agreement 2019 and/or the Industrial Relations Act 1979 (WA) to represent the interests of Ms Cerinich to the Respondent in this matter?
10. If the answer to question 9 is 'yes', did the Respondent interfere with, impair or prevent the Western Australian Municipal, Administrative, Clerical and Services Union of Employees or Ms Cerinich from exercising that right?

Evidence and Facts

- 4 The parties agreed on the facts as follows and the relevant documents referred to were submitted as a bundle of agreed documents.
- 5 Ms Cerinich commenced employment with the City on or around 3 February 2014 as a Parking and Information Officer (**P&I Officer**). The relevant contract of employment is dated 22 January 2014, and a copy was submitted along with the position description for the role of P&I Officer reviewed and modified in October 2017.
- 6 As a P&I Officer, Ms Cerinich was part of the Parking Services team within the Community Safety Business Unit (**Community Safety BU**), which was part of the broader Community Development directorate of the city.
- 7 Ms Cerinich is a financial member of the Union and eligible to be a member of the Union under rule 5 of the *Rules of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees*.
- 8 At all times relevant to this matter, the *City of Stirling Inside Workforce Agreement 2019 (2019 Agreement)* applied to Ms Cerinich. The 2019 Agreement is a new State instrument under s 80BB of the *IR Act*.
- 9 In early-2023 the City made a decision to restructure the Community Safety BU to streamline services and deliver efficiencies across various teams.
- 10 In accordance with its obligations under cl 6 of the 2019 Agreement, the City advised the employees that were to be affected by the City's decision to restructure the Community Safety BU (Affected Employees). The Affected Employees were invited to attend a meeting at which the restructure would be discussed. This advice and invitation to attend a meeting was provided to Ms Cerinich.
- 11 The City also advised Mr Paul Cecchini, a Senior Industrial Organiser of the Union, of the proposed restructure on or around 16 February 2023.
- 12 As part of the restructure, the Parking Services team would cease as a team and the position of P&I Officer, in which Ms Cerinich was employed as, was to be abolished. The abolition of the P&I Officer position affected four (4) employees who were employed as P&I Officers in the Parking Services Team.
- 13 As Ms Cerinich was on parental leave (having commenced that period of parental leave on 8 December 2022) at the time that the restructure was advised to the Affected Employees, the City contacted Ms Cerinich by e-mail to arrange a time that was convenient to meet to discuss the City's decision to restructure the Community Safety Business Unit.
- 14 A member of the Human Resources Business Partner and the Manager of the Community Safety business unit met with Ms Cerinich on 22 March 2023. Ms Cerinich attended the meeting alone. Ms Cerinich did not indicate in writing or otherwise that she wanted to appoint a representative under clause 6.7 of the 2019 Agreement.
- 15 During the meeting, the City advised Ms Cerinich of its decision to restructure the Community Safety BU and that because of that decision, the role of P&I Officer would change and become the role of Ranger. Ms Cerinich was advised that employees who were employed in a P&I Officer role would each be offered suitable alternative employment at the City as a Ranger. Ms Cerinich raised concerns about performing the role of Ranger.
- 16 Following the meeting, the City e-mailed Ms Cerinich thanking her for attending the meeting and provided her with the position description for the Ranger role and attached to the e-mail and copies were submitted to the Commission:
- a) the position description for the Ranger position;
 - b) a copy of the proposed structure of the Community Safety business unit post restructure;
 - c) a contract of employment in the position of Ranger; and
 - d) a casual and additional hours timesheet (so Ms Cerinich could claim and be re-imbursed for her time in attending the meeting).
- 17 On 29 March 2023, Ms Cerinich e-mailed the City about the Ranger role and stated that the '*only viable option*' was for the City to terminate her employment on redundancy grounds.
- 18 Having considered Ms Cerinich's e-mail of 29 March 2023, on 31 March 2023 (at 9.38am) Mr Mullins replied by e-mail to Ms Cerinich.

- 19 Also, on 31 March 2023 (at 1:41pm), Mr Mullins sent an e-mail to all employees of the Community Safety BU outlining the new structure of the business unit that was to take effect from 3 April 2023.
- 20 Later in the day of 31 March 2023 (at 2:48pm), Ms Baker e-mailed Ms Cerinich again with the contract of employment for the position of Ranger, the outcome letter that had already been provided to Ms Cerinich on 29 March 2023, and the position description for the role of Ranger. In the e-mail, Ms Baker requested that Ms Cerinich return a signed copy of the contract of employment for the position of Ranger by 'close of business' Monday 3 April 2023.
- 21 On 3 April 2023, the Union wrote to the City for the first time about Ms Cerinich.
- 22 On 21 April 2023, Ms Baker e-mailed Ms Cerinich and Mr Robert Knox (the Industrial Officer of the Union representing Ms Cerinich) inviting both of them to attend a meeting on 28 April 2023 to discuss Ms Cerinich's redundancy matter.
- 23 Mr Knox responded to Ms Baker's e-mail on 21 April 2023, asking for the meeting to be moved to 26 April 2023 because of Ms Cerinich's difficulties in arranging care of her children. Mr Knox stated that he would be attending this meeting as Ms Cerinich's union representative.
- 24 Ms Baker responded to Mr Knox's reply e-mail on 24 April 2023 proposing the meeting be held on 1 May 2023 as 26 April 2023 was a day that Ms Baker and Mr Mullins were unavailable.
- 25 Mr Knox replied to Ms Baker's e-mail on 24 April 2023 proposing the meeting be held on that Friday 28 April 2023.
- 26 Ms Baker telephoned Ms Cerinich on 24 April 2023 to arrange a meeting date and time.
- 27 Ms Baker then e-mailed Mr Knox and Ms Cerinich on 24 April 2023 confirming the date, time and location of the meeting to discuss Ms Cerinich's redundancy matter.
- 28 Ms Cerinich, Mr Knox on behalf of the Union, and the City attended the meeting on 1 May 2023. Ms Baker and Mr Michael Quirk (Director of the Community Development directorate) attended the meeting on behalf of the City. The discussion between the attendees included the following:
- a) the attendees agreed that further opportunities for redeployment could be explored;
 - b) the City considered the redeployment period could remain open until Ms Cerinich was due to return to her work from parental leave in 2024;
 - c) Mr Knox suggested that Ms Cerinich could provide the City with a list of her preferences for other roles with the City. The City agreed that it would consider Ms Cerinich's preferences but could not guarantee that those preferences could be accommodated; and
 - d) Mr Knox stated that he would continue to be involved in the matter acting as Ms Cerinich's "representative" to which Ms Baker said "support person."
- 29 On 1 May 2023, Ms Cerinich provided to the City by e-mail an outline of her preferences for employment and other factors that would affect her decision.
- 30 The City then requested by e-mail that Ms Cerinich provide her curriculum vitae.
- 31 Ms Cerinich provided the City with her curriculum vitae by e-mail on 12 May 2023.
- 32 On 12 May 2023, the City provided by e-mail to Ms Cerinich position descriptions for the following three roles that the City considered were redeployment opportunities:
- a) Customer Experience Officer;
 - b) Senior Customer Service Officer; and
 - c) Library Officer.
- 33 On 18 May 2023, Mr Knox e-mailed the City to communicate Ms Cerinich's response to the three (3) redeployment opportunities.
- 34 On 2 June 2023, the City e-mailed Ms Cerinich and Mr Knox in relation to another two (2) roles, namely the roles of Community Patrol Officer and Engagement Officer. The position descriptions for these roles were attached to the e-mail.
- 35 On 9 June 2023, Mr Knox e-mailed the City to communicate Ms Cerinich's position about the further two (2) positions that had been presented to Ms Cerinich.
- 36 On 30 June 2023, the City replied to the e-mail sent by Mr Knox. Attached to that e-mail was a comparison undertaken by the City of the P&I Officer role, the Community Patrol Officer role and the Ranger role.

Question 1: Is the role of Community Patrol Officer Suitable Alternative Employment?

- 37 The first question the parties seek an answer to is:
- ‘Is the role of Community Patrol Officer, suitable alternative employment under cl 10.4.2 of the *City of Stirling Inside Workforce Agreement 2019*?’
- 38 Clause 10.4.2 of the City of Stirling Inside Workforce Agreement 2019 (2019 Agreement) states:
- ‘Suitable alternative employment refers to a position of similar classification, salary and status to the employee’s former role. The employee’s skills, qualifications, abilities and experience may also be considered with regard to the requirements of the position. And the practicality and cost of any retraining requirements.’
- 39 The Union says that where an industrial agreement or award provides that the test is conducted on the basis of what is ‘suitable alternative employment’ it has been accepted by the Commission that the test is an objective one and refers the Commission to *United Voice WA v The Minister for Health in His Incorporated Capacity Under s.7 of the Hospitals and Health Services Act 1927 as the Hospitals Formerly Comprised in the Metropolitan Health Service Board* [2012] 93 WAIG 261, 264 [32] (Kenner C) (*United Voice*); *Australian Liquor, Hospitality and Miscellaneous Workers Union*,

Western Australia Branch v Eurest (Australia) Pty Ltd [2003] 83 WAIG 4157, 4160 [24] (Harrison C) (*Eurest*); *Cranswick v Burswood Resort (Management) Limited* [2003] 84 WAIG 887, 896 [80] (Harrison C) (*Cranswick*).

- 40 The City agrees that the test to apply when assessing whether an alternate position is ‘suitable alternative employment is an objective one.’
- 41 I find that the test to be conducted in assessing whether an alternative position is ‘suitable alternative employment’ under *The City of Stirling Inside Workforce Agreement 2019 (2019 Agreement)* is an objective one. That is, an employee is not able to reject an alternative employment opportunity on an unreasonable basis as set out by the Full Bench of the Australian Industrial Relations Commission in *Australian Chamber of Manufacturers and Derole Nominees Pty Ltd – Clothing Trades Award 1982(1)* [1990] 140 IR 123 (*Derole Nominees*) at [30]-[31]:
- ‘What constitutes “acceptable alternative employment” is a matter to be determined, as we have said, on an objective basis. Alternative employment accepted by the employee (and its corollary, alternative employment acceptable to the employee) cannot be an appropriate application of the words because that meaning would give an employee an unreasonable and uncontrollable opportunity to reject the new employment in order to receive redundancy pay; the exemption provision would be without practical effect.’
- 42 The Union says that the role of a Community Patrol Officer (**CP Officer**) is not ‘suitable alternative employment’ because it is ‘extraordinarily different’ from that of the P&I Officer role. The Union asserts that the P&I Officer was concerned with completing parking patrols during the day and enforcing the Shire’s parking laws by issuing infringements. In contrast to the limited duties of the P&I Officer, the Union contends, the CP Officer role undertakes a diverse array of duties addressing anti-social and criminal behaviour during the day and at night, providing security for the City’s buildings and infrastructure and performing Ranger duties outside of the Ranger teams operating hours when called upon.
- 43 The City submits that the role of Community Patrol Officer is suitable alternative employment to that of P&I Officer because the two roles are similar in classification, salary and status.

What are the Factors to Consider in an Assessment of ‘Suitable Alternative Employment’?

- 44 The Union contends that the assessment when deciding whether a position is ‘suitable alternative employment’ includes the factors listed in cl 10.4.2 of the 2019 Agreement but is not limited to those factors. Consideration of other factors is permitted consistent with the tests applied by the Fair Work Commission.
- 45 The Union submits that ‘suitable alternative employment’ has the same meaning as ‘acceptable alternative employment’ in the *Fair Work Act 2009* (Cth) (**FW Act**) and says that the tests adopted by the Fair Work Commission to assess ‘other acceptable employment’ ought to be adopted by the Commission to assess ‘suitable alternative employment.’
- 46 The Union further submits that cl 10.4.2 is not an exhaustive list because the text of cl 10.4.2 uses the term ‘refers’ which has the effect of:
- a) Evincing an intention that clause 10.4.2 is non exhaustive because the definition of ‘refer’ in the Macquarie Dictionary (online 30 August 2023) is ‘to direct attention to or thoughts of’ and merely directs attention to the factors listed in clause 10.4.2;
 - b) The use of refer and not ‘means’ is important because the use of the term ‘mean’ in a statutory content, citing Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019 265 [6.5]), would evince an intention for clause 10.4.2. to be exhaustive.
 - c) Clause 10.4.2 was made under a legislative scheme provided by the FW Act and when clause 10.4.2 is considered in the context of the decisions of the Fair Work Commission the term ‘other acceptable employment’ is not confined nor exhaustive and turns on the facts of a matter. The Union refers the Commission to the factors set out in *Spotless Services Australia Limited t/a Alliance Catering* [2016] FWC 4505, 18 [64] (*Alliance Catering*):
 - i) Rate of pay
 - ii) Hours of work
 - iii) Work location
 - iv) Seniority
 - v) Fringe benefits
 - vi) Workload
 - vii) Job security
 - viii) Continuity of service
 - ix) Accrual of benefits
 - x) Probationary periods
 - xi) Carer’s responsibilities; and
 - xii) Family circumstances.
 - d) The second sentence in clause 10.4.2 uses ‘may also’ which tends to indicate the factors listed in the clause are not exhaustive and other factors may be considered.
- 47 The City disagrees with the Union and says that it is only the matters listed in cl 10.4.2 of the 2019 Agreement that are to be considered in this matter because;
- (i) clause 10.4.2 is clear and unambiguous and it is not necessary (or is it permissible) to look beyond the clause to discern the intention of the parties or the clause’s meaning; and
 - (ii) if the parties to the Agreement wanted to list other factors that should be taken into account when assessing whether a position is suitable alternative employment for the purposes of clause 10, they would have included those factors in clause 10.4.2 and they did not.
- 48 The City submits that this matter is an application made under s 44 of the IR Act and that matters referred for hearing and determination under s 44 (9) do not include determining the meaning of cl 10.4.2 and says to do so is impermissible given an application to interpret a clause in an industrial agreement must be made under s 46 of the IR Act.

- 49 The City disagrees with the Union's contention that 'statutory context' is a relevant consideration because the industrial agreement is not statute.
- 50 The City contends that there is no basis for the Union to assert that the factors listed in cl 10.4.2 are just 'illustrative' and that the word 'includes' can be substituted for the word 'refers.' The City submits that to adopt this submission would be to re-write a clear and unambiguous provision.

Consideration

- 51 The Memorandum sets out the questions that are to be answered. The first question relates to the assessment of the role of the Community Patrol Officer under clause 10.4.2 of the Agreement. The task is for the Commission to decide if the role is suitable alternative employment under cl 10.4.2 of the Agreement.
- 52 Therefore, the place to start is with the text of the clause and the factors listed within the clause. These factors are whether the position is a similar classification, salary and status to the employee's former position. The employee's skills, qualifications, abilities and experience may also be considered regarding the requirements of the position and the practicality and cost of any retraining requirements.

Classification, Salary and Status

- 53 The CP Officer is classified at Level 5 whereas the P&I Officer is Level 4. The Union contends that the difference in classification reflects important and significant differences in the duties, qualifications, skills, abilities and experience requirements between the two positions. The Union says the CP Officer is not a similar classification.
- 54 The City says the CP Officer Level 5 role has a similar classification to the Parking and Information Officer Level 4 role and that the CP Officer has a similar salary, albeit higher salary and the two positions have a similar status because they are both roles in the Community Safety Business Unit and report to the Senior Community Patrol Officer. The City says the role of CP Officer Level 5 does not need to be the same, rather it just has to be similar.
- 55 The classification of positions and roles reflect the differences in the work value of the various roles in an organisation. The differences result from the duties, the qualifications required to undertake the duties, and the skills, abilities and experience possessed by the employee necessary to undertake the duties of the role. The classification is a result on the assessment of the value, and differences in value, between the various roles in the organisation.
- 56 In this matter, there is no evidence of a classification assessment of the relevant positions having been conducted. The difference in the classification of the two roles appears to reflect differences in the elements of the roles set out in the Position Descriptions of the two roles: Position Overview, Position Objectives, Qualification/Education Level, and Knowledge, Skills and Experience, and Other.
- 57 In respect of the Position Overview, the Parking & Information Officer role is described as one that carries out parking patrols with a view to gaining high level and fair compliance with the City's laws and regulations concerning parking. This is achieved with consistent interpretation and application of the City's local parking law, relevant legislation, policies, guidelines, and instructions. The role also provides accurate and timely parking related information to the public to assist them locate convenient parking available at the time required. The Position Overview for the role of a CPO is described as one that undertakes community safety patrol services (7 days a week, 24 hours a day) to deliver on the City's strategic plan objective concerning working with the community to create a safer City. The role is to deliver a visible and responsive patrol service that is engaging within the community, intelligence driven and proactive to the demands of the evolving customer. The role administers and enforces the various relevant acts, regulations and local laws where required and provides excellent customer service to both external and internal customers regarding community safety matters. The position of CPO is placed in the context of the City's statement that it will be a leader in community safety, addressing crime and antisocial behaviour and working with the community to make people who visit and work in the City feel safer.
- 58 In respect of the Position Objectives, the P&I position needs to maintain a highly visible presence while undertaking parking patrols to encourage and achieve a high level of compliance with parking restrictions and to deter anti-social behaviour. The CPO's Position Objectives requires the attendance at complaints and action to resolve the complaints or referral where necessary. The CPO patrols designated areas to identify and report on issues of concern including suspicious activities, damage and faults, graffiti and obstructions.
- 59 The CPO attends to building alarms and specified incidences and liaise and assist Western Australian Police as required. Outside of core hours the CPO assists with Ranger related services.
- 60 It is my assessment that the Position Overviews of the two positions are not similar. The P&I has a specific and limited focus to that of enforcing parking rules and regulations whereas the CPO has a broader focus covering a range of unspecified but various laws, rules and regulations. The CPO position is directed toward addressing crime and antisocial behaviour and is to be visible and responsive and must anticipate the actions or activities of the City's customers. The CPO role involves interaction with people in a greater variety of situations and more challenging circumstances. It is my assessment that the scope and responsibilities of the P&I are less than those of the CPO.
- 61 With respect to qualifications and education, I find that the two positions are not similar. The P&I role did not require any qualifications nor specific certifications. Whereas the CPO role requires a Certificate II in Security Operations, a WA Security Officers Licence and a WA Crowd Controllers Licence.
- 62 In respect of Knowledge, Skills and Experience, the P&I role requires the abilities to deal with the public in a courteous way, using good customer service and conflict resolution skills. The CPO requires excellent communication (both written and verbal) including the ability to display tact and sensitivity and demonstrate problem solving skills and the ability to exercise professional judgement in a lawful and accountable way. In addition, the CPO requires developed community and interpersonal skills including the ability to effectively manage conflict situations and negotiate positive outcomes effectively.

The two roles require very different skills and abilities which is not surprising when the different position overviews and objections are considered.

- 63 The P&I role has a comparatively limited scope, confined to matters associated with the enforcement of parking regulations. I recognise this may, from time to time, require a P&I officer to engage with people unhappy with being issued an infringement notice. The engagement in conflict resolution is limited. The CPO role, in contrast, is directed towards conflict resolution and ensuring a safer community. The CPO role is required and expected to engage in resolution of conflict as a core element of their role, not one that is incidental.
- 64 For the reasons set out above I find that the Classification of the two roles are not similar.
- 65 I find that the salary of the P&I Officer is less than that of the CPO and reflects the differences in the classification, and work value, of the two roles. The positions are not similar.
- 66 That status of the roles, based on reporting lines in the organisational structure, are similar and this supports a finding that the positions are similar.
- 67 Clause 10.4.2 permits the consideration of an employee's skills, qualifications, abilities and experience with regard to the practicality and the cost of any retraining requirements. The clause uses the term 'may also be considered.' That is consideration of the practicality and cost is a discretionary consideration.
- 68 The evidence is that the CPO role requires the occupant possess a Certificate II in Security Operations. Ms Cerinich did not have this qualification and to undertake the CPO role would require her to undertake the relevant training course and assessment.
- 69 The City contends that it would facilitate Ms Cerinich obtaining the qualification. The City says that means it may have paid for the fees and charges and have permitted Ms Cerinich paid time to undertake the training. Ms Cerinich says she was not informed of these factors until after she had declined the CPO role and the Union had made this application.
- 70 Ms Cerinich considered the practicality of obtaining additional qualifications and undertaking the training required to obtain a Certificate II in Security Operations and concluded that she would struggle to attain the qualification in her circumstances of caring for two young children and working full time.
- 71 Retraining and obtaining further qualifications requires an employee to learn. It is difficult to gain additional knowledge and skills in circumstances where a person lacks motivation or capacity to undertake any training required. In Ms Cerinich's circumstances it would not be fair to direct her to undertake the training required and to obtain a qualification she did not wish to obtain.

Conclusion to Question 1

- 72 For the reasons above, I find that the Community Patrol Officer is not suitable alternative employment for the Union's member for the Parking and Information Officer.

Consideration of Other Factors Not Specified in Clause 10.4.2

- 73 Given my conclusion in [70], the question of whether other factors may be considered need not be addressed.
- 74 In this matter, the parties to the Agreement have adopted conflicting positions as to the meaning of the term 'refer' in cl 10.4.2 and consequentially the factors that are to be considered in an assessment of 'suitable alternative employment.'
- 75 Clause 10.2 'Definitions of the Agreement' uses the terms 'includes' and 'means.' This subclause does not contain a definition for the term 'suitable alternate employment' and cl 10.4 'Suitable Alternate Employment' uses the term 'refers' in cl 10.4.2.
- 76 The term 'refer' is potentially capable of two meanings according to the Merriam Webster dictionary. The first defines 'refer' as a transitive verb:
- (1) to think of, regard, or classify within a general category or group
 - (2) to explain in terms of a general cause
 - (a) to allot to a particular place, stage, or period
 - (b) to regard as coming from or located in a specific area
- 77 Whereas the second defines 'refer' as an intransitive verb:
- (1) to have relation or connection
 - (2) to direct attention usually by clear and specific mention
- 78 Dictionary definitions are not to be simply adopted when interpreting the terms of an Agreement however I observe that the term 'refer' is ambiguous and clarification of the text in cl 10.4.2 by the parties in future Agreements may assist in preventing and/or resolving disputes concerning the factors to be assessed in deciding whether a position is 'suitable alternative employment.'

Question 2: If the answer to Question 1 is 'yes', is Ms Cerinich entitled to:

- a. **Reject an offer of suitable alternative employment made under cl 10.4 of the City of Stirling Inside Workforce Agreement 2019?**
 - b. **Be paid a redundancy payment under cl 10.7 of the City of Stirling Insider Workforce Agreement 2019?**
- 79 Given the answer to Question 1 is 'no' it is not necessary to answer this question.

Question 3: If the answer to question 2 is ‘yes’, does section 80BE(2) of the Industrial Relations Act 1979 (WA) apply so as to give the Western Australian Industrial Relations Commission the power under cl 10.7.5 of the City of Stirling Inside Workforce Agreement 2019 to vary the applicable redundancy package the City is required to pay to Ms Cerinich under clause 10.7.1?

80 Given there is no necessity to answer question 2, it is not necessary to answer this question 3.

Question 4: If the answer to question 1 is ‘no’, is Ms Cerinich entitled to a redundancy payment under clause 10.7 of the City of Stirling Inside Workforce Agreement 2019?

81 The Union submits that Ms Cerinich is entitled to a redundancy payment in circumstances where there is a declaration by the Commission that the role of Community Parole Officer is not suitable alternative employment.

82 The Union submits that cl 10.7 of the 2019 Agreement operates in the same manner as described by how the Honourable Justice Katzmann of the Federal Court of Australia determined how s 119 of the FW Act operated in *Broadlex Services Pty Ltd v United Worker’ Union* [2020] FCA; 296 IR 425 (*Broadlex*) with regard to when an employee’s redundancy pay entitlement crystallised. In line with the Union’s submissions, Katzmann J held that:

- a) an employer’s declaration of redundancy under s 119 of the FW Act is a repudiation of the employment contract;
- b) an affected employee’s refusal to continue their employment is acceptance of the employer’s redundancy repudiation;
- c) the employment of the affected employee is terminated by reason of their acceptance of the employer’s redundancy repudiation for the purposes of redundancy pay under s 119 of the FW Act; and
- d) the termination of employment has thus occurred and the employer must pay the employee the applicable redundancy payment under s 119 of the FW Act.

83 The Union contends that Ms Cerinich’s employment contract terminated when Ms Cerinich accepted the City’s repudiation on 9 June 2023.

84 The Union says Ms Cerinich has terminated her employment by acceptance of the City’s redundancy repudiation by way of her refusal to accept any offers of further employment. Therefore, her entitlement to redundancy pay has crystallised in accordance with cl 10.7 of the 2019 Agreement and the City must pay her a redundancy payment. Refusal of any ‘suitable alternative employment’ does not extinguish Ms Cerinich’s entitlement to redundancy pay upon termination of employment.

85 The Union submits that Ms Cerinich is entitled to a redundancy payment applying cl 10.7 ‘Redundancy Payment’:

10.7.1 An employee whose employment is terminated by reason of redundancy is entitled to the following amount of redundancy pay in respect of a period of continuous service:

Period of Continuous Service	Redundancy Payment
Less than 1 year	3 weeks’ pay
1 year but less than two years	4 weeks’ pay
2 years or more	3 weeks’ pay per year on a pro rata basis for every year of service up to a maximum of 52 weeks

10.7.2 An employee who is 50 years of age or more at the time of redundancy shall be entitled to an additional eight (8) weeks’ pay provided that the total amount payable under 10.7.1 and 10.7.2 is capped at 52 weeks’ pay.

10.7.3 The above package shall be additional to all other entitlements owing to the employee.

10.7.4 For the purposes of this clause, continuity of service shall be the same as defined in Regulation 5 of the Local Government (Long Service Leave] Regulations regarding service to the City, as amended from time to time.

10.7.5 Application may be made to the FWC for variation of the applicable redundancy package where the City has obtained other acceptable employment for the employees or cannot pay the relevant amount stipulated in clause 10.7.1.

86 The City submits that an assessment that the CPO role is not suitable alternative employment does not entitle Ms Cerinich to a redundancy payment under clause 10.7.1 because:

- i) there is another position available to Ms Cerinich that the City says is suitable alternative employment, being the role of Ranger;
- ii) even if the both the Ranger role and the Community Patrol Officer role are found after proper assessment by the Commission not to be suitable alternative employment, the City has the option of redeploying Ms Cerinich to another role, so long as it complies with its obligations under clause 10.5 of the Agreement;
- iii) given the City has not yet decided to terminate the employment of Ms Cerinich on redundancy grounds, an entitlement to redundancy pay under clause 10.7.1 of the Agreement has not crystallised for Ms Cerinich.

87 The City’s submissions are that the processes set out in cl 10.4 ‘Suitable Alternate Employment’ and cl 10.5 ‘Redeployment’ and cl 10.6 ‘Transfer to Lower Paid Duties’ must be engaged and explored before it can be concluded that the decision results in the termination of the employment of an incumbent employee. The City contends that a decision to terminate the employment of Ms Cerinich has not been made.

88 The Union contends that the City’s submissions if accepted will permit the City to unfairly withhold a redundancy payment by refusing to terminate an employee when they are genuinely redundant and deny the employee a redundancy payment.

89 Clause 10.2 defines ‘redundancy’:

- (b) ‘Redundancy’ occurs where the City has made a definite decision that the City no longer requires a particular job to be performed by anyone and that decision leads to the termination of employment of the incumbent employee, except where this is due to the ordinary and customary turnover of labour.

- 90 It is not disputed that the City has made a definite decision that the City no longer requires the particular job of Parking and Information Officer to be performed by anyone. The disagreement between the parties is whether this decision leads, or has led, to the termination of Ms Cernich's employment.
- 91 Adopting similar reasoning to that of *Broadlex*, I find that the City's decision to no longer require a position to be performed leads to termination of employment because it is a repudiation of the employment contract. An effected employee's refusal to continue their employment is acceptance of the employer's redundancy repudiation and the employment is terminated.
- 92 In this matter, Agreement between the parties requires the City to consider alternative options to termination of an employee's employment contract in circumstances where it has decided that the employee's position is no longer required. However, I do not find that these obligations then mean the decision to fundamentally change the employment contract in this manner does not amount to a repudiation of the employment contract. The employee may elect to accept an alternative position/s offered by the City or accept the repudiation of the employment contract.
- 93 An employee may not unreasonably reject all positions offered. The test of whether a position is not acceptable is an objective one. However, it would be unfair to an employee for the City to engage in a practice of offering alternative positions that are not objectively acceptable alternatives and that are beyond the skills, knowledge and competence of the employee over an extended period of time such that the employee is given no option but to resign.
- 94 In circumstances where the City believes that any alternative position offered to Ms Cerinich was acceptable and was suitable alternate employment and was rejected by Ms Cerinich, the 2019 Agreement provides that the City may apply to the Commission to reduce the redundancy payment to be made. The City has not done so.
- 95 In these circumstances, I find that on 3 June 2023, Ms Cerinich accepted the repudiation of her employment contract because of the abolition of her position.

Does the Commission have Jurisdiction to Determine the Entitlement?

- 96 Question 4 seeks an answer to whether Ms Cerinich is entitled to a redundancy payment in accordance with the industrial agreement.
- 97 The City submits that the Commission does not have the power to decide this question because it requires the Commission to interpret the terms of the Agreement. The City contends that the s. 46 of the IRA provides the authority to interpret agreements and therefore it is not open to the Commission to interpret the Agreement under s. 44.
- 98 The Commission's powers under s 44 are arbitral and are directed toward rights and obligations to be created whereas the exercise of judicial powers concern the ascertainment and enforcement of rights and liabilities as they are set out in industrial instruments.
- 99 A claim for the interpretation of an Agreement is an exercise of judicial power by the Commission under s 46 of the *IR Act* and a claim for enforcement of an industrial instrument is an exercise of judicial power and is within the exclusive jurisdiction of the Industrial Magistrate Court under s 83 of the *IR Act*.
- 100 The Full Bench in *Crewe and Sons Pty Ltd v AMWSU* (1989) 69 WAIG 2623 considered the powers available to the Commission under s 44 of the *IR Act* and at 2627 said:

'In the ultimate analysis, the issue for determination in the present case is whether the authority was deciding a claim for payment of wages made as a matter of legal right or a claim for payment of wage is made not as a matter of legal right? But of what was right and fair.
'The former, then the decision constituted an attempted exercise of judicial power and was not the resolution of a dispute as to an "industrial matter". If the latter, then the decision resolved a dispute as to such a matter.'

and at 2628 said:

'A matter which involves the determination of existing rights under an award and therefore does not involve the application of section 26, because it involves the determination of existing prescribed legal rights, is not a matter which section 44 empowers in the arbitral function, unless it is in the course of addressing an industrial matter, but subject to what we say hereunder.

....

If the claim involves a determination of what is payable in accordance with legal principle that than what should be ordered as a matter of equity, good conscience and the substantial merits of the case, under section 26, then the matter is more likely to be a matter of enforcement or interpretation.

The arbitral function, however, does not involve a final determination of matters of right under the award.

A bald interpretive decision is precluded by the express existence of the power in section 46. However, in our opinion, in the course of a section 44 matter, unless the question is a bald interpretative matter, the Commission is entitled to interpret an award or any other document before it.

The recourse of interpretation removed from the arbitral process is not authorised by section 44.

A claim for payment based on matters of industrial policy as distinct from matters of legal entitlement is clearly one which might be dealt with under section 44.

A claim which arises clearly out of the contract of employment and the award is more likely to be a matter for enforcement. Thus, a claim for wages due and payable by an employer to an employee is a claim for the enforcement of an existing right as is a claim for the enforcement of a provision in an award.

If the claim involves a determination of what is payable in accordance with legal principle rather than what should be ordered as a matter of equity, good conscience and the substantial merits of the case, under section 26, then the matter is more likely to be a matter of enforcement or interpretation.'

- 101 In *St Michael's School v The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers* [2000] WAIRC 00002; 80 WAIG 2839 the Full Bench found in a dispute pursuant to s 44 of the *IR Act* concerning the correct classification of an employee, that:

42 Its resolution required a finding of fact as to [the employee's] duties and the application of the terms of the award (perhaps involving its interpretation) to those duties, to determine whether her classification should be as a Level 4, not a Level 3, employee, and whether the order sought should therefore issue.

43 There was clearly no attempt to enforce an order to pay the monies or indeed to enforce the award. The matter involved a determination of what classification under the award applied to an employee. The order, as the Commissioner, correctly observed, did not seek to compel the employer to do anything. Clearly, if the City was successful in obtaining the order and Mrs Murray was not paid what a Level 4 employee should be paid under the award, then the award would be enforceable in the Industrial Magistrate's Court, pursuant to s.83 of the Act

102 In *United Voice WA v The Director General, Department of Education* (2015) 95 WAIG 13 (*United Voice WA*), The Full Bench considered the jurisdiction of the Commission under s 44 and the determination of the rights and obligations of parties under an industrial instrument and Smith AP sets out:

[94] In my respectful opinion, the determination of this issue starts from a consideration of the nature of the relief sought and whether the Commission is called upon to exercise arbitral power.

[95] The difference between an exercise of judicial power and arbitral power was explained by Issacs and Rich JJ in *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1928) 25 CLR 434, 463 as:

[T]he judicial power is concerned with an assessment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.

[96] In *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australian* (1987) 163 CLR 656, 666 the High Courts put the distinction simply:

The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.

... ..

[99] The Full Bench in *Crewe and Sons* referred to the decision of the High Court in *Re Cram; Ex parte The Newcastle Wallsend Coal Co Pty Ltd* [1987] HCA 29; (1987) 163 CLR 140 in which the High Court held that the making of a binding declaration or right is the exercise of judicial power. The Full Bench then summarise the principles enunciated by Mason CJ, Brennan, Deane, Dawson and Toohey JJ in *Re Cram* as follows (2627);

- (1) A claim for payment of wages due and payable by an employer to an employee is a claim for the enforcement of an existing legal right.
- (2) A claim for the enforcement of a provision in an award for the payment of wages to an employee is also a claim for the enforcement of an existing legal right.
- (3) Claims for the enforcement of existing legal rights necessarily invoke the exercise of judicial power.
- (4) The Court held that there was no jurisdiction in the Board to determine or enforce a legal right to payment of wages on the part of employees in respect of a past period during which they had been stood down or refused work or to enforce the provisions of an award regulating the right to payment of wages for such a period.
- (5) Thus, the authority was denied the power of judicial determination which included, to use the words of Kitto J. in *Aberdare Collieries Case* (*op. cit.*) 'the giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct'.

(6) The making of a binding declaration of right is an instance of the exercise of judicial power.

It stands outside the arbitral function.

But there is no substance in the suggestion that an industrial tribunal cannot interpret laws, awards and other legal instruments. A tribunal could not discharge its arbitral functions if it were unable to form an opinion on a matter of interpretation. The formation of views and opinions on matters of interpretation in arbitral proceedings does not of itself amount to a usurpation of judicial power (see *Cessnock Collieries Case* (*op. cit.*) and *Australian Coal and Shale Employees' Federation Case* (*op. cit.*) at page 174 and *R. v. Gough; ex parte Key Meats Pty Ltd* (1982) 148 CLR 582 at 596-597) (our underlining).

[Put in the context of the Industrial Relations Act (W.A.) it would not necessarily amount to an intrusion on the section 46 power].

- (7) Indeed, a tribunal may find it necessary to form an opinion as to the existing legal rights of the parties as a step in arriving at the ultimate conclusions on which the tribunal bases the making of an award intended to regulate the future rights of the parties [see *Aberdare Collieries Case* (*op. cit.*)]. Of course, the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights.
- (8) Despite the reference by Kitto J. in *Aberdare Collieries Case* (*op. cit.*) to 'the distinction between a power of arbitral decision in respect of the future and a power of judicial determination of existing rights and obligations', the arbitral function includes the determination of a dispute

relating to past transactions, events and conduct. Commercial arbitration often involves the determination of such a dispute and so does industrial arbitration.

[100] Thus, it is clear that the Commission when exercising an arbitral function is not prohibited from interpreting industrial instruments. It necessarily follows that whilst a Commissioner may not make a binding declaration of the rights and obligations of parties under an industrial instrument, it is open to the Commission to make a binding determination of future rights and obligations.’

103 Adopting the reasoning of the Full Bench in *United Voice WA*, the question to be answered and determination of this issue in this matter arts from the nature of the relief sought and whether it is a determination of an existing right. The essential character of Question 4 is a determination of whether an entitlement to redundancy payment under the terms of the Agreement exists.

104 The question to be answered in Question 4 does not concern issues of fairness nor an issue of industrial policy. The relief sought by the question is a declaration as to an existing entitlement under the Agreement because of an event in the past. It is not a declaration on the pathway to a binding determination of future rights and obligations. It is therefore an exercise of judicial and not arbitral power and therefore, beyond the power of this Commission to make.

Representation

105 The questions concerning the Union’s entitlements in relation to representation are set out in Questions 5 to 10. The Union seeks orders in relation to each of the Questions.

106 The Union seeks orders as to the ‘industrial matters’ that are expressed as binding orders upon the parties. The Union submits that the ‘industrial matters’ are elucidated by the questions contained in the Memorandum

107 In relation to the issues concerning representational rights, the first question set out in the s 44(9) memorandum of referral, drafted and agreed by the parties, to be answered is:

Application of cl 6

Question 5. *During what period did cl 6 of City of Stirling Inside Workforce Agreement 2019 apply to Ms Cerinich as an employee affected by the City’s decision to restructure the City’s Community Safety Business Unit?*

108 The Union submits that the period cl 6 applied to Ms Cerinich as an employee affected by the City’s decision to restructure the City’s Community Safety Business Unit was between early to mid-February 2023 and 9 June 2023.

109 The Union contends that the City made a ‘definite decision’ to abolish the Parking Services team within the Community Safety Business Unit and that it is on the occurrence of the Respondent’s ‘definite decision’ under cl 6.1 of the 2019 Agreement that the obligations of consultation crystallised and applied. The Union submits that the agreed facts and evidence that this was early-2023 given that the agreed facts state that the Union was informed of the decision on 16 February 2023 and from this point in time cl 6 of the 2019 Agreement applied to Ms Cerinich.

110 The Union submits that the period during which clause 6 continued to apply was early to mid- February 2023 until 9 June 2023 when Ms Cerinich accepted the repudiation of her employment contract

111 The City contends that period cl 6 applied to Ms Cerinich as an employee affected by the City’s decision to restructure the City’s Community Safety Business Unit as between the beginning of February 2023 and 31 March 2023. The City submits that cl 6 ceased to apply sometime between February 2023 and when the consultation process concluded at the end of March 2023.

112 Clause 6 of the 2019 Agreement provides:

6. Communication and the Introduction of Change

- 6.1 Where the City has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that is likely to have significant effects on employees, the City shall notify the employees who may be affected by the proposed changes as soon as practicable.
- 6.2 "Significant effects" include termination of employment, major changes in composition, operation or size of the City’s workforce or in the skills required, the elimination of or diminishing of job opportunities, promotion opportunities, or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Where the Agreement allows for the City to make changes as part of the terms of the Agreement these shall not be considered “significant effects”.
- 6.3 Where the City has made a definite decision to make the changes referred to in subclause 6.2, the City shall notify the relevant union and commence discussions with affected employees within four (4) weeks of making such a decision. The City shall discuss the effects the changes are likely to have, measures to avert or mitigate the adverse effects of such changes and shall give prompt consideration to matters raised by the employees in relation to the changes.
- 6.4 Where the City proposes to make changes to employee(s) regular roster or ordinary hours of work, the City shall notify the relevant employee(s) and commence discussions with affected employee(s) as soon as reasonably practicable. The City will provide information and shall discuss the effects the changes are likely to have and invite the employee(s) to give their views about the impact of the change. The City shall give prompt consideration to the views given by employees about the impact of the change.
- 6.5 For the purpose of the discussions referred to above, the City shall provide in writing to the employees concerned all relevant information about the change including the nature of the changes proposed and the

expected effects of the changes on employees. The City shall not be required to disclose confidential information, the disclosure of which would be unfavourable to the City's interests.

6.6 *Commitment to Change in Work Practices*

The parties agree to a commitment to change by establishing work practices aimed at increasing productivity and efficiency in the workplace.

This commitment includes but is not limited to:

- (i) The introduction of new equipment to improve the efficiency of the City;
- (ii) Annual review of equipment, operational methods and procedures in place to maximise opportunities for efficiency and business growth;
- (iii) Flexibility in working hours;
- (iv) Acceptance of new technologies such as Global Positioning Systems on vehicles, which lead to a greater understanding of the requirement and characteristics of the business/services provided;
- (v) The recording of any information ultimately requested by the City, which will benefit the business and services, provided to customers;
- (vi) Multi-skilling is viewed by all parties as an essential aspect of working in a team situation where a multitude of tasks need to be performed and as such shall be adopted wherever it is beneficial to the services provided.

6.7 The relevant employees may appoint in writing a representative for the purpose of any of the procedures in this clause. If a relevant employee appoints or relevant employees appoint a representative for the purpose of consultation and the employee or employees advise the employer in writing of the identity of the representative, the City must recognise that representative.

113 Clause 6 does not specify a finite or prescribed period. The clause is directed toward the obligation of the City to notify employees and to engage in discussions with affected employees and their representatives.

114 I find that the relevant period commenced in February 2023 and continued for the period during which discussions concerning the consequences of the decision by the City had on Ms Cerinich's duties and her employment continued. These discussions included the consideration of the impact the abolition of her position would have, the effect of the changes and consideration of Ms Cerinich's views. The agreed evidence is that these discussions continued until 30 June 2023. The discussions did not resolve the concerns Ms Cerinich held and the Union made an application to the Commission pursuant to s 44 on 3 July 2023.

115 I find that that the answer to Question 5 is clause 6 applied until 3 July 2023.

Appointment of representative under cl 6.7

Question 6: *Was Mr Knox appointed as Ms Cerinich's representative pursuant to cl 6.7 of the City of Stirling Inside Workforce Agreement 2019 and if so, from when?*

116 The Union first wrote to the City in relation to Ms Cerinich on 3 April 2023 (Letter). The Union submits that it is clear from this letter that Mr Knox was acting for Ms Cerinich as his name appears at the bottom of the letter in bold lettering and identified him as the relevant official of the Union. The Union says that is all that is required is for the City to be informed of the appointment of a representative by an employee in writing. That is, the employee is not required to personally write and inform of the appointment of a representative and, as in this matter, the representative may write to the City.

117 Following the letter there is an exchange of emails between Mr Knox and the City concerning Ms Cerinich's employment in which Mr Knox is acknowledged as acting on behalf of Ms Cerinich.

118 The City contends that Mr Knox was not appointed as a representative under cl 6.7 because Ms Cerinich did not appoint Mr Knox by way of writing and that the union cannot retrospectively assert that one of their officer's was appointed under cl 6.7 in these circumstances.

119 The City submits that the Letter does not refer to cl 6.7 nor specifically state, using the language of cl 6.7 and the question in the memo of referral, that Mr Knox has been appointed to represent Ms Cerinich for the purposes of the procedures under cl 6.

120 The City contends that the appointment of a representative, cl 6, requires an employee to nominate a representative in writing. That is, the subclause prescribes the means by which an employee invokes an entitlement to representation and communicates this to their employer.

121 In *The Civil Service Association of Western Australia Incorporates v Director General as the Employing Authority, Department of Justice* [2023] 104 WAIG 11 (*the CSA Case*) the Full Bench considered how representatives are appointed:

[61] Because of the breadth, or indeed the unlimited scope, of who can be a representative, it is no surprise that the parties would seek, by clause 36A(4), to provide a process for invoking the entitlement to representation. The process makes it clear when the obligation is triggered. The segregation of clause 36A(4)(a) and (b) ensures that an employer is not required to recognise the representative capacity of just anyone, unless:

- the representative is a person of certain standing such that their notification in writing that they so act can be relied upon (clause 36A(4)(a)); or
- the officer has themselves notified the employer in writing (clause 36A(4)(b)).

[63] Another key feature of clause 36A(4) is the conditions it prescribes must be met, before the obligation to recognise the representative or their capacity as such kicks in. Specifically, clause 36A(4) requires the

identity and contact details of the representative to be given in writing. If a representative's conduct, communications, acts and omissions will bind the officer, the employer needs sufficient details of the representative to be able to rely confidently on communications received from the representative.

[64] A further purpose of requiring notification of the identity of the representative is so that the employer understands whether the representative is acting in their capacity as a paid professional advisor, as a union official, or a lay person. The identity of the representative in this regard may inform how the 'representative capacity' of the person is to be recognised. For instance, it might be inappropriate to attempt communications with a legal practitioner outside of ordinary business hours. It might be entirely appropriate to communicate with a representative who is a workplace delegate working shiftwork, or a family member who works full-time, outside of ordinary business hours.

122 In this matter, the processes for appointment of a representative differ from those before the Full Bench, particularly the requirements for specific contact details of the representative. However, the Full Bench set out the purpose of the requirements of how a representative is appointed and that the purpose is an important consideration in determining whether a representative was properly appointed.

123 The clause considered by the Full Bench in *the CSA Case* provides for either an employee to inform in writing of the appointment of a representative or an appointed representative to inform, in writing, the employer they have been appointed. In this matter, cl 6 of the 2019 Agreement provides for an employee or employees to advise the employer in writing of the representative. Clause 6 does not provide for the representative to inform the employer.

124 I find that cl 6 requires that Ms Cerinich inform the City in writing that she has appointed a representative. There is no evidence that Ms Cerinich did so. Therefore, I find that no such appointment was made.

Rights of representative under cl 6.7

Question 7: *What rights, if any, does Mr Knox have as Ms Cerinich's representative under cl 6.7 of the City of Stirling Inside Workforce Agreement 2019?*

Question 8: *Did the City interfere with, impair or prevent Ms Cerinich from exercising her right to be represented under cl 6.7 of the City of Stirling Inside Workforce Agreement 2019?*

125 Given I have found that Mr Knox was not appointed to represent Ms Cerinich under cl 6.7, Question 7 and Question 8 does not arise.

Other rights relating to representation of Ms Cerinich

Question 9. *If Mr Knox was not at any time appointed as Ms Cerinich's representative under cl 6.7 of the City of Stirling Inside Workforce Agreement 2019, did the Western Australian Municipal, Administrative, Clerical and Services Union of Employees have a right under the City of Stirling Inside Workforce Agreement 2019 and/or the Industrial Relations Act 1979 (WA) to represent the interests of Ms Cerinich to the City in this matter?*

126 The Union submits that it has a right to representation under the *IR Act* and its registration under the *IR Act* has the effect of conferring rights of representation upon it to represent eligible members.

127 The City submits that the Question has no relevance to these proceedings because there is no evidence that the Union was prevented from representing its member. The Union has not set out any facts that point to the dispute to be resolved concerning its rights and nor any circumstances where its rights to representation as a party to the Agreement have been stifled nor any conduct by the City that prevents officials of the Union from representing its members.

128 The orders sought by the Union to quell the dispute are vague and lack clarity. It is not possible to determine the remedy that goes to creating future rights and obligation and, in these circumstances, I decline to make a finding or determination.

Question 10. *If the answer to question 9 is 'yes', did the City interfere with, impair or prevent the Western Australian Municipal, Administrative, Clerical and Services Union of Employees or Ms Cerinich from exercising that right?*

129 The Union submits the City interfered with the Union's rights to represent its members by attempting to have another officer of the Union attend a meeting with Ms Cerinich despite being on notice that Mr Knox was representing her. The Union contends that this amounted to an interference with the representative rights of Mr Knox and the right of Ms Cerinich to be represented by Mr Knox.

130 The City denies it interfered with, impaired or prevented the Union or Ms Cerinich from exercising a right.

131 There is no dispute that an officer of the City suggested officers of the Union, other than Mr Knox, attend a meeting with Ms Cerinich. However, when Ms Cerinich declined to agree that another person attend the meeting to represent or support her, the officer did not press this, and Mr Knox continued to represent Ms Cerinich.

132 On the evidence I conclude that the City did not interfere with, impair or prevent the Union from representing its member.

UNIONS—Matters dealt with under Section 66

2024 WAIRC 00787

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KAREL VAN STYN

PARTIES

APPLICANT

-v-

BAKING INDUSTRY EMPLOYER'S ASSOCIATION OF WEST AUSTRALIA

RESPONDENT

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSIONER

INTERVENOR

CORAM CHIEF COMMISSIONER S J KENNER

DATE WEDNESDAY, 28 AUGUST 2024

FILE NO/S PRES 7 OF 2024

CITATION NO. 2024 WAIRC 00787

Result Order issued

Representation

Applicant In person

Respondent No appearance

Intervener Mr J Carroll of counsel and with him Ms S Pontifex

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be discontinued by leave.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2024 WAIRC 00804

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ROMINA RASCHILLA

PARTIES

APPLICANT

-v-

MARK OLSON

FIRST RESPONDENT

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

SECOND RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER

DATE MONDAY, 9 SEPTEMBER 2024

FILE NO/S PRES 10 OF 2024

CITATION NO. 2024 WAIRC 00804

Result Order issued

Appearances

Applicant In person

First Respondent No appearance

Second Respondent Ms B Burke of counsel

Proposed Intervenor Mr J Carroll of counsel

Order

HAVING heard Ms R Raschilla on her own behalf, there being no appearance on behalf of the first respondent, Ms B Burke of counsel on behalf of the second respondent and Mr J Carroll of counsel on behalf of the proposed intervenor, the Chief Commissioner, pursuant to the powers conferred on him under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the Registrar, Western Australian Industrial Relations Commission be and is hereby granted leave to intervene in the herein application.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.**2024 WAIRC 00805****ORDER PURSUANT TO S.66**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROMINA RASCHILLA

APPLICANT

-v-

MARK OLSON

FIRST RESPONDENT

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

SECOND RESPONDENT

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INTERVENOR**CORAM** CHIEF COMMISSIONER S J KENNER**DATE** MONDAY, 9 SEPTEMBER 2024**FILE NO.** PRES 10 OF 2024**CITATION NO.** 2024 WAIRC 00805

Result	Direction issued
Appearances	
Applicant	In person
First Respondent	No appearance
Second Respondent	Ms B Burke of counsel
Intervenor	Mr J Carroll of counsel

Direction

HAVING heard Ms R Raschilla on her own behalf, there being no appearance on behalf of the first respondent, Ms B Burke of counsel on behalf of the second respondent and Mr J Carroll of counsel on behalf of the intervenor, the Chief Commissioner, pursuant to the powers conferred on him under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the applicant file an amended application:
 - (a) specifying each rule of the second respondent's registered Rules in respect of which an interpretation is sought and stating the specific question(s) to be answered;
 - (b) specifying each rule of the second respondent's registered Rules that the applicant contends has not been observed and how it has not been observed; and
 - (c) specifying the interim and final orders sought
by no later than 4.00 pm 11 September 2024.
- (2) THAT the respondents file an amended response and the intervenor a response by no later than 4.00 pm 13 September 2024.
- (3) THAT the applicant and respondents shall give discovery on affidavit by no later than 18 September 2024.
- (4) THAT inspection of documents shall be completed by 20 September 2024.
- (5) THAT the parties file affidavits in support of or in opposition to the application by no later than 30 September 2024.

- (6) THAT the applicant file an outline of submissions and any list of authorities upon which she intends to rely no later than five days prior to the date of hearing.
- (7) THAT the respondents and the intervenor file an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
- (8) THAT the matter be listed for hearing on a date to be fixed.
- (9) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2024 WAIRC 00800

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD GIVEN ON 2 FEBRUARY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SHANNON COWARD

PARTIES

APPLICANT

-v-

CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 6 SEPTEMBER 2024
FILE NO/S APPL 7 OF 2024
CITATION NO. 2024 WAIRC 00800

Result	Programming orders issued
Representation	
Applicant	On his own behalf
Respondent	Ms H McIntyre (of counsel)

Programming orders

HAVING heard from the applicant on his own behalf and Ms H McIntyre (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –

1. THAT by 3.00pm on Friday 4 October 2024 the applicant file outlines of any evidence and the documents that he intends to rely on;
2. THAT by 3.00pm on Friday 25 October 2024 the respondent make any application for discovery;
3. THAT by 3.00pm on Friday 1 November 2024 the respondent file outlines of any evidence and the documents that it intends to rely on;
4. THAT by 3.00pm on Friday 22 November 2024 the applicant file written submissions and a list of authorities;
5. THAT by 3.00pm on Friday 13 December 2024 the respondent file written submissions and a list of authorities;
6. THAT the matter be listed for a two-day hearing on dates to be fixed; and
7. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2024 WAIRC 00791

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JACQUELINE COOPER

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 30 AUGUST 2024
FILE NO. APPL 74 OF 2023
CITATION NO. 2024 WAIRC 00791

Result Direction issued
Representation
Applicant Ms J Cooper
Respondent Mr D Anderson (of counsel)

Direction

HAVING heard from the applicant on her own behalf and Mr Anderson on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the respondent's application to dismiss for want of prosecution pursuant to section 27(1)(a) of the *Industrial Relations Act 1979* (WA) be heard and determined;
2. THAT the applicant file and serve any submissions and outlines of witness evidence and documents, upon which they intend to rely, by no later than 18 September 2024;
3. THAT the respondent file and serve any submissions and outlines of witness evidence and documents, upon which they intend to rely, by no later than 9 October 2024;
4. THAT this matter be listed for hearing on a date to be fixed; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00788

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JACQUELINE COOPER

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 29 AUGUST 2024
FILE NO/S APPL 74 OF 2023
CITATION NO. 2024 WAIRC 00788

Result Name of Respondent Amended
Representation
Applicant Ms J Cooper
Respondent Mr D Anderson (of counsel)

Order

HAVING heard from the applicant on her own behalf and Mr Anderson on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders:

THAT the name of the respondent be amended to ‘Minister for Corrective Services.’

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00780

COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF SWAN WASTE AND RECYCLING SERVICES INDUSTRIAL AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CITY OF SWAN, LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA), WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES

APPLICANTS

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE FRIDAY, 23 AUGUST 2024

FILE NO. APPL 127 OF 2024

CITATION NO. 2024 WAIRC 00780

Result Direction issued

Representation

First Applicant Ms K Groves of counsel

Second Applicant Mr A Johnson

Third Applicant Mr R Knox

Direction

THE Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent —

1. THAT Orders 1, 2, 4, 5 and 6 of the Directions made by Senior Commissioner Cosentino on 26 July 2024 [(2024) WAIRC 00730] be set aside;
2. THAT the parties lodge with the Commission an **agreed statement of facts** no later than 4:00pm on 12 September 2024;
3. THAT the parties **file any signed witness statements** which it intends to rely upon on by no later than 4:00pm on 19 September 2024;
4. THAT the parties **file written submissions and a list of any authorities** relied upon by no later than 4:00pm on 26 September 2024;
5. THAT the parties **file any written submissions responsive** to those filed by another party by no later than 4:00pm on 30 September 2024;
6. THAT each party notify each of the other parties whether they will require any witness who has filed a witness statement to be available for **cross examination**, by no later than 4:00pm on 30 September 2024;
7. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2024 WAIRC 00793

DISPUTE RE REVIEWS OF THE WESTERN AUSTRALIAN FIRE SERVICE ENTERPRISE BARGAINING AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA

APPLICANT

-v-

DEPARTMENT OF FIRE AND EMERGENCY SERVICES

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** FRIDAY, 30 AUGUST 2024**FILE NO.** C 17 OF 2024**CITATION NO.** 2024 WAIRC 00793**Result** Recommendation issued**Representation****Applicant** Mr T Nolan (of counsel)

Mr J Marsh

Respondent Ms N Pyne

Ms S Bennett

Recommendation

HAVING heard from Mr Nolan on behalf of the applicant and Ms Pyne on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby recommends:

1. THAT the respondent is to provide the applicant a copy of the 'DFES EBA Rates Review' and the parties are to meet on or before 12 September 2024 to discuss in good faith and on a without prejudice basis the 'Annualised Wage Review;'
2. THAT the parties are to meet on or before 19 September 2024 to discuss in good faith and on a without prejudice basis the 'Award Update,' including provisions on which may parties agree to apply for incorporation into the relevant award;
3. THAT the respondent is to provide the applicant a copy of the 'International Deployment Conditions' on or before 19 September 2024;
4. THAT the parties are to have a meeting on or before 26 September to discuss in good faith and on a without prejudice basis the topic of 'International Deployment Conditions;'
5. THAT the applicant representatives and the respondent's Director of Human Resources and the Manager Health and Safety meet to discuss Fatigue Management on or before 12 September 2024;
6. THAT the respondent responds to the applicant's recent correspondence and any further questions of the applicant's concerning the 'District Officer Transfer and Rotation' by 26 September 2024;
7. THAT the respondent is to provide the applicant the name of the respondent's representative for the purposes of the 'Rank Review' on or before 5 September 2024;
8. THAT the applicant and respondent's representative meet on or before 12 September to discuss in good faith and on a without prejudice basis the topic of 'Rank Review;'
9. THAT the parties have a meet on or before 6 September 2024 to discuss in good faith and on a without prejudice basis the topic of 'Fire Brigade Regulations – Medical Benefits;' and
10. THAT the parties will attend a further Conciliation Conference at the Western Australian Industrial Relations Commission at 2.15pm on 27 September 2024 unless the parties agree to an alternate date or to vacate the conference.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00778

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 17/2024 GIVEN
ON 13 JUNE 2024**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DELIA GAVRIL	APPELLANT
	-v-	
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION, WA	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG COMMISSIONER T KUCERA	
DATE	WEDNESDAY, 21 AUGUST 2024	
FILE NO/S	FBA 15 OF 2024	
CITATION NO.	2024 WAIRC 00778	

Result	Order issued
Representation	
Appellant	Ms E Alvarez as agent
Respondent	Mr J Carroll of counsel

Order

HAVING heard from Ms E Alvarez as agent on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders —

1. THAT the time for filing the appeal book be extended to 20 August 2024.
2. THAT the appellant serve the appeal book on the respondent by 23 August 2024.
3. THAT the order of the Industrial Magistrates Court issued on 21 June 2024 be included in the appeal book in substitution for the order at page 136 and page 137 of the appeal book.
4. THAT the transcript of the hearing on 6 June 2024 before the Industrial Magistrates Court be deemed to be included in the appeal book.
5. THAT the appeal is to be set down for hearing of one-day duration on a date to be fixed not before 20 September 2024.

(Sgd.) R COSENTINO,
Senior Commissioner,
By the Full Bench.

[L.S.]

2024 WAIRC 00784

DISPUTE RE UNION MEMBERS ENTITLEMENT TO PAID SICK LEAVE

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WESTERN AUSTRALIAN POLICE UNION OF WORKERS	APPLICANT
	-v-	
	COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 27 AUGUST 2024	
FILE NO.	PSACR 2 OF 2024	
CITATION NO.	2024 WAIRC 00784	

Result Direction issued
Representation
Applicant Mr S Farrell (of agent)
Respondent Mr J Carroll (of counsel)

Direction

HAVING heard from Mr Farrell on behalf of the applicant and Mr Carroll on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT by 4:00 pm on 30 August 2024, the respondent file their written submissions in support of their jurisdictional objection on the basis that there is no longer an industrial matter;
2. THAT by 4:00pm on 13 September 2024, the applicant file their written submissions in opposition to the jurisdictional objection; and
3. THAT the jurisdictional objection is to be heard at the same time as the hearing of the substantive proceedings.

(Sgd.) T B WALKINGTON,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

2024 WAIRC 00807

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WARREN ROBERT JOHNSTON

APPLICANT

-v-

LOOMA COMMUNITY INC

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE TUESDAY, 10 SEPTEMBER 2024
FILE NO. U 16 OF 2023
CITATION NO. 2024 WAIRC 00807

Result Direction issued
Representation
Applicant Mr S Kemp (of counsel)
Respondent Ms V Stamper (of counsel)

Direction

HAVING heard from Mr Kemp on behalf of the applicant and Ms Stamper on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the applicant file and serve upon the respondent any affidavits or statutory declarations, by no later than 13 September 2024;
2. THAT the respondent may file and serve upon the applicant any affidavits or statutory declarations, by no later than 14 October 2024;
3. THAT the parties file and serve any written submissions, by no later than 28 October 2024;
4. THAT the Commission list a hearing date no earlier than 28 October 2024; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
 Commissioner.

[L.S.]

2024 WAIRC 00798

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAITLIN LARNEY

APPLICANT

-v-

DANAO, JACQUELYN

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 5 SEPTEMBER 2024

FILE NO.

U 51 OF 2024

CITATION NO.

2024 WAIRC 00798

Result

Direction issued

Representation

Applicant

Ms M Brown (of counsel)

Respondent

Ms J Danao

Direction

HAVING heard from Ms Brown on behalf of the applicant and the respondent on her own behalf, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the applicant file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 11 September 2024;
2. THAT the respondent file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 2 October 2024;
3. THAT the applicant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 16 October 2024;
4. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 30 October 2024;
5. THAT this matter be listed for hearing on a date not before 6 November 2024; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00771

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAITLIN LARNEY

APPLICANT

-v-

DANAO, JACQUELYN

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 16 AUGUST 2024

FILE NO.

U 51 OF 2024

CITATION NO.

2024 WAIRC 00771

Result Direction issued
Representation
Applicant Ms M Brown (of counsel)
Respondent Ms J Danao

Direction

HAVING heard from Ms Brown on behalf of the applicant and the respondent on her own behalf, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the applicant file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 4 September 2024;
2. THAT the respondent file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 25 September 2024;
3. THAT the applicant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 9 October 2024;
4. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 23 October 2024;
5. THAT this matter be listed for hearing on a date not before 30 October 2024; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00806

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THOMAS GHIGO

APPLICANT

-v-

PICARD, AURELIE ESTELLE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE TUESDAY, 10 SEPTEMBER 2024
FILE NO. U 79 OF 2023
CITATION NO. 2024 WAIRC 00806

Result Directions issued
Representation
Applicant Mr T Ghigo
Respondent Ms A E Picard

Direction

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

1. THAT the parties file and serve any outlines of submissions and any documents upon which they intend to rely on concerning the admission of video and audio recordings taken by the applicant, no later than 4pm 16 September 2024; and
2. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00799

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THOMAS GHIGO

APPLICANT

-v-

PICARD, AURELIE ESTELLE

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 5 SEPTEMBER 2024

FILE NO.

U 79 OF 2023

CITATION NO.

2024 WAIRC 00799

Result	Directions issued
Representation	
Applicant	Mr T Ghigo
Respondent	Ms A E Picard

Direction

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

1. THAT the parties file and serve any outlines of submissions and any documents upon which they intend to rely on concerning the admission of video and audio recordings taken by the applicant, no later than 4pm 11 September 2024; and
2. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00777

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES

PERTH AIRPORT PTY LTD

APPLICANT

-v-

WORKSAFE COMMISSIONER

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 21 AUGUST 2024

FILE NO/S

WHST 10 OF 2024

CITATION NO.

2024 WAIRC 00777

Result	Programming orders issued
Representation	
Applicant	Mr A Anderson (of counsel)
Respondent	Mr A Hay (of counsel)

Programming orders

HAVING heard from Mr A Anderson (of counsel) on behalf of the applicant, and Mr A Hay (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred by the *Work Health and Safety Act 2020* (WA), orders by consent –

1. THAT the respondent provide to the applicant materials (including any witness statements) that she relies on by 18 September 2024;

- 2. THAT the applicant provide to the respondent materials (including any witness statements) that it relies on by 16 October 2024;
- 3. THAT the parties confer and file a statement of agreed facts and contentions and an agreed bundle of documents by 27 November 2024;
- 4. THAT a directions hearing be listed on a date to be fixed not before 4 December 2024; and
- 5. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2024 WAIRC 00720

APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES

PERTH AIRPORT PTY LTD

APPLICANT

-v-

DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE THURSDAY, 25 JULY 2024

FILE NO/S WHST 10 OF 2024

CITATION NO. 2024 WAIRC 00720

Result Order issued

Representation

Applicant Mr A Anderson (of counsel)

Order

WHEREAS this is an application to the Work Health and Safety Tribunal (**Tribunal**) for external review under the *Work Health and Safety Act 2020* (WA);

AND WHEREAS on 25 July 2024 the applicant’s representative emailed the Tribunal and said that the WorkSafe Commissioner (and not the Department of Energy, Mines, Industry Regulation and Safety) is the proper respondent to application WHST 10 of 2024;

AND WHEREAS, the Tribunal considers that the name of the respondent should be corrected to the WorkSafe Commissioner;

NOW THEREFORE the Tribunal, pursuant to the powers conferred under the *Work Health and Safety Act 2020* (WA) and the *Industrial Relations Act 1979* (WA), orders—

THAT the name of the respondent be amended to ‘WorkSafe Commissioner’.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Kalamunda Salaried Workforce Agreement 2024 AG 23/2024	19/08/2024	City of Kalamunda	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
Greens (WA) Inc. Staff Agreement 2023 - The AG 15/2024	27/08/2024	Western Australian Municipal, Administrative, Clerical and Services Union Of Employees	The Greens (WA) Inc	Commissioner T Kucera	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2024 WAIRC 00773

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 7 FEBRUARY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00773

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G BROWN – BOARD MEMBER
MS L BRICK – BOARD MEMBER

HEARD : THURSDAY, 8 FEBRUARY 2024

DELIVERED : FRIDAY, 16 AUGUST 2024

FILE NO. : PSAB 18 OF 2023

BETWEEN : MARK LAWN
Appellant
AND
DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
Respondent

CatchWords : Appeal of decision to terminate probationary employment and application to appeal out of time – whether employee has an arguable case to warrant an extension of time – principles of probationary employment – whether employer’s concerns were genuinely held and whether their right to terminate the probationary employment was not misused or abused – whether employee was adequately informed they were not meeting the required standards and whether they received support and training to enable them to perform satisfactorily

Legislation : *Industrial Relations Act 1979* (WA) ss 80C(1), 80I(1)(d)
Industrial Relations Commission Regulations 2005 (WA) reg 107(2)
Public Sector Management Act 1994 (WA) s 64(1)(a)

Result : Application for an extension of time to appeal dismissed. Appeal dismissed.

Representation:

Appellant : Mr M Lawn (on his own behalf)

Respondent : Ms I Inkster (of counsel)

Cases referred to in reasons:

Crabtree v Director General, Department of Education [2021] WAIRC 00538

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728

Nicholas v Department of Education and Training [2008] WAIRC 01645

Reasons for Decision

Background

- 1 The appellant (**Mr Lawn**) was appointed as a Level 2 Community Work Officer on 22 August 2022, pursuant to a Letter of Offer dated 2 August 2022 (**Contract**).
- 2 The Contract specifies the following:
 - (a) Mr Lawn’s appointment is made under s 64(1)(a) of the *Public Sector Management Act 1994* (WA) (**PSM Act**);
 - (b) Mr Lawn’s conditions of employment are governed by the *Public Sector CSA Agreement 2021* (**Agreement**) and the *Public Sector Award 1992* (**Award**);
 - (c) Mr Lawn’s appointment is subject to a six month probationary period in accordance with cl 8(1) of the Award;
 - (d) Either party may terminate the Contract during the probationary period by giving one week’s notice, or by the employer paying in lieu of notice.

3 On 7 February 2023, the respondent annulled Mr Lawn's appointment during the probationary period, providing one week's pay in lieu of notice.

4 Mr Lawn contests the dismissal on the grounds of substantive and procedural fairness.

The Board's jurisdiction

5 Mr Lawn is a 'public service officer' pursuant to s 64(1)(a) of the PSM Act and therefore a 'government officer' pursuant to s 80C(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**). There is no dispute that by s 80I(1)(d) of the IR Act, the Public Service Appeal Board (**Board**) has jurisdiction to hear the appeal of Mr Lawn's dismissal.

6 Pursuant to regulation 107(2) of the *Industrial Relations Commission Regulations 2005* (WA), Mr Lawn's appeal was required to be filed by 28 February 2023. The appeal was filed on 28 June 2023. Consequently, the Board directed that Mr Lawn's out of time application be heard concurrently with his appeal.

The application to appeal out of time

7 In *Nicholas v Department of Education and Training* [2008] WAIRC 01645, the Public Service Appeal Board identified the following four key considerations relevant to its determination of an application to extend the time in which to appeal:

- (a) the length of the delay;
- (b) the reason for the delay;
- (c) whether the appellant has an arguable case; and
- (d) any prejudice to the respondent if the application were granted.

8 Mr Lawn's appeal was filed four months late. Mr Lawn attributes the delay to researching his options for challenging the dismissal, believing he had 21 days to file an application, and submitting an application to the wrong jurisdiction on the 20th day. Mr Lawn says that he submitted two applications, both in the wrong jurisdiction, before eventually filing the appeal.

9 The respondent's records indicate that Mr Lawn filed a *Form 5 – Referral of a matter under the Public Sector Management Act 1994* under s 79 of the PSM Act (**Form 5**) on 5 April 2023, which is approximately one month after the deadline to appeal the dismissal decision.

10 The respondent contends that, despite Mr Lawn's claim of an earlier application, the Board cannot be satisfied that Mr Lawn filed any application prior to filing the Form 5, as no documents have been produced to corroborate his oral testimony.

11 The respondent submits that granting an extension of time is a discretionary decision, with Mr Lawn having the onus to establish that the discretion should be exercised in his favour. The respondent does not claim any prejudice if the application were to be granted. However, the respondent submits that the discretion to grant an extension of time should only be exercised if strict compliance with the time requirements would result in an injustice and, in this case, no injustice would be caused. This is because, given the general principles of law governing probationary employment, Mr Lawn does not have an arguable case.

12 Following the hearing, the Board reviewed the Commission's records for applications submitted by Mr Lawn. This review indicated that:

- (a) On 7 March 2023, Mr Lawn submitted a *Form 2 – Unfair Dismissal Application* (**Form 2**).
- (b) On 8 March 2023, the Commission's Registry notified Mr Lawn that the Commission can only deal with Form 2s from certain private sector employees, and that claims by government employees are dealt with using alternate applications. The Registry provided Mr Lawn with links to the 'Claims by government officers' and 'Lodge a New Form' pages of the Commission's website. The Registry sent follow up emails to Mr Lawn regarding the Commission's jurisdiction on 16, 20 and 27 March 2023. On 28 March 2023, Mr Lawn responded to the Registry's emails to advise that he no longer wished to proceed with the Form 2.
- (c) On 14 March 2023, Mr Lawn submitted a Form 5 to the Commission's Registry. Mr Lawn subsequently requested the lodgement of the Form 5 be suspended so that he could make amendments to it. On 31 March 2023, Mr Lawn re-submitted the Form 5. Due to deficiencies relating to the proposed attachments to the Form 5, it was not accepted for filing until Mr Lawn responded to the Registry's email and telephone calls requesting him to address the deficiencies. On 5 April 2023 at 3:43pm, Mr Lawn telephoned the Registry to address the deficiencies, and the Form 5 was accepted for filing as at that time.
- (d) On 18 April 2023, the respondent filed a Response to the Form 5, objecting to the Commission's jurisdiction and stating that as Mr Lawn was a government officer, his only right of appeal against his dismissal is to the Public Service Appeal Board.
- (e) On 20 June 2023, Mr Lawn notified the Commission that he sought to withdraw the Form 5 and proceed with filing an appeal to the Public Service Appeal Board.
- (f) On 28 June 2023, Mr Lawn filed the appeal.

13 In light of the matters at [12], Chambers wrote to the respondent to enquire whether they seek leave to amend their submissions regarding Mr Lawn's application to appeal out of time. The respondent did not seek leave to amend their submissions, acknowledged that Mr Lawn's first application, the Form 2, was filed within the 28-day period that applies to a Form 2, and maintained their submissions regarding both the overarching delay until the filing of the appeal and the merits of the appeal.

14 The Board accepts the respondent's submissions regarding the overarching delay. The Board's review of the Commission's records indicates that despite being notified of the jurisdictional issues with both the Form 2 and Form 5, Mr Lawn did not file the appeal until 28 June 2023. Mr Lawn's delay in remedying the jurisdictional issue first raised with him on 8 March 2023 has

not been adequately explained.

15 The Board also accepts the respondent's submissions regarding the merits of the appeal for the reasons that follow.

Legal principles and issues for determination

16 The appeal involves the review of the dismissal de novo. Accordingly, any procedural fairness issues are able to be cured in the disposition of the appeal by the Board: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728. Further, the Board is to consider the appeal based on the evidence before it and is not constrained to determining whether the respondent made the right decision on the evidence available at the time of the dismissal.

17 The implications of probationary employment are settled, as stated in *Crabtree v Director General, Department of Education* [2021] WAIRC 00538 (*Crabtree*) [30] as follows:

In industrial law, the implications of probationary employment are clear. They were explained by the Full Bench of the Western Australian Industrial Relations Commission in *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth* [2000] WAIRC 00067; (2000) 80 WAIG 3155. At [49], the Full Bench said:

... the following principles apply—

- (a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
- (b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
 - (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.
- (c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)
- (d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit)).
 - (ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* (op cit), citing *Hull v F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).
- (e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)
 - (ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein).

18 In determining the appeal, the Board may legitimately have regard to, and place weight upon, the respondent's subjective view of Mr Lawn's suitability for ongoing employment: *Crabtree* [32]. The decision to terminate Mr Lawn's probationary employment would be consistent with the purpose and principles of probationary employment where: *Crabtree* [33]:

- (a) The concerns raised against Mr Lawn were genuinely held;
- (b) The respondent's right to terminate Mr Lawn's employment during the probationary period was not misused or abused;
- (c) Mr Lawn was adequately informed he was not meeting the required standards, including the consequences of a failure to improve; and
- (d) Mr Lawn received adequate support and training to enable him to perform satisfactorily.

The evidence

19 On 23 October 2023, the parties filed a Statement of Agreed Facts, stating:

The parties agree as follows:

1. [Mr Lawn] was appointed on 22 August 2022 under s 64(1)(a) of the [PSM Act] as a level 2 Community Work Officer (CWO) pursuant to [the Contract]: **Agreed Document 1**.
2. [Mr Lawn's] employment was governed by the [Agreement] and the [Award].

3. [Mr Lawn] was required to:
 - (a) perform all duties to the best of his ability at all times;
 - (b) use his best endeavours to promote and protect the interests of the employer (i.e. the Respondent);
 - (c) conduct himself in accordance with the Department of Justice's Code of Conduct and the Public Sector Code of Ethics, as amended from time to time.
 - (d) follow all reasonable and lawful directions given to him by the employer, including complying with the policies and procedures as amended from time to time.
4. Pursuant to cl 8(1) of the [Award], and cl 5 of [the] Contract, [Mr Lawn's] permanent appointment was subject to a six month probation period. [Mr Lawn's] probation period was due to expire on 22 February 2023.
5. On 12 September 2022 [Mr Lawn] commenced at the South Hedland Office of the Pilbara Youth Justice Services (**PYJS**).
6. On 14 September 2022 [Mr Lawn] met with Ione Griffiths (Manager) and Emma Anderson (Team Leader) to discuss the parameters of his role and the possibility of [Mr Lawn] working a second job as a residential care worker for the Department of Communities. [Mr Lawn] was advised to submit a conflict of interest form if he did wish to pursue secondary employment.
7. On 20 September 2022 [Mr Lawn] attended induction with Acting Senior Community Work Officer Shannon Moxham.
8. On the morning of 21 September 2022 [Mr Lawn] was absent from the South Hedland Office.
9. On 28 November 2022, [Mr Lawn] asked to speak with Child Protection and Support Officer (**CPFSO**) [Lucy] McKnight alone. [Mr Lawn] and Ms McKnight had a conversation in a small room together.
10. On 6 December 2022, [Mr Lawn] called Ms Griffiths and spoke to her for approximately 45 minutes about his interactions with other staff members.
11. On 7 December 2022, Ms Griffiths met with [Mr Lawn] to discuss the complaints made about him.
12. In the early morning of 12 December 2022, [Mr Lawn] attended the Office. Ms Griffiths asked [Mr Lawn] to head home. During a later phone call between Ms Griffiths and [Mr Lawn], he was advised not to return to work until further notice.
13. On 20 January 2023, an officer of the Respondent wrote to [Mr Lawn] detailing concerns the Respondent had regarding [Mr Lawn's] suitability: **Agreed Document 2**.
14. On 30 January 2023, [Mr Lawn] provided a written response to the Respondent's suitability concerns: **Agreed Document 3**.
15. On 9 February 2023, [Mr Lawn] received correspondence from the Respondent which confirmed that his appointment was being annulled immediately: **Agreed Document 4**.
20. On 23 October 2023, Mr Lawn filed outlines of evidence for his wife, Jacqueline Lawn, and for Laurie Fletcher. The respondent did not seek to cross-examine Mrs Lawn or Ms Fletcher as the respondent did not consider their evidence to be pertinent to the appeal. The respondent was content for their outlines of evidence being tendered without the need for them to attend the hearing.
21. The outline of evidence for Mrs Lawn refers to her and Mr Lawn attending the gathering of Department of Communities and Department of Justice personnel at Stacey Peterson's birthday event on Saturday 26 November 2022 and how Ms Peterson welcomed them, and to the content of their conversation with Emma Anderson and Lucy McKnight at that event.
22. The outline of evidence for Ms Fletcher refers to a telephone call she received from Mr Lawn on 21 September 2022. Ms Fletcher recalls that, during this telephone call, Mr Lawn spoke of a conversation he had with Emma Anderson and Shannon Moxham where it was stated that Mr Lawn had chosen the wrong career. The outline of evidence refers to Mr Lawn stating to Ms Fletcher that he did not appreciate the comment and would address it with his manager, Ms Griffiths.
23. The Board agrees with the respondent's submissions that the evidence of Mrs Lawn and Ms Fletcher are not pertinent to the Board's disposition of the appeal, for the following reasons:
 - (a) The evidence of Mrs Lawn may corroborate Mr Lawn's evidence regarding his exchanges with Ms Peterson, Ms Anderson and Ms McKnight at Ms Peterson's birthday event as outlined in Agreed Document 3. However, there is no dispute regarding these exchanges. This is because the appeal concerns Mr Lawn's workplace conduct and does not concern these out-of-work exchanges, such that no corroborating evidence of these out-of-work exchanges is required. Furthermore, if Mr Lawn seeks to place reliance on these out-of-work exchanges in addressing his workplace conduct, he can do so directly in this appeal.
 - (b) The evidence of Ms Fletcher may corroborate Mr Lawn's evidence regarding the 'occasion that I mentioned to Ione that I wanted to resign was due to the fact that my team leader said publicly in an audience during a discussion with other people that "I may have chosen the wrong career" which I personally disagree with' as outlined in Agreed Document 3. However, there is no dispute regarding Mr Lawn's belief that this statement was made, or that he raised it with Ms Griffiths (Agreed Document 3 states it was raised on 22 September 2022), such that no corroborating evidence of either Mr Lawn's belief or of the discussion with Ms Griffiths is required. Furthermore, if Mr Lawn seeks to place reliance on the discussion on 22 September 2022 in addressing his workplace conduct, he can do so directly in this appeal.

24 On 7 November 2023, Mr Lawn filed an outline of the evidence he would give at the hearing. Attached to the outline were letters of support from:

- (a) Faraday Boydell, formerly the manager of Spinifex Hill Studio in South Hedland;
- (b) Father Gasper Mushi; and
- (c) Timothy Turner, Deputy Mayor of the Town of Port Hedland.

25 Mr Lawn also attached to his outline an email from Donna Jasper to Peter Fleming (Senior Investigator), dated 1 February 2023, stating:

Good Morning Peter

I feel that it is important to make comment on the email trail pertaining to *'I believe that Ms Jasper was not intimidated by him but his behaviour but he may have acted inappropriately asking her if she had a problem with him.'*

As I am the only person besides Mr Lawn that was part of the conversation and therefore I am the only one who can comment on the appropriateness of his actions.

I appreciated that Mr Lawn brought the matter up with me and that he and I were able to resolve it by having an open and honest conversation. I thanked him for speaking to me because I can be abrupt at times. Too often in workplace environments we are quick to make judgements and assumptions of others and their manner. When this is then discussed with other people in the office it can lead to a negative culture which can be detrimental to the work environment and especially to the worker involved.

I hope that you consider my interaction with Mr Lawn was VERY positive and not negative in any way as part of your investigation. If I was to give a statement it would be in favour of Mr Lawn and his actions. We should be able to work in a place where we feel emotionally safe and comfortable to express our feelings and discomfort without being humiliated.

I have felt some pressure to make a statement regarding this matter and it has not sat comfortably with me.

Thank you for [your] time to consider my position on this matter further.

Warmest regards

Donna Jasper

26 On 21 November 2023, the respondent filed a bundle of documents, comprising of the following documents:

#	DATE	DESCRIPTION
1.	03.12.22	Email from Emma Anderson to Ione Griffiths
2.	05.12.22	Email from Henry Taualai to Brooke Sutherland and Ione Griffiths
3.	06.12.22	Email from Brooke Sutherland to Ione Griffiths
4.	12.12.22	Email from Henry Taualai to Brooke Sutherland and Ione Griffiths
5.	12.12.22	Email from Ione Griffiths to Darren Akerman and Jim August
6.	13.12.22	Email Karen Jones to Ione Griffiths
7.	13.12.22	Email Vanessa Caine to Karen Jones
8.	14.12.22	Email Karen Jones to Mark Lawn
9.	20.12.22	Email Ione Griffiths to Andy Tunstall
10.	05.01.23	Email [Lucy] McKnight to Ione Griffiths
11.	06.01.23	Summary of Interview with Ione Griffiths
12.	20.01.23	Proof of Service of Letter on Mark Lawn
13.	31.01.23	Email Brooke Sutherland to Peter Fleming
13A.	31.01.23	Attachment to Email Brooke Sutherland to Peter Fleming
14.	31.01.23	Email Emma Anderson to Peter Fleming
15.	31.01.23	Email Skye Ugle to Emma Anderson (forwarded)
16.	09.02.23	Proof of Service of Letter on Mark Lawn

27 Agreed Document 2 is the respondent's letter to Mr Lawn, dated 20 January 2023, in which the respondent raises 10 grounds for concern about Mr Lawn's suitability to continue in employment, relating to an alleged pattern of inappropriate behaviour that, if substantiated, breaches the Department's Code of Conduct in relation to personal behaviour.

28 Agreed Document 3 is Mr Lawn's written response, dated 30 January 2023, to the 10 grounds for concern.

Ground for concern 1

29 Ground 1 states:

On 20 September 2022, within a month of starting your employment, during a meeting to discuss your recent employee induction with a Senior Youth Justice Officer (SYJO), you became physically and verbally agitated, stating that you had received conflicting information about the role, commenting that you were not being trusted by management and saying you were unhappy that you were not permitted to go fishing with young persons (clients) or pick them up from their

homes. You were dismissive of the information provided to you and aggressive in your demeanour towards the SYJO.

30 In Agreed Document 3, Mr Lawn responds to Ground 1 by stating the following:

From the very beginning - On the actual interview panel that was conducted with myself and two people from DOJ and one person from Dept of Communities, I was informed by the Team Leader whom works directly with the regional manager in the same office and at the time was responsible for both regions Karratha and South Hedland, along with the Community Work officer where it was stated 'usually there is not enough work hours during the day and afterwards just take them fishing'

It was also stated to myself from the regional manager that it would be necessary for myself to collect the young people from their residential houses which was understood to be due to their lack of transport and other motivational issues.

Information given to myself at the Karratha branch from the team leader who interviewed myself who was at the time responsible for both districts and the regional manager who is in charge of the Pilbara District.

I only had knowledge of information passed onto myself to elaborate with.

The Team Leader had stated that she is not aware of this information as she was not on the panel and was not around at the time it was stated to myself and would be using her own protocol.

I can clarify again the information I elaborated on was that of what I was told before [I] started and also at the time I started.

31 At the hearing, Mr Lawn addressed Ground 1 as follows (ts 11–17):

- (a) The SYJO is Shannon Moxham. He agreed there was a discussion with Mr Moxham on 20 September 2022 about whether or not he could take young people fishing and pick them up from their homes.
- (b) He denied he was unhappy that what he was told during the interview (that he is allowed to go fishing) was not passed on to Mr Moxham and stated that he was confused and baffled that the information was not passed on to Mr Moxham.
- (c) He provided another example of the Regional Manager, Ms Griffiths, having approved the finance for and approval of all of his work clothing, and Mr Moxham saying that he could not wear shorts, as information not being passed on to Mr Moxham, which left him feeling 'at a loss'.
- (d) He denied he was aggressive in his demeanour or upset during the discussion and stated that he and Mr Moxham were both repetitive in talking about the information.
- (e) He denied he was physically and verbally agitated during the discussion and stated that he may have been tired, the discussion may have been long-winded, but there was no agitation. He stated that he and Mr Moxham were 'discussing things [and] throwing things back and forwards between us'.
- (f) He stated that his emotions at the time were that of disbelief that Mr Moxham was uninformed of the information that was conveyed to him (that he was allowed to take clients fishing) during his induction in the Karratha office. He felt helpless. He felt underutilised. He also believed his Supervisor, Emma Anderson, was not utilising the fishing program and did not think highly of going near the water because of her own beliefs about safety.

32 Under cross-examination, Mr Lawn (ts 46–47):

- (a) Accepted that he signed the Statement of Agreed Facts stating that he commenced at the South Hedland Office on 12 September 2022 and attended an induction with Mr Moxham on 20 September 2022. However, he denied that he saw Mr Moxham eight days after commencing at the South Hedland Office. Mr Lawn says he 'did not see Shannon for quite some substantial time after I started', 'it took quite some time for Shannon to arrive', 'at first, I went with three months, because I was there almost five months. And I spent a considerable time in the office without being to enact my role. And ... that's a very good guide. I can't give you that date, ... when Shannon came along, but ... I spent a considerable time without being inducted'.
- (b) Agreed that he had a discussion with Mr Moxham after the induction (about being able to go fishing with young people or being able to pick them up from their homes) and that Ms Anderson was involved in that discussion.
- (c) Agreed that he felt that he had received conflicting information about his role.
- (d) Denied that the Hedland team, including Ms Anderson, were wrong about the parameters of his role. He said that they had not been informed about the parameters of his role.
- (e) Agreed that he tried to explain to the Hedland team his understanding about his role and how that differed to their understanding of his role. He said that he had explained, on two prior occasions, that he could go fishing and could pick up young people from their homes. He agreed he tried to explain that to Ms Anderson and Mr Moxham. He denied he tried to explain it to them repeatedly but agreed that it was a long-winded conversation.

Ground for concern 2

33 Ground 2 states:

On 28 November 2022, you approached a Child Protection Family Services Officer (CPFSO), who was not an employee of the Department. You asked to speak with her alone, which she did. You said words to the effect, '*Do you have a problem with me? You always look at me funny and pull faces*'. Your behaviour was intimidating and caused the CPFSO to become distressed and concerned for her safety.

34 In Agreed Document 3, Mr Lawn responds to Ground 2 by providing the background of his invitation to Stacey Peterson's birthday event and of the half-hour conversation that he and his wife had at the event (held at a pub on Saturday 26 November

2022) with Emma Anderson and Lucy McKnight, and stating the following: (original emphasis)

In the afternoon I was walking through the office, and Lucy had just walked in with another staff member (Ciara) it was late in the afternoon at 1500 hours Lucy noticed me and appeared to falter, Lucy said good morning oh good afternoon I hope you have a good rest of the day.

After speaking to her the previous night, I felt that I could communicate to Lucy about this awkwardness I appeared to notice.

I asked Lucy if I could speak with her. Lucy gave me Her consent by saying yes.

I apologised to Lucy for the small Proximity of the room I began and started with we can just say morning if she wishes and have a professional level relationship or greet with good morning an how are you which can incite a more authentic relationship but I wasn't going to sit in the middle as I knew I did not want to be false and or pretend and I stated her body language appears awkward. Referring to when she said good morning good afternoon as Lucy appeared [off] balance and faltering.

Lucy responded by saying Oh sorry I didn't know and walked out

The conversation was over

I did not know or realise and was not informed till much later that Lucy had gone back to her desk and cried. It was at the meeting on point 8 Dec 7th that I was informed of Lucy's feelings. After walking off during the discussion, Lucy did not indicate anything else, If this was evident at the time I would certainly make it clear that I wished the latter idea of an authentic relationship be known. As Lucy always made an effort to say hello and good morning to Nathan who sat across from me as well as communicate frequently with my Team Leader who also sat across from myself and discuss her personal life regarding relationships. ...

The next morning 29th Stacey walked through the rear office door and said Morning. I knew it was Stacey from the sound of her voice but did not know whom she was greeting so I said morning back.

Stacy spoke quick and in a low tone and all I heard was 'body language' which I noticed to myself this is something I had mentioned to Lucy the day before.

35 At the hearing, Mr Lawn addressed Ground 2 as follows (ts 17–21):

- (a) Because he and Ms McKnight had conversed over the weekend, he thought they 'had a good stance in able to have a ... fruitful conversation', however, when their paths crossed on the Monday, she 'barely spoke to me at all'. He thought that when Ms McKnight said, 'Good morning' when their paths crossed at 3pm and then corrected herself to say 'Good afternoon' that she 'seemed taken back' when she saw him. He was concerned with 'the way she faltered' and with 'the expression on her face'. Ms McKnight was walking along with another person, engrossed, and his presence was noted 'like, maybe as an obstacle', and 'her head sort of [moved] sharply'. He felt 'she could be a little more relaxed with herself' if she sees him. Hence, he asked to speak with her to 'to see if things could get simpler'.
- (b) He asked Ms McKnight if they could speak, to which she consented. They walked over to a conference room, which felt 'quite cramped'. It was a small room, with no chairs leaving them both standing, so he apologised to Ms McKnight for the proximity. If there was a bigger room, and they could sit down and be across a table 'that might've been a better scenario. But it just felt a little bit awkward'.
- (c) He asked Ms McKnight if they 'might have a more authentic and genuine relationship', but if she chose not to then 'the everyday "Good morning" would suffice', because:

I didn't want to have that small talk. I didn't want to have it in – in between. It was just a professional 'Good morning. How are you going?' Or if – if you wanted, ah, 'Hi, how are you? How was your weekend?' But I didn't want to sort of pretend in the middle, because, ah – yeah. Ah, and Ms McKnight, ah, stated she didn't think she was, ah, um, not acknowledging me or avoiding me, ah, and said 'Sorry' and walked out the room.
- (d) He was surprised to hear subsequently that Ms McKnight was upset by their conversation because she appeared to him to be non-emotional during the conversation, and had 'shut the conversation down pretty much straight away, saying, "Oh, I'm sorry, I – I didn't know it looked like that", and walked out'.
- (e) He acknowledged that while he did not know at the time that Ms McKnight had returned to her desk and cried, he was subsequently made aware of this, but he did not address the genuineness of Ms McKnight's reaction in Agreed Document 3. This is because he 'had some kind of doubt in my mind as well of the – the genuineness of it'. His doubt arises from Ms McKnight being close with his Supervisor, who had said to him that he may have chosen the wrong career. He subsequently raised this comment during a videoconference with the Regional Manager whilst his Supervisor was sitting next to him. He had 'basically blindsided' his Supervisor, and during the videoconference she denied having made this comment to the Regional Manager. He believes that from that day on, his standing 'was not very good with my Supervisor' and 'it is a well-known fact that Ms McKnight and my Supervisor, Emma are closely associated and do ... things out of hours ... as well as during hours'. It was his Supervisor who had asked if Ms McKnight had wanted to make a statement about his conversation with her, and while Ms McKnight initially did not want to, she ended up doing so.

36 Under cross-examination, Mr Lawn (ts 48):

- (a) Agreed he asked to speak with Ms McKnight privately, but denied this was because he had a problem with the way that Ms McKnight had interacted with him. He asked to speak to Ms McKnight because he felt they 'could achieve a ... more ... beneficial relationship. I didn't have a problem. I just wanted things to be ... in a better way'. By 'better way', he means an improvement in 'the way we greet each other'. He denied the 'situation' between him and Ms

McKnight could be 'improved or fixed' and said the 'topic or a situation' between him and Ms McKnight could be improved.

- (b) Accepted that Ms McKnight's demeanour towards him changed after their conversation.

Ground for concern 3

37 Ground 3 states:

On 29 November 2022, you approached a second CPFSSO who was not an employee of the Department. You questioned support and strategies for engaging with a mutual client. As you spoke with the CPFSSO you invaded her personal space and spoke to her in a manner that caused her to feel intimidated.

38 In Agreed Document 3, Mr Lawn responds to Ground 3 by stating the following:

On the day I was scheduled to work with client Roadie, Stacy engaged my self and called out to me and asked me to let her know how roadie went on community work, as I work from the next lot of partitions over. I called out and asked 'do you work with him?' Stacy replied I'm his case manager

So not to keep calling out aloud, I approached Stacy in front of other numerous people who were working relatively close in their own partitions, while Stacy was standing at her station, and talked about Roadie i also enquired about his talents and his motivations thinking I may be able to build on them through programs that are actioned within his community work which is my role. Part of the outcome in my role as CWO is to develop or practice skills within young people which is a relatively person centred practice. ...

39 At the hearing, Mr Lawn addressed Ground 3 as follows (ts 22–26):

- (a) He had mentioned Roadie's name, and Ms Peterson said that she was his case manager. So, he walked over to Ms Peterson's cubicle, which she shared with another person, to learn more about Roadie, to help align what Roadie enjoyed or was good at with Roadie's community work.
- (b) He was baffled by Ground 3 because he did not speak with Ms Peterson in a bad tone or manner and he did not invade her personal space. He simply walked over to Ms Peterson and had a conversation with her. He sincerely doubts that he invaded Ms Peterson's personal space and spoke to her in a manner that caused her to feel intimidated. All he did was ask about Roadie. He does not know what he could have said in a conversation about Roadie to make Ms Peterson feel intimidated.
- (c) He has doubts about the genuineness of Ground 3 because Ms Peterson did not make a formal complaint about him. He also thinks that Ms Peterson's allegations are not genuine and have arisen because she was upset by hearing that he had allegedly mistreated Ms McKnight.
- (d) Because of his warm interactions with Ms Peterson at the pub at her birthday event, he felt he was in a good place with Ms Peterson when he greeted her 'Hello ... Stacey' the morning after his conversation with Ms McKnight (Ground 2). But all he heard was 'body language'. The only person that he said 'body language' to was Ms McKnight. Ms McKnight and Ms Peterson are of similar age, have similar likes, and go out and meet up with each other. He thinks that Ms McKnight spoke about their conversation either directly with Ms Peterson or with someone else who relayed the conversation to Ms Peterson.

40 Under cross-examination, Mr Lawn (ts 48):

- (a) Agreed that Ms Peterson had approached him quite familiarly out-of-work hours.
- (b) Said, in response to a question about Ms Peterson's approach to him in the workplace being different, that Ms Peterson did not physically approach him in the workplace rather he went over to her.
- (c) Denied that he had a discussion with Ms Peterson about her demeanour.

Ground for concern 4

41 Ground 4 states:

In November 2022, you approached a third CPFSSO who is not an employee of the Department. You asked her if she had a problem with you. The CPFSSO was concerned that there was an emerging pattern of your behaviour towards female Child Protection Family Services staff. Your behaviour was inappropriate.

42 In Agreed Document 3, Mr Lawn responds to Ground 4 by stating the following:

The situation in question happened sometime before the 29th of November. The person was generally friendly up until a certain point of time. We coincidentally went to the staff room at a similar time in the morning at start and at morning tea.

The persons gestures appeared curt and accompanied noises of sighs, engagement was very minimal than previous history. the scenario appeared to repeat in different circumstances.

When the person went to the fridge to get milk where I also was standing mixing my coffee the person glanced sideways at myself and sighed.

I asked the person have I done anything to upset you. The person said oh no why would you say that, I explained you seem very short with me nowadays. The person said that yes she was not feeling right due to [personal circumstances]. So I've had a very rough time but it has nothing to do with you though I am glad that you are able to approach me and ask me. This same scenario was handed over to me in my meeting from Ione. Ione stating that Emma had advised her of this. I asked Ione did Emma bother to include that The person in question stated that she was glad that I could communicate this with her. Ione shook her head and said no. ...

43 At the hearing, Mr Lawn addressed Ground 4 as follows (ts 26):

- (a) He was in the staff room and noticed that Donna Jasper appeared 'a little bit closed off. Her demeanour was a little bit different towards her normal, happy, jovial talking self', so he asked Ms Jasper if he had done something to upset her. She went on to share information about herself and was happy that they had a productive conversation.
- (b) He knows Ms Jasper was happy about their conversation because of Ms Jasper's letter (at [25] above) in which she stated words to the effect that she was glad the conversation occurred and that people should be free to have conversations and show their emotions in a workplace.

Ground for concern 5

44 Ground 5 states:

On 6 December 2022, You were informed by a SYJO that you were not permitted to invite a particular young person (**client**) to a barbeque program. You argued and spoke aggressively with her, despite her being the client's designated case manager. You circumvented the SYJO when you approached the Child Protection Family Services (**CPFS**) Team Leader, who is not an employee of the Department, and sought permission for you to bring the client to the barbeque. Your aggressive demeanor towards the SYJO was inappropriate, disrespectful and, by approaching the CPFS Team Leader you undermined her authority.

45 In Agreed Document 3, Mr Lawn responds to Ground 5 by providing the background to the event (16 Days in WA without violence against women), citing emails about the event and emails regarding the client (**Leo**), Leo's health and its impact on Leo's attendance at the event, and stating the following:

I believe my conversation was inquisitive when speaking to Brooke.

I recall asking Brooke to request Leo to attend. Where Brooke replied why don't you try asking him?

And without much pause I replied why don't you request him to attend through community work that way it will remove any personal decisions on his behalf as it will not be a request from me but rather a directive through attendance from yourself within community work. Brooke replied but I know you don't like me asking him.

As I also recall that this is the 'current procedure' for the YJ officer to request, as I have encountered this situation before and technically if clients refuse or do not attend then they cannot have paperwork reflect their decision to not attend.

At this point in the conversation, Brooke appeared to have taken my comment to heart and then mentioned in front of two YJ officers Leo had just seen a doctor from hospital about his burns and scarring And that she is concerned. (acquired as an infant.)

I believed this to be a second instance or visit to the Dr, that I was not made aware of, as the original and only instance Leo had been in hospital in regards to the situation was on Nov 8th. As stated in the next email below. pertaining to Leo being in hospital.

From there I was cautious as I had heard new information though Brooke then mentioned the last time which was November 8 and is now nearly 1 month later and the medical certificate was for three days. Mentioning this information was confusing and I now sought clarification from my manager as the information was clearly inaccurate and I was questioning my occupational health and safety concerns to work with him as he had signed a contract stating he has no medical condition at all what so ever.

When I was comfortable that Leo had not attended another appointment I stated he'll be ok and showed Brooke a scar on my leg to show I had an awareness and empathy on Leo's condition and occupational health and safety.

Brooke did not expand on the situation and remained staunch in her views. No other conversation was drawn out, Brooke appeared 'closed down' while two YJ officers/ staff looked on and I did not expand further on the conversation.

46 At the hearing, Mr Lawn addressed Ground 5 as follows (ts 26–32):

- (a) The SYJO is Brooke Sutherland and the CPFS Team Leader is Henry Tualai.
- (b) He denied he argued with and spoke aggressively with Ms Sutherland. Rather, he asked if Leo could attend the BBQ. When Ms Sutherland said that Leo could not attend for health reasons, he stated that 'I needed to learn further also, because I have a duty of care'. He stated that at the end of the conversation, he accepted that Leo could not attend the BBQ.
- (c) He believes Ground 5 'to be totally incorrect and untrue'. He agrees that following his discussion with Ms Sutherland that he had a conversation with Mr Tualai, but denies he asked Mr Tualai for permission for Leo to attend the BBQ event. He stated that this is because he is aware that he cannot seek permission from another employee, from another department, for one of his clients to attend a BBQ.
- (d) He stated that his conversation with Mr Tualai related to Mr Tualai attending the BBQ as a mentor to 'assist and watch over some of the young people while they were alternating their events. So for instance, if there was ballon blowing'. He 'may have said, "Oh, it's a pity Leo ... can't go" or ... something like that' to Mr Tualai, but he was not asking Mr Tualai for permission for Leo to attend. He was not speaking to Mr Tualai about Leo attending the BBQ, '[b]ut if Leo and the others are to attend, could Henry please help me out and do some mentoring'. This is because he queries whether 'is it defined at that stage that Leo was definitely not going at all whatsoever?'
- (e) He stated that Ground 5 and the other grounds are either made up or exaggerated. He provided the example of Ms Sutherland stating that he pulled up his trouser leg 'quite aggressively' (Document 14 of the respondent's bundle). He agreed he pulled up his trouser leg, '[h]owever people determined what style, that's up to them'.

47 Under cross-examination, Mr Lawn (ts 48–50):

- (a) Denied that he disagreed with Ms Sutherland about whether Leo should be able to attend the BBQ, or about whether Leo should be directed to attend. He said that he ‘asked why. It’s ... not for me to agree or disagree. I asked and learn information to ... redirect my questions to learn ... further’.
- (b) Denied that when Ms Sutherland said that Leo was not to attend, that he asked again. He said, ‘I wouldn’t ask again.’ ‘I might’ve asked ... “What’s the situation behind it?” “Why do you think he’s not fit?” “Is he fit?” ... It’s only information I can make my conversation with’.
- (c) Said, in response to a question regarding whether he persisted with the issue of whether Leo could attend the BBQ, ‘It’s the information I learnt. ... and I may have conversed, ... if it was the rationale about a medical certificate, then the medical certificate made me curious as to has he got a different and another medical certificate that I’m unaware of’.
- (d) Denied the discussion with Ms Sutherland was tense and said, ‘it may have been ... constructive and, ... putting information ... forward’. Mr Lawn agreed that the next day he said he was dishevelled by the discussion. He said, ‘this news of a new medical certificate ... brought up suddenly had blindsided me while I was in front of ... other people. And I had no recourse. And I did not know there was a current medical certificate in place’.
- (e) Said, in response to a question about why he was dishevelled about the discussion when whether Leo attended the BBQ or not ‘would not affect my work position or my personal self’, ‘I was very curious. Well, I was blindsided through this new information. ... it was used as ... a reason. And ... it ended the discussion, basically’.
- (f) Accepted that Ms Sutherland is Leo’s case manager.

Ground for concern 6

48 Ground 6 states:

On 6 December 2022, you spoke to a SYJO who was sitting at her desk and said words to the effect, ‘*Actually I’m a little disheveled about yesterday*’, and ‘*I’m going to put it in an email otherwise I’m going to get heightened...*’ The SYJO offered to assist you and you walked around her desk to stand over her. You said words to the effect, ‘*Yes I will but you’ll get it in an email so I don’t become heightened...*’ whilst breathing heavily and staring intently at her. The SYJO felt intimidated and uncomfortable in your presence.

49 In Agreed Document 3, Mr Lawn responds to Ground 6 by stating the following:

The next morning I arrived at work and greeted Brooke good morning and Brooke returned the greeting and asked myself how I was feeling. And did offer any assistance.

My reply was I’m a little dishevelled from yesterday, And I’m going to put it in an email as I don’t want to get heightened. Brooke wanted more elaboration and I knew that running the story over between us both would not lead to a beneficial outcome as I had not felt good about how the conversation went silent at the end yesterday. So without having to speak louder as we had a partition between us I did walk round and explain that I wish to put it in an email so that it is transparent and we can all voice our opinions.

I believe that I answered honestly and respectfully and initiated a fair transparent and open process and communicated this well and [feel] that the conversation needed to be explored at a higher level. Without compromising anyone’s feelings.

By explaining how I felt and communicating my views and intentions I believe I displayed selfregulation and made my intentions clear. I was open in my actions and did not wish to ‘just spring the email and information onto Brooke’ or blindside her. But communicate my intentions in a professional manner to take the matter higher. It is possible Brooke felt threatened and defensive of my intent and used these counter measures to safeguard herself.

I did have eye contact with Brooke, I am concencious [sic] of body language and I am unaware that I stared intently. I may have been waiting for a response? And when no answer is received in the right amount of time I would likely break that eye contact.

Also I was uncertain about the community work contract filled out by Leo and Brooke and where it may lead myself in regard to occupational health and safety and my duty of care.

I feel that by Brooke mentioning Leo had just visited the Dr’s seemed like it was new information and did not disclose the information to necessary parties, making it a big and non-negotiable surprise. I felt blindsided by information that is actually a month old, though it was made to sound current. A Drs certificate for 3 days a month ago which has expired.

Mentioning it at the time in front of the YJ officers who are not familiar with the situation, may cause them to think it is current which is misleading.

Is Leo’s contract inaccurate? and what does it mean for me when I am working with him?

I had followed up with a phone call to Ione that day in point 7

50 At the hearing, Mr Lawn addressed Ground 6 as follows (ts 32–34):

- (a) He agreed he said to Ms Sutherland that he felt dishevelled by the conversation they had the previous day and that he would put it in an email otherwise he would be heightened. This is because he was wary ‘about the information handed over and explained to me’ and whether there was another doctor’s certificate that he did not know about, and he felt that if he went over the subject that he would feel upset.
- (b) He agreed that Ms Sutherland offered to assist him and that he walked around to Ms Sutherland’s desk. He denied he

stood over her. He stated that he stood next to her. He agreed that she was sitting and he was standing.

- (c) He disagreed that he was breathing heavily and staring intently at Ms Sutherland. He stated that that description of his body language is 'not true and exaggerated'.
- (d) He stated that he was maintaining eye contact with Ms Sutherland whilst he waited for her response, 'that was all', after that 'I wouldn't have just sat there' and kept eye contact.
- (e) He stated that he did not intentionally make Ms Sutherland feel intimidated. He went over to her desk so as to not talk over the partition. There 'was no emotion behind it', 'I have a right to explain ... my views. And I explained that I was going to make it transparent. I didn't want to be ... bickering between two people. I was displaying my intentions of communication so that it wouldn't blindside her, and the subject is transparent'.
- (f) He stated that he was just communicating. He 'was trying to be ... as pleasant and communicative as possible ... using my best body language possible'.
- (g) He accepted that when he is communicating with people outside the Department of Justice that he is in effect representing the Department, and there is a responsibility to represent the Department in a reasonable and appropriate manner.

Ground for concern 7

51 Ground 7 states:

On 6 December 2022, you telephoned the Manager Pilbara Youth Justice Services and held a 45-minute conversation, during which you said that you were upset about not being permitted to rewire a trailer and accused a staff member of blind-siding you deliberately in front of other people. You became angry and repeatedly referenced that there was a conspiracy by staff who were using you to 'cut their teeth on' and 'get their claws into'. Your conduct made your manager feel uncomfortable.

52 In Agreed Document 3, Mr Lawn responds to Ground 7 by citing the email chain regarding the trailer rewiring and stating the following: (original emphasis)

held a 45-minute conversation – included a debriefing of segment 6 where I explained the situation with Leo to Ione. Nothing became of the situation and no correct procedure or matter was resolved. The term **blindsiding** was referenced in this conversation and not the trailer. I was referring to the news of Leo, 'apparently' seeing a Dr a second time. Which the case was not, it was only the one time a month ago where the Dr's certificate expired after three days and I was very confused why it was brought up again a month later and referred to. And when hearing the news, felt like I had missed something, and had not been disclosed with any new information. Hence the term blindsiding.

I do not use the word **conspiracy** at all. As it can be easily taken out of context and used against you for a number of reasons.

I used the words 'cutting her teeth' and 'sharpening her pencil' as Brooke was delegated to acting team leader and Ione referred to her experience as practice development, and I replied yes cutting her teeth on me. Which in turn meant practicing.

...

When I arrived at the office that day bat 1230pm

I also sent Ione a straight forward email with a link and guide to the department policy and procedure for the consumer division and also sent a copy of the applicable qualifications and licences.

The need for the trailer to be sorted is a high priority

Would cost the department hundreds of dollars and the delay would be in the weeks till it was able to be seen diagnosed and then repaired.

The work delay within community work program would minimise the program extensively and knew that the issue can be sorted by myself within one working day.

I had also scheduled this work program with an 18 year old person whom had the interest and aptitude in mechanics. Basic testing and wiring would be beneficial and was trying to find his interests and strengths within this community work.

The weather was extremely hot and knew this would be a good short term project for early on in the morning and also benefit the department by repairing or diagnosing the wiring issue. I would be breaching occupational health and safety If I knowingly drove around the streets and can be liable if I have an accident.

53 At the hearing, Mr Lawn addressed Ground 7 as follows (ts 34–36):

- (a) He denied saying that he was upset he could not rewire the trailer, as it is a 'non-emotional factor'. Rather, he had said it was unfair he could not rewire the trailer.
- (b) He agreed that he said a staff member had blind-sided him, and that that had occurred in front of other people.
- (c) He denied he used the word 'conspiracy'. He denied he said that staff were using him to 'get their claws into' but agreed he said that staff were using him to 'cut their teeth on'.
- (d) At first, he agreed that he was angry during this phone conversation. He then resiled from being angry and said, 'it's only natural to be able to talk and vent your feeling in conversation and talk with someone'.
- (e) He stated that he honestly does not know how Ms Griffiths felt. She did not tell him that she felt uncomfortable, and

she did not appear or sound that way. He stated that he does not 'believe I made my manager feel uncomfortable by talking with her'. He had no indication from her that she felt uncomfortable.

54 Under cross-examination, Mr Lawn (ts 50):

- (a) Agreed he had a lengthy phone call with Ms Griffiths to discuss his interactions with his fellow staff members. He agreed he needed to vent his feelings, about 'what was going on at work ... and the way that people ... carry out ... or utilise instructions and directions'. 'An example might be bringing new information to light without ... informing me ... because I directly work with ... Leo. And I have a duty of care. And I am responsible. And if I am unknown to his ... new conditions, then I can be liable for ... certain things ... involved with my community work'.
- (b) Stated that by his reference to Ms Sutherland 'cutting her teeth' that he was referring to Ms Sutherland not having a lot of experience in the role.
- (c) Agreed that he questioned Ms Sutherland's competency.
- (d) Agreed that he felt like swearing during the conversation but denied that it was during the conversation about Ms Sutherland, or that it was in part directed at Ms Sutherland. He said, 'it was not totally directed at [Ms Sutherland]' and 'I believe it would be more so on ... my mindset on the ... whole impact of how I was feeling'.

Ground for concern 8

55 Ground 8 states:

On 7 December 2022, you had a meeting with your manager, to address concerns about your communication style with staff. During the conversation you repeatedly referred to female CPFSSO's as '*Fuckedy Fucks*'. Your body language was aggressive towards your manager and you were wide-eyed and intense in your conversation. At times you were angry, unable to speak and stared at the ceiling. Your behaviour was intimidating and made your manager feel very concerned for her personal safety.

56 In Agreed Document 3, Mr Lawn responds to Ground 8 by providing the background to Ms Griffiths' request for a meeting and her opening comments at the meeting, and stating the following:

During explanation of point 1, I had described how the person was swearing consistently in conversation on the night that the person was talking with us and I mentioned to Ione that I refer to people who swear a lot in their conversation as 'fucken fuckens' it is more so a term of endearment and muse. Along with Ione's approval of swearing the day before I was lax and thought it humanly relatable and at times due to my clouded and mixed feelings, I could not think of the persons name and the swearing is what I recalled mainly when recalling the person.

Hence the reason so when the person was being related to I asked oh do you mean 'fucken fucken'

After hearing point 2,3,4 explained to me, my feelings and emotions where setting in me and where moving and changing. I felt hugely betrayed, un friended, isolated, and felt the need to withdraw. I felt I kept my self-regulation to a minimum. I believe it may be human or have regular human reaction classed as 'normal' to show some type of emotion when confronted with these types of allegations. Hence maybe wide eyes, non-eye contact by staring at the ceiling. I believe my speech would have also become slower as I felt I had to try harder to think about the questions and recollect on the situations to give a reply as well as deal with the feelings from the allegations.

At no time did I act out, say anything threatening.

I noticed my body language and pointed it out myself to Ione that my hands move sometimes when I talk in a gestural way, Ione replied that its ok a lot of people also do this.

I did say to Ione 'you have been so good you have always heard me out' Ione replied 'oh Mark I'm just doing my job'

I stated to Ione that they have made their recipe, mixed the ingredient's and put it in the oven.

Maybe it's better I just go, Ione did suggest at sometime through the meeting after this comment that the process would be to clear my name within this investigation. This is prominent in my mind and knew it is the right and correct path to follow, as I feel that the facts have been twisted. Though at the time the situation just felt hopeless.

After the meeting had finished my feelings were that of to take an easy path and just leave, on my way out just before I left I handed in my credit card which I am solely responsible for and did not want any hiccups with and I left my ID badge. I did so to see if I would get a reaction, I left them close by to Iones personal handbag which was sitting on the desk.

57 At the hearing, Mr Lawn addressed Ground 8 as follows (ts 36–38):

- (a) He agreed that he met with Ms Griffiths on 7 December 2022, and that the meeting was to discuss his communication with Ms McKnight.
- (b) He disagreed he repeatedly referred to female CPFSSO's as 'fuckedy fucks'. During his conversation with Ms McKnight at the pub event for Ms Peterson's birthday, Ms McKnight had 'swore profoundly all the time'. At the meeting, after hearing from Ms Griffiths about the allegations, he felt 'aghast, drained, tired', and he could not recall Ms McKnight's name. As he had permission from Ms Griffiths from the call from the previous day to swear, and he could not recall Ms McKnight's name he said, 'Oh, do you mean fucken fucken'. He denied he called Ms McKnight 'fucken fucken' and stated that he used this term to recall the person that Ms Griffiths was referring to.
- (c) He denied his body language was aggressive, but agreed he could have been wide-eyed because he was drained, and his speech may have slowed.
- (d) He remembered looking up at the ceiling. He was in disbelief with what Ms Griffiths was saying.

- (e) He denied his behaviour was intimidating and made Ms Griffiths feel concerned for her personal safety. He stated that if Ms Griffiths had genuinely felt unsafe, she would have removed herself from the situation.

58 Under cross-examination, Mr Lawn (ts 50–51):

- (a) Agreed that he had a meeting with Ms Griffiths in person and that she told him she had several complaints about him that she needed to investigate.
- (b) Agreed that during this conversation he raised issues about his interactions with Ms Jasper, Ms Peterson and Ms McKnight.
- (c) Agreed that he said that Ms Jasper, Ms Peterson and Ms McKnight, ‘had made their recipe, mixed the ingredients and put it in the oven’.
- (d) Said, in response to a question about whether he was suggesting they were corroborating to come up against him, ‘it felt like that at the time. Some kind of collusion’.
- (e) Said, in response to a question about whether ‘some kind of collusion’ was a reference to the number of complaints made against him, ‘a collusion would equate to that. But ... it was a reference to how it was ... brought up from two, three months ago, which wasn’t brought up, up until now. If ... I believe it was relevant ... it wasn’t relevant at the time it was ... that it was made’.
- (f) Accepted that his discussion with Ms McKnight occurred on 28 November 2022 and his discussion with Ms Griffiths occurred on 7 December 2022, approximately eight days apart, and not months apart, but says ‘that was a formal complaint. And it was being addressed. And it was Ione’s job. So that was not months apart. That was addressed at the time’.

Ground for concern 9

59 Ground 9 states:

On 7 December 2022, at the conclusion of a meeting with your manager, you were expressly instructed by her to go home and not to return to work until further notice. You collected your personal belongings and left your Department issued lanyard, identification, credit card and paperwork on the manager’s desk. You had on multiple occasions advised her that you intended to resign. Your manager attempted to contact you the following day as arranged; however, you did not answer or call her back.

Five days later, you accessed the office against the instruction issued to you by your manager, by using your Department issued swipe card that you did not surrender with other Department property. This caused security concerns with the onsite staff as it was not known that you had withheld the swipe card. You were instructed by your manager to leave the office until further notice.

60 In Agreed Document 3, Mr Lawn responds to Ground 9 by providing background of his movements after arriving home on Wednesday 7 December 2022, citing the email trail indicating that he responded to Ms Griffiths’ missed call (of Thursday 8 December 2022) on Friday 9 December 2022 at 4:24pm, outlining that he expressed to Ms Griffiths an intention to resign (on 22 September 2022 when he raised with Ms Griffiths ‘that Emma had said in public’ ‘I may have chosen the wrong career’), and stating the following:

I expressly recall Ione advising me to take the next couple of days off, dating that Wednesday 7th and Thursday 8th though in my head on Thursday morning when speaking to the person who dropped my lunchbox off I knew I need the Friday 9th off also and to recoup on Saturday 10th and Sunday 11th which is my birthday.

On Monday morning I felt ready and collected with good self-regulation to return to work. Hence the email I sent on arrival Good Morning Ione, I have arrived at work, please advise how you wish me to proceed. I wish to clear my name within the formal proceedings for the matter you have raised. Then if possible I wish to follow up with yourself what was discussed in relation to the cwo position, please.

....

That same day, December 12th at 1403 I initiated a phone call to Ione who at the time asked to defer the call citing that she is currently busy and will call back at the earliest convenience. Ione called back at 1421 and part of the conversation Ione stated and said ‘I thought you were not returning due to the manner and way that you left your identification. I did not respond to that.

Ione also stated to not return back to work till further notice. I acknowledged this.

...

During the meeting on December 7th at no time was I asked to surrender any effects and that the meeting surmised mainly of listening to what happened and what I had to say, and a basic outline of the professional standards board process. However, I voluntarily surrendered my id and credit card without any prompts and without anyone seeing me. I did so to see if I would get a reaction as my manager stated before it would be best and be good to clear my name. As I believe this to be a misjudgement of what I had intended to be of a good and happy outcome of communication.

If I was made aware of the requirements, I would have handed them in personally and I believe that someone or the person asking would have waited and collected them personally from myself so to account for the belongings. I would not go against instructions especially to illegally enter a workplace / building as that stated on December 12th.

61 At the hearing, Mr Lawn addressed Ground 9 as follows (ts 38–41):

- (a) He agreed that Ms Griffiths asked him to take the next couple of days off but denied that she had said ‘to not return’.

Despite having a strong emotional reaction to what he was hearing at the meeting on Wednesday, he denied it was possible that he misunderstood the direction given to him not to return to the office until further notice. He stated that he is very 'versed in recalling what is stated', he does follow instructions, and he does not 'do things so that I can get [reprimanded]'.

- (b) He left his lanyard, ID, credit card and paperwork because he wanted to see if Ms Griffiths 'wanted to follow up with me leaving or was content with me going'. He wanted to see if Ms Griffiths followed him up by asking, 'Why did you leave your things here?' 'Are you going? Are you going to go?'
 - (c) He said he did not leave his access card because he 'intended to come back'.
- 62 Under cross-examination, Mr Lawn (ts 51):
- (a) Agreed that immediately following his meeting with Ms Griffiths, he left his belongings (lanyard, work credit card) to see if Ms Griffiths would react to him doing so. He said, '[b]ecause I was not directed to leave them. And I was not asked for them. So I ... mentioned I was going to leave'.
 - (b) Agreed that he wanted to give the impression that he was not returning. He said, '[b]ecause Ione did not want me to leave'.

Ground for concern 10

63 Ground 10 states:

On 14 December 2022, you were served with a formal letter from the Director of Professional Standards instructing you not to return to work until otherwise directed. After being served the letter, you became angry and hostile and stepped towards your manager invading her personal space. She was forced to step backwards and attempted to walk away when you stepped in front of her and blocked her path causing her to have to step around you. Your behaviour was intimidating, threatening and made your manager feel very concerned for her personal safety.

64 In Agreed Document 3, Mr Lawn responds to Ground 10 by stating the following: (original emphasis)

...

On the **15 December 2022** at 1332 hours, I saw Ione and Nathan walk out the office building to the immediate car park for that site. I noticed them and called Ione, before the phone could be answered Ione noticed where I stood. I cancelled the call and waited for them to arrive. Ione announced that Nathan was there as a witness as there was a letter to be served and it need to be witnessed. Ione handed the letter to myself.

As I had matters to ask In confidentiality, I asked to move further away from Nathans hearing range. Some details were discussed, and the conversation slowly led back up towards Nathan as we dwindled while talking about the pending investigation.

Next I recall stating to Ione in front of Nathan while I was processing all the possible scenarios of situations as I was led to believe it hinged on point 2, 3, 4. One situation I explained and felt that can be inflamed or exaggerated was I don't know how it will work out if Lucy keeps avoiding myself and is afraid of me, if I was afraid of someone, I would not return at all as I would be concerned for my safety and I would take the matter to a higher level if I was forced to work with someone that comprised my safety. Ione replied that would not be up to Lucy and that would be a matter for her manager and myself to work through.

I also stated out loud in front of Nathan to Ione, I'm the least expensive part of the team you can operate without me, I'm the most dispensable part of the chess set, like a pawn. Ione replied don't say that. I stated I'm just moving through all the different scenarios in my mind and playing it out.

The conversation rounded up with Ione mentioning that if I felt down and needed to talk, I can call and use the EAP and Ione deflected the conversation over to Nathan where Nathan spoke up and said yeh they are really good I've used them myself. I said thankyou to Ione and then said thankyou to Nathan for everything you've done. Nathan stated I haven't done anything in a slightly higher voice. I replied oh for saying to use the EAP (pointing out that he is concencious [sic]) the conversation then steered to all of us giving Christmas wishes to each other and then parting my separate way.

65 At the hearing, Mr Lawn addressed Ground 10 as follows (ts 41–43):

- (a) He thought the whole 'communication was pleasant. Everything seemed pleasant about it. ...towards the end ... we said, "Merry Christmas":' 'What happened was a very pleasant and nice transaction and communication.'
- (b) He stated that he was 'more deflated' and that he 'was the opposite of intimidating because ... my whole life had just been upturned and I felt small'.
- (c) He stated that he 'felt betrayed'. 'I was betrayed by what was written and how it was written. I don't know what Mr Fleming or why Mr Fleming portrayed that'. He stated that he does not have a relationship with Mr Fleming 'for him to betray me', rather, he feels betrayed by the Department.

Mr Lawn's contentions

- 66 Mr Lawn accepts that 'there is a probationary period with many and probably all positions' and that 'a probationary period is for six months to see if people are suited to work with each other, to see if they are suited to the job and how well they perform', but believes that if it was not for his conversation with Ms McKnight (Ground 2) that he would not have received a probationary review (ts 10).
- 67 Mr Lawn stated that his conversation with Ms Jasper was before his conversation with Ms McKnight, and he had intended to replicate the conversation with Ms McKnight. He stated that he is 'sincerely sorry that [Ms McKnight] walked away feeling

the way ... she has. And it was intended to strengthen the relationship in [all] goodwill'. In relation to Ms Peterson, Mr Lawn stated that he had no direction he was in her personal space, 'nor any direction into how she may have felt intimidated', as he believed he spoke with Ms Peterson about Leo, who they both worked with, 'in a pleasant way', and that he 'was carrying out my daily duties at work ... by approaching ... another public officer' (ts 52).

68 Mr Lawn filed a written outline of submissions, in which he states:

[Agreed Document 2] requiring my response was written in a very defamatory approach and I feel untrue events of allegations were written and stated to which I responded to accordingly and not taken into consideration. The alleged untrue events were then forwarded to the acting Director and Director General [and] taken-on merit. Though the people in question regarding the allegations had all left the Department of Justice shortly after the allegations were put forward as well as the main person making an accusation has left the Pilbara district.

69 At the hearing, Mr Lawn provided the example of the investigator documenting Ground 2 as alleging that he said to Ms McKnight that 'You always look at me funny and pull faces', when this allegation is not contained in Ms McKnight's complaint (ts 54).

70 Mr Lawn submits that only Ms McKnight made a formal complaint. Mr Lawn notes that the investigator asked Mr Taulai and Ms Peterson to lodge a formal complaint, but they did not. Mr Lawn suggests that if their concerns were serious, that should have occurred (ts 55).

71 Mr Lawn submits that his dismissal comes down to two people: Ms McKnight who made a formal complaint, and the investigator, who Mr Lawn says documented the allegations against him in a defamatory manner. Mr Lawn urges the Board to review all the information to determine whether the allegations are substantiated (ts 55).

72 Mr Lawn submits that the respondent's delay in addressing the concerns about his behaviour raises doubts that the situations 'occurred and [are] largely true' (ts 55).

73 Mr Lawn submits that he collected letters of support (at [24] above) which was not 'looked at from my peers and taken into account' (ts 55).

74 The Board notes that while the letters of support at [24(a)-(b)] above are undated, the letter at [24(c)] is dated 16 October 2023, which suggests the letters were obtained by Mr Lawn in support of the appeal, rather than letters provided in response to Agreed Document 2 that were not considered by the decision-maker prior to the dismissal decision. The Board also notes that Agreed Document 3 makes no reference to these letters.

75 Mr Lawn submits that he has worked in the field for 10 years and has worked in the Department of Justice in other roles. He submits that he has never 'had this kind of reverberation come against me in my career [of] having difficulty with people. I have taken it upon myself to do internal and external courses and curriculum in educating myself to be amongst people. And for this to happen remotely, in a remote place, is ... very odd' (ts 55).

76 Mr Lawn submits that the lesson he has learnt from the experience is to not put himself into a position where it can be used against him. He says that from this experience, he has 'been educated to have all my following conversations in front of people' and to look at the way he approaches people 'and identify how people may not get triggered, what may be any underlying background that they have that might upset them that I'm not aware of [and] to be more informed and ask for advice before I approach situations' (ts 57).

77 Mr Lawn submits that nothing formal was brought to his attention during the probationary period. He says that he was acting through good intentions and was unable to be aware of other people's opinions of what was happening. He says that he would have followed directions and been more alert to his behaviour and their boundaries. He says he could make sure there was a good distance if he approached anyone (ts 67).

78 Mr Lawn accepts the Code of Conduct applied to his employment, agrees he was aware of it at all times whilst employed, and agrees he must abide by it (ts 68).

79 Mr Lawn says he has a lot of experience working with young people, and it is necessary for him to learn and ask questions about how things and procedures can be carried out. He has a duty of care to the clients and needs information to learn about each client so that he can work and feel safe when he works with a client. By this, the Board understands Mr Lawn to be saying that he asks questions to gain information and did not do so with an intention to undermine his colleagues.

The respondent's contentions

80 The respondent relies on *Crabtree* and submits that when considering an appeal from a decision to terminate probationary employment, the Board is not deciding whether there was underperformance or misconduct that justified termination. Rather, the Board is deciding whether the employer's right to terminate employment during the probationary period was misused or abused. The respondent submits that the right to terminate Mr Lawn's probationary employment was neither misused nor abused.

81 The respondent submits that the evidence before the Board establishes that the respondent had concerns about Mr Lawn's conduct, those concerns were reasonably held, and the respondent appropriately exercised the right to terminate Mr Lawn's probationary employment.

82 The respondent submits that while there are 10 grounds in Agreed Document 2, they all relate to the requirement for Mr Lawn to comply with the Department's Code of Conduct, requiring him to show respect, follow instructions, work in cooperation with supervisors, managers and work colleagues, and to maintain a professional approach to all.

83 The respondent submits that they were concerned about Mr Lawn's willingness to engage in intimidating and aggressive behaviour, in particular, regarding female staff, including his supervisors and female staff from the Child Protection Family Services Unit.

- 84 The respondent submits that by the number of events identified over the course of Mr Lawn's probationary period, which involved a range of individuals from different departments who provided separate evidence from separate events, and the fact Mr Lawn does not dispute the basic facts of those interactions, the concerns were reasonably held by the respondent.
- 85 The respondent acknowledges Ms Jasper's email (at [25] above) but says that that singular positive endorsement is outweighed by the array of other complaints about Mr Lawn's behaviour.
- 86 The respondent submits that Mr Lawn was afforded procedural fairness through firstly having the opportunity to discuss his concerns about the workplace with Ms Griffiths on multiple occasions, and when he was formally notified of the concerns (Agreed Document 2), he was given an opportunity to respond in writing (Agreed Document 3) before the final decision was made (Agreed Document 4). The respondent submits that, in any event, any procedural fairness issues have been cured by the detailed opportunity Mr Lawn had to put his version of events forward to the Board on appeal.
- 87 The respondent relies on *Crabtree* that a probationary employee has little cause to complain if a decision was made to terminate the probationary employment where the employee:
- (a) was counselled and informed that they were not meeting the required standard of performance;
 - (b) was given reasonable training in respect of the required standard; and
 - (c) was warned of the possible consequences of a failure to improve.
- 88 The respondent submits that the following documents evidence that Mr Lawn was counselled and informed that he was not meeting the required standard of performance:
- (a) Ms Griffiths's summary of interview on 6 January 2023, describing a series of conversations between Mr Lawn and his supervisors (Document 11 of the respondent's bundle); and
 - (b) the email exchange between Ms Sutherland and Mr Lawn explaining that it was ultimately Ms Sutherland's decision whether or not Leo should be able to attend the BBQ. (The respondent says this email supports Mr Lawn having been counselled regarding allowing the persons with authority to make decisions and having those decisions listened to.)
- 89 The respondent also refers to the multiple discussions with Mr Lawn about the distinction between his role as a CWO and what the YJSOs were to do, and to ensure there was an understanding of the delineation between the two roles.
- 90 The respondent submits that Mr Lawn was provided with training before his commencement at the South Hedland Office and when he was in South Hedland, he received on-the-ground induction training from Mr Moxham. The respondent submits that the Code of Conduct is front-and-centre in the Contract – being identified and described to Mr Lawn that he must comply with it and shown where he may find it. The Contract also states that Mr Lawn is required to follow all reasonable and lawful directions given to him by the respondent, including policies and procedures.
- 91 The respondent submits that the requirement to ensure a probationary employee is aware of the consequences of their conduct needs to be taken in context of a probationary employee who has made persons feel so uncomfortable that there was a concern, from the respondent's perspective, about the need to maintain the safety of persons in the office. The respondent submits that the warning of the possible consequences may be tempered by the need to have Mr Lawn no longer attend the workplace, as was directed on 14 December 2022 (Document 8 of the respondent's bundle), which curtailed to a degree the opportunity for further discussion about the consequences.
- 92 The respondent says this is because, at that point, things had escalated to the need for a formal investigation. On 7 December 2022, Ms Griffiths attended the South Hedland Office to put the concerns held by Mr Lawn's colleagues to him, to gain his perspective and discuss next steps (Document 11 of the respondent's bundle). In that discussion, Mr Lawn told Ms Griffiths that he was going to leave the role. Ms Griffiths requested Mr Lawn not to make any rash decisions, to think about it, and to stay away from the workplace until they have a further discussion. Their discussion and Mr Lawn's subsequent action of leaving his lanyard and workplace belongings created a general understanding that he would not be returning to the South Hedland Office until further action was taken. Mr Lawn's subsequent attendance at the office on 12 December 2022, prior to office hours, and to the surprise of his colleagues and supervisors, without permission, led to the escalation of a suspension of his swipe card and the formalised direction not to attend work (Document 8 of the respondent's bundle). The respondent submits that 'where there would have been that opportunity for more learning, that was contracted by his attendance without authority on the Monday' (12 December 2022) (ts 71).
- 93 The respondent also submits that Mr Lawn was warned of the possible consequences through the investigation (Agreed Document 2) and the opportunity provided to him to respond (Agreed Document 3), which was taken into account in the ultimate decision to terminate his probationary employment (Agreed Document 4).
- 94 The respondent submits that the onus is on Mr Lawn to demonstrate that the Board should adjust the dismissal. The respondent submits that Mr Lawn has not demonstrated that the respondent's decision to terminate his probationary employment was unreasonable and unfair. Therefore, the respondent's decision should be upheld and the appeal should be dismissed.

Consideration

- 95 The Board agrees with the respondent's submission at [80] above, that in disposing of the appeal, it is not necessary to determine whether the grounds for concern are substantiated. Instead, the focus is on whether the respondent's concerns were genuinely held and whether the respondent's right to terminate Mr Lawn's probationary employment was exercised without misuse or abuse.
- 96 Agreed Document 2 outlines 10 concerns, involving the following persons, across the following Departments, on the following dates:

Ground	Date	Person	Position
1	20 September 2022	Shannon Moxham	SYJO, Department of Justice
2	28 November 2022	Lucy McKnight	CPFSO, Department of Communities
3	29 November 2022	Stacey Peterson	CPFSO, Department of Communities
4	November 2022	Donna Jasper	CPFSO, Department of Communities
5 – 6	5 and 6 December 2022	Brooke Sutherland	Acting Team Leader / SYJO, Department of Justice
7 – 10	6, 7 and 14 December 2022	Ione Griffiths	Manager, Department of Justice

- 97 The table at [96] highlights that the concerns relate to interactions with six individuals some of whom are Mr Lawn's supervisors and others are his work colleagues, who work across two different Departments, across a less than three-month period, with Ground 1 occurring within eight days of Mr Lawn commencing at the South Hedland Office on 12 September 2022.
- 98 The Board's assessment of whether the respondent's concerns in relation to each ground was genuinely held follows.
- 99 In relation to Ground 1, Mr Lawn agreed that he had the discussion with Mr Moxham that is the subject of Ground 1. What he disagrees with is the characterisation of his demeanour (that he was physically and verbally agitated and aggressive in his demeanour) during the discussion. He agreed that he was repetitive and that it was a long-winded conversation.
- 100 In relation to Ground 2, Mr Lawn agreed that he initiated the discussion with Ms McKnight that is the subject of Ground 2. He disagrees he said, 'You always look at me funny and pull faces'. He says that the fact that Ground 2 contains those words when in Ms McKnight's email to the investigator dated 5 January 2023 (Document 10 of the respondent's bundle) (**Document 10**) Ms McKnight does not claim that Mr Lawn said those words to her, suggests that the investigator was biased.
- 101 The Board notes that Agreed Document 2 is dated 20 January 2023, by which time Ms McKnight had provided her written account of her interaction with Mr Lawn (Document 10) to the investigator. In Document 10, Ms McKnight says that Mr Lawn said the following words to her: 'Do you have a problem with me', 'I feel like you have a problem with me, I can tell through your facial expressions and way you talk to me'.
- 102 The Board notes that Ground 2 is framed as Mr Lawn saying words **to the effect of** 'Do you have a problem with me? You always look at me funny and pull faces' to Ms McKnight. The Board considers it would have been preferable for Ground 2 to slavishly reflect the words used by Ms McKnight in Document 10. However, the Board does not accept this imputes any bias on the investigator.
- 103 While Mr Lawn accepted that Ms McKnight's demeanour towards him changed after their conversation, he stated to the Board that he doubted the genuineness of Ground 2. By this, the Board understands that Mr Lawn doubts that his conversation with Ms McKnight caused her to 'become distressed and concerned for her safety' as is stated in Ground 2. Indeed, Mr Lawn stated to the Board that his doubt arises from Ms McKnight being close with his supervisor, Ms Anderson. He stated to the Board that his standing with Ms Anderson changed when he blind-sided her with his complaint to their manager, Ms Griffiths, on a video-conference call (at [35(e)] above).
- 104 In relation to Ground 3, Mr Lawn stated to the Board that he sincerely doubts he invaded Ms Peterson's personal space and spoke to her in a manner that caused her to feel intimidated. He stated that the fact that Ms Peterson did not make a formal complaint causes him to doubt the genuineness of Ground 3. Further, he stated that he believes that Ms Peterson raised Ground 3 because she was upset upon hearing that Mr Lawn had upset Ms McKnight.
- 105 The Board notes that Ms Peterson first raised her concern about her conversation with Mr Lawn on 29 November 2022 with his team leader, Ms Anderson on or before 3 December 2022 (Document 1 of the respondent's bundle). In Document 1, Ms Anderson records that Ms Peterson stated that she 'felt intimidated as Mark was in her personal space and intensive'.
- 106 In relation to Ground 4, the Board notes that on 2 December 2022, Ms Jasper reported to Ms Anderson that Mr Lawn had approached her in the kitchen and asked if she had an issue with him. While Ms Jasper stated to Ms Anderson that she was not intimidated and felt that it was fair for Mr Lawn to ask her that question because she was grumpy around that time, Ms Jasper wanted to inform Ms Anderson of her interaction with Mr Lawn because she 'felt there was a pattern'.
- 107 The Board notes that Ms Jasper informed Ms Anderson of her concerns about Mr Lawn on 2 December 2022 and Agreed Document 2 is dated 20 January 2023 and Agreed Document 3 is dated 30 January 2023. However, Ms Jasper's letter (at [25] above) is dated 1 February 2023. This means, at the time of Agreed Document 2, the respondent only had Ms Jasper's report to Ms Anderson given on 2 December 2022 from which to frame Ground 4.
- 108 In relation to Ground 5, Mr Lawn agreed that he had the discussion with Ms Sutherland and Mr Tualai that is the subject of Ground 5. What he disagrees with is the characterisation of his demeanour (that his demeanour was aggressive and that by approaching Mr Tualai he undermined Ms Sutherland's authority).
- 109 While Mr Lawn disagreed he argued with Ms Sutherland, he agreed that he persisted in his questioning of Ms Sutherland regarding Ms Sutherland's position on Leo's attendance at the BBQ. While Mr Lawn disagreed that he was undermining Ms Sutherland by speaking with Mr Tualai following speaking with Ms Sutherland about Leo's attendance at the BBQ, and under cross-examination he accepted that Ms Sutherland was Leo's case manager, he maintained before the Board that at that stage of his discussions with Ms Sutherland he was not convinced that 'Leo was not going at all whatsoever'.
- 110 Under cross-examination regarding Ground 7, Mr Lawn agreed that he questioned Ms Sutherland's competency. Further, Mr

- Lawn stated before the Board that he considered that Ground 5, and the other grounds, were either made up or exaggerated.
- 111 In relation to Ground 6, Mr Lawn agreed that he had the discussion with Ms Sutherland which was the subject of Ground 6. What he disagrees with is the characterisation of his demeanour (that he was breathing heavily and staring intently at Ms Sutherland).
- 112 Mr Lawn stated to the Board that he considered the description of his body language to be untrue and exaggerated. While he agreed that he maintained eye contact with Ms Sutherland, he says this was because he was waiting for a response from her.
- 113 Mr Lawn stated that he did not intentionally make Ms Sutherland feel intimidated. While the Board accepts this, for the reasons that are to follow, the Board considers the respondent's concerns about Mr Lawn to be genuinely held.
- 114 In relation to Ground 7, Mr Lawn agreed that he had the discussion with Ms Griffiths that is the subject of Ground 7, subject to a clarification over the exact words used by him. At first, Mr Lawn agreed that he was angry during this phone conversation. He then resiled from this statement and said he was only venting his feelings with his manager. He stated to the Board that he doubted that Ms Griffiths felt uncomfortable during their phone call because she gave no indication to him during the call of her discomfort.
- 115 In relation to Ground 8, Mr Lawn agreed that he had the discussion with Ms Griffiths that is the subject of Ground 8, subject to a clarification over the exact words used by him (such as 'fucken fucken' as opposed to 'fucked up fucks'). Mr Lawn denied his body language was aggressive but agreed that he was wide-eyed and that he was staring at the ceiling. Mr Lawn disagreed that his behaviour was intimidating and made his manager feel concerned for her personal safety because, he said, if she genuinely felt that way, she would have removed herself from the situation.
- 116 Mr Lawn agreed under cross-examination that he said to Ms Griffiths that Ms Jasper, Ms Peterson and Ms McKnight 'had made their recipe, mixed the ingredients and put it in the oven', by which he meant that they were colluding in their complaints against him – the imputation being that their complaints were not genuine.
- 117 In relation to Ground 9, Mr Lawn agreed that he had the discussion with Ms Griffiths that is the subject of Ground 9. What he disagrees with is that Ms Griffiths instructed him to stay away from the office until further notice. He says, Ms Griffiths only directed him to stay away from the office for the next couple of days. Under cross-examination, Mr Lawn agreed that he left his lanyard, ID, credit card and paperwork because he wanted to give the impression he was not returning.
- 118 Given the items that Mr Lawn left behind and the impression that he wanted to give (that he was not returning), the Board does not consider Mr Lawn retaining his swipe card, which created a security issue when he used it to access the office on the following Monday, to have been adequately explained by him.
- 119 In relation to Ground 10, Mr Lawn denied all aspects of this ground. Mr Lawn said to the Board that he was the opposite of intimidating to Ms Griffiths. He said that by the events leading up to that day, he felt betrayed. Mr Lawn struggled with articulating who he felt betrayed by and ultimately stated that he felt betrayed by the Department.
- 120 In Agreed Document 4, the respondent states the following:
- In my view, the information presented to me demonstrates a willingness on your part to engage in intimidating and aggressive behaviour towards female staff, including your supervisors and female staff from the Child Protection Family Services who occupy the same office.
- Your response does not assuage my concerns about your conduct. The impression I am left with after reading your response is that you are focused on explaining why you believe you were 'right' or justified in your views about the subject matter being discussed in the conversations. This is irrelevant. The issue of concern is the manner in which you conducted yourself during these conversations. Your response did not demonstrate any significant insight into the concerns that were put to you. One comment made in your response was, 'It is out of my control to how people wish to believe and perceive and say how they think I felt and acted.'
- I have no confidence that there will be any change in your conduct and, as an employer, I will be continuing to expose other staff to behaviours that create an unsafe workplace should your employment continue.
- I consider that fact that this pattern of behaviour has emerged so consistently so early in your career present a significant risk to the Department should you continue as a community work officer.
- 121 Having heard from Mr Lawn directly in relation to each concern, the Board considers that the respondent's conclusions reached in [120] to be available on all of the evidence and therefore genuinely held by the respondent.
- 122 Mr Lawn suggests that in relation to Grounds 2–4, that Ms McKnight, Ms Peterson and Ms Jasper corroborated and colluded to make false allegations against him. The Board does not consider there to be any substance to this suggestion. To the contrary, the positive statement made by Ms Jasper (at [25] above) speaks against any such collusion.
- 123 Mr Lawn suggests that if Ms Peterson and Mr Tualai had genuine concerns about his conduct, that they would have made a formal complaint about him. The Board notes that the respondent's bundle does not contain their formal complaints, but Ms Peterson was concerned enough about her interaction with Mr Lawn that she reported it to his team leader, Ms Anderson, on or shortly after the exchange (Document 1 of the respondent's bundle). Further, the Board notes that the respondent's bundle indicates that Mr Tualai's concerns were to support his team, comprising of Ms McKnight and others, in their complaints against Mr Lawn, rather than having a complaint of his own to make against Mr Lawn.
- 124 Mr Lawn suggests that if Ms Griffiths and others had genuinely felt uncomfortable by his conduct, they should have either expressed that feeling to him or removed themselves from the situation. Mr Lawn suggests that the fact that this did not occur speaks against the genuineness of their feelings and of his intention to place them in that situation.
- 125 While the Board can accept that Mr Lawn may not have been aware that his conduct made his colleagues feel uncomfortable at the time, Mr Lawn was placed on notice, firstly by his manager on 7 December 2022, secondly by Agreed Document 2, and

thirdly by having to answer to each concern in the appeal, of each ground for concern. In responding in writing to Agreed Document 2, and in addressing each ground for concern in the appeal, Mr Lawn has had ample opportunity to reflect on his behaviour and whether it could reasonably have caused each of Mr Moxham, Ms McKnight, Ms Peterson, Ms Sutherland and Ms Griffiths to have experienced the feelings detailed in each ground for concern.

126 The Board has reviewed Ms Griffiths' record of interview with the investigator (Document 11 of the respondent's bundle). In this record, Ms Griffiths states the following about her discussion with Mr Lawn on 7 December 2022:

She challenged him on the situation with Ms McKnight, explaining she said that she also would not have been comfortable, and she too would have been intimidated. He disagreed and said that if people felt uncomfortable, they should have raised it at the time if it was true. She told him that is not something that everyone would be able to do if they're confronted in the moment and they wanted to get out of the situation. They wouldn't be able to say they're feeling uncomfortable or feeling scared. He didn't agree with this at all.

...

That was how every conversation went with him. She could never get him to a place where he could understand his behaviours or have insight or reflect that his behaviour made people feel uncomfortable.

127 During the hearing, the Board asked Mr Lawn to comment, from his perspective, as to why there is an appeal involving 10 grounds for concern, and what his role is in any of the grounds. Mr Lawn's answer was that 'the concerns are not positive and they have been put forward to be addressed to learn further information of what occurred'.

128 The Board considers Mr Lawn's approach before the Board to each ground for concern to be consistent with Ms Griffiths' observations at [126], namely that Mr Lawn does not appear to accept that his behaviour could reasonably have caused each of Mr Moxham, Ms McKnight, Ms Peterson, Ms Sutherland and Ms Griffiths to feel uncomfortable.

129 The Board also considers Mr Lawn's approach before the Board to be consistent with his approach in responding to the respondent, resulting in the respondent's conclusion that 'I have no confidence that there will be any change in your conduct and ... I will be continuing to expose other staff to behaviours that create an unsafe workplace': [120] above. As noted at [121] above, the Board considers this conclusion available on all of the evidence, and therefore, the Board considers the respondent's dismissal of Mr Lawn for this reason was not a misuse or abuse of the right to terminate his probationary employment.

130 In accordance with [18(a)-(b)] above, and for the reasons at [96]-[129] above, the Board finds that the respondent's concerns about Mr Lawn were genuinely held and that the respondent did not misuse or abuse the right to terminate his probationary employment.

131 In accordance with [18(c)-(d)] above, the Board finds that Mr Lawn received adequate support and training to enable him to perform satisfactorily and was adequately informed he was not meeting the required standards, including the consequences of a failure to improve, for the following reasons:

- (a) Mr Lawn agrees that the Code of Conduct applied to his employment and that he was required to comply with it as a term of his employment.
- (b) On 7 December 2022, Ms Griffiths met with Mr Lawn to discuss the concerns that had been raised against him.
- (c) By Agreed Document 2, Mr Lawn was formally placed on notice that his probationary employment was under review and of the consequences of a failure to demonstrate suitability for ongoing employment: (emphasis added)

Clause 5 of the contract of employment you signed on 4 August 2022 states that, in accordance with subclause 8(1) of the [Award], you are subject to a probationary period of six months and if there are any concerns regarding your performance or conduct, *your probation may be extended or your employment terminated by the giving of one week's notice or payment in lieu of notice.*

The question of your suitability is a matter that is determined by the Director General. To this end, to assist me in considering whether to recommend to the Director General that he consider your suitability *and whether to potentially extend your probation or terminate your employment*, I am providing you with an opportunity to respond to the concerns.

The concerns relate to an alleged pattern of inappropriate behaviour that, if it has occurred, breaches the Department's Code of Conduct in relation to personal behaviour. The alleged conduct is particularly concerning because the first incidents are alleged to have occurred within a month of you starting your employment.

To afford you procedural fairness, I will set out the grounds of concern, below, and provide you with an opportunity to respond in writing to those concerns within seven days of your receipt of this letter.

- (d) By Agreed Document 2, Mr Lawn was given the opportunity to demonstrate suitability for ongoing employment: (emphasis added)

Providing a response

Should you wish to provide a written response to these concerns, I will consider your response before deciding whether to progress this matter to the Director General for his consideration on *whether to terminate your employment on the grounds of suitability during the probationary period of your employment or to extend your probationary period.*

- (e) Mr Lawn exercised the opportunity to demonstrate suitability for ongoing employment (Agreed Document 3), which the respondent considered before exercising the right to dismiss Mr Lawn (Agreed Document 4): (emphasis added)

Ms Jones advised you that she was considering recommending to me that I consider extending your

probationary period or terminate your employment due to concerns relating to a pattern of inappropriate behaviour that consistently breaches the Department's Code of Conduct in relation to personal behaviour.

You were informed Clause 5 of the contract of employment you signed on 4 August 2022 states that, in accordance with subclause 8(1) of the [Award], you are subject to a probationary period of six months and that if there are any concerns regarding your performance or conduct, your probation may be extended or your employment terminated by the giving of one week's notice or payment in lieu of notice.

You were provided with an opportunity to respond to the information that formed the basis of this recommendation. Based on your response of 30 January 2023, together with the raised concerns, Ms Jones has progressed the recommendation to me to consider terminating your employment.

Having considered the same material I am dismissing you from your employment whilst on probation with immediate effect.

Conclusion

132 For the preceding reasons, the Board finds that the decision to terminate Mr Lawn's probationary employment aligns with the purpose and principles of probationary employment.

133 Consequently, the Board finds that Mr Lawn has not demonstrated an arguable case that would warrant granting an extension of time for him to appeal the dismissal.

134 Therefore, both the application for an extension of time to appeal, and the appeal, will be dismissed.

2024 WAIRC 00772

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
MS L BRICK – BOARD MEMBER
MR G BROWN – BOARD MEMBER

DATE

FRIDAY, 16 AUGUST 2024

FILE NO

PSAB 18 OF 2023

CITATION NO.

2024 WAIRC 00772

Result

Order issued

Representation

Appellant

Mr M Lawn (on his own behalf)

Respondent

Ms I Inkster (of counsel)

Order

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

1. THAT the application for an extension of time to appeal under reg 107(2) of the *Industrial Relations Commission Regulations 2005* (WA) be, and by this order is, dismissed.
2. THAT this appeal be, and by this order is, dismissed.

(Sgd.) C TSANG,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2024 WAIRC 00795

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 17 MAY 2023
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00795
CORAM : PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER C TSANG – CHAIR
 MS B CONWAY – BOARD MEMBER
 MS E HAMILTON – BOARD MEMBER
HEARD : MONDAY, 11 DECEMBER 2023, MONDAY, 18 DECEMBER 2023
DELIVERED : MONDAY, 2 SEPTEMBER 2024
FILE NO. : PSAB 17 OF 2023
BETWEEN : TRISTA CAROLE JEWELS BURKE
 Appellant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Public Service Appeal Board – Appeal of dismissal for inability to perform inherent requirements of role due to poor attendance – preliminary issue regarding admissibility of evidence concerning past disciplinary proceedings – whether inability to perform inherent requirements of role to be determined at time of dismissal or time of appeal hearing – whether dismissal unfair in all the circumstances

Legislation : *Industrial Relations Act 1979* (WA) ss 26(1)(b), 80C(1), 80I(1)(d), 80L
Public Sector Management Act 1994 (WA) s 80(c), Part 5
School Education Act 1999 (WA) s 239

Result : Appeal dismissed

Representation:
Appellant : Mr S Pack (of counsel)
Respondent : Ms E Negus (of counsel)

Cases referred to in reasons:

Batchelar v Skybus (1983) 63 WAIG 2244
Carter v Director General, Department of Education [2023] WAIRC 00883
Colpitts v Australian Telecommunications Commission [1986] FCA 1
Durham v Director General, Department of Communities [2023] WAIRC 00403
G v H (1994) 181 CLR 387
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36
Goodrem v Commissioner for Public Employment [2023] FWCFB 186
Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728
Heller-Bhatt v Director General, Department of Communities [2022] WAIRC 00719
Jones v Commissioner of Police [2007] WAIRC 00440
Kos v Director General, Department of Transport [2023] WAIRC 00298
Kyriakopoulos v James Hardie & Company Pty Ltd (1970) 38 SAIR 91
Magyar v Department of Education [2019] WAIRC 00781
Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385
Mills v South Metropolitan TAFE [2023] WAIRC 00230
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40
Moran v The Commissioner of Police [2015] WAIRC 00464
Mourtada v Dnata Airport Services Pty Ltd [2022] FWC 1014
Nicholls v The Queen [2005] HCA 1

Noble v North Metropolitan Health Service [2022] WAIRC 00661
Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41) [2023] FCA 555
Rooney v State of Queensland (Queensland Health) [2022] QIRC 267
Spasojevic v Speaker of the Legislative Assembly [2023] WAIRC 00001
Titelius v Director General of the Department of Justice [2019] WAIRC 00195
Walley v Director General, Department of Biodiversity, Conservation and Attractions [2021] WAIRC 00569
Wilkie v National Storage Operations Pty Ltd [2013] FCCA 1056
X v The Commonwealth of Australia [1999] HCA 63

Reasons for decision

Background

- 1 The appellant (**Ms Burke**) commenced employment with the respondent on 14 April 2011.
- 2 Ms Burke worked at Roseworth Primary School, Girrawheen (**Roseworth**):
 - (a) From 30 January 2012–28 February 2016 as a Special Needs Education Assistant; and
 - (b) From 29 February 2016 as a School Officer.
- 3 Since 2017, the respondent held concerns about Ms Burke’s ability to maintain an acceptable standard of attendance at work.
- 4 Separately, in September 2020, Ms Burke was suspended from her employment and subjected to a disciplinary investigation by the Department’s Standards and Integrity Directorate (**SID**) for five allegations of misconduct in breach of s 80(c) of the *Public Sector Management Act 1994* (WA) (**PSM Act**):
 - (a) Collecting, on behalf of Roseworth, a \$100 Bunnings gift card from Bunnings, Balcatta on 29 June 2019, keeping the gift card and using it to buy household items on 19 July 2019 at Bunnings, Malaga, in breach of the Department’s Code of Conduct.
 - (b) Being convicted at the Perth Magistrates Court on 17 September 2020 for an offence of stealing for taking possession of a \$50 Coles gift card posted to Roseworth on 25 October 2019 by Coles, Warwick Grove, and using it to purchase household items on 1 and 9 November 2019 at Coles, Mirrabooka, in breach of the Department’s Code of Conduct.
 - (c) Receiving a permission slip and \$23 in cash from a student’s parent for the student to attend a school excursion on 25 November 2019, submitting the permission slip but failing to record the receipt of money in RM Billing, resulting in the inability to locate the funds by Roseworth, in breach of the Department’s Code of Conduct.
 - (d) Being convicted at the Joondalup Magistrates Court on 17 July 2020 for the offence of ‘Drove with prescribed illicit drug in oral fluid or blood’ after testing positive for methylamphetamine and tetrahydrocannabinol (cannabis) while driving a motor vehicle on a road in Warwick on Sunday 12 April 2020 and:
 - (i) Failing to notify the respondent of the charge and conviction, in breach of the *Criminal History Screening for Department of Education Sites Policy* and the Department’s Code of Conduct.
 - (ii) For both taking illicit drugs and driving with illicit drugs present in her body, in breach of the Department’s Code of Conduct.
- 5 On 12 July 2021, the respondent found the five allegations of misconduct to be substantiated.
- 6 On 24 March 2022, the respondent reprimanded Ms Burke for each allegation, and transferred her out of her substantive role at Roseworth.
- 7 In May 2022, the respondent temporarily placed Ms Burke at Ashdale Primary School, Darch (**Ashdale**) as a permanent employee requiring placement.
- 8 On 10 October 2022, Ashdale’s Principal wrote to Ms Burke outlining concerns regarding her ongoing absenteeism issues.
- 9 On 6 December 2022, the respondent placed Ms Burke on notice that she was being given an opportunity over Term 1, 2023 to demonstrate her ability to regularly attend work. Ms Burke was warned that her ongoing employment was at risk if she failed to meet this expectation.
- 10 During Term 1, 2023, Ms Burke only attended work for one part-day.
- 11 On 20 April 2023, the respondent sent a letter to Ms Burke proposing to dismiss her from her employment.
- 12 On 17 May 2023, the respondent terminated Ms Burke’s employment with four weeks’ pay in lieu of notice, based on her inability to fulfil the inherent requirements of her role due to poor attendance.
- 13 Ms Burke contests the dismissal on the ground of substantive fairness. She does not contend there were any procedural fairness issues with the dismissal (ts 20).

The Board’s jurisdiction

- 14 There is no dispute that Ms Burke is a ‘government officer’ pursuant to s 80C(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) and that by s 80I(1)(d) of the IR Act, the Public Service Appeal Board (**Board**) has jurisdiction to hear the appeal of Ms Burke’s dismissal.
- 15 The appeal involves the review of the dismissal de novo. The Board is to consider the appeal based on the evidence before it

and not merely on the basis of whether the respondent made the right decision available to it at the time. The Board has greater scope to substitute its own view for the view taken by the respondent: *Noble v North Metropolitan Health Service* [2022] WAIRC 00661 [10].

Preliminary issue – Objection to evidence relating to past disciplinary proceedings

- 16 The respondent filed outlines of witness evidence for:
- (a) Louise Nielsen, Roseworth’s Principal (**Ms Nielsen**).
 - (b) Jayne McKernan, Ashdale’s Manager of Corporate Services (**MCS**) (**Ms McKernan**).
 - (c) Sara Young, Principal Labour Relations Advisor with the Department (**Ms Young**).
- 17 Ms Burke objects to Ms Nielsen giving evidence of two matters relating to Ms Burke’s conduct in June and October 2019, which Roseworth did not treat as disciplinary issues. Additionally, Ms Burke objects to both Ms Nielsen and Ms Young giving evidence concerning the disciplinary proceedings at [4] above.
- 18 While Ms Burke concedes that both parties presented evidence of the historical fact of the disciplinary action at [4] above, she argues that the details of the disciplinary proceedings (including SID’s investigation report attached to Ms Young’s witness outline, 17–209) are irrelevant, prejudicial and distracting from the issues for determination in the appeal.
- 19 Ms Burke submits that there are three issues for determination in this appeal.
- (a) Firstly, what is the inherent requirement of her role? While Ms Burke acknowledges that, in general, employees are expected to attend and perform work according to their scheduled hours, she argues that it is not an inherent requirement of her role to attend work when she has an entitlement to take leave, whether paid or unpaid.
 - (b) Secondly, is she unable to fulfil the inherent requirements of her role? Ms Burke contends that this assessment is forward-looking and there is no basis to conclude that she would be incapable of fulfilling the inherent requirements of her role in the future.
 - (c) Thirdly, is her dismissal fair in all the circumstances? Ms Burke argues that even if she was unable to fulfil the inherent requirements of her role, dismissal would be unfair given her length of service and employment history, financial circumstances, the likelihood that her absences in Term 1, 2023 would recur and the respondent’s ability to treat any future unapproved absences as a disciplinary matter.
- 20 Ms Burke submits that the evidence of her prior disciplinary proceedings should be limited to the respondent’s outcomes letter dated 24 March 2022 (attachment to Ms Young’s witness outline, 213–214) (**Letter imposing reprimands**).
- 21 Ms Burke acknowledges the respondent relies on her past disciplinary proceedings to question her credibility, and she concedes that evidence relating to her credit may be admissible based on relevance. However, Ms Burke argues that the evidence of her past disciplinary proceedings is only peripherally relevant and should be excluded on this basis: *Nicholls v The Queen* [2005] HCA 1 (McHugh J) [39]:
- Policy considerations provide the rationale for the collateral evidence rule. The reasons for the rule are generally practical: it is based on principles of case management, such as the desirability of avoiding a multiplicity of issues and of protecting the efficiency and cost-effectiveness of the trial process by preventing the parties from litigating matters of marginal relevance. The rule is also based on the need to be fair to the witness. (footnotes omitted)
- 22 The respondent submits the prior disciplinary proceedings are relevant for three reasons:
- (a) Firstly, the quality of Ms Burke’s service is relevant to assessing the fairness of the dismissal: *Garbett v Midland Brick Company Pty Ltd* [2003] WAsCA 36 [72]. The respondent submits that assessing the quality of Ms Burke’s service is a broad exercise and not limited to particular matters: *Jones v Commissioner of Police* [2007] WAIRC 00440 (*Jones*) [70]:
 - 70 In response to a specific question put to her in the hearing Ms Jones, very properly, recognised that there must at some point be an avenue for an employer to medically retire someone in a fair and just way including considering rehabilitation, depending upon whether it is work related or non-work related. Ms Jones’ comment is consistent with the position in industry generally where the decided cases appear to regard the general comments made in the 1970 decision of the Industrial Relations Commission of South Australia in *Kyriakopoulos v James Hardie & Company Pty Ltd* (1970) 38 SAIR 91 [(*Kyriakopoulos*)] at 103 as helpful. There, Olsson J dealt with an employee who had been dismissed when a medical condition meant that he could not perform his normal work and stated:
 - i. that an employee dismissed by the employer would only succeed in showing that the dismissal was unfair if it could be shown that the employee is, or will in the reasonably near future on the balance of probabilities be able adequately and fully to discharge all of the duties of his former position;
 - ii. that the period elapsing from the time of injury to the time of recovery must, in all of the circumstances be reasonable (a period which must differ greatly according to all of the circumstances including the length of the employee’s service, the size and nature of the employer’s business, and its ability to make reasonable temporary arrangements to carry on its operations in the absence of the employee);
 - iii. *that the past employment history of the employee viewed from all aspects is a consideration of what is just in all of the circumstances;*

- iv. that the conduct of an employee in relation to his efforts to rehabilitate himself and to place himself in a position to resume his former duties at the earliest possible moment also constitutes a relevant circumstance. (transcript references omitted) (emphasis added)
 - (b) Secondly, in the absence of medical evidence regarding Ms Burke's absences in Term 1, 2023, the Board will need to form a view of Ms Burke's reliability and credibility as a witness when determining the extent to which it relies on her self-reporting of her medical issues. Ms Burke's disciplinary history (including both her conduct and responses to the respondent during the disciplinary process) is relevant to that exercise.
 - (c) Thirdly, parts of the disciplinary history may be relevant to the issues in the appeal, such as evidence suggesting her use of illicit drugs might have contributed to her absences in 2019.
- 23 Having heard the parties' submissions, the Board refused Ms Burke's application to exclude evidence of her past disciplinary proceedings for the following reasons: Ms Burke's employment history, including the past disciplinary proceedings, is relevant to the appeal. While Ms Burke does not object to the Letter imposing reprimands being tendered, that letter in isolation does not provide the Board with sufficient detail regarding the severity of the past disciplinary matters. As the Board is to hear the appeal de novo, the past disciplinary matters are relevant to a key question the Board must determine, namely, whether it should adjust Ms Burke's dismissal.

The evidence

24 On 1 December 2023, the parties filed a Statement of Agreed Facts, stating:

1. [Ms Burke] commenced employment with the Respondent on 14 April 2011.
2. [Ms Burke] was employed on a contract until 30 January 2012.
3. From 30 January 2012 until 28 February 2016, [Ms Burke] worked as a Level 2/3 Special Needs Education Assistant at [Roseworth].
4. From 29 February 2016 until 18 May 2022, [Ms Burke] worked as a School Officer at [Roseworth].
5. From 23 May 2022 until 17 May 2023, [Ms Burke] worked as a School Officer at [Ashdale], as a permanent employee requiring placement (also commonly referred to by the Department as a 'supernumerary').
6. While at [Ashdale], [Ms Burke] was one of four School Officers (being three School Officers and one Business Support Officer) at the school.

Attendance at [Roseworth] (2017 to 2020)

7. [Ms Burke] was rostered to work 188 days in 2017.
8. Of [Ms Burke's] 188 rostered days in 2017, [Ms Burke] attended work on 156.51 days, and was absent on approved leave for 31.49 days.
9. [Ms Burke's] approved leave in 2017 is accurately set out in **Agreed Document 1**.
10. [Ms Burke] was rostered to work 199 days in 2018.
11. Of [Ms Burke's] 199 rostered days in 2018, [Ms Burke] attended work on 161.53 days and was absent on approved leave for 37.47 days.
12. [Ms Burke's] approved leave in 2018 is accurately set out in **Agreed Document 1** and **Agreed Document 2**.
13. [Ms Burke] was rostered to work 202 days in 2019.
14. Of [Ms Burke's] 202 rostered days in 2019, [Ms Burke] attended work on 130.06 days, was absent on approved leave for 61.34 days and no leave was approved by the Respondent for the other 10.6 days.
15. [Ms Burke's] approved and unapproved leave in 2019 is accurately set out in **Agreed Document 2**.
16. From the beginning of 2020 to her suspension on 18 September 2020, [Ms Burke] was rostered to work 148 days.
17. Of [Ms Burke's] 148 rostered days in 2020, [Ms Burke] attended work on 52.77 days, was absent on approved leave for 85.23 days and no leave was approved by the Respondent for the other 10 days.
18. [Ms Burke's] approved and unapproved leave in 2020 is accurately set out in **Agreed Document 3**.

Attendance at [Ashdale]

19. From her commencement at [Ashdale] on 23 May 2022, [Ms Burke] was rostered to work 119 days in 2022 (taking into account her reduction to 0.9 FTE as from 2 August 2022).
20. Of [Ms Burke's] 119 rostered days in 2022, [Ms Burke] attended work for 63.4 days, and was absent on approved leave for the other 55.6 days.
21. [Ms Burke's] approved leave in 2022 is accurately set out in **Agreed Document 4**.
22. From the beginning of 2023 to her suspension on 20 April 2023, [Ms Burke] was rostered to work 45 days in 2023.
23. Of [Ms Burke's] 45 rostered days in 2023, [Ms Burke] attended work for 0.33 of a day, was absent on approved leave for 36.67 days, and no leave was approved by the Respondent for the other 8 days.
24. [Ms Burke's] approved and unapproved leave in 2023 is accurately set out in **Agreed Document 4**.

Other matters concerning [Ashdale]

25. **Agreed Document 5** is a record of communications between [Ashdale] and [Ms Burke] regarding [Ms Burke's]

absences from work from 23 May 2022 to 6 April 2023 prepared by [Ms McKernan].

26. Ms McKernan did not tell [Ms Burke] that she had created and was maintaining **Agreed Document 5** at the time of the communications she recorded.
27. On 2 August 2022, [Ms Burke] had a discussion with Ms Carla Rodriguez, School Staffing Consultant, and Ms McKernan.
28. On 3 August 2022, Ms Rodriguez sent [Ms Burke] **Agreed Document 6**.
29. On 10 October 2022, [Ms Burke] met with Ms McKernan and Mr Tony Watson, [Ashdale's] Principal. Mr Watson provided [Ms Burke] with a letter regarding her absences (**Agreed Document 7**) and referred her to an Occupational Physician (**Agreed Document 8**).
30. On 26 October 2022, [Ms Burke] attended a fitness for work assessment with Dr Lai. Dr Lai provided a fitness for work assessment to Mr Watson the same day (**Agreed Document 9**).
31. On 16 November 2022, Dr Lai provided Mr Watson an update to his fitness for work assessment (**Agreed Document 10**).
32. **Agreed Document 11** is the evidence provided by [Ms Burke] for absences from work during 2023.
33. On 27 February 2023, [Ms Burke] met with Ms McKernan.
34. Ms McKernan emailed [Ms Burke] a summary of their discussions on 28 February 2023 (**Agreed Document 12**).
35. On 6 April 2023, Mr Watson wrote to Ms Jenny Felstead, School Staffing Consultant at the Department, regarding [Ms Burke] (**Agreed Document 13**).

Correspondence between the Respondent and [Ms Burke]

36. On 6 December 2022, Mr Paul Wilding, Director Employee Relations at the Department, wrote to [Ms Burke] and his letter was provided to [Ms Burke] by email that day (**Agreed Document 14**).
37. On 20 April 2023, Mr Wilding wrote to [Ms Burke] regarding her absences from work and a proposal to terminate her employment. His letter was provided to [Ms Burke] by email that day (**Agreed Document 15**).
38. On 15 May 2023, [Ms Burke] responded to Mr Wilding's letter by email (**Agreed Document 16**).
39. On 17 May 2023, Ms Cindy Barnard, A/Executive Director Workforce, wrote to [Ms Burke] and her letter was provided to [Ms Burke] by email the following day (**Agreed Document 17**).
40. For the avoidance of doubt, the accuracy of the statements in the correspondence and their attachments in paragraphs [25] to [39] is not agreed.

Termination

41. The Respondent terminated [Ms Burke's] employment with effect from 17 May 2023 and this termination was communicated to [Ms Burke] on 18 May 2023 as set out at paragraph [39].
42. The Respondent paid [Ms Burke] a four week notice period commencing 18 May 2023 (i.e. 18 May 2023 was treated as day one of the notice period rather than a day of work).

Department of Education performance management policies

43. At all relevant times, the Department of Education maintained an:
 - a. Employee Performance Policy;
 - b. Employee Performance Procedures; and
 - c. Substandard Performance Procedures (together, **Agreed Document 18**).

Industrial Instruments

44. At all relevant times, [Ms Burke's] employment with the Respondent was governed by:
 - a. the *Department of Education (School Support Officers) CSA Agreement 2021* (**Agreed Document 19**) or its precursors; and
 - b. the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983* (**Agreed Document 20**).
45. The following Circulars also applied to [Ms Burke's] employment with the Respondent:
 - a. Circular 6/2020 – Leave arrangements for COVID-19 (revised February 2022) (**Agreed Document 21**); and
 - b. Circular 4/2023 – Leave arrangements for COVID-19 (**Agreed Document 22**).

Ms Burke's contentions

- 25 Ms Burke contends that the inherent requirement of her role is defined by the terms and conditions of the employment relationship: *X v The Commonwealth of Australia* [1999] HCA 63 (*X*) (McHugh J) [31]–[32], [37]–[38]; (Gummow and Hayne JJ, with Gleeson CJ agreeing) [103], [105]–[106]:
 - 31 Whether something is an 'inherent requirement' of a particular employment for the purposes of the Act depends on whether it was an 'essential element' of the particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. Thus, implied in every contract of employment are obligations of fidelity and good faith on

the part of the employee with the result that an employee breaches those requirements or obligations when he or she discloses confidential information or reveals secret processes. Furthermore, it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment. These obligations and warranties are inherent requirements of every employment. If for any reason – mental, physical or emotional – the employee is unable to carry them out, an otherwise unlawful discrimination may be protected by the provisions of s 15(4).

- 32 Similarly, carrying out the employment without endangering the safety of other employees is an inherent requirement of any employment. It is not merely ‘so obvious that it goes without saying’ – which is one of the tests for implying a term in a contract to give effect to the supposed intention of the parties. The term is one which, subject to agreement to the contrary, the law implies in every contract of employment. It is but a particular application of the implied warranty that the employee is able to and will exercise reasonable care and skill in carrying out his or her duties.
- 37 Unless the employer’s undertaking has been organised so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inhering in the particular employment. The Commission must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment. ...
- 38 Nevertheless, contract or statute to the contrary, performing the duties of the employment without unreasonable risk to the safety of fellow employees is, as a matter of law, an inherent requirement of employment. ...
- 103 It follows from both the reference to inherent requirements and the reference to particular employment that, in considering the application of s 15(4)(a), it is necessary to identify not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on. Those circumstances will often include the place or places at which the employment is to be performed and may also encompass other considerations. For example, it may be necessary to consider whether the employee is to work with others in some particular way. It may also be necessary to consider the dangers to which the employee may be exposed and the dangers to which the employee may expose others.
- 105 The inquiry that was required in the present case was an inquiry about what were the requirements of the particular employment. As we have said, that would begin by identifying the terms and conditions of service which revealed what the Army required of the appellant, not only in terms of tasks and skills, but also the circumstances in which those tasks were to be done and skills used. From there the inquiry would move to identify which of those requirements were inherent requirements of the particular employment. It was at this point that the Commissioner fell into error by confining the inherent requirements of the particular employment to the performance of the ‘tasks or skills for which [the appellant was] specifically prepared’. Only when the inherent requirements of the employment have properly been identified can one ask whether *because* of the employee’s disability the employee was *unable* to carry out those requirements.
- 106 Confining attention to tasks and skills for which a soldier is specifically prepared was too narrow a focus in the present case. It left out of account where, when, in what circumstances, and with whom those tasks and skills were to be performed or used. It treated all of those features as incidents of the employment rather than as inherent (in the sense of characteristic or essential) requirements of the employment. But just as the capacity to travel from school to school at short notice is an inherent requirement of employment as an emergency teacher (but may not be an inherent requirement of employment as a teacher at a particular school), the places and the circumstances in which the tasks of a soldier are to be performed and skills are to be used may be important considerations in identifying inherent requirements of service in the forces. The identification of inherent requirements must begin with the terms and conditions of service. (footnotes omitted) (emphasis in original)
- 26 Ms Burke contends that the inherent requirement of her role is determined by her employment contract in conjunction with Agreed Document 20 (**Award**) and Agreed Document 19 (**CSA Agreement**), which specify the leave, both paid and unpaid, to which she is entitled. Ms Burke argues that these documents establish that she is not required to attend work if she has an entitlement to take leave.
- 27 Ms Burke submits that the time for conducting the forward-looking assessment of her ability to fulfil the inherent requirements of her role is at the date of the appeal hearing. Ms Burke relies upon:
- (a) *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728 [24]:

In *Raxworthy*, which was an appeal brought before the Appeal Board under the then s 80I(e), as to the nature of the appeal, it was said at 2266 as follows:

The nature of an appeal made under section 80I(1)(e) is somewhat different from the authority ordinarily given to the Commission to enquire into whether a dismissal is fair or not. ... However, these proceedings are expressly an appeal, with the Appeal Board being given the power ‘to adjust’ a decision to dismiss an employee. The onus is of course on the appellant to show that the Board should interfere with and adjust the decision. However, as with promotion appeals the decision is to be reviewed *de novo* on the basis of the evidence before the Board, not merely on the basis of whether the decision maker made the right decision on the evidence available to it at the time (*cf: Colpitts v Australian Telecommunications Commission* (1986) 20 IR 184 [(*Colpitts*)]). The process afforded by

section 80I is such that the Commission, constituted by an Appeal Board, is given a greater license to substitute its own view. Although as Mr Burns so rightly said the dismissal was lawful, the matter does not end there. Where as here the dismissal was based on a particular act of misconduct, albeit that there are parts to it, the Board, as part of the appellate process, is required to enquire into that allegation, if as is the case, the Appellant denies the Commission of such misconduct. If on appeal the act of misconduct is not shown to have occurred, then the very basis for the decision under appeal, in this case the decision to dismiss, is lost.

(b) *Colpitts* [1986] FCA 1 [45]–[47]:

45 ... The statutory imperative, and the applicant's right was that there be review of the decision, not the process by which the delegate has arrived at it. It is judicial review, as distinct from administrative review, which is concerned with the decision-making process: *Council of Civil Service Unions v Minister for the Civil Service* (1985) 1 AC 374 at 401, 414. A short false step may set one's feet upon the wrong path. In concentrating upon the decision process of the delegate the Tribunal failed entirely to consider the ability of the applicant to discharge the duties of his position upon the material available at the time of the hearing before the Tribunal. It simply considered whether he was correctly deemed unable to do so by the decision of the delegate. The Tribunal accordingly ignored, on this issue, the evidence of continued recovery, given by Dr Kjørrefjord, upon which it relied on the further question of possible transfer. It just did not consider whether the recommendation of minimal contact with other personnel still applied. (Indeed it does not seem to have considered the question whether that recommendation was ever based on persisting medical incapacity, or was merely, as Mr Katz contended, a common sense precaution in view of what had happened in the past. Both psychiatrists regarded Mr Colpitts as quite fit for his previous work. But the Tribunal's reasons, as formulated, turn on the evidence of supervisors about his incapacity at an earlier period when, or at least for much of which, he was admittedly ill.)

46 In my opinion the regulations clearly contemplate a full inquiry into the position at the time of the review, and not merely as at the time of the original decision. This is the normal position in a wide range of appeals to an appellate court, and I do not see why an administrative review should be more rigidly confined: see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-20. In *Drake v Minister for Immigration* (1979) 24 ALR 577 at 589 Bowen CJ and Deane J said with reference to the Administrative Appeals Tribunal:

The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

In *Sullivan v Department of Transport* (1978) 20 ALR 323 (a case concerned with whether a transient psychotic illness debarred a pilot the issue of a license) Smithers J (at p 332) referred to the 'current and probable future health of the appellant' in terms clearly related, not to the time of the original decision of the department, but to the time of the decision of the Administrative Appeals Tribunal. Deane and Fisher JJ (at pp 346 and 352 respectively) did likewise.

47 Particularly having regard to the provision of the regulations for further consideration by the Commission itself at the end of the appeal process, I think the Tribunal was bound, as a matter of law, to consider the current condition of the applicant, and accordingly to have regard, on the primary issue of whether this case fell within s 56 at all, to the evidence of Dr Kjørrefjord. Otherwise, an officer, retired under s 56 for coronary insufficiency, for example, who applied for review, and in the meantime underwent wholly successful by-pass surgery, could have his application dismissed without regard to his recovery (*Cf* the remarks of Bowen CJ in *Peko-Wallsend Ltd v Minister for Aboriginal Affairs* (1985) 59 ALR 51 at 59).

(c) *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 [20]:

It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.

28 In relation to the forward-looking predictive assessment of Ms Burke's ability to fulfil the inherent requirements of her role, she submits that:

- (a) During 2019–2020, there were exceptional circumstances affecting her attendance at Roseworth, and there is no basis in the evidence to suggest that those circumstances are likely to recur in the future.
- (b) In the period September 2020–May 2022, while suspended during the disciplinary investigation, she fulfilled all her employment requirements, namely, to remain contactable.
- (c) In 2022, she either attended work or was on approved leave.

- (d) In Term 1, 2023, she either attended work or was on approved leave, with the exception of eight days:
- (i) Tuesday 7 February 2023.
 - (ii) Wednesday 8 February 2023.
 - (iii) Friday 10 March 2023.
 - (iv) Friday 24 March 2023.
 - (v) Monday 3 April 2023.
 - (vi) Tuesday 4 April 2023.
 - (vii) Wednesday 5 April 2023.
 - (viii) Thursday 6 April 2023.
- 29 Of the eight days, Ms Burke states that while she was not on approved leave, she nonetheless had an entitlement to take leave: *Spasojevic v Speaker of the Legislative Assembly* [2023] WAIRC 00001 (*Spasojevic*) [61]–[62]:
- 61 When Gageler J observed that procedural rules safeguard against ‘sickies’, his Honour was averting to abuse of the entitlement by paid absence from work in circumstances that do not qualify for the entitlement. The procedural rules, however, do not condition the entitlement. The entitlement depends, relevantly, on an employee being unfit for work due to an illness or injury.
 - 62 While there may be procedural rules, processes and procedures designed to prevent the abuse of leave entitlements, compliance with the procedure does not, in and of itself, give rise to an entitlement to the benefit. The preconditions for the benefit must always be met. The other side of the coin is that satisfying the procedural rules is not, in and of itself, conclusive as to whether there has been an abuse of the entitlement. Rules can be used dishonestly, just as they can be improperly evaded.
- 30 Ms Burke submits that she was entitled to take personal leave on the first four of the eight days at [28(d)(i)–(iv)] above.
- 31 While Ms Burke did not provide a medical certificate to the respondent at the time of her absence on Wednesday 8 February 2023 ([28(d)(ii)] above), she has subsequently produced a medical certificate for this day in these proceedings: Appellant’s Bundle: Screenshot of email from Hola Health dated 8 February 2023 with attached medical certificate.
- 32 While Ms Burke does not have a medical certificate for Tuesday 7 February, Friday 10 March and Friday 24 March 2023 ([28(d)(i), (iii)–(iv)] above), she contends that those days are sandwiched in-between other days for which she has provided medical certificates.
- 33 Ms Burke maintains that, given the circumstances outlined at [31]–[32] above, the Board should be satisfied that she was ill or injured and therefore had an entitlement to take leave, whether paid or unpaid.
- 34 Ms Burke was absent on Sorry Business on Monday 27–Thursday 30 March 2023, for which the respondent granted three days bereavement leave and one day cultural leave. Ms Burke says that clauses 32–33 of the CSA Agreement entitles her to 10 days of leave, comprising five days of cultural leave and five days of bereavement leave where she is required to travel more than 240km due to the bereavement, as was the case on this occasion. Ms Burke maintains that her entitlement to 10 days of cultural and bereavement leave would cover her four days of absences listed at [28(d)(v)–(viii)] above.
- 35 In any event, Ms Burke argues that a small handful of unapproved absences in the past do not provide a basis to conclude that she would be incapable of fulfilling the inherent requirements of her role going forward.
- 36 Ms Burke submits that there is no medical evidence which suggests she is unable to fulfil the inherent requirements of her role. Ms Burke relies on Dr Lai’s reports dated:
- (a) 26 October 2022 [Agreed Document 9]:
 - 1) **Does Trista Burke have a medical condition that may be affecting their ability to work?**
[x] Further information required
The only longer term conditions apparent to me that are likely to affect future attendance are asthma and endometriosis. I am seeking further information from Ms Burke’s regular GP Dr Okezie. ...
 - 3) **Their medical capacity to undertake the inherent requirements of their substantive position including regular attendance, ability to work safely and ability to undergo normal performance management. If not fully fit, what is impact of the condition as it related to work tasks.**
[x] Further information required, (continue as is at work)
I am seeking further information from Dr Okezie on whether Ms Burke is medically capable of regular attendance.
 - (b) 16 November 2022 [Agreed Document 10]:
 - 1) **Does Trista Burke have a medical condition that may be affecting their ability to work?**
Dr Okezie advised that Ms Burke’s most common medical presentations were:
 - a) Anxiety and depression – possibly reactive/situational (stress)
 - b) Asthma, with seasonal triggers, possibly affected by (a)
 In relation to (a), Ms Burke had explained to me that she had no history of any mental health conditions or treatment of such but rather had felt quite stressed at times by what was going on in her life – in my

opinion, a normal reaction and not reflective of any underlying condition or vulnerability.

Dr Okezie confirmed endometriosis and that the impact of this on future work was unpredictable. ...

3) Their medical capacity to undertake the inherent requirements of their substantive position including regular attendance, ability to work safely and ability to undergo normal performance management. If not fully fit, what is impact of the condition as it related to work tasks.

[x] Can return to – or continue to perform – the full duties of their current position without restriction

Ms Burke is medically capable of attending work reliably.

Dr Okezie did not recommend any workplace adjustment or restriction.

37 In relation to the fairness of the dismissal, Ms Burke submits that the Board cannot rely on all of the disciplinary findings in SID's investigation report (**SID's report**) because:

- (a) She only accepted the disciplinary outcome (to be reprimanded and transferred) and not all of the findings in SID's report. She:
 - (i) Acknowledges her conviction for drug driving and that she did not report it to the respondent as required.
 - (ii) Denies any deliberate and dishonest conduct regarding the Bunnings gift card she collected on Roseworth's behalf. She asserts that she accidentally gave the gift card she collected to a family member and then arranged for her fiancée to purchase a replacement (ts 31).
 - (iii) Concedes that she pleaded guilty to the charge of stealing the Coles gift card (downgraded from stealing as a servant) because she used the gift card knowing it did not belong to her. She denies stealing it from Roseworth, stating that she found the gift card on the ground outside Roseworth's premises while walking home from work (ts 32).
 - (iv) Says, regarding the \$23 excursion money, that she is unsure if she was the person who received the money. If she did receive the money, she claims that she would have put it in the safe (ts 33).
- (b) The SID's report is incomplete, contains errors and has not investigated everything that ought to be investigated and is a hearsay document, in circumstances where she has given sworn evidence in the appeal contrary of some of the report's findings (ts 180).

38 Ms Burke also argues that the Board cannot rely on concerns about her not returning a work iPad that she took home and paying for her Working with Children Check (**WWCC**) on a corporate credit card, as well as reimbursing herself for the payment of the WWCC in her role as School Officer, because these matters were not subject to disciplinary action and there is no evidence upon which the Board can make a finding regarding her intentional dishonesty.

39 As to fairness, Ms Burke contends that she has more than 10 years' service and apart from the disciplinary proceedings leading to her transfer to Ashdale, there is no other disciplinary action on her record. Moreover, the dismissal has a disproportionate impact on her due to her financial circumstances.

The respondent's contentions

40 The respondent contends that the decision to dismiss Ms Burke was based on her absences from the beginning of 2017 to the end of Term 1, 2023, excluding the period she was suspended due to the disciplinary proceedings.

41 On 6 December 2022, the respondent wrote to Ms Burke stating the view held that she was unable to fulfil the inherent requirements of her role due to her inability to attend work regularly and reliably, and providing her with an opportunity during Term 1, 2023 to displace this view. At the end of Term 1, 2023, the respondent concluded that Ms Burke was still unable to attend work regularly and reliably, thereby unable to fulfil the inherent requirements of her role. After providing Ms Burke with an opportunity to respond (Agreed Document 15), and considering her response (Agreed Document 16), the respondent dismissed Ms Burke on this basis (Agreed Document 17).

42 The respondent submits that Ms Burke's contract specifies that her 'Duties/Task' as being 'in accordance with the Job Description Form [(**JDF**)] and other duties as directed which are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions'. The respondent maintains that the JDF outlines Ms Burke's role as performing administrative support tasks at the school:

ROLE

The School Officer:

- provides assistance to the [MCS] with administering the financial resources of the school including undertaking account and GST coding, reconciliations, invoice processing and BAS/FREDA returns
- assists with month-end procedures, including transporting receipts to the bank and ensuring data integrity
- collates figures for financial planning and budgeting
- assists with the management of school assets, including assistance with the administration of out-of-hours use of school facilities, coordinating and negotiating maintenance and repairs and maintaining key registers and security system codes
- assists with the induction and support of administrative school support staff development of induction programs and materials for school support staff, and the coordination of relief staff
- provides advice to staff on travel, subsidies and allowances
- administers the operation of school databases, records and management information systems including timetabling

- establishes ordering procedures for office consumables
 - creates and prepares school materials for publication and undertakes routine analyses and reports on results
 - undertakes student-related activities, including providing information, advice and collecting documentation for enrolment of new students
 - supervises work experience students and assists the Vocational Education and Training Coordinator with the placement and monitoring of students.
- 43 The respondent contends that the implication of Ms Burke's contention regarding the inherent requirements of her role being subject to an entitlement to leave, would effectively prevent an employer from making a finding that an employee is unable to perform their duties where there is an ongoing entitlement to leave. Effectively, this would mean that in cases where a long-term public sector employee has years of accrued personal leave, the employer would need to wait out the duration of the leave before being able to consider retirement due to health reasons. Furthermore, as demonstrated by Ms Burke under the CSA Agreement, where there is no cap on the amount of unpaid personal leave she can apply for, the employer would be prevented from taking action even if they have medical evidence indicating that the employee will be unfit to attend work in the foreseeable future.
- 44 In contrast to other forms of leave, such as parental leave, where the employer can plan for the absence, Ms Burke gave very short notice of her absences for most of Term 1, 2023, making it difficult for the respondent to plan for. Despite the respondent placing Ms Burke on notice that her employment was at risk, and despite Ms McKernan communicating that it would be helpful for Ms Burke to apply for longer periods of leave where she anticipated needing time off, such as a week's leave, Ms Burke did not do so (ts 188).
- 45 The respondent contends the dismissal decision was open to them for the following reasons:
- (a) Firstly, the extent of Ms Burke's absences were consistently high throughout her employment from 2017–2023. Her absences did not abate for any significant period and tended to escalate over time.
 - (b) Secondly, Ms Burke's reasons for her absences lacked an identifiable consistent cause. With the exception of Term 1, 2023, where she cited only two reasons (COVID-19 and ongoing respiratory symptoms at the beginning of the Term, and Sorry Business at the end of the Term), her explanations for being absent varied widely.
 - (c) Thirdly, Ms Burke was twice assessed in 2019 and 2022 by the Department's Occupational Physician as medically capable of attending work regularly.
- 46 The respondent agrees that the assessment of whether Ms Burke's ability to fulfil the inherent requirements of her role is a forward-looking one. However, the respondent submits that the appropriate time for undertaking this assessment is at the point of dismissal. The respondent relies upon *Durham v Director General, Department of Communities* [2023] WAIRC 00403 [33]–[47] and the position in the Commission's unfair dismissals jurisdiction.
- 47 Nevertheless, the respondent submits that given the matters at [45] above, it makes little practical difference whether the Board undertakes the forward-looking assessment at the time of dismissal or at the time of the appeal hearing.
- 48 The respondent accepts there is evidence that Ms Burke contracted COVID-19 in December 2022 and January 2023 and that she visited her usual GP, Dr Okezie four times during Term 1, 2023 on 2 February, 17 February, 22 February and 22 March 2023. Additionally, the respondent recognises that Ms Burke has a long-term history of asthma and that Dr Okezie ordered blood tests and an X-ray due to her protracted post-COVID-19 cough on 17 February and 22 February 2023. However, the respondent submits there is a significant gap between this evidence and the conclusion sought by Ms Burke that her absences during Term 1, 2023 were so exceptional that they cannot be taken into account, for the following reasons:
- (a) There is no evidence linking all of Ms Burke's Term 1, 2023 absences to COVID-19. After 27 February 2023, a one-month gap precedes her cultural and bereavement leave on 27 March 2023. During this period, there is evidence of only one consultation with Dr Okezie on 22 March 2023 which may be linked to her medical condition, whilst the remaining certificates were issued by Hola Health (ts 192).
 - (b) The Board should not accept the certificates issued by Hola Health as constituting a doctor's medical opinion in each case, because the Board cannot be satisfied that Ms Burke consulted with a doctor through a telehealth consult on each occasion.
 - (c) In any event, the Hola Health certificates do not state the nature of Ms Burke's illness. Thus, even if they are accepted as being from a telehealth consult with a doctor, there is no ability to know whether they are issued due to the after-effects of COVID-19 or due to a new and different medical condition.
 - (d) Therefore, Ms Burke has not established that her post-COVID-19 symptoms provide a complete explanation for her absences in Term 1, 2023.
 - (e) Accordingly, it was open to the respondent, and it is now open to the Board, to find that Ms Burke has not disturbed the position as at the end of Term 1, 2023 that she could not fulfil the inherent requirements of her role based on her absences since 2017.
- 49 The respondent submits that in circumstances where Ms Burke was put on notice that she was required to meet very strict evidence requirements due to ongoing concerns about her absences and that her employment was at risk, taking eight days of unapproved leave is indicative of her inability to work within the respondent's requirements regarding her absences, even if the number of unapproved absences is numerically low.
- 50 The respondent submits that the disciplinary outcomes of the past disciplinary proceedings (of reprimand and transfer) cannot be divorced from the disciplinary findings: *Titelius v Director General of the Department of Justice* [2019] WAIRC 00195 [22]; *Magyar v Department of Education* [2019] WAIRC 00781 [33]. The respondent submits that the Board can have regard

to the evidence in the SID's report without being satisfied that the findings made in the report were open to the respondent.

- 51 Further, the respondent submits that Ms Burke's evidence before the Board was essentially the same as her evidence throughout the disciplinary proceedings, and it is open to the Board to find that Ms Burke was dishonest in her responses to the allegations concerning the Bunnings gift card, the Coles gift card and the \$23 excursion money.
- 52 The respondent submits that two implications arise from a finding concerning Ms Burke's dishonesty:
- (a) Firstly, the weight the Board assigns to Ms Burke's evidence about the nature, extent and reasons for her absences in Term 1, 2023. Specifically, whether such absences were due to long-COVID, and if they should be considered exceptional and distinct from all of Ms Burke's absences in previous years.
 - (b) Secondly, Ms Burke's failure to 'engage frankly, candidly and cooperatively' with the respondent means that an order for reinstatement would be inconsistent with the Board's exercise of power in accordance with equity, good conscience and the substantial merits of the case: *Walley v Director General, Department of Biodiversity, Conservation and Attractions* [2021] WAIRC 00569 [114]–[115].
- 53 The respondent submits that Ms Burke has been dishonest about her health on two occasions.
- 54 The first occasion was on 26 October 2022, during her fitness for work assessment, when she informed Dr Lai that she 'had no history of any mental health conditions or treatment of such but rather had felt quite stressed at times by what was going on in her life' (Agreed Document 10). This is inconsistent with Ms Burke's written response to the five allegations of misconduct on 12 April 2021 (Attachment 44 of SID's report), where she stated: 'since speaking with my GP to explain my current state of mind, emotionally & physically, he's diagnosed me with severe anxiety & depression. I was prescribed medication to assist me in my everyday life, something I've never needed to rely on due to my resilience'.
- 55 The respondent submits that the fact Ms Burke was sent to Dr Lai (the Department's occupational physician) for a fitness for work assessment due to concerns regarding her ability to attend work, makes her dishonesty to Dr Lai particularly significant.
- 56 The second occasion of dishonesty was her response to the respondent's proposal to dismiss her dated 15 May 2023 (Agreed Document 16):

- (a) Agreed Bundle, 169:

2023 ABSENCES – 45 DAYS ABSENT

January, February, March – Sick due to Covid & Long Covid. [I've] had numerous courses of antibiotics & steroids. A number of different ultrasounds, x-rays, Cat Scans, Blood tests, Iron infusions. I have had a 2 week break from needing antibiotics, however I'm still taking steroids & relying on my Asthma medication.

- (b) Agreed Bundle, 159:

L Hillbrick states you were provided an opportunity Term 1 2023, however during this period you were still absent majority of the term. Evidence supports a finding that you did not demonstrate that you can regularly attend work.

I tested positive to Covid on 21/1/23 for the second time in just over 2 months. I'm a severe asthmatic & also suffer with [Anaemia]. My symptoms all show that I'm a likely candidate for long Covid, I've had numerous tests including ultrasounds, cat scans, x-rays. Several courses of antibiotics & steroids.

The judgement of I was provided ample opportunity of all Term 1 2023 is not a fair judgement due to an illness I didn't choose to catch, nor did I do anything to put myself in a situation where I would potentially catch Covid.

- 57 The respondent submits that Ms Burke's dishonesty in claiming to have undergone tests when either no such tests were conducted or the tests were not for the purported reasons she stated (COVID and long-COVID) is a particularly significant issue.
- 58 The respondent submits that the two occasions of Ms Burke's dishonesty about her health are significant enough for the Board to be convinced that if she were reinstated and an issue arose concerning her absences, Ms Burke would likely be dishonest with the respondent once again.
- 59 The respondent submits that the Board should not reinstate Ms Burke where it cannot be assured that she will attend work regularly and reliably. Moreover, Ms Burke's demonstrated dishonesty is a further factor working against her reinstatement.

Consideration

The evidentiary onus

- 60 There is no dispute that as it is Ms Burke's appeal, she has the onus of satisfying the Board that it should interfere with and adjust the dismissal.
- 61 In *G v H* (1994) 181 CLR 387 (*G v H*), 391–392, Brennan and McHugh JJ stated:

[W]hen a court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had to that party's ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response. As Mason CJ, Deane and Dawson JJ explained in *Weissensteiner v The Queen*:

[I]t has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not

just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. (footnotes omitted)

62 In *G v H*, 402, Deane, Dawson and Gaudron JJ stated:

[I]t is well settled that, in the course of the ordinary processes of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his or her power to provide or give evidence on some issue, declines to do so. Thus, for example, there may sometimes be an inference in civil cases that the evidence, if called, would not assist that party's case. And there may sometimes be an inference in criminal cases of 'guilty knowledge', in the sense of knowledge that the evidence cannot be explained in a way that is consistent with innocence. They are inferences that are to be drawn, if at all, in accordance with strict legal reasoning. In other cases, the failure to give evidence may result in more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence. (footnotes omitted)

63 Besanko J in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555 [122]–[124] summarised the decisions relevant to the question of whether a court could be satisfied to the relevant standard from the evidence that was before the court:

122 In *Ho v Powell* [2001] NSWSCA 168; (2001) 51 NSWLR (*Ho v Powell*) Hodgson J (with whom Beazley JA agreed) made the following two points. First, Lord Mansfield's maxim in *Blatch v Archer* (1774) 1 Cowp 63 at 65; (1774) 98 ER 969 at 970 that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted, may affect the assessment of matters which are relevant to whether the limited material before the Court is an appropriate basis on which to reach a reasonable decision. Secondly, the principle in *Jones v Dunkel* is a particular application of Lord Mansfield's maxim. Hodgson JA said the following (at [14]–[16]):

14 There is a long-standing controversy whether the civil standard of proof requires a numerical probability in excess of 50 per cent (see *Davies v Taylor* [1974] AC 207 at 219), or belief amounting to reasonable satisfaction (see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362). My own opinion is that the resolution of the controversy involves recognition that, in deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision. I discussed this in some detail in an article published at (1995) 69 ALJ 731 (D H Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-finding').

15 In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so: cf 69 ALJ at 732-3, 736, 740. As stated by Lord Mansfield in *Blatch v Archer* (1774) 1 Cowp. 63 at 65 (98 ER 969 at 970): '... [A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'. See also *Azzopardi v The Queen* (2000) 75 ALJR 931 at 935 [10]; 179 ALR 349 at 353 [10].

16 The case of *Jones v Dunkel* (1959) 101 CLR 298 is a particular application of this principle. That case itself related to a situation where there was evidence supporting an inference against a party, and that party did not give or call evidence, which that party was plainly in a position to have given or called, in order to explain or contradict the material presented. In my opinion, a similar principle applies where a person bearing the onus of proof does not give or call evidence which that person is plainly in a position to give or call; and unless some explanation is given of this failure, the tribunal of fact is entitled to infer that this evidence would not have assisted that person's case: cf *Commercial Union Insurance Co. of Australia Limited v Fercom Pty Limited* (1991) 22 NSWLR 389.

123 In *Coshott v Prentice* [2014] FCAFC 88; (2014) 221 FCR 450 (*Coshott v Prentice*), the Full Court of this Court referred with approval to Lord Mansfield's maxim and the observations of Hodgson JA in *Ho v Powell* (at [80]) and went on to say the following (at [81]–[82]):

81 Thus, where the evidence relied upon by a party bearing the onus of proof does not itself clearly discharge the onus, the failure by that party to call or give evidence that could cast light on a matter in dispute is relevant to determining whether the onus is being discharged: *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371 (Dixon CJ); *Shalhoub v Buchanan* [2004] NSWSC 99 at [71] (Campbell J). This principle is therefore wider than that in *Jones v Dunkel* (1959) 101 CLR 298.

As Austin J in *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 explained at 93 [440], '[w]hereas *Jones v Dunkel* reinforces an inference drawn against the party who has not called evidence, to the effect that the evidence would not have assisted that party's case, *Blatch v Archer* leads either to the drawing of such an inference, or to some other assessment of the weight of evidence, unfavourable to the party against whom the principle is applied.' (emphasis in original)

82 In short, the Coshott parties bore the onus of proving the trust over Robert's interest but failed to call or give evidence explaining the documents and transactions on which they rely. Yet Robert, in particular, was in the best position to explain them. This cannot be ignored when weighing the limited evidence they relied upon to support their case with all the other evidence which tended to undermine it.

124 In Heydon JD, *Cross on Evidence* (13th ed, LexisNexis Australia, 2021), the learned author states (at [1215]):

Lord Mansfield CJ's maxim is wider than the rule in *Jones v Dunkel* because the rule is available against a party not bearing the onus of proof. But the maxim is also available against a party bearing that onus – in permitting a conclusion that uncalled evidence would not have helped the case of a party not calling it, or permitting inferences against the party to be more strongly drawn, or assisting in deciding whether the party bearing the onus has discharged it.

Can Ms Burke be dismissed for an inability to fulfil the inherent requirements of her role?

64 In her written submissions, Ms Burke challenges whether an inability to fulfil the inherent requirements of her role is a basis on which she can be dismissed, considering s 239 of the *School Education Act 1999* (WA) provides that Part 5 of the PSM Act applies to her employment, and Part 5 only deals with dismissal for substandard performance or breach of discipline.

65 The respondent's written submissions state that a dismissal due to an inability to fulfil the inherent requirements of the role has been accepted in circumstances including:

- (a) Where an employee cannot fulfil the inherent requirements of their role due to illness or injury, and will not be able to do so in the reasonably near future: *Batchelar v Skybus* (1983) 63 WAIG 2244 (*Batchelar*), *Jones* [70]–[72]; *Moran v The Commissioner of Police* [2015] WAIRC 00464 (*Moran*) [195]–[197].
- (b) Where an employee cannot fulfil the inherent requirements of their role because they cannot attend work due to mandatory vaccination requirements: *Goodrem v Commissioner for Public Employment* [2023] FWCFB 186 [50], [65]; *Mourtada v Dnata Airport Services Pty Ltd* [2022] FWC 1014 [59]–[66]. The respondent submits that whilst Western Australian public sector employers dismissed employees for a failure to comply with a lawful vaccination direction, it does not preclude employees being dismissed for their inability to fulfil the inherent requirements of their role as a result of their inability to attend work due to their vaccination status.

66 In *Heller-Bhatt v Director General, Department of Communities* [2022] WAIRC 00719 (*Heller-Bhatt*), the employer dismissed Ms Heller-Bhatt for not following a lawful vaccination direction [3]. The Public Service Appeal Board found at [108] and [111]:

108 ... In this case, failing to comply with the requirement to be vaccinated or provide a valid exemption meant that Ms Heller-Bhatt was unable to perform some of those key duties that she was engaged to perform. We find that because Ms Heller-Bhatt was not vaccinated or exempt, Ms Heller-Bhatt could not perform all of the duties of her role in accordance with her engagement. We consider that Ms Heller-Bhatt's conduct in failing to comply with the Employer Direction was inconsistent with the continuation of her employment.

111 In this case, failing to comply with the Employer Direction was incompatible with Ms Heller-Bhatt's obligation as an employee to provide service. It meant that she could not perform all of the duties she was engaged to perform.

67 *Heller-Bhatt* [108] has been followed in:

- (a) *Kos v Director General, Department of Transport* [2023] WAIRC 00298 [116], where the appeal before the Public Service Appeal Board involved the dismissal of Ms Kos for being absent from work without authorisation: [115]–[116]

115 Whether in the public or private sector, an employee's ongoing refusal to provide an explanation for being absent from work, supported by medical evidence, would provide a valid reason for an employee's dismissal. In a public sector setting it would similarly constitute a breach of discipline within the meaning of s 80(c) of the PSM Act.

116 There is little doubt the appellant's ongoing conduct by refusing to comply with the Department's directions to return to work after 3 May 2022 was inconsistent with the continuation of her employment: *Heller-Bhatt* [108].

- (b) *Mills v South Metropolitan TAFE* [2023] WAIRC 00230 [96], an unfair dismissal claim before the Commission in which the Commission found: [93]–[96]

93 Based on the evidence, I find that an inherent requirement of Mr Mills' responsibilities as a trade lecturer involves in-person instruction and demonstration, requiring his presence on campus.

94 TAFE maintains that Mr Mills' non-compliance with the Employer Direction, given that it prevents him

- from fulfilling the essential core duties of his role, constitutes a serious disciplinary breach justifying dismissal.
- 95 TAFE submits that the breach is serious because, like the employees in *Kazantzis* and *Stevens*, Mr Mills made a choice to not get vaccinated, which meant he was unable to perform the inherent requirements of his role.
- 96 I find that Mr Mills' failure to comply with the Employer Direction meant Mr Mills was unable to perform the inherent requirements of the role he was employed to perform. His conduct in failing to comply with the Employer Direction was inconsistent with the continuation of his employment: *Heller-Bhatt* [108]. ...
- (c) *Carter v Director General, Department of Education* [2023] WAIRC 00883 [128], where the Public Service Appeal Board was determining whether it had jurisdiction to hear Ms Carter's appeal of her dismissal under s 80I(1)(d) of the IR Act: [125]–[128]
- 125 Mr Matkovich stated that as at Term 1, 2020 all the schools were open and all school-based staff needed to be vaccinated to enter a school. This meant Ms Carter was unable to perform her role at any school.
- 126 The respondent contends that it was entirely appropriate to stand down Ms Carter without pay, given that she could not enter the school grounds, could not perform her duties and could not fulfil her employment contract. The Board agrees.
- 127 The Board finds that Ms Carter's failure to comply with the CEO Instructions meant Ms Carter was unable to perform the inherent requirements of the role she was employed to perform.
- 128 An employee's conduct in failing to comply with an employer direction to vaccinate or provide an exemption, preventing the employee from performing all of the duties of their role, is inconsistent with the continuation of employment: *Heller-Bhatt* [108].
- 68 For the reasons at [66]–[67] above, the Board agrees with the respondent's submission at [65(b)] above that an employee's inability to attend work and fulfil the inherent requirements of their role is inconsistent with the continuation of their employment, for which they may be dismissed.
- 69 While Ms Burke submitted that her dismissal appears to be the first occasion in which a Western Australian public sector employer has dismissed an employee on the basis that their non-attendance at work amounts to an inability to fulfil the inherent requirements of a role, she did not directly advance the challenge at [64] above at the hearing. Further, as noted at [13] above, Ms Burke does not contest the dismissal on any procedural fairness grounds, and there is no dispute that the Board has jurisdiction to hear Ms Burke's appeal de novo and can substitute the respondent's view with its own view ([14]–[15] above), which would cure any procedural irregularities.
- 70 Furthermore, Ms Burke submitted that the respondent's 'decision must be totally disregarded and must not be given any weight in the Board's determination of this appeal': Appellant's Outline of Submissions [23].
- 71 By this, and for the reasons at [69] above, the Board considers that it is not prevented from substituting the respondent's view (to dismiss Ms Burke for an inability to fulfil the inherent requirements of her role and not for substandard performance or a breach of discipline under Part 5 of the PSM Act), with its own view about Ms Burke's dismissal for a reason under Part 5 of the PSM Act.

What are the inherent requirements of Ms Burke's role?

- 72 The Board agrees with the principles set out in *Spasojevic* [53]–[56] that: (emphasis added)
- (a) An employee's entitlement to payment of salary arises from their contract of employment, *which requires them to perform the full range of work assigned to them.*
- (b) Leave entitlements are exceptions to the primary obligation to perform work.
- (c) 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 any service. 'There may also be leave entitlements that authorise an absence from work, but do not involve any liability for the employer to pay.'
- (d) *There is no at large entitlement to take leave. Leave can only be taken in the circumstances set out in the relevant clauses of the industrial instrument creating the leave entitlement.*
- 73 Considering the principles at [72] above, and Ms Burke's contract and JDF (at [42] above) in accordance with X [105], the Board finds that it is an inherent requirement of Ms Burke's role to attend for work: *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056 (*Wilkie*) [78].
- 74 Furthermore, the Board finds that Ms Burke was required to attend the workplace for 72 hours each fortnight (in accordance with clause 22.2 of the CSA Agreement and her 0.9 FTE) in order to fulfil the inherent requirements of her role: *Rooney v State of Queensland (Queensland Health)* [2022] QIRC 267 [35].
- 75 The Board accepts the respondent's submission that *Wilkie* [77] and [78] should be read together, and as stating that it is not an inherent requirement of Ms Burke's role that she not take *any* annual leave, personal leave and carer's leave to which she is entitled under the Award and CSA Agreement: Respondent's Outline of Submissions [52]:
- 77 The Respondent also argues that the transfer of the Applicant was necessary due to the 'inherent requirements of the particular position concerned.' The basis of this argument appears to be that because the Centre at Cockburn was operated with only one full-time and one part-time employee it was an 'inherent requirement' that the full-time employee be there for all rostered hours.

- 78 While it is clearly an inherent requirement of a position that an employee attend for work, it could hardly be an inherent requirement of a position that the person not access the annual leave, personal leave and carer's leave to which they are entitled by statute and contract.

Was Ms Burke unable to fulfil the inherent requirements of her role?

- 76 Ms Burke objects to the respondent's reliance upon *Jones* and *Moran* on the basis that those cases involve the removal of a police officer under the *Police Act 1892* (WA), a specific statutory scheme, which does not apply to Ms Burke.

- 77 In *Jones* [70] (at [22(a)] above), [71]–[72], Beech CC (Wood C and Mayman C agreeing), states:

- 71 [*Kyriakopoulos*] was endorsed by Fielding C of this Commission in [*Batchelor*] when he dismissed a claim of unfair dismissal by Ms Batchelar who, after 3 months' employment as a bus driver injured her knee sufficiently to prevent her operating the controls of a bus. Upon her return to work some 6 months later, but still unable to drive a bus, she was dismissed because there was not enough alternate work for her to do. In dismissing Ms Batchelar's claim that her dismissal was unfair, Fielding C stated:

An employer is not obliged to keep the former position open indefinitely, but only for a reasonable time. In considering the question of fairness of otherwise of any dismissal which results in circumstances such as these, consideration should be given to the employee's past service record, and the efforts made to rehabilitate after the injury.

- 72 The above points, whilst a useful aid for analysis, are not directly applicable here because the circumstances of police officers are not directly comparable to those of employees in industry generally. Employees in industry generally in WA have had an entitlement to ten days' sick leave per year since that was determined by this Commission in 1979 (*The West Australian Shop Assistants and Warehouse Employees Industrial Union of Workers, Perth v Boans Ltd* (1979) 59 WAIG 1377) and this is reflected in Part 4 Division 2 of the *Minimum Conditions of Employment Act, 1993* as 76 hours per fortnight.

- 78 In *Moran* [197], Kenner C states:

To the extent that the general approach in [*Kyriakopoulos* and *Batchelar*] was endorsed in *Jones*, I would similarly have regard to them in this appeal. I cannot accept the proposition that the Commissioner of Police should be required to maintain indefinitely in the Police Force, an Officer who has been found to be medically unfit for duty, has no reasonable prospect of any recovery and is either unable or unwilling to be rehabilitated into any other available position within the Force. ...

- 79 By the passages at [77]–[78] above, the Commission in *Jones* and *Moran* acknowledged that the approach in *Kyriakopoulos* and *Batchelar* applying to employees in industry generally, was a useful aid for analysis even within the context of the removal of a police officer.

- 80 There is no suggestion that Ms Burke is not an employee to whom the principles in *Kyriakopoulos* and *Batchelar* would apply. Therefore, the Board considers it appropriate to apply the principles at [22(a)] and [77]–[78] above to Ms Burke's appeal.

- 81 Ms Burke did not dispute that the period the respondent provided for her to demonstrate she could fulfil the inherent requirements of her role, namely throughout Term 1, 2023, was an unreasonable timeframe. Furthermore, applying the principles set out in *Kyriakopoulos* and *Batchelar*, the Board considers the period, namely throughout Term 1, 2023, a reasonable one, taking into account all the circumstances involved: *Jones* [70(ii)].

- 82 Agreed Document 14 is the respondent's letter to Ms Burke dated 6 December 2022. In this letter, the respondent notifies Ms Burke:

- (a) Of the concern that since commencing at Ashdale in May 2022, she has 'demonstrated a pattern of irregular absences from work due to a range of reasons'. The letter attaches the *Absence Yearly Calendar* reports for 2017–2020 and 2022.
- (b) Of the expectation to 'work with regularity' and to 'attend for work as per [her] hours of duty on a consistent and reliable basis', Monday–Friday, 8am–4pm according to her 0.9 FTE.
- (c) That:
 - (i) She has an opportunity to demonstrate regular attendance over Term 1, 2023;
 - (ii) Her attendance over Term 1, 2023 will be reviewed at the end of the term on 6 April 2023; and
 - (iii) If her attendance over Term 1, 2023 is considered 'concerning, consideration will be given to making a recommendation to the Executive Director Workforce that your employment be terminated'.

- 83 Despite Agreed Document 14 at [82] above, over Term 1, 2023, Ms Burke only attended for work 0.33 of a day (Statement of Agreed Facts [23]) on Monday 27 February 2023. On this day, Ms Burke left work at around 10.30am, and on 28 February 2023, Ms McKernan entered Ms Burke's 'personal leave into HRMIS for 27 and 28 February (as you texted me this morning to say you'd give today a miss). You have exhausted all your paid personal leave, so it will now be unpaid personal leave': Agreed Document 12.

- 84 Agreed Document 11 is the evidence Ms Burke provided to the respondent for her absences during Term 1, 2023. These are summarised as follows:

Rostered days of work/absences in Term 1, 2023	Document provided by Ms Burke as evidence	Days covered	Certificate issued by Hola Health?
Wednesday 25 January–Friday 27 January	Medical Certificate issued by Dr McMullen on 24 January 2023	3	
Monday 30 January–Wednesday 1 February	Medical Certificate issued by Dr Lodhi on 31 January 2023	3	Yes
Thursday 2 February	Medical Certificate issued by Dr Okezie on 2 February 2023	1	
Monday 6 February	Medical Certificate issued by Dr Doria on 6 February 2023	1	Yes
Tuesday 7 February			
Wednesday 8 February			
Thursday 9 February–Friday 10 February	Medical Certificate issued by Dr Hetenyi on 9 February 2023	2	Yes
Monday 13 February–Tuesday 14 February	Medical Certificate issued by Dr Bajwa on 13 February 2023	2	Yes
Wednesday 15 February–Thursday 16 February	Medical Certificate issued by Dr Bajwa on 15 February 2023	2	Yes
Monday 20 February	Medical Certificate issued by Dr Hetenyi on 20 February 2023	1	Yes
Tuesday 21 February	Medical Certificate issued by Dr Hetenyi on 21 February 2023	1	Yes
Wednesday 22 February	Medical Certificate issued by Dr Okezie on 22 February 2023	1	
Thursday 23 February	Medical Certificate issued by Dr Hetenyi on 23 February 2023	1	Yes
Friday 24 February	Medical Certificate issued by Dr Hetenyi on 24 February 2023	1	Yes
Monday 27 February–Tuesday 28 February	Medical Certificate issued by Dr Bajwa on 28 February 2023	2	Yes
Wednesday 1 March	Medical Certificate issued by Dr Bajwa on 1 March 2023	1	Yes
Thursday 2 March	Medical Certificate issued by Dr Bajwa on 2 March 2023	1	Yes
Monday 6 March	Medical Certificate issued by Dr Hetenyi on 6 March 2023	1	Yes
Tuesday 7 March–Wednesday 8 March	Medical Certificate issued by Dr Hetenyi on 7 March 2023	2	Yes
Thursday 9 March	Medical Certificate issued by Dr Hetenyi on 9 March 2023	1	Yes
Friday 10 March			
Monday 13 March	Medical Certificate issued by Dr Lodhi on 13 March 2023	1	Yes
Tuesday 14 March	Medical Certificate issued by Dr Lodhi on 14 March 2023	1	Yes
Wednesday 15 March–Thursday 16 March	Medical Certificate issued by Dr Lodhi on 15 March 2023	2	Yes
Monday 20 March–Tuesday 21 March	Medical Certificate issued by Dr Hetenyi on 20 March 2023	2	Yes
Wednesday 22 March–Thursday 23 March	Medical Certificate issued by Dr Okezie on 22 March 2023	2	
Friday 24 March			
Monday 27 March–Thursday 30 March	Letter to Ashdale’s MCS and Principal requesting cultural leave to attend Sorry Business	4	

Monday 3 April–Thursday 6 April			
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- 85 Under cross-examination, Ms Burke testified that her appointment with Dr McMullen was over the telephone, and some of her appointments with Dr Okezie were also telehealth consultations.
- 86 The table at [84] above outlines that Ms Burke submitted to the respondent the following number of medical certificates from Hola Health for the following periods:
- Eleven certificates for a 1-day absence.
 - Seven certificates for a 2-day absence.
 - One certificate for a 3-day absence.
- 87 On 10 November 2023, the initial version of Ms Young’s witness outline was filed, notifying Ms Burke that Ms Young would testify at the hearing about Hola Health and the possibility of obtaining a ‘Single-Same Day Certificate for Work’ by completing an online questionnaire.
- 88 By the time of the hearing, the respondent had placed Ms Burke on notice that it would be challenging her evidence regarding the reasons for her absences. The respondent’s outline of submissions state:

[Ms Burke’s] assertions about the reasons for her absences in Term 1 2023

- [Ms Burke] gave two reasons for her absences in 2023. At the beginning of the term, [Ms Burke] had COVID-19 and then reported ongoing respiratory symptoms. At the end of Term 1 2023, [Ms Burke] was absent for five days to attend Sorry Business in Fitzroy crossing.
 - However, despite being on notice that her employment was at risk, [Ms Burke] provided only generic and short term medical evidence to the Respondent during Term 1 2023.
 - During Term 1 2023, [Ms Burke] provided only one and two day medical certificates to the Respondent (with the exception of one three day certificate).
 - Many of these medical certificates were provided by Hola Health, an online provider which offers one day medical certificates if a patient self-reports they are ‘feeling unwell/unfit for work today due to general illness’ and without a telehealth appointment.
 - The Respondent acknowledges that [Ms Burke] intends to give evidence that on almost every occasion she obtained a medical certificate through Hola Health, she booked a telehealth appointment and spoke to a doctor.
 - No medical certificate provided included any detail regarding the reason for [Ms Burke’s] absences.
 - When the Respondent invited [Ms Burke] to respond to her proposed dismissal, [Ms Burke] asserted that the reason [for] most of her absences was likely long COVID but did not provide any medical evidence to support this.
 - In these proceedings, [Ms Burke] has not provided any medical evidence (including, for example, notes from her General Practitioner appointments during Term 1 2023) to confirm the nature and severity of her illness throughout this period.
 - The Respondent accepts that the evidence is sufficient to show that [Ms Burke] had COVID in both December 2022 and January 2023 (leading to hospitalisation on the second occasion) and had a protracted cough for at least part of Term 1 2023.
 - However, the evidence is insufficient to demonstrate either that:
 - [Ms Burke’s] complications from COVID-19 provide a full explanation for her absences during Term 1 2023 (excluding those to attend Sorry Business); or
 - her Term 1 2023 absences should be considered an exceptional ‘one off’ such that no conclusions about her ongoing ability to attend work could be drawn at that point of time.
 - It was therefore open to the Respondent to find, at the end of Term 1 2023, that [Ms Burke] was unable to regularly attend work for the reasonably near future.
 - Similarly, [Ms Burke] has not, in these proceedings, provided evidence sufficient to satisfy the Board of the matters at [74] above. (footnotes omitted)
- 89 On 6 December 2023, Ms Burke filed a Bundle of Documents attaching a medical certificate issued by Dr Jan Hetenyi of Hola Health on 8 February 2023, which covered her absence on Wednesday 8 February 2023.
- 90 Ms Burke included in her Bundle of Documents what appear to be screenshots taken from her mobile telephone of emails addressed to her from Hola Health:
- From ‘No reply Hola He...’ ‘31 Jan’:

Hi Trista ,
Your on-demand appointment with Practitioner Hola has been confirmed. Please join by clicking this link [...].
Thank You,
The Hola Health Support Team
 - From ‘No reply Hola He...’ ‘8 Feb’:

Hi Trista ,

Thank you for your consult with Practitioner Jan. Find attached your Medical Certificate Referral .

Thank You,

The Hola Health Support Team

(c) From 'No reply Hola He...' '16 Feb':

Hi Trista,

We received your medical certificate request and assigned it to a doctor. You will receive your medical certificate within 15 minutes of approval by the doctor.

Thank You,

The Hola Health Support Team

...

Hi Trista,

Thank you for submitting a medical certificate request. It has been approved by Dr Sobia Bajwa. Please find attached your medical certificate.

91 In accordance with s 26(1)(b) of the IR Act, which applies to the Board by virtue of s 80L of the IR Act and provides that the Board must not be bound by any rules of evidence and may inform itself on any matter in such a way as it thinks just, the Board notes that the Hola Health website provides the following options to a person seeking a medical certificate:

- (a) Access to a single-same day certificate, which cannot be backdated, for \$15.90; and
- (b) Access to a multi-day certificate, which cannot be backdated, by seeing 'a Hola doctor via a telehealth consult' 'within 15 minutes' for \$35.

92 Further, the Board notes that the Hola Health website's 'Frequently asked questions' section states:

Medical Certificates

How does it work?

Fill out a short questionnaire online for one of our GPs to review – once approved, we will email your certificate to your nominated email address.

...

How many times can I book in for a single day medical certificate?

We can only provide you with three single day medical certificates in a row, after which if you are still unwell and need a fourth medical certificate, a consultation with one of our available practitioners will be required.

- 93 As noted at [60]–[63] above, the onus rests on Ms Burke to provide evidence supporting her claims, and the Board may draw inferences from her election not to do so.
- 94 As noted at [87]–[88] above, the respondent had placed Ms Burke on notice that they would contest her assertion that she obtained medical certificates following telehealth consultations rather than by self-reporting her symptoms through Hola Health's online questionnaire. Moreover, Ms Burke was placed on notice that the respondent would challenge her evidence regarding the nature and severity of her illnesses during Term 1, 2023.
- 95 The respondent requested that Ms Burke provide her bank statements as evidence to determine whether she paid the lower fee (Ms Burke said this was about \$12 at the time) for a 1-day certificate or the higher fee (Ms Burke said this was about \$35 at the time) for a certificate following a telehealth consultation. Additionally, the respondent asked Ms Burke to produce her medical records and offered to cover any costs associated with obtaining these records.
- 96 Ms Burke testified that she had discussed with Dr Okezie the possibility of him providing evidence of her medical condition, but he would need to take time away from his practice to do so. She also claimed that the reason she did not produce a medical report was due to the costs, approximately \$120 per page. Ms Burke said that the reason she has not provided comprehensive medical records is because she has been busy moving house. She said she has produced the test results she obtained from the administrative staff of Dr Okezie's practice that did not involve any costs to produce.
- 97 During cross-examination, Ms Burke acknowledged that she informed Dr Okezie about the respondent's offer to cover his costs. She then stated that she was not comfortable to produce her medical file because, 'there are things in there that – about my mental health that maybe I have more of a conversation with my doctor than I do with the Department' (ts 85). Ms Burke recognised that the request for her medical records was for the period December 2022 to the end of Term 1, 2023. She stated that she has not produced these records because she has not had the opportunity to obtain them.
- 98 The Board notes that Ms Burke's evidence at [96] and [97] is inconsistent. This is a matter that the Board will return to in these reasons for decision.
- 99 Ms Burke explained that the reason she has not produced all emails from Hola Health is because she deleted several of them as part of her email inbox management process.
- 100 Ms Burke claimed that the reason she did not provide her bank statements was because she could not access Centrelink with four bank accounts, so she closed one of them. This happened to be the one she used to pay for Hola Health. During cross-examination, Ms Burke admitted that she did not attempt to retrieve records from the closed account by contacting her bank. She stated that she lacked the time to do so because she had recently moved house (on 24 November 2022) and has been occupied with unpacking (ts 82).

- 101 Ms Burke gave evidence that it was her choice to produce 1-day and 2-day medical certificates. She said (ts 54):
- That was my choice. Um, I was so, so sick, and the optimism of waking up the next day and being okay, um, was something I wanted more than anything. Um, the stress of knowing I only had that term to come to work, yeah, it – it was my choice, um, most times against the doctor, but I just wanted to be back.
- And you said, ‘The stress because you only had that term’. What did you mean by that?---Um, the ultimatum of if I couldn’t attend regularly from term 1 of 2023 that I’d be just – well, effectively, I could possibly be dismissed.
- 102 Ms Burke gave the following evidence about not providing the medical certificate dated 8 February 2023, covering her absence on Wednesday 8 February 2023, to Ashdale (ts 55):
- Why didn’t you provide that to Ms McKernan?---Um, because I just – I went back to bed for one, um, but two, I was feeling like it didn’t really matter anyway. She’d already made up her judgment of me and – and – and everything moving forward. Um, it was just – you know what, whatever. I’ve had enough of this. I’m too sick. Um, yeah.
- 103 Ms Burke gave unequivocal evidence that every appointment she had with Hola Health was a telehealth consult, other than on 8 February 2023 (ts 59).
- 104 It was only when Ms Burke was taken to the document at [90(b)] above, which refers to a ‘consult with Practitioner Jan’, and to the document at [90(c)] above, which refers to Ms Burke being issued a medical certificate by Dr Bajwa on 16 February 2023 without a telehealth consult, that Ms Burke resiled from her evidence at [103] above (ts 60).
- 105 In relation to the document at [90(c)] above, Ms Burke gave evidence that she had a telehealth consult with Dr Bajwa on 15 February 2023 but did not get a certificate until 16 February 2023 ‘because again I didn’t get her to write a two-day certificate. Ah, my choice’ (ts 60).
- 106 When taken to the medical certificate dated 15 February 2023 stating, ‘Trista Burke has a medical condition and will be unfit for work from 15-02-2023 to 16-02-2023’ (Agreed Document 11, 77), Ms Burke gave the following evidence (ts 61):
- So when you’d seen the doctor on the 15th, did she give you a medical certificate?---Ah, so I haven’t found it in my emails, no, so I don’t have a single-day certificate, so I’m guessing when I’ve done this one, um, she’s edited it ---
- Okay? to supply me, because she was meant to supply me with one on the 15th, um, so I’m guessing she’s added that to it.
- 107 The Board finds this explanation unconvincing. It is clear from the Hola Health website that regardless of whether a single-day certificate or a multi-day certificate is requested, it will result in a medical certificate being issued. Accepting Ms Burke’s evidence requires the Board to accept all of the following:
- (a) Ms Burke participated in a telehealth consult with Dr Bajwa on 15 February 2023;
 - (b) Despite Ms Burke paying for a medical certificate, Dr Bajwa did not issue one for 15 February 2023;
 - (c) This led to Ms Burke paying for a single-day certificate on 16 February 2023;
 - (d) Ms Burke’s single-day certificate request on 16 February 2023 was assigned to Dr Bajwa; and
 - (e) On 16 February 2023, Dr Bajwa issued a two-day certificate covering the two-days of 15–16 February 2023 but backdated it with an issue date of 15 February 2023.
- 108 The Board considers the proposition at [107] above implausible, particularly considering that Hola Health cannot backdate its certificates, as noted at [91] above.
- 109 The Board concludes that it is more plausible, in accordance with the document at [90(c)] above, that Ms Burke paid for and obtained a single-day certificate on 16 February 2023, which certificate was issued by Dr Bajwa based on the information Ms Burke selected herself when completing the online questionnaire, without any consultation with Dr Bajwa.
- 110 This raises doubts about the certificate dated 15 February 2023 that Ms Burke submitted to the respondent (Agreed Document 11, 77). It also questions the two instances in the table at [84] above where Hola Health medical certificates appear to have been backdated:
- (a) Certificate issued by Dr Lodhi on 31 January 2023 for 30 January–1 February 2023.
 - (b) Certificate issued by Dr Bajwa on 28 February 2023 for 27–28 February 2023.
- 111 The matters at [110] above, are matters the Board will return to in these reasons for decision.
- 112 As noted at [93]–[94] above, the onus rests on Ms Burke to produce the evidence supporting her claims, and the respondent had informed her that it would challenge specific aspects of her testimony.
- 113 Despite this, Ms Burke failed to provide any evidence, including bank statements, to support her claim that all but one Hola Health certificate was obtained following a telehealth consult. The testimony she did give (at [103]–[104] above) was inconsistent. Considering these reasons and the matters at [92] above, the Board finds Ms Burke’s evidence at [103] above asserting that all but one Hola Health certificate was obtained following a telehealth consult to be implausible. Instead, the Board finds it more plausible that each time Ms Burke provided the respondent with a 1-day certificate from Hola Health, she paid for and obtained a 1-day certificate without a telehealth consult.
- 114 Despite the matters at [112] above, and despite the respondent offering to pay for Dr Okezie’s costs, Ms Burke did not call nor produce evidence from Dr Okezie to support her contentions regarding her health. The testimony Ms Burke did give about the reasons for not doing so (at [96]–[97] above) were inconsistent.
- 115 Ms Burke was referred to her statement on 15 May 2023 in which she stated having undergone various tests, such as ultrasounds, x-rays, CAT scans, blood tests, and iron infusions (at [56] above). Under cross-examination, Ms Burke admitted

that the ultrasound was not related to COVID. Other than the ultrasound, she said her statement referred to the COVID-related treatments that she had either had or were pending. Despite this clarification, Ms Burke was reluctant to acknowledge that her statement might have been an exaggeration of her situation concerning her COVID-related absences during Term 1, 2023.

- 116 Despite Ms Burke's reluctance to acknowledge that her statement (at [56] above) might have been an exaggeration, the Board concludes it was indeed so. The Board considers Ms Burke's refusal to concede this minor point in the appeal to be a factor weighing against Ms Burke's witness credibility.
- 117 Also weighing against Ms Burke's witness credibility is her inconsistent, argumentative and evasive evidence concerning the prior disciplinary proceedings, as well as matters involving the WWCC and iPad (at [38] above), as outlined below.
- 118 On 12 July 2021, the respondent found the five allegations of misconduct (at [4] above) to be substantiated and proposed the following action:

Allegation 1: Dismissal from employment and reprimand.

Allegation 1: Dismissal from employment and reprimand.

Allegation 3: Reprimand.

Allegation 4: Reprimand.

Allegation 5: Reprimand.

- 119 In relation to this letter, Ms Burke said (ts 34):

All right. So this is the letter where the Department has come back to you and given you the findings?---Yes.

And they found that all of the charges are substantiated, and they've proposed to dismiss you?---Yes, on the balance of probabilities.

Yes. And before they made that finding, did they interview you and ask you about it orally in the way we're talking about it now?---No. No, um, I was never given the opportunity.

- 120 The Board notes that Ms Burke's evidence at [119] above, directly contradicts the respondent's letter dated 12 July 2021, which expressly states:

Responding to the Findings and Proposed Action

Before I make a final decision and take action, you can respond to the Findings and proposed action in writing or in person with the investigator.

Please send your response to [SID] within 10 business days of you receiving this letter.

Should you choose to provide a written response, please send it to the following: ...

If you would like to respond to the allegation in person, please contact ..., Senior Investigator, [SID], who will arrange a convenient time for this to occur. We audio record responses to ensure full transparency. You can have a support person present.

I will consider your response before I make a final determination and impose any action.

Please note that you can choose not to provide a response. If you do not provide a response the matter will progress and you will be advised of my decision. (emphasis added)

- 121 During cross-examination about the allegation at [4(a)] above regarding the Bunnings gift card, Ms Burke (ts 92–93):

- (a) Accepted that she collected the gift card on 29 June 2019 (Attachment 6 of SID's report).
- (b) Accepted that on 21 September 2019, Ms Keunen sent her an email stating 'I got this voucher for our school to do the line markings. Trista picked it up but I am not sure where it went from there...Trista where did it go?' (Attachment 6 of SID's report).
- (c) Said that after this email, she had a discussion with Ms Evans who asked her where the gift card went. Ms Burke said this was the first time the gift card had been brought up since she collected it, and that she told Ms Evans the gift card was in her spare room as she had been packing boxes to move house. Ms Burke said she told Ms Evans she was sorry, she had forgotten about it, and that she would go look for it.
- (d) Agreed that on 21 November 2019 Ms Evans sent her home to find the gift card.
- (e) Denied that on returning to the school, that she said to Ms Evans, 'that was easier to find than I thought' because 'I'd been looking for it for – since September. Why would I say something so silly?'
- (f) In addressing the contention that her response in the disciplinary investigation was dishonest said:

I gave them another card. They have a card with money on it. This is not relevant. I'm sorry, I don't understand where you're going with this when it's not relevant to absences.

- 122 The Board considers Ms Burke's evidence regarding the Bunnings gift card to be implausible. The Board considers it unlikely that she had been searching for the gift card since September 2019, as stated by her. If so, it is inexplicable why she did not inform Ms Keunen or Ms Evans about her search results. The Board considers it more plausible that Ms Burke had not been searching for the gift card since September 2019, which prompted Ms Evans to direct her to return home to retrieve the card on 21 November 2019. The Board has also taken into account Ms Burke's demeanour during cross-examination. The Board perceives her as argumentative and evasive when giving her evidence at [121(f)] above, which weighs against her credibility. Considering these factors, the Board considers it is more likely that returning to Roseworth with the gift card purchased on 21 November 2019 by her fiancée, Ms Burke stated the gift card was easier to find than she thought and proceeded to hand over

the newly obtained card to give the impression that it was the same one collected on Roseworth's behalf on 29 June 2019.

123 During cross-examination about the allegation at [4(b)] above regarding the Coles gift card, Ms Burke (ts 93–94):

- (a) Maintained that she found it near Roseworth.
- (b) Agreed that on the morning of 21 November 2019 (the day Ms Evans directed her to go home to find the Bunnings gift card), Ms Evans informed her about the missing Coles gift card and mentioned that they had obtained CCTV footage showing someone using the gift card.
- (c) Stated that it did not occur to her that the missing Coles card could possibly be the same card that she claims to have found.
- (d) Denied any dishonesty in her description of finding the gift card, asserting that she was unaware it belonged to Roseworth.

124 The Board finds Ms Burke's evidence regarding the Coles gift card to be implausible. The Board notes that Ms Burke's evidence at [123(c)] above directly contradicts her written response dated 12 April 2021, in which she states, 'Tracey Evans told me late November [2019] that there was CCTV footage of Roseworth missing gift card being spent. At this point I thought there might be a slight possibility the gift card I found, could have been the one RPS was waiting on.'

125 In regard to paying for the WWCC application fee on a work credit card and seeking a reimbursement, Ms Burke stated that it happened due to an oversight. She was at the post office with her fiancée at the time, and while she was having her photograph taken, he paid the WWCC application fee on Roseworth's credit card. She did not become aware of this until Ms Evans (Roseworth's MCS) asked her about it.

126 Ms Burke said she had 'quite a bit of money' in her account so she did not notice that the fee (\$85) 'was still in there' (ts 38).

127 The *Statement of Purchase Card Used for a Personal Purpose* attached to Ms Nielsen's witness outline indicates that Ms Burke provided the same explanation at [125] above to Ms Evans and subsequently to Ms Nielsen. Under the section 'Circumstances leading to use of purchase card for a personal purpose', the following are completed:

Type of Purchase Other

Select Circumstance Accidental purchase

128 In response to a question from her counsel as to whether anyone had ever suggested to her that this was anything other than an accident, Ms Burke said (ts 39):

[N]o, but I did have my card removed off me instantly, um, which - I mean, I felt a bit hard done by considering (a) I paid it back straight away, um, as soon as the - the accident was noticed, um, but (b) we had also had other staff members who had, for instance, bought alcohol - \$100 worth of alcohol on their purchasing card, and it was laughed off as if it was just an accident and just a joke. However, I was all, ah - yeah, I was all of a sudden being - having my card removed, and this was the first time anything like this had ever happened.

129 The Board notes that this is inconsistent with what is stated on the *Statement of Purchase Card Used for a Personal Purpose*:

Section 7 – Action Taken

... The principal indicated that the money (\$85) will need to be repaid immediately, no one other than card holder is permitted to use the card and that her corporate card will now be canceled. The principal also stated that it was not appropriate for her to approve her own reimbursement and this should be done by MCS or in her absence, the principal. The receipt for the transaction was also requested. Trista indicated that the card, receipt and money to pay back \$85.00 were all at home and she would bring them in the next day. Trista texted Tracey (MCS) on the morning of 6/06/2019 to indicate she would not be at school due to sick with asthma. MCS texted Trista back to let her know that money needed to be repaid by 2 days after transaction was discovered as per guidelines. Trista returned to work after sick leave, on Friday 7/06/2019. She returned the receipt and credit card but indicated she did not have money to repay until next pay period Thursday 13 June 2019. Trista has not paid back the money yet, see attached payment plan.

130 When Ms Burke was directed to this inconsistency by her counsel and asked when she made the repayment, she stated (ts 40):

Now you're looking at these documents, was it straight away or was it ---?---No. It would have been the pay period. You're well, ah - yeah, you're correct, so whatever the pay period was for then. I can't remember that far ago.

All right?---So I'm guessing if this was an off week, go to the following Thursday, that's the pay week.

131 Taking into account the inconsistencies in Ms Burke's evidence as noted at [98], [103]–[104] and [113] above, and the matters that weigh against Ms Burke's credit as noted at [116]–[117] above, the Board considers it unsafe to accept her testimony where it is unsupported by other evidence.

132 Ms Burke gave the following evidence about her unapproved absences for the last four days of Term 1, 2023, Monday 3 April–Thursday 6 April 2023 (ts 63):

So you were driving on the Monday?---Yes.

You got back early on the Tuesday?---Tuesday, yes. You didn't attend on the Tuesday?---No.

Did you attend on the Wednesday or the Thursday?---No. I didn't.

Why not?---Um, that wasn't due to my illness that I'd been suffering. Um, I just needed a few days. Um, my Sorry Business had taken a bit of a toll. Um, I was scared of going back to work and what I was going to face. Um, yeah.

Did you ask if those extra days could be covered by bereavement or cultural leave?---No, because I had already tried to get, you know, travel time and things like that, and I'd been knocked back already so---

- 133 Ms Burke did not produce any evidence to corroborate her testimony at [132] above.
- 134 In the context of Agreed Document 14 (at [82] above), the Board finds Ms Burke's evidence at [132] above to be inexplicable. The Board considers this evidence supports the respondent's assertion at [49] above that the taking of unapproved leave in these circumstances demonstrates Ms Burke's inability to adhere to the respondent's requirements regarding her attendance at work.
- 135 In accordance with *Jones* [70(iv)] citing *Kyriakopoulos* (at [22(a)] above), when deciding whether the dismissal of an employee with a medical condition is unfair, one relevant consideration is the efforts made by the employee to place themselves in a position to resume their former duties as soon as possible. In the context of Agreed Document 14 (at [82] above), the Board considers that Ms Burke's failure to provide evidence to the respondent during her eight days of absences (at [28] above), further demonstrates her inability to adhere to the respondent's requirements regarding attendance at work.
- 136 Given the evidentiary onus resting on Ms Burke and considering the Board's findings above at [108]–[109], [113] and [131], the Board does not consider that Ms Burke has sufficiently explained the reasons for her absences in relation to those instances where:
- (a) No evidence was provided as per [28] above;
 - (b) Ms Burke produced a 1-day medical certificate issued by Hola Health, given these certificates can be obtained by her self-reporting her health condition through an online questionnaire without a telehealth consult; and
 - (c) A medical certificate issued by Hola Health covers backdated absences as mentioned at [110] above.
- 137 Ms Burke failed to produce her bank statements, or any evidence from Dr Okezie despite the respondent's offer to cover Dr Okezie's costs, to substantiate her claims concerning her absences, which is relevant for the future-looking assessment of her ability to meet the inherent requirements of her role.
- 138 The Board does not accept Ms Burke's assertion that she could not produce her bank statements and evidence from Dr Okezie due to inability. The Board finds that Ms Burke had sufficient time to produce this evidence. Furthermore, Ms Burke could have requested an adjournment of the hearing in order to obtain this evidence or provided an undertaking to produce them following the hearing.
- 139 The Board finds that Ms Burke chose not to provide the requested evidence, and in accordance with the principles [61]–[63] above, the Board finds that Ms Burke has not discharged the onus on her to demonstrate to the Board that she can fulfil the inherent requirements of her role.
- 140 As noted at [131] above, the Board is unable to accept Ms Burke's testimony regarding her health without supporting evidence. Since Ms Burke has not provided corroborating evidence, the Board agrees with the respondent's submission at [47] above, that it is immaterial whether the forward-looking assessment of Ms Burke's inability to fulfil the inherent requirements of her role is determined at dismissal or at hearing.
- 141 In accordance with *Jones* [70(i)] citing *Kyriakopoulos* (at [22(a)] above), Ms Burke would only succeed in showing her dismissal was unfair if she demonstrates, on the balance of probabilities, that she can adequately and fully discharge all duties of her role in the reasonably near future. For the reasons at [139] above, Ms Burke has failed to establish this.

Should the Board adjust the dismissal?

- 142 The Board has found at [72]–[75] above, that attendance at work was an inherent requirement of Ms Burke's role.
- 143 The Board has found at [139] above, that Ms Burke has not discharged the onus on her to satisfy the Board that she is able to fulfil the inherent requirements of her role.
- 144 Given these findings, it is unnecessary for the Board to substitute its view about Ms Burke's inability to fulfil the inherent requirements of her role with the respondent's views.
- 145 Given these findings, the Board does not consider that the decision to dismiss Ms Burke was harsh, oppressive or unjust. It was not an abuse of the employer's right to dismiss in the sense discussed in *Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.
- 146 Even if the Board arrived at a different conclusion, the Board does not believe that the dismissal should be adjusted for the following reasons.
- 147 Ms Burke was subject to prior disciplinary proceedings as referenced at [4] above. The respondent found all five allegations of misconduct substantiated. Initially, the respondent proposed dismissal for the substantiation of allegations 1 and 2 regarding the Bunnings and Coles gift cards. However, after considering Ms Burke's response, the respondent instead reprimanded her and transferred her to Ashworth, essentially providing her with a second chance in her employment. In light of these circumstances, it is unfortunate that Ms Burke did not make a greater effort to adhere to the respondent's requirements regarding her attendance at work, particularly with respect to the eight days of unapproved leave at [28] above.
- 148 The Board has made credibility findings about Ms Burke's evidence in this appeal, which consequently includes her responses to the respondent during the prior disciplinary proceedings. Given these findings, the Board cannot be satisfied that Ms Burke will engage in an open and transparent manner if she were to be returned to her employment with the respondent.
- 149 As noted at [144] above, although it not necessary for the Board to substitute its views about Ms Burke's inability to fulfil the inherent requirements of her role with the respondent's views, it is noteworthy that while the respondent did not dismiss Ms Burke for substandard performance or breach of discipline, the Board considers that it was within the respondent's discretion to do so due to Ms Burke's failure to adhere to the attendance requirements.

150 Although the Board has considered Ms Burke's length of service and financial situation, it finds that these mitigating factors are insufficient to justify adjusting the dismissal in light of all the circumstances.

Conclusion

151 For the preceding reasons, the Board finds that Ms Burke has not discharged the onus on her to satisfy the Board that the decision to dismiss her should be adjusted.

152 Accordingly, the Board will order that PSAB 17 of 2023 be dismissed.

2024 WAIRC 00796

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
MS B CONWAY – BOARD MEMBER
MS E HAMILTON – BOARD MEMBER

DATE

MONDAY, 2 SEPTEMBER 2024

FILE NO

PSAB 17 OF 2023

CITATION NO.

2024 WAIRC 00796

Result	Appeal dismissed
Representation	
Appellant	Mr S Pack (of counsel)
Respondent	Ms E Negus (of counsel)

Order

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

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

(Sgd.) C TSANG,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

WORK HEALTH AND SAFETY ACT—Matters dealt with

2024 WAIRC 00782

APPLICATION FOR AN ORDER IN RELATION TO ENGAGING IN OR INDUCING DISCRIMINATORY OR COERCIVE CONDUCT PURSUANT TO SECTION 112 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

CITATION	:	2024 WAIRC 00782
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	MONDAY, 27 MAY 2024, TUESDAY, 28 MAY 2024, WEDNESDAY, 29 MAY 2024 & THURSDAY, 30 MAY 2024
DELIVERED	:	TUESDAY, 27 AUGUST 2024
FILE NO.	:	WHST 8 OF 2023
BETWEEN	:	JUSTIN SIMMONDS Applicant AND ELECTRICITY NETWORKS CORPORATION T/A WESTERN POWER Respondent

CatchWords	:	Work Health and Safety Tribunal - Whether the applicant was discriminated against for a prohibited reason (raising an issue or concern about work health and safety) - Whether placing the applicant on a performance improvement plan was discriminatory conduct - Performance improvement plan not discriminatory conduct but discriminatory conduct did include dismissal - Discriminatory conduct not for a prohibited reason - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA): s 26(1)(a) & s 26(1)(b) <i>Electricity (Network Safety) Regulations 2015</i> (WA): reg 24 <i>Surveillance Devices Act 1998</i> (WA) <i>Work Health and Safety Act 2020</i> (WA): s 3(1), s 3(2), s 104, s 105, s 106, s 106(h), s 112, s 113, s 113(2) & cl 29(1) of Sch 1
Result	:	Application dismissed

Representation:

Applicant	:	In person
Respondent	:	Ms H Millar (of counsel)

Cases referred to in reasons:

Board of Bendigo Regional Institute of Technical and Further Education v Barclay & Anor [2012] HCA 32
Browne v Dunn (1893) 6 R 67
Chambers v Commonwealth of Australia (Bureau of Meteorology) [2024] FedCFamC2G 100
Dickson v Downer EDI Works Pty Ltd [2014] FCA 1134

Reasons for Decision

- 1 Mr Simmonds has made an application under s 112 of the *Work Health and Safety Act 2020* (WA) (**WHS Act**).
- 2 In effect, Mr Simmonds says that he was the subject of discriminatory conduct for a prohibited reason contrary to s 112 of the WHS Act. He says that after he raised an issue or concern about work health and safety, Western Power took discriminatory action against him by putting him on a performance plan and dismissing him.
- 3 Fundamentally, the parties are in dispute about why Western Power took the action against Mr Simmonds.
- 4 Western Power accepts that dismissing Mr Simmonds amounts to discriminatory conduct under the WHS Act, but it says that the reasons why it put Mr Simmonds on a performance improvement plan and dismissed him did not include the fact that Mr Simmonds had raised an issue or concern about work health and safety. Western Power says that this is 'just a case about misconduct, about an employee who didn't follow the rules and got fired by his employer.'

Questions to be decided

- 5 To resolve this matter, the Tribunal must decide:
 - a) Did Mr Simmonds raise an issue or concern about work health and safety?
 - b) Did Western Power engage in discriminatory conduct?
 - c) Was any discriminatory conduct engaged in for a prohibited reason?
 - d) What, if any, orders should the Tribunal make?

Background

- 6 Having worked for Western Power from 2004 to 2016, Mr Simmonds started employment with Western Power as a Safety Operations Business Partner on 15 December 2022. His contract of employment provided that he had a six-month probationary period.
- 7 In early January 2023, Mr Simmonds' line manager, Ms Sophie Silvester (Operations Team Leader) asked him to lead the investigation and to finalise an investigation report into an incident in which members of the public had received electric shocks (**Wundowie Report**).
- 8 Western Power had to report to the regulator (Building & Energy, also referred to as B & E) in relation to the incident in Wundowie in accordance with reg 24 of the *Electricity (Network Safety) Regulations 2015* (WA):

24. Reporting of notifiable incidents

- (1) Unless the network operator has notified the Director under regulation 23(4) that the network operator is satisfied that the incident is not a notifiable incident, the network operator must —
 - (a) prepare a report of the investigation of the incident in accordance with subregulation (2); and
 - (b) give the report to the Director within 30 working days after the day on which the incident occurred or any extension of that period the Director, in writing, allows.

Penalty for this subregulation: a fine of \$250 000.

(2) The report must —

- (a) be in a form acceptable to the Director; and
- (b) describe the incident; and
- (c) identify the cause of the incident or state that the cause of the incident is not known; and
- (d) describe the steps taken to investigate the incident; and
- (e) indicate whether the network operator proposes to revise its safety management system (if one applies to the network) and, if so, how and by when; and
- (f) include or be accompanied by the following —
 - (i) any photographs, videos, maps or diagrams that the network operator has that are relevant to the incident;
 - (ii) any opinions obtained from experts in relation to the incident;
 - (iii) the results of any tests conducted to determine the cause of the incident;
 - (iv) maintenance records relating to the apparatus involved in the incident;
 - (v) any other information that the network operator considers relevant to the investigation of the incident.

[Regulation 24 amended: SL 2021/218 r. 12.]

- 9 On 7 February 2023, Mr Simmonds met with Ms Suzanne Nesci at 2pm to discuss the Wundowie Report. Ms Nesci was Ms Silvester's line manager.
- 10 On 8 February 2023, Ms Silvester sent Mr Simmonds an email telling him that the draft Wundowie Report needed to be approved by Mr Andrew Shaw, Head of Safety, Environment, Quality and Training (SEQT) at Western Power, before it could leave SEQT:

Hey Justin

Let me know when you have updated the report to reflect comments and update [sic] recommendations section to acknowledge current SEQT projects / strategy etc. I will then jump in and have a look.

I think next steps we get Andy across it via a meeting. This will be our best chance to get it across the line **as he needs to approve before it can leave SEQT** [emphasis added].

Thanks

Sophie Silvester

Operations Team Leader

Safety, Environment, Quality & Training

- 11 The next day, Mr Simmonds sent a copy of the draft Wundowie Report to Mr Ben Vasiliauskas. Mr Vasiliauskas was Operations East Manager - Operational Maintenance. He worked outside SEQT.

- 12 On Wednesday 22 February 2023 at 1.31pm, Ms Silvester emailed Mr Simmonds:

Hi Justin

I have spoken to Sue re: our conversations and she is going to chat to Andy re: organising [sic] catch up to go through the report.

In [sic] meantime, in case I didn't explain properly Sue requested the report be split into the below. She does not want to loose [sic] any of the information contained in the report, however just wants it to be split into the right channels. Reasons below:

1. **B&E Report:** Outline findings and recommendations that are directly related to the incident and in the B&E requested report format [original emphasis]
2. **Lessons learnt register (L3-L5 incidents):** Capture all lessons in relation to the incident investigation ie: Timeframes, process etc. Note: We have been doing these for the past few L3-L5 incidents. [original emphasis]
3. **SEQT Organisational learning report:** Include all findings and recommendations with associated action plan for all recommendations. As discussed many of these report findings we see in part in other incidents. Therefore as part of this report contact [sic] high level analysis of other recent 3-5 incidents and show links to the findings. This will add weight to the findings and recommendations. Report to be disseminated to relevant areas of the business. [original emphasis]

At the moment, Sue does not want the report as it stands to leave SEQT. I will update you if/when this changes. [emphasis added]

I will schedule a meeting for you and Andy ASAP. Stay tuned. Hoping it to be in the next two days.

Thanks for being patient.

Soph

- 13 Mr Simmonds replied to Ms Silvester's email within the hour, disputing the need to 'split' the Wundowie Report:

Hi Sophie,

Thank you for clarifying Sue's request in writing. I would also like to clarify my concerns with Sue's request in writing, expanding on the content within the report that explains and justifies the need to keep the investigation findings within the Investigation Report at the very least.

- ICAM allows for the identification of Organisational Factors, for a good reason, and must be included in the Investigation Report.
- The Investigation Report is just that, a report outlining all findings of the investigation. It must be the source or reference point of any other documents deemed necessary, and the mechanism for such documents to be created.
- Any other analysis, which I am an advocate for, can still be done, however it is crucial that the information from this Investigation Report is presented to Western Power Officers to ensure appropriate action is taken, and to meet their Due Diligence Obligations set out in the Work Health and Safety Act 2020 by taking reasonable steps;
 - to acquire and keep up-to-date knowledge of work health and safety matters, to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations,
 - to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking,
 - to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information,
 - to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under the Act, and
 - to verify the provision and use of the resources and processes mentioned above.
- To meet my/our Duty under the Act to:
 - Take reasonable care that the my [sic] acts or omissions (in this case if I do not speak out) do not adversely affect the health and safety of other persons.

As I point out in the report, the defensiveness shown inadvertently through the need to hide information from the PCBU and its Officers is human nature in which I can truly empathise with. This does however, provide additional weight to the organisational factors and unconscious biases presented in the incident investigation, and my empathy disappears when accountability is not taken.

Kind regards,

Justin Simmonds

Operations Business Partner

Safety, Environment, Quality & Training

- 14 After liaising with her line manager Ms Nesci and human resources, Ms Silvester replied to Mr Simmonds' email at 12.31pm on Thursday 23 February 2023:

Hi Justin

We are not trying to minimise the impact of any risk, **we are trying to have the information put in the right areas so the issues raised can be dealt with appropriately. Sue does not want any information removed, rather, that it live in the right documentation** [emphasis added].

Therefore, I am repeating Sues [sic] direction to please be split into three [emphasis added]:

1. **B&E Report:** Outline findings and recommendations that are directly related to the incident and in the B&E requested report format - *Note this action is complete* [original emphasis]

2. **Lessons learnt register (L3-L5 incidents):** Capture all lessons in relation to the incident investigation ie: Timeframes, process etc. Note: We have been doing these for the past few L3-L5 incidents. [original emphasis]

Timeframe – please do so by COB 3rd March.

3. **SEQT Organisational learning report:** Include all findings and recommendations with associated action plan for all recommendations. As discussed many of these report findings we see in part in other incidents. Therefore as part of this report contact [sic] high level analysis of other recent 3-5 incidents and show links to the findings. This will add weight to the findings and recommendations. Report to be disseminated to relevant areas of the business after relevant SEQT endorsement has been obtained. [original emphasis]

Timeframe – please provide final draft for my review by close of business 3rd March (or we can discuss a later date if this is not achievable – however really after just the org recommendations that currently sit in the other report).

Pls confirm by return email your understanding of this direction and your intention to take the required action. [emphasis added]

Thanks

Sophie Silvester

Operations Team Leader

Safety, Environment, Quality & Training

- 15 At 3.16pm on Thursday 23 February 2023, Mr Simmonds emailed Western Power's Chief Executive Officer, Mr Sam Barbaro, executives Mr Zane Christmas and Mr Gair Landsborough, and Mr Brett Hovingh (Head of Operational Maintenance – Asset Operations) raising his concerns (**Issues Email**):

Good afternoon all,

I am writing this to you prior to following other procedures and avenues because:

- I believe I am breaching legislation until I do.
- Failure to do so presents a liability risk for you.
- I believe I am being given instruction that results in a breach of legislation that would present a liability risk for all of us.
- Failure to do so prevents known risks from being managed in a timely manner.
- My experiences with you provide me with the confidence that you will take this seriously and appreciate being informed.
- The new strategy being announced in the very near future will only be as good as the leadership tasked with its implementation, and drastic changes are required within the SEQT function.

I have attached an email chain between myself and my Formal Leader that shows she has been instructed to tell me to retract information from my investigation report to keep our function deficiencies in-house.

I have also attached a PDF of my Incident Investigation Report. You will notice that I changed the approved format, with approval, to resemble an actual report, and the content matches the detail of what a level 5 investigation report should.

I take WHS Legislation and, more importantly, its intent very seriously. Additionally, following company values and those of my own, I will not follow instructions that I feel are unreasonable or unlawful.

I have identified many Organisational Factors including deficiencies within SEQT and its Management System. For this reason, the approval process is flawed and I feel it imperative that all Officers see unredacted investigation reports and all personnel are made aware of investigation outcomes in a timely manner.

The Organisation Factors were all presented, explained and agreed upon by the SEQT Ops Team Leaders, Area Manager and the Acting HOF at the time.

Prior to me taking over this investigation, it was concluded that our employees were being untruthful, which I was told would result in one's employment being terminated. I was able to prove otherwise through a thorough investigation. This person was already suffering mental illness and the way the investigation was carried out was nothing short of disgusting.

I would encourage you to discuss this with the person involved, [name omitted] and his formal Leader, [name omitted]. I would also encourage you to talk to Mark Garden, as he was in my investigation team, and Kevin Tully as he was the SEQT Team Leader in charge of the initial investigation.

I am happy to discuss all of the above in detail, including particular sections within the legislation I am referring to.

The report can also be accessed via the following link: [link omitted]

Kind Regards,

Justin Simmonds

Operations Business Partner

Safety, Environment, Quality & Training

- 16 Meanwhile, having received the Wundowie Report from Mr Simmonds on 9 February 2023, a week later Mr Vasiliauskas emailed the Wundowie Report to Mr Hovingh. Mr Hovingh forwarded that email to Mr Shaw at 8.02am on 23 February 2023, saying:

Hey Andy

As discussed, I think the report needs to be validated before it's approved. It also does not answer the question on the SCT form.

Regards

Brett Hovingh

Head of Operational Maintenance

- 17 Mr Shaw responded to Mr Hovingh's email at 8.24am on the same day, 23 February 2023, (around seven hours before Mr Simmonds sent the Issues Email), copying in Ms Nesci, Ms Silvester and Mr Ben Prideaux (who was Operational Senior Workforce Specialist - SEQT), saying:

Hi all,

I'm not happy this has been distributed after requesting it not to leave SEQT. The report still fails to answer if the SCT form is an issue or not and, in my opinion, has wasted valuable resources getting to this point. [emphasis added]

I agree with the functional opportunities to learning and improving incident management but sharing this with the wider business does not provide a unified approach and further hinders are [sic] ability to influence change in an organisation that is trying to mature its safety culture or reduce further incident or injury.

Regards

Andy

- 18 Mr Barbaro asked Mr Landsborough to investigate Mr Simmonds' concerns set out in the Issues Email. On 1 March 2023, Mr Landsborough concluded that there had been no attempt to hide information.

First HR Process

- 19 On 27 February 2023, Western Power stood Mr Simmonds down with pay and sent him a letter (**First Allegation Letter**) setting out two allegations:
1. On 9 February 2023 Mr Simmonds had emailed the draft Wundowie Report to Mr Vasiliauskas contrary to Ms Silvester's instructions; and
 2. On 22 February 2023 Mr Simmonds acted dishonestly by not informing Ms Silvester that he had already distributed the draft Wundowie Report to someone outside the SEQT function.
- 20 In late February and early March 2023, Western Power conducted an investigation and Mr Simmonds provided a response to the two allegations. As part of the investigation in the First HR Process, Western Power also identified performance concerns relating to Mr Simmonds and decided that an action plan should be implemented to address those concerns.
- 21 Having considered Mr Simmonds' response to the allegations, on 14 March 2023 Western Power (through Mr Shaw) found that allegation one was substantiated and allegation two was not. Western Power gave Mr Simmonds a warning in relation to allegation one and put him on a probation period performance improvement plan (**PIP**).
- 22 Mr Simmonds returned to work in his role on 16 March 2023. Mr Shaw decided that Mr Simmonds should report to Mr Steven Armstrong instead of Ms Silvester.

Probation period performance improvement plan

- 23 Following initial meetings with Mr Shaw and others on 8 and 13 March 2023, on 16 March 2023 Mr Simmonds had a performance discussion meeting with Mr Armstrong and Ms Nesci. He was given the PIP document, which he signed.
- 24 After some discussion with Mr Simmonds, Western Power agreed to amend the PIP so that Mr Simmonds no longer had to have his emails or meeting invitations reviewed by others. Mr Simmonds signed the amended PIP document on 17 March 2023.

Second HR Process

- 25 By around 16 March 2023, Western Power considered that Mr Simmonds may have disclosed confidential information to people outside of Western Power.
- 26 On 3 April 2023, Western Power stood Mr Simmonds down with pay and sent him a letter (**Second Allegation Letter**) setting out three allegations:
1. When preparing the draft Wundowie Report, Mr Simmonds asked Mr Joseph Crook, a worker engaged by Shodan Electrical, to send confidential material to Mr Simmonds' personal email address (**Allegation 1**).
 2. On 12 or 13 February 2023, Mr Simmonds shared confidential information with a person identified as 'Claire', believed to be Mr Simmonds' girlfriend, who had no right to access that confidential information (**Allegation 2**).
 3. On 24 occasions between 20 January 2023 and 28 March 2023, Mr Simmonds emailed Western Power's confidential information to his personal email address (**Allegation 3**).
- 27 In April 2023, Western Power conducted an investigation relating to Allegations 1, 2 and 3. Mr Simmonds' solicitor provided a written response and request for further information in relation to the allegations.

Mr Simmonds' grievances

- 28 On 28 March 2023, Mr Simmonds lodged two grievances (**Grievances**) in which he:
- a) appealed against the warning and PIP; and
 - b) raised bullying complaints against Mr Prideaux, Mr Armstrong, Ms Silvester and Ms Nesci.
- 29 Mr Matthew Mercer, Human Resources Business Partner, investigated those matters and drafted a grievance investigation report.
- 30 Mr Simmonds was told at a meeting on 17 April 2023 that Western Power had concluded its investigation into the Grievances, and the Grievances were not substantiated.

Outcome of Second HR Process

31 On 27 April 2023, Western Power sent Mr Simmonds a letter, informing him that all three allegations were substantiated and dismissing him with notice.

Public interest disclosure process

32 On 28 February 2023, after he had been stood down with pay, Mr Simmonds sent a public interest disclosure email (**PID**) about Mr Shaw, Ms Nesci and Ms Silvester to Western Power's public interest disclosure email address.

33 On 3 August 2023 Mr Chris Porteous (Senior Forensic Advisory Specialist) wrote to Mr Simmonds and said:

Dear Mr Simmonds,

I refer to your email dated 2 August 2023 regarding the Public Interest Disclosure notification (**PID Notification**) issued on 28 February 2023, and your subsequent emails of 2 March 2023, 3 March 2023 (6:51am), 3 March 2023 (8:22am) and 3 March 2023 (9:20am). I also refer to my email dated 2 March 2023.

Your substantive PID Notification was detailed in the email dated 28 February 2023 as expanded by your email on 3 March 2023 at 6:51am.

I confirm that the PID Notification was assessed and, due to being vexatious and frivolous, did not require further investigation. This decision was formed on the basis that my assessment of the material and initial inquiries did not identify any instance of misconduct.

With respect to the other matters referenced in your email, I confirm that:

1. the PID Notification is treated confidentially and has remained confidential;
2. I have maintained confidentiality of the PID Notification; and
3. the PID Notification and PID Investigation was not involved in, related to, or relied upon for the purposes of any disciplinary action – these processes were kept independent from each other and at no time impacted the other.

On the basis of the above this matter is considered finalised and closed.

Notwithstanding the completion of this matter, you should note that the confidentiality requirements of the Public Interest Act 2003 continue to apply to you and all other people involved in the disclosure.

Regards

Chris Porteous (MBA)

Senior Forensic Advisory Specialist

Governance & Assurance

Legislative framework

34 This application is the first of its type to be heard under the WHS Act.

35 The objects of the WHS Act are set out in s 3. The WHS Act focusses on securing safety for workers and others in the workplace:

3. Object

- (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by —
 - (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work; and
 - (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and
 - (c) fostering cooperation and consultation between, and providing for the participation of, the following persons in the formulation and implementation of work health and safety standards to current levels of technical knowledge and development and encouraging those persons to take a constructive role in promoting improvements in work health and safety practices —
 - (i) workers;
 - (ii) persons conducting businesses or undertakings;
 - (iii) unions;
 - (iv) employer organisations;
 and
 - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
 - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
 - (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and

- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
 - (h) providing for the formulation of policies, and for the coordination of the administration of laws, relating to work health and safety; and
 - (i) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in the State.
- (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable.

36 Sections 104, 105, 106, 112 and 113 of the WHS Act are relevant to this matter. They provide:

104. Prohibition on discriminatory conduct

- (1) A person must not engage in discriminatory conduct for a prohibited reason.
Penalty for this subsection:
- (a) for an individual, a fine of \$115 000;
 - (b) for a body corporate, a fine of \$570 000.
- (2) A person commits an offence under subsection (1) only if the reason referred to in section 106 was the dominant reason for the discriminatory conduct.

Note for this section:

Civil proceedings may be brought under Division 3 of this Part in relation to discriminatory conduct engaged in for a prohibited reason.

105. What is discriminatory conduct

- (1) For the purposes of this Part, a person engages in *discriminatory conduct* if —
- (a) the person —
 - (i) dismisses a worker; or
 - (ii) terminates a contract for services with a worker; or
 - (iii) puts a worker to the worker's detriment in the engagement of the worker; or
 - (iv) alters the position of a worker to the worker's detriment;
 or
 - (b) the person —
 - (i) refuses or fails to offer to engage a prospective worker; or
 - (ii) treats a prospective worker less favourably than another prospective worker would be treated in offering terms of engagement;
 or
 - (c) the person terminates a commercial arrangement with another person; or
 - (d) the person refuses or fails to enter into a commercial arrangement with another person.
- (2) For the purposes of this Part, a person also engages in *discriminatory conduct* if the person organises to take any action referred to in subsection (1) or threatens to organise or take that action.

106. What is a prohibited reason

Conduct referred to in section 105 is engaged in for a *prohibited reason* if it is engaged in because the worker or prospective worker or the person referred to in section 105(1)(c) or (d) (as the case requires) —

- (a) is, has been or proposes to be a health and safety representative or a member of a health and safety committee; or
- (b) undertakes, has undertaken or proposes to undertake another role under this Act; or
- (c) exercises a power or performs a function, has exercised a power or performed a function or proposes to exercise a power or perform a function as a health and safety representative or as a member of a health and safety committee; or
- (d) exercises, has exercised or proposes to exercise a power under this Act or exercises, has exercised or proposes to exercise a power under this Act in a particular way; or
- (e) performs, has performed or proposes to perform a function under this Act or performs, has performed or proposes to perform a function under this Act in a particular way; or
- (f) refrains from, has refrained from or proposes to refrain from exercising a power or performing a function under this Act or refrains from, has refrained from or proposes to refrain from exercising a power or performing a function under this Act in a particular way; or

- (g) assists or has assisted or proposes to assist, or gives or has given or proposes to give any information to, any person exercising a power or performing a function under this Act; or
- (h) raises or has raised or proposes to raise an issue or concern about work health and safety with —
 - (i) the person conducting a business or undertaking; or
 - (ii) an inspector; or
 - (iii) a holder of an IR entry authority; or
 - (iv) a health and safety representative; or
 - (v) a member of a health and safety committee; or
 - (vi) another worker; or
 - (vii) any other person who has a duty under this Act in relation to the matter; or
 - (viii) any other person exercising a power or performing a function under this Act;
- or
- (i) is involved in, has been involved in or proposes to be involved in resolving a work health and safety issue under this Act; or
- (j) is taking action, has taken action or proposes to take action to seek compliance by any person with any duty or obligation under this Act.

...

112. Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct

- (1) An eligible person may apply to the Tribunal for an order under this section.
- (2) The Tribunal may make 1 or more of the orders set out in subsection (3) in relation to a person who has —
 - (a) engaged in discriminatory conduct for a prohibited reason; or
 - (b) requested, instructed, induced, encouraged, authorised or assisted another person to engage in discriminatory conduct for a prohibited reason; or
 - (c) contravened section 108.
- (3) For the purposes of subsection (2), the orders that the Tribunal may make are —
 - (a) in the case of conduct referred to in subsection (2)(a) or (b), an order that the person pay (within a specified period) the compensation to the person who was the subject of the discriminatory conduct that the Tribunal considers appropriate; or
 - (b) in the case of conduct referred to in subsection (2)(a) in relation to a worker who was or is an employee or prospective employee, an order that —
 - (i) the worker be reinstated or re-employed in their former position or, if that position is not available, in a similar position; or
 - (ii) the prospective worker be employed in the position for which they had applied or a similar position;
 - or
 - (c) any other order that the Tribunal considers appropriate.
- (4) For the purposes of this section, a person may be found to have engaged in discriminatory conduct for a prohibited reason only if a reason referred to in section 106 was a substantial reason for the conduct.
- (5) Nothing in this section is to be construed as limiting any other power of the Tribunal.
- (6) For the purposes of this section, each of the following is an *eligible person* —
 - (a) a person affected by the contravention;
 - (b) a person authorised as a representative by a person referred to in paragraph (a).

113. Procedure for civil actions for discriminatory conduct

- (1) A proceeding brought under section 112 must be commenced not more than 1 year after the date on which the applicant knew or ought to have known that the cause of action accrued.
- (2) In a proceeding under section 112 in relation to conduct referred to in section 112(2)(a) or (b), if a prohibited reason is alleged for discriminatory conduct, that reason is presumed to be a substantial reason for that conduct unless the defendant proves, on the balance of probabilities, that the reason was not a substantial reason for the conduct.
- (3) It is a defence to a proceeding under section 112 in relation to conduct referred to in section 112(2)(a) or (b) if the defendant proves that —
 - (a) the conduct was reasonable in the circumstances; and

- (b) a substantial reason for the conduct was to comply with the requirements of this Act or a corresponding WHS law.
- (4) To avoid doubt, the burden of proof on the defendant under subsections (2) and (3) is a legal burden of proof.

Conduct of the proceedings

- 37 Mr Simmonds was unrepresented at the hearing. He had been represented by two different lawyers earlier in the proceedings.
- 38 The Tribunal must assist an unrepresented party as necessary to ensure a fair and just trial, while respecting the rights of the opposing party. Throughout the course of his application before the Tribunal, Mr Simmonds frequently sought and received procedural help from my chambers. At the hearing, I repeatedly explained the order of proceedings, summarised the matters in issue and accommodated Mr Simmonds' frequent requests for adjournments or the re-ordering of proceedings to allow him more time to prepare. I explained to Mr Simmonds that if he wanted me to place weight on a document, he must give evidence about that document. I explained to Mr Simmonds the rule in *Browne v Dunn* (1893) 6 R 67, emphasising many times that he must challenge the evidence of Western Power's witnesses in cross-examination where he did not agree with their evidence or his case contradicted their evidence. Mr Simmonds said that he understood that.
- 39 I acknowledge the exemplary conduct of Western Power's counsel. Ms Millar conducted Western Power's case in a way that was of real assistance to the Tribunal.
- 40 Contrary to views expressed by Mr Simmonds, I consider that Mr Simmonds received considerably more assistance than is usual. It was certainly sufficient to ensure a fair and just trial.

Witnesses

- 41 Mr Simmonds gave evidence in support of his case. Although Mr Simmonds filed a very long, detailed outline of evidence and large number of documents, all of which he was able to use during his oral evidence to prompt his memory and assist him to give evidence, ultimately Mr Simmonds canvassed very little of that material in his oral evidence despite many reminders about the opportunity to do so.
- 42 Mr Simmonds continuously focussed on irrelevant matters. Taken as a whole, I found Mr Simmonds' testimony to be inconsistent and incomplete. I approach it with considerable caution. Though in no way an exhaustive set of examples, it is useful to highlight the following to show some of the exchanges that underpin my concerns about Mr Simmonds' evidence:
- a) Mr Simmonds consistently gave inaudible responses in his testimony and had to be asked to answer audibly;
 - b) Mr Simmonds had to be prompted many times to answer questions in cross-examination;
 - c) I had to ask Mr Simmonds four times when and how he told Ms Silvester that he had sent the Wundowie Report to Mr Vasiliauskas;
 - d) Mr Simmonds's evidence about what he showed his then girlfriend of the Wundowie Report, and how, was inconsistent with his explanation about that matter in his response to the Second HR Process. His examination-in-chief about that matter also differed from his evidence in cross-examination;
 - e) Mr Simmonds' explanation of why the version of the Wundowie Report that he showed his then girlfriend was 'redacted' was simply not believable; and
 - f) Mr Simmonds changed his story multiple times about why he had asked Mr Crook, (the worker engaged by Shodan Electrical), to send test sheets to his personal email address, and about when, or whether, those test sheets came through to him.
- 43 Mr Simmonds was unhelpfully argumentative with counsel and would not make concessions when they were plainly due. He offered strained, convoluted interpretations about matters to fit his case. Mr Simmonds' evidence routinely changed to fit his narrative at that time. Overall Mr Simmonds consistently attempted to insist, through elaborate explanation, that particular conduct was acceptable when it plainly was not.
- 44 During his evidence-in-chief about the allegations relating to confidentiality, Mr Simmonds said:

SIMMONDS, MR: But getting back to the point with you know when – when there's certain rules that weren't clear to me – like confidentiality, I don't believe is really set out in the contract – in the contract very well. Hence the reason why my lawyer tried to get more clarification on it. **When I mentioned that my ex, Claire, she had read part of the report, that was sort of a little bit of a lie anyway.** I mean she's Vivien Yap's protégée. She doesn't really take her eyes off the screen. **And I read her the executive summary.** Regardless, I said that to - in the team's message to Sophie Silvester. And she replied with a thumbs up insinuating that there's nothing wrong with that. I do – I did reference that.

EMMANUEL C: Is there a Claire within the SEQT team?

SIMMONDS, MR: No, it was my ex-girlfriend who I lived with.

EMMANUEL C: No, I understand that that's who you showed it to and it seemed that that's who Western Power understood you showed it to. What I'm asking is at the time there wasn't somebody called Claire within SEQT, was there?

SIMMONDS, MR: No. Also we discussed that verbally because she told me that she always gets Ryan to read her stuff. It's something that our safety nerds always do.

...

EMMANUEL C: So I can't see which email you're talking about. But are you just saying generally in this bundle - - - ?

SIMMONDS, MR: I think - - -

EMMANUEL C: - - - the ones that are headed with Aiden O'Hara - - - ?

SIMMONDS, MR: It's in - and then - - -

EMMANUEL C: It's - - - ?

SIMMONDS, MR: So the first one that says enclosure 2 is Microsoft Teams message. I don't quite really understand what - what that one is to be honest. But - sorry, that's what it is. That's - that's evidence to say Claire read it to see if makes sense and she gets it. So that was my ex-girlfriend.

- 45 Counsel for Western Power later cross-examined Mr Simmonds about this, and a letter that Mr Simmonds' solicitors sent to Western Power during the Second HR Process, which said, 'Mr Simmonds has instructed us that his girlfriend was presented with a redacted version of the Wundowie Report for the purposes of proofreading only':

MILLAR, MS: So in that message, you've told Sophie that Claire has read the report and she gets it, is that right, that she read the report and understood - - -?

SIMMONDS, MR: No, I read her the executive summary, um, to see if it flowed nicely and if it made sense to an outside person what the - the thought was going to entail.

MILLAR, MS: Okay. So we're going to stop you there because - so you're saying you read it out loud, is that what you're saying? She didn't actually read the document?

SIMMONDS, MR: Yeah. I showed her the, um, the flowchart that I was proud of - - -

MILLAR, MS: Okay?

SIMMONDS, MR: - - - physically.

MILLAR, MS: So that's not the executive summary - - -?

SIMMONDS, MR: Yeah.

MILLAR, MS: - - - that's something else as well as the executive summary?

SIMMONDS, MR: Yeah, I was getting to that. Yeah.

MILLAR, MS: Well, you answered the Commissioner's questions before as to what was looked at and you said that Claire - you read the summary out loud to Claire is all that happened?

SIMMONDS, MR: I didn't - I don't recall saying that that was all that happened, I mean, I don't - - -

MILLAR, MS: Okay. Why don't you tell us all that was provided to Claire?

SIMMONDS, MR: I read the executive summary to Claire, um, she said it's in a good - and made sense and was written well and she - I showed her the, um, I think one of the - the flow charts, the - I showed her the - the easy one for her to grasp the human - the - the human factor as the root cause as - at depression, um, and asked her if it - if it made sense the - the flow of how it, um, happened as well as if it looks like it's not blaming anyone in particular, as in the formal letter because he didn't notice it, um, because that's not what I wanted to convey. So I wanted to see from someone without Sophie's knowledge as to what they thought of that flow - flow - the process flow.

MILLAR, MS: So there's two processes by which you share information with Claire from the report. One is that you read the executive summary out loud to her - - -?

SIMMONDS, MR: Mm hmm.

MILLAR, MS: - - - and you said something in your evidence-in-chief about she never takes her eyes off the screen, so she read that with you, is that what you meant?

SIMMONDS, MR: No. I mean that she was lying on the bed with her laptop open, looking through RP data or realestate.com or any of her other things, because she's Vivian Yap's protégé and she doesn't really take a break.

...

MILLAR, MS: So you had the hard copy and you gave it to her to look at the - the diagram?

SIMMONDS, MR: No, I opened up the page to the - I think it's the first process flow of, um, what - what I explained, and I held it to her and then showed her and then I mapped it out with my finger and showed her what it meant.

MILLAR, MS: Okay. And so this is a document that you had printed out multiple copies of or just one copy?

SIMMONDS, MR: Um, knowing what I'm like, I probably would have printed it on more than one occasion, um - - -

MILLAR, MS: But when - I'm talking about the occasion when you were speaking with Claire about it, did you have multiple copies with you?

SIMMONDS, MR: No.

MILLAR, MS: So you had one copy and you handed it to her to look at page 493?

SIMMONDS, MR: No, I didn't hand it to her, as I said, I held it and then show - explained it, "Do you - does this make sense?" And then I showed her with my finger of how it makes sense because it's got sort of a starting point, which is a root cause and then another root cause that comes in from another way.

MILLAR, MS: And were you using your hand to block certain portions so she couldn't see them, is that what you're saying?

SIMMONDS, MR: No. It was only on this page, so the only other things that I could block would be, um - - -

MILLAR, MS: I'm not asking what you could block. I'm asking were you blocking material out, or were you using your finger to indicate it?

SIMMONDS, MR: Using my finger to indicate.

MILLAR, MS: I understand? Thank you. So if we turn up page 633 - if we move away, and we're going to come back to this report, but if we go to page 633; it's in the same volume. This was a letter sent by your solicitors to Western Power, yes? I'm sorry. You're not there. yet. I apologise?-

...

EMMANUEL C: So, is that a letter from your legal representative at the time?

SIMMONDS, MR: Yeah.

MILLAR, MS: So - and was this sent on your instruction?

SIMMONDS, MR: Mm.

MILLAR, MS: I'm going to get you to stop reading for a second, just listen to the question. Was this sent on your instruction?

SIMMONDS, MR: Um, depends what you call, "Instruction." I just said that he would - he just said that he would respond to it because he needed more information.

...

MILLAR, MS: - - - it says about halfway down - well, three-quarters of the way down:

"Mr Simmonds has instructed us that Ms O'Meara" -

- that's Claire, yes?

SIMMONDS, MR: Mm hmm.

MILLAR, MS: "Was presented with a redacted version of the Wundowie report for the purposes of proofreading only."

SIMMONDS, MR: Mm hmm.

MILLAR, MS: So that doesn't align with what you've just said?

SIMMONDS, MR: If by - - -

MILLAR, MS: Can you explain that?

SIMMONDS, MR: Yeah, it doesn't in my mind, because a redacted version to me means a -- a version that's not complete, so I didn't let her read the whole thing I read to her - I - I say I read a lot of books, but I don't read a lot of books. I listen to audio books, but I call it the same thing. When I say I let her read it, I read it to her, and then I showed her a page, and in my mind, that means it is a redacted version of that report.

MILLAR, MS: So the next sentence says:

"A telephone conversation between Mr John of our firm. **And Ms O'Meara confirms that the version she viewed was indeed redacted, but does - she does not recall any specifics.**

SIMMONDS, MR: **To be honest with that one, she doesn't recall any specifics. She actually said that she doesn't even remember seeing the report or listening to the report.**

MILLAR, MS: But the part I'm interested in it is says:

"The version she viewed was indeed redacted."

So that does sound as if there were - at least you informed your solicitor - solicitor that there was a redacted version of the report?

SIMMONDS, MR: Yeah, which is me showing her the executive summary and that one flow chart, which is, in my mind, a redacted version of the report because it's only two pages of said report.

MILLAR, MS: Okay. So can you explain to me the final sentence:

"Mr Simmonds has also instructed our firm that this redacted version has since been destroyed."

SIMMONDS, MR: The version that I read - I don't keep a book with all of my prints that I review and mark up and things. That version that I read off the page to her - - -

MILLAR, MS: Yes?

SIMMONDS, MR: - - - is probably - it's in my waste - Tamala Park, sorry, at the moment,

EMMANUEL C: What does that mean?

SIMMONDS, MR: The tip.

MILLAR, MS: So you're saying you destroyed it?

SIMMONDS, MR: Yeah. I didn't keep any of my, um, the draft report that I used as writing notes.

MILLAR, MS: Mr Simmonds, I'm going to put it to you that you've not been honest with this Tribunal about this matter?

SIMMONDS, MR: I'll put it to you that you're wrong.

MILLAR, MS: And I want to ask if there's anything else that you haven't been truthful about?

SIMMONDS, MR: I've been truthful the whole time.

- 46 On the topic of why and how Mr Simmonds asked Mr Crook to send him test sheets, in his examination-in-chief, Mr Simmonds said:

SIMMONDS, MR: Sorry. So the very first one apparently was the trigger for this – was asking Joseph Crook, who was the electrician, who was sort of key to the identifying the – the incident, the facts of the incident, he worked on the – the customer side that day... So I spoke to him over the phone and I asked him if he could send me his test sheets which are his own private test sheets that his company owns for work that he was doing for his own customer, not Western Power. So he had the choice whether he would like to send me documents or not.

I was working from home like I did quite often and to get this big job done. **And my Internet, it wasn't – like I wasn't getting emails. It ended up coming but I think like 20 or 30 minutes later.** But when I was – I – I messaged him and asked him to send it to my personal email address because at my house I have a good office with a printer and all that sort of stuff.

EMMANUEL C: Sorry, are you saying that it didn't come through to your work address until half an hour later?

SIMMONDS, MR: Yeah, and I wanted to get this – I worked a lot of hours on this and once I – also once I was able to prove that the two tests were done... The information that I was looking for was whether he did any tests to ensure the polarity was correct at the installation to make sure that anything connected to the MEN, multiple earthed neutral, like taps and pipes that sort of thing, make sure that that doesn't become energised which is actually what happened. It energised the – the house about a kilometre down the road.

EMMANUEL C: That's all right. I probably don't need to get into that level of detail?

SIMMONDS, MR: Yeah, so – so what I'm saying is that that's not confidential information.

EMMANUEL C: But was it fair to say it's information you wanted for the purposes of your investigation that you were doing on behalf of Western Power?

SIMMONDS, MR: Correct.

EMMANUEL C: Okay. And am I understanding right? In effect you're saying you asked for him to send it to your personal address because you were having Internet issues while working at home?

SIMMONDS, MR: Mm.

EMMANUEL C: Is that the gist of it?

SIMMONDS, MR: Correct.

- 47 However in cross-examination, he said:

MILLAR, MS: You can see that that's your submissions, tab 6 and this is from the middle of your submissions, and you're explaining at 37 there, the process that you went through to obtain test sheets from Mr Crook and you explain at 37(d) that you:

"Requested Crook to provide these test sheets to my Hotmail address because the information technology systems were defective at the time."

SIMMONDS, MR: Yeah.

MILLAR, MS: Well, I mean, were they defective at the time because earlier you said that he sent them through the system and they came to you, they just came to you slightly delayed?

SIMMONDS, MR: Depends on what you think, "Defective" is. In this day and age, I believe that is defective. I mean, I wanted it to come through then and there. **I don't know if it even did come through that day, to be honest.**

MILLAR, MS: I see. **Well, you said earlier that they came through half an hour later?**

SIMMONDS, MR: Yeah, it would have been at least half an hour later depending - we can check the phone records to see when we spoke - I spoke to him and then how long it was until I asked him in a message that, um, to send them and that would show the time frame, the minimum time frame that we know for a fact that it didn't get sent to me.

- 48 Later, Western Power further cross-examined Mr Simmonds about his different explanations for when, how and why he received the test sheets from Mr Crook. Mr Simmonds complained about being 'scrutinised':

MILLAR, MS: This is an email exchange - well, from the second half of 1123 onwards, it's an email exchange between yourself and Mr Armstrong. On page 1124, there's a clip of the text messages exchanged between you and Mr Shodan [sic], which we were talking about earlier. On the right hand side, those messages in green, they're the ones sent from you? I'll get you to stop reading them for a second and just listen to the question?

SIMMONDS, MR: Yeah, I've sent them. Yeah.

MILLAR, MS: And in the first message, you say:

"Thanks, mate. It never came through. Can you please send to my personal email? WP blocks a lot."

SIMMONDS, MR: Yeah.

MILLAR, MS: So that's different to what you said before, which is that you got him to send it through because it's faster?

SIMMONDS, MR: Well, no, I - oh, God. Western Power blocks a lot so it wouldn't have come to my inbox. So that's the explanation for it not coming faster than a carrier pigeon. So when I say, "Western Power blocks a lot," I'm thinking because he's an external person, that it would never made it to me, but all - - -

MILLAR, MS: **But it did ultimately come through?**

SIMMONDS, MR: I believe so, yes.

MILLAR, MS: **Half an hour later?**

SIMMONDS, MR: I, I can't actually - considering I'm going to be, like, um, scrutinised over - - -

MILLAR, MS: Cross-examined?

SIMMONDS, MR: - - - the factual - factually - I was, um, **I don't know when I got it, and I don't even recall if I got it. I'm pretty sure that I did.**

MILLAR, MS: Okay. And Mr Simmonds, you're going to have to be careful because what you said to the Tribunal earlier was that you received it half an hour later?

SIMMONDS, MR: I also then said that I don't recall the time and that if you check the phone records of the - - -

MILLAR, MS: No, that's what you said to me in cross-examination. Prior to that in evidence-in-chief, you said to the Tribunal that it came half an hour or so later. In any case, let's move back to page 481 - - -

EMMANUEL C: The transcript will bear out what you said. That's the respondent's recollection?

SIMMONDS, MR: Yeah, but I - - -

EMMANUEL C: I thought you did say that but - - -?

SIMMONDS, MR: I might have said it but - - -

EMMANUEL C: - - - it will be in the transcript?

SIMMONDS, MR: - - - the fact that I followed up with what happened; I mean, I'm trying to recall a traumatising event from over a year ago. So I have clarified that, um, when I was trying to work out whether I - I'd got it or not, I said that it had to have been the time between, um, when I met - after I messaged him because that's the amount of time that I obviously hadn't had it yet. I mean, what benefit would I get for him to send it to my email address instead of my Western Power address when I can get it either way, it's coming. It's - - -

MILLAR, MS: Well, I'm not going to argue with you, Mr Simmonds, but it isn't a question of benefit. If you can turn up - - - ?

SIMMONDS, MR: Okay.

- 49 Western Power called four witnesses. Mr Simmonds did not cross-examine Mr Mercer. The evidence of Mr Shaw, Ms Royston and Ms Nesci was not undermined in cross-examination. Although Mr Simmonds focussed on it, Ms Nesci's safety, operational and technical knowledge is not in issue in these proceedings and nor were other irrelevant matters. Ms Royston and Ms Nesci presented as credible, reliable witnesses. All of Western Power's witnesses' evidence was cogent, consistent and credible. Mr Shaw was a particularly impressive witness. He was forthcoming and made concessions when they were due. Mr Shaw remained patient and focussed during a lengthy and often disjointed cross-examination.
- 50 I accept the evidence of Mr Shaw, Ms Royston, Ms Nesci and Mr Mercer.
- 51 Broadly, Mr Simmonds' testimony was not particularly effective in establishing the points he needed to make to pursue his claim or to successfully counter Western Power's case. His testimony did not meaningfully impact on the case Western Power established.

Preliminary issue – recordings

- 52 During the hearing Mr Simmonds sought to tender five audio recordings. Eventually he only pressed for two, being recordings of:
- a) The performance discussion meeting on 16 March 2023 (see [23] above) (**Recording 1**), which Mr Simmonds said shows that Ms Nesci lacks experience and knowledge, and defers to Mr Prideaux;
 - b) Mr Simmonds' discussion with Mr Robert Mitchell (Human Resources Business Partner) on around 17 March 2023 (**Recording 2**), which he said shows Mr Mitchell considered that:
 - i) Ms Silvester and Ms Nesci did not handle the disciplinary process well;
 - ii) the PIP had flaws; and
 - iii) Western Power's process of handling grievances would be different to what actually happened in Mr Simmonds' case.
- 53 Essentially Mr Simmonds argued that Western Power had a toxic culture and the reason he made Recordings 1 and 2 was to protect himself against injustice. He said he had paid 'an audio person' to 'clean up' the recordings.
- 54 Having undergone an unspecified 'cleaning up' process casts doubt on the integrity of Recordings 1 and 2. But even if that were not the case, I decided that Recordings 1 and 2 would not be admitted in to evidence.
- 55 The Tribunal is not bound by any rules of evidence but may inform itself on any matter in such a way as it thinks just: s 26(1)(b) of the *Industrial Relations Act 1979* (WA) (**IR Act**) by virtue of cl 29(1) of Schedule 1 of the WHS Act.

- 56 Fundamentally, I did not consider that Recordings 1 and 2 were relevant or necessary. Ms Nesci, Mr Armstrong and Mr Mitchell were not the relevant decision-makers in relation to the alleged discriminatory conduct. Recordings 1 and 2 did not go to the question of whether the decision-makers had impermissible reasons in their mind when they engaged in the discriminatory conduct. In any event, Mr Simmonds was able to fairly prosecute his claim without reliance on the recordings. He was able to cross-examine the relevant decision-makers and Ms Nesci. Mr Mitchell's view about the matters set out at [52b] above is not relevant.
- 57 Further, the recordings appeared to have been made contrary to the *Surveillance Devices Act 1998* (WA). The regime under that Act expressly prohibits covert recordings of private conversations except in limited circumstances. Mr Simmonds made Recordings 1 and 2 without the knowledge or consent of those he recorded. I was not persuaded that the recordings were reasonably necessary for the protection of Mr Simmonds' lawful interests.
- 58 In any event, in circumstances where:
- a) the party seeking to deploy and rely on the recording of a private conversation deliberately made the recording and was aware during the conversation that the conversation was being recorded; and
 - b) the other party or parties to the recorded conversation were not aware that the conversation was being recorded,

I considered that there would need to be a compelling reason why such a covert recording should be admitted. There is otherwise something inherently unfair about being able to deploy and rely on such a recording in support of one's case.

- 59 In the circumstances of this matter, I concluded that the Tribunal could fairly hear and determine application WHST 8 of 2023 without listening to the covert recordings. I considered Recordings 1 and 2 were not relevant and that, at a minimum, it would not be just or necessary to admit them in to evidence. In my view, to allow reliance on Recordings 1 and 2 would also be contrary to the Tribunal's obligation to act in accordance with s 26(1)(a) of the IR Act. For these reasons I ordered that Recordings 1 and 2 would not be admitted in to evidence.

Preliminary issue – the 'altered' email

- 60 It is not in dispute that when Ms Silvester sent to Mr Simmonds the email set out at [10] above, the last paragraph said: 'This will be **our** best chance to get it across the line as he needs to approve before it can leave SEQT' (emphasis added), but when Ms Silvester forwarded that email to Ms Nesci, the line read 'This will be **your** best chance to get it across the line as he needs to approve before it can leave SEQT' (emphasis added).
- 61 It is perhaps unsurprising that Mr Simmonds places importance on this. But how the email came to be altered is not relevant to these proceedings, given that:
- a) Western Power does not dispute that the word 'our' became 'your' in the forwarded email;
 - b) Ms Silvester was not the decision-maker in relation to the PIP, warning or dismissal;
 - c) Ms Silvester is no longer employed by Western Power and was not called as a witness by either party; and
 - d) whether the email said 'our best chance' or 'your best chance' does not change the clear direction that the Wundowie Report needed to be approved by Mr Shaw before it could leave SEQT.

Did Mr Simmonds raise an issue or concern about work health and safety?

- 62 In his amended application, examination in chief and closing submissions, Mr Simmonds says that he raised an issue or concern about work health and safety by sending the Issues Email.
- 63 I accept (and Western Power did not contest) that Mr Simmonds tried to raise an issue or concern about work health and safety when he sent the Issues Email.
- 64 In his opening submissions, Mr Simmonds argued that he also raised an issue or concern about work health and safety by sending the Wundowie Report to Mr Vasiliauskas. That matter was not part of Mr Simmonds' amended application and therefore it is not part of his case. But even if Mr Simmonds attempted to raise an issue or concern by sending the Wundowie Report to Mr Vasiliauskas, ultimately I am not satisfied that the PIP, dismissal or the warning were for a prohibited reason under the WHS Act.

Did Western Power engage in discriminatory conduct?

- 65 It is not in dispute that Western Power gave Mr Simmonds a warning, put him on the PIP and dismissed him.
- 66 Although at the hearing Mr Simmonds sought to make submissions about a broad range of discriminatory conduct, he is limited to the discriminatory conduct set out in his amended application. There, Mr Simmonds says that the discriminatory conduct was dismissal and altering his position to his detriment on 16 March 2023 by putting him on a performance management plan that required him not to work from home, required his work to be reviewed by Mr Prideaux, Ms Nesci and Mr Armstrong, including his emails, and required him to do daily electronic timesheets and change his start times.
- 67 I am satisfied, and Western Power concedes, that the dismissal amounts to discriminatory conduct as defined under the WHS Act.
- 68 The parties disagree about whether the PIP is discriminatory conduct. It is clear from analogous case law arising in the context of general protections claims made under the *Fair Work Act 2009* (Cth) that the question of whether a performance improvement plan is discriminatory conduct is a heavily factually-dependent question: *Humphreys J in Chambers v Commonwealth of Australia (Bureau of Meteorology)* [2024] FedCFamC2G 100.
- 69 Although it was not part of Mr Simmonds' amended application, the parties proceeded on the basis that the warning formed part of the alleged discriminatory conduct. For that reason I have addressed the warning in my reasons that follow.

- 70 Mr Simmonds did not put to Western Power's witnesses or submit that the expectations in the PIP meaningfully involved doing other than performing the requirements of his role.
- 71 Western Power says that while a performance improvement plan could be discriminatory conduct, here the PIP was not discriminatory conduct.
- 72 In my view, the PIP did not alter Mr Simmonds' position to his detriment. Rather, it sought to support and guide Mr Simmonds about Western Power's expectations of his performance during probation. In the circumstances of this matter, I am not persuaded that the PIP amounted to discriminatory conduct because:
- a) Mr Simmonds was a probationary employee and I accept that Western Power had legitimate concerns in relation to Mr Simmonds' conduct. In particular:
 - i) that Mr Simmonds sent the Wundowie Report outside of SEQT despite Ms Nesci's instruction not to do so (see [12] and [14] above) until Mr Shaw had approved it;
 - ii) Mr Simmonds' obstinate, antagonistic approach and resistance to following reasonable instructions; and
 - iii) Mr Simmonds' attitude and approach at the meeting on 8 March 2023.
 - b) I accept that the expectations set out in the PIP were essentially to perform the requirements of Mr Simmonds' role. Mr Simmonds did not identify how the PIP required him to do other than perform his role.
 - c) Western Power amended the PIP in response to Mr Simmonds' views. Given Ms Nesci's evidence that Business Partners did not have an automatic right to work from home, I am not persuaded that Mr Simmonds had an unfettered right to work from home before the PIP was put in place. In any event, it was reasonable for Western Power to decide that Mr Simmonds required close supervision, given his conduct and approach during his first few months of employment in 2023.

Was any discriminatory conduct engaged in for a prohibited reason?

- 73 Mr Simmonds says: '[T]his is all from me doing a good job and, um, finding the truth and sharing a report with a shared duty holder on his request, allowing for the potential prevention of fatalities.'
- 74 Mr Simmonds alleges that the prohibited reason in s 106(h) of the WHS Act is the reason for the warning, PIP and his dismissal. It follows that in accordance with s 113(2) of the WHS Act, that prohibited reason is presumed to be a substantial reason for that discriminatory conduct, unless Western Power proves on the balance of probabilities that the prohibited reason in s 106(h) of the WHS Act was not a substantial reason for the conduct.
- 75 As I go on to explain, I consider that Western Power has discharged its onus of proving that a prohibited reason was not a substantial reason for the impugned conduct.

The warning and the PIP

- 76 The question in this matter is not whether it was fair for Western Power to give Mr Simmonds a warning and the PIP, but whether a substantial reason for why Western Power gave Mr Simmonds the warning and the PIP was because he raised an issue or concern about work health and safety. That necessarily involves inquiring into the state of mind of the decision-maker. For the reasons the follow, I am satisfied on the balance of probabilities that Western Power did not give Mr Simmonds the warning or the PIP for a prohibited reason.
- 77 Mr Simmonds gave evidence to the effect that he needed to send the Wundowie Report to Mr Vasiliauskas in order to comply with his consultation obligations under the WHS Act, but that the warning and the PIP were a punishment for doing so.
- 78 Mr Shaw's evidence that he was the decision-maker for the warning and the PIP was unchallenged. He gave direct, credible evidence about his reasons for engaging in that conduct, which was preferable to the evidence Mr Simmonds relied on in support of his case (see *Board of Bendigo Regional Institute of Technical and Further Education v Barclay & Anor* [2012] HCA 32 at [44] – [45] per French CJ and Crennan J). The effect of Mr Shaw's evidence was that he did not act as he did toward Mr Simmonds for any prohibited reason.
- 79 Even if I am wrong and the warning and the PIP amount to discriminatory conduct, I am satisfied that a prohibited reason was not a substantial reason (or any part of the reason) for the warning or the PIP.
- 80 It is plain from the email Ms Silvester sent to Mr Simmonds (set out at [10] above) that Mr Simmonds was directed on 8 February 2023 not to distribute the Wundowie Report outside of SEQT before it was approved by Mr Shaw. Mr Simmonds claimed he understood that 'Andy needs to approve it before it leaves SEQT' meant 'it couldn't leave SEQT to go to the regulator but it could leave SEQT for review by other people without Andy's approval.' Such an understanding is at best very misconceived and it does not change the clear direction.
- 81 Further, Mr Simmonds' evidence about Ms Silvester 'being fine' with him sending the Wundowie Report to Mr Vasiliauskas really amounted to him saying that he told Ms Silvester on the phone he wanted to send the report to Mr Vasiliauskas and Ms Silvester said that she did not have the time to talk about it. Nothing in the testimony or documents leads to the finding that Ms Silvester authorised Mr Simmonds to send the Wundowie Report outside SEQT before Mr Shaw had approved it.
- 82 Mr Simmonds did not:
- a) challenge Mr Shaw about his reasons for giving Mr Simmonds the warning or putting him on the PIP; or
 - b) put to Mr Shaw that he gave Mr Simmonds the warning and put him on the PIP for a prohibited reason.
- 83 I do not consider that Western Power gave Mr Simmonds the warning and put him on the PIP for raising an issue or concern about work health and safety.

- 84 Ultimately, I find that Western Power gave Mr Simmonds the warning and put him on the PIP because of Mr Shaw's understandable concerns about Mr Simmonds' conduct and performance.
- 85 Specifically, Mr Simmonds sent the Wundowie Report outside SEQT despite Ms Silvester's email set out at [10] above. Mr Shaw's email at [17] above, sent hours before Mr Simmonds sent the Issues Email, also supports Mr Shaw's evidence about his concerns about the negative cultural impact that the draft Wundowie Report could have on other teams within Western Power (such as the large Operations team) if it left SEQT before being approved by Mr Shaw. That Ms Silvester telephoned Mr Simmonds to invite him to the meeting on 27 February 2023 before Mr Simmonds sent the Issues Email does as well. It is clear that Mr Shaw did not want a report with any commentary within it going outside SEQT before he had had a chance to review and approve the report. Mr Shaw rightly conceded that according to the Incident Management Procedure, as Operations East Manager – Operational Maintenance, Mr Vasiliauskas had a role in supporting Mr Simmonds in the investigation process. Mr Shaw accepted that ordinarily one would expect that the investigation report could be shared with Mr Vasiliauskas. But the effect of Mr Shaw's evidence was that such an expectation did not hold given that Mr Simmonds had been directed on 8 February 2023 not to distribute the Wundowie Report before it was approved by Mr Shaw. I accept Mr Shaw's evidence that it was irrelevant whether Mr Simmonds had shared a version of the Wundowie Report without derogatory comments, because the direction was not to share the report before it was approved by Mr Shaw.
- 86 I accept Mr Shaw's evidence that he was concerned about the Wundowie Report being available to the Head of Operations without Mr Shaw having signed off on it. That led to the direction that the Wundowie Report was not to leave SEQT before Mr Shaw had approved it. Such a direction was reasonable in the circumstances.
- 87 I have considered the fact that the calendar invitation sent to Mr Simmonds on 24 February 2023 referred to the Issues Email: '[T]he email you sent yesterday afternoon to members of the executive team following a direction also gives me further cause for concern'. However, the Issues Email did not form part of the allegations in the First HR Process. Moreover, it is clear that Mr Shaw's concerns about Mr Simmonds' conduct arose before Mr Simmonds sent the Issues Email, and Mr Shaw's concerns were not that Mr Simmonds was raising an issue or concern in relation to work health and safety.
- 88 I accept Ms Nesci's evidence that she had tried to deal with Mr Simmonds' performance informally without success. It is unsurprising that Western Power decided to institute the First HR Process.
- 89 I accept Mr Shaw's evidence that Mr Simmonds' approach at the meeting on 8 March 2023 showed that he lacked insight into why his approach and conduct was problematic.
- 90 Further, Mr Simmonds' refusal to 'split' parts of the Wundowie Report by separating the information in it into different documents was plainly unreasonable, as was his insistence in the Issues Email that 'all officers see unredacted investigation reports'. While I accept that was his view, ultimately such a matter was not up to Mr Simmonds.
- 91 I accept Mr Shaw's evidence that although he considered allegation one in the First Allegation Letter was substantiated, at first Mr Shaw did not intend to impose any formal disciplinary action. It was Mr Simmonds' unnecessarily antagonistic approach and lack of remorse at the meeting on 8 March 2023 (including Mr Simmonds' remarks that he 'would be the next Erin Brockovich' and 'would do the same thing again') that led Mr Shaw to decide that the warning and the PIP were necessary.
- 92 Mr Shaw gave evidence that ordinarily Ms Silvester would have conducted the disciplinary process, as Mr Simmonds' line manager. Mr Shaw said that he decided that in this case it would be more appropriate for him to review the human resources investigation and make any decisions relating to disciplinary proceedings. This is because on around 23 February 2023, Ms Silvester had told Mr Shaw that she felt threatened and intimidated by Mr Simmonds' aggressive and dominant behaviour toward her. Mr Shaw said that he took her concerns at face value and thought it was appropriate to create distance between Ms Silvester and Mr Simmonds where possible. The human resources report dated 10 March 2023, Mr Shaw's email to human resources dated 13 March 2023 and Ms Nesci's evidence that Ms Silvester had told Ms Nesci that she was intimidated by Mr Simmonds support Mr Shaw's evidence about his view that there had been a relationship breakdown between Mr Simmonds and Ms Silvester. In the circumstances, I do not consider there was anything unusual or inappropriate about Mr Shaw being the decision-maker in the First HR Process.
- 93 In my view, the warning and the PIP were reasonable and appropriate in the circumstances. They were not for a prohibited reason set out in s 106 of the WHS Act. I am satisfied that the reason Western Power gave Mr Simmonds the warning and put him on the PIP was not because Mr Simmonds raised an issue or concern about work health and safety (or for any other prohibited reason). Raising an issue or concern about work health and safety was not any part of the reason for Western Power's conduct, let alone a substantial reason.

Dismissal

- 94 Given the nature of application WHST 8 of 2023, I am not considering the merits of Western Power's decision to dismiss Mr Simmonds, but rather whether the decision-maker acted because of prohibited reasons: *Dickson v Downer EDI Works Pty Ltd* [2014] FCA 1134 at [62] – [63], [85].
- 95 Considering all the evidence and arguments before me, I accept that Western Power dismissed Mr Simmonds because it upheld the three allegations from the Second HR Process against him. Specifically, Ms Royston reviewed the human resources report and was satisfied that Allegations 1, 2 and 3 (set out at [26] above) were substantiated.
- 96 Ms Royston considered that Mr Simmonds had engaged in misconduct that justified dismissal. In my view, that conclusion was open to Ms Royston on what was before her at the time.
- 97 Further, on the evidence before the Tribunal, it is clear that Mr Simmonds:
- a) shared the confidential Wundowie Report with his then girlfriend;
 - b) arranged for the confidential customer information from Mr Crook to be sent to his personal email address;

- c) did not store the test sheets as he should have on Western Power's document management system; and
 - d) sent attachments 1 – 24 to his personal email address. At a minimum, those attachments contained information owned by Western Power and also confidential, personal and private information of Western Power's customers.
- 98 I cannot accept Mr Simmonds' evidence that the information in [97b] above was not confidential 'because it's [Mr Crook's] information and he chose to send it to me' or that none of the attachments 1 – 24 were confidential. In cross-examination Mr Simmonds agreed that attachments 1 – 24 included customer names, addresses, email addresses and GPS locations. It is readily apparent on the face of the material in [97] above that it included confidential information.
- 99 Mr Simmonds takes issue with Western Power sending an email to his personal email address in the course of the disciplinary proceedings. However, it was not inappropriate for Western Power to do so and it has no bearing on the actions set out at [97]. Mr Simmonds accepted in cross-examination that Western Power's Code of Conduct (**Code**) applied to him and that personnel who breach the Code may be subjected to disciplinary action, including dismissal. Mr Simmonds accepted that in accordance with the Code:
- a) ICT assets and facilities provided by Western Power must be used responsibly, appropriately and ethically;
 - b) personnel must exercise care in the use of ICT systems and assets to avoid exposing Western Power to cyber security attacks, or disclosure of confidential information and must not knowingly undertake any action that undermines cyber security protections;
 - c) inappropriate use of ICT assets is regarded as misconduct and will be dealt with accordingly;
 - d) to protect information, reports and other data, personnel must ensure that all records made in the course of the employment with Western Power are saved in the appropriate record management system in line with the information management standard, ensuring only those personnel authorised to use or access sensitive or confidential information in the course of their role at Western Power are given permissions to access that information;
 - e) the confidentiality and privacy of information about Western Power, its customers and employees are respected and maintained; and
 - f) sensitive or confidential information is securely stored,

but Mr Simmonds would not accept that Western Power dismissed him because it thought he breached the Code.

- 100 Plainly Mr Simmonds' actions were in breach of the Code (see pages 5 and 6 of the Code). Mr Simmonds did not ensure the privacy and confidentiality of information or accurately and appropriately maintain records.
- 101 Ms Nesci's uncontested evidence was that she was not involved in the decision to dismiss Mr Simmonds.
- 102 Although Mr Simmonds submitted in closing that Ms Royston 'wouldn't have been the best person to choose for procedural fairness', he did not put that to her in cross-examination. It is not in dispute that Ms Royston had authority to make the decision to dismiss Mr Simmonds, nor that she was the relevant decision-maker who decided to dismiss Mr Simmonds. Mr Simmonds did not put to Ms Royston that the reason (or a substantial reason) for his dismissal was because he raised an issue or concern about work health and safety concerns or for any other prohibited reason, despite the Tribunal explaining the rule in *Browne v Dunn* to him many times and despite Mr Simmonds confirming he understood it.
- 103 I consider that by engaging in the conduct at [97] above, Mr Simmonds engaged in misconduct during his probationary period. I accept Ms Royston's evidence and am satisfied on the balance of probabilities that this was the reason that Ms Royston decided that Mr Simmonds should be dismissed from his employment. Ms Royston spent time reviewing the human resources documents and recommendation. Ms Royston agreed with the findings and outcomes before she discussed the matter with Mr Mercer. Ms Royston only took into account the matters outlined in the investigation documents and Mr Mercer's recommendation. She did not discuss the matter with anyone other than Mr Mercer. Ms Royston was unaware that Mr Simmonds had raised an issue or concern about work health or safety. I accept that Ms Royston did not (and could not) take such matters into account.
- 104 Accordingly, I find that although Western Power took discriminatory action (as defined by s 105 of the WHS Act) against Mr Simmonds when it dismissed him, Western Power did so for a reason other than a prohibited reason. Western Power has proved on the balance of probabilities that the prohibited reason in s 106(h) of the WHS Act was not the reason, or a substantial reason, for the warning, PIP or dismissal.

Instruction to split the Wundowie Report

- 105 Finally, given the serious matters raised by Mr Simmonds, I consider it appropriate to make the following comments. Although not necessary to decide, I am not persuaded that the instruction to split the Wundowie Report was a breach of the consultation requirements under the WHS Act. I am satisfied that Western Power did not hide or attempt to hide safety matters raised by Mr Simmonds. I accept the evidence of Mr Shaw and Ms Nesci to the effect that the relevant information can be captured in separate documents, for example the Building and Energy Report, the SEQT Organisational Learning Report, the Lessons Learned Register and in the material that goes to the Incident Review Board. Notwithstanding Mr Simmonds' criticisms of Western Power's approach, I am satisfied that the relevant information was reported to the Regulator, recorded in an appropriate register and considered by the Incident Review Board at its April 2023 meeting.

What, if any, orders to make?

- 106 Mr Simmonds says that he suffered loss on the basis that Western Power engaged in discriminatory conduct for a prohibited reason, although he did not particularise the loss. He seeks such compensation and other order the Tribunal considers appropriate.

107 Given my findings above, I cannot make an order for compensation or other order in Mr Simmonds' favour.

Conclusion

108 I must dismiss application WHST 8 of 2023.

2024 WAIRC 00180

APPLICATION FOR AN ORDER IN RELATION TO ENGAGING IN OR INDUCING DISCRIMINATORY OR COERCIVE CONDUCT PURSUANT TO SECTION 112 OF THE WORK HEALTH AND SAFETY ACT 2020

THE WORK HEALTH AND SAFETY TRIBUNAL

CITATION : 2024 WAIRC 00180
CORAM : COMMISSIONER T EMMANUEL
HEARD : ON THE PAPERS
DELIVERED : TUESDAY, 23 APRIL 2024
FILE NO. : WHST 8 OF 2023
BETWEEN : JUSTIN SIMMONDS
 Applicant
 AND
 ELECTRICITY NETWORKS CORPORATION T/A WESTERN POWER
 Respondent

CatchWords : Work Health and Safety Tribunal – applications for leave to amend earlier amended application and witness statement – respondent opposes the applications – applications for leave refused
Legislation : *Industrial Relations Act 1979* (WA) s 26(1), s 27
Work Health and Safety Act 2020 (WA) cl 29 of Sch 1
Result : Applications dismissed
Representation:
Counsel:
 Applicant : On his own behalf
 Respondent : Mr G Giorgi (of counsel)

Cases referred to in reasons:

Civil Service Association of Western Australia Incorporated v Director General as the employing authority, Department of Justice [2023] WAIRC 00793; (2023) 103 WAIG 1715

Consolidated Pastoral Company Pty Ltd; Hancock Prospecting Pty Ltd v WorkSafe Commissioner [2024] WAIRC 00101

Reasons for Decision

- 1 Mr Simmonds filed an application to the Work Health and Safety Tribunal (**Tribunal**) under s 112 of the *Work Health and Safety Act 2020* (WA) (**WHS Act**). The Tribunal has made programming orders and the matter is set down for hearing next month.
- 2 Mr Simmonds filed applications for leave to amend his application and replace his witness statement (**Applications**). In effect, he says he wants to introduce new allegations.
- 3 Electricity Networks Corporation trading as Western Power (**Western Power**) opposes the Applications and asks the Tribunal to dismiss them.

Question to be answered

- 4 The Tribunal must decide whether to grant leave for Mr Simmonds to amend his application and replace his witness statement.

Should the Tribunal grant leave for Mr Simmonds to amend his application and replace his witness statement?

- 5 Mr Simmonds filed his Form 6 – Application to the Work Health and Safety Tribunal on 29 September 2023. At that stage he was represented by Lafayette Legal Consulting. Mr Simmonds listed twelve individuals as well as Western Power as the respondents. To enable Western Power and the Tribunal to understand Mr Simmonds' application, on 2 October 2023 the Tribunal directed Mr Simmonds to file a document that clearly set out which subsection of the WHS Act he says applies, and the alleged discriminatory conduct and prohibited reason. Mr Simmonds filed that further document on 4 October 2023. Western Power and the other respondents duly filed responses to Mr Simmonds' application on 31 October 2023.
- 6 On 3 November 2023 Mr Simmonds said he was no longer represented by Lafayette Legal Consulting.
- 7 The matter was conciliated in November 2023 but did not resolve.

- 8 In December 2023 Hammond Legal became Mr Simmonds' legal representative. Mr Simmonds asked for leave to amend his application. The Tribunal granted him leave to do so. Programming orders were made on 13 December 2023 after a directions hearing:
1. By 3.00 pm on 2 February 2024, the applicant file an amended application.
 2. By 4.00 pm on 14 February 2024, the respondents file and serve any interlocutory application seeking that the amended application or any part thereof be struck out.
 3. If the respondents file an interlocutory application in accordance with order 2:
 - a. By 4.00 pm on 21 February 2024, the respondents file and serve any written submissions in respect of the interlocutory application.
 - b. By 4.00 pm on 6 March 2024, the applicant file and serve any written submissions in respect of the interlocutory application.
 4. The interlocutory application be heard on a date to be fixed by the Tribunal.
 5. Subject to further order, evidence in chief in this proceeding be adduced by way of written witness statement (with the exception of conversation or discussion evidence that is likely to be contested, which will be set out in an outline of evidence for each witness).
 6. By no later than 10 weeks before the start of the substantive hearing, the applicant file and serve any witness statement on which he wishes to rely in the substantive hearing.
 7. By no later than 6 weeks before the start of the substantive hearing, the respondents file and serve any witness statement on which they wish to rely in the substantive hearing.
 8. Each party is to notify the other parties of any witnesses they intend to cross examine by no later than one week before the start of the substantive hearing.
 9. By no later than 4 weeks before the start of the substantive hearing, the applicant file and serve written submissions on which he wishes to rely in the substantive hearing.
 10. By no later than 3 weeks before the start of the substantive hearing, the respondents file and serve written submissions on which they wish to rely in the substantive hearing.
 11. The substantive application be listed for hearing, with an estimate of 5 days, starting on a date to be fixed by the Tribunal, not before 1 May 2024.
 12. The parties have liberty to apply to vary these orders on 3 days' notice;
- 9 On 2 February 2024 Mr Simmonds filed an amended application and in effect also asked that the application be discontinued in relation to the individual respondents. The Tribunal ordered that the application be discontinued in relation to the individual respondents.
- 10 Western Power did not file the interlocutory application foreshadowed in the second programming order set out above at [8].
- 11 On 18 March 2024 Mr Simmonds filed a document entitled 'Witness Statement – Justin Simmonds (the applicant)' (**Original Statement**).
- 12 On 27 March 2024 Mr Simmonds wrote to chambers and the Registry to highlight that the allegations in the Original Statement are different to those in his amended application. He asked if he needed amend his application again. Hammond Legal then informed the Registry that it no longer represented Mr Simmonds. On 28 March 2024, the Tribunal explained to Mr Simmonds that the Original Statement did not appear to meet the requirements of a witness statement in a number of respects. For example, it was written in the third person, it did not appear to include words to the effect of 'I have read the contents of this my witness statement and the documents referred to in it and I am satisfied that it is correct and that this is the evidence-in-chief which I wish to give at the trial of the proceeding'; and it was undated and unsigned. Further, the Tribunal told Mr Simmonds that he would need to seek leave before he could amend his application again.
- 13 On 28 March 2024 Western Power indicated that it would oppose any application to amend the application.
- 14 Ultimately, on 2 April 2024 Mr Simmonds filed the Applications the subject of this decision. Broadly he says he wants to amend his application again to include additional allegations and events that Hammond Legal did not include in the amended application. Mr Simmonds says Hammond Legal did not follow his instructions or properly consult with him before filing the amended application on 2 February 2024. He says the amendments support the administration of justice, save time for all, correct any defects or errors, avoid multiple proceedings and meet the objects of the *Industrial Relations Act 1979 (WA)* (**IR Act**). He says Western Power is aware of the legislation he alleges that it breached and has enough information about his allegations and the timeline to adequately prepare for the hearing.
- 15 Western Power opposes the Applications. In essence, it says the replacement witness statement contains material changes to Mr Simmonds' evidence and new allegations. Western Power says it is not apparent why those matters could not have been addressed in the Original Statement, and Western Power has already substantially progressed the preparation of its evidence, such that Western Power would be prejudiced if required to identify and respond to the additional allegations.
- 16 In relation to Mr Simmond's application for leave to again amend his application, Western Power says:
1. If the applicant were allowed to amend the claim, the respondent would be prejudiced in that there will be significant additional costs associated with preparing an amended response and amended witness statements (including the likely need for further witnesses). Additionally, it would be inevitable that the current hearing dates would be lost if leave were granted.

2. The respondent has already incurred unrecoverable costs as a consequence of the applicant amending his application once.
 3. The respondent has already filed a response to the original application on 29 September 2023 in which it first foreshadowed its concerns in relation to aspects of the applicant's claim. These concerns were then explained in further detail before the Tribunal on 13 December 2024 and in a letter to the applicant's representative on 21 December 2023. Subsequently, the applicant was granted leave to file an amended application, which allowed the applicant significant time to confer with his legal representation and amend the application. Despite this significant opportunity, the applicant now asserts that his amended application is deficient. There is no explanation as to why the applicant asserts that such time was insufficient.
 4. The respondent has proceeded with preparing its evidentiary materials which are now well advanced and intends to file these statements on 15 April 2024 in accordance with the programming orders made on 13 December 2023.
 5. Further, the applicant has not filed any evidence in support of his application for leave to further amend the application. The applicant has simply made assertions. The respondent notes that any perceived shortcomings in the applicant's prior legal representative's services are not matters which can be heard or resolved in this forum and should not lead to the respondent incurring further costs, particularly in circumstances where the respondent is unlikely to recover its costs due to restrictions in the relevant legislation.
- 17 The Tribunal suspended the programming orders of 13 December 2023 in order to resolve these Applications. The parties consented to the Applications being determined on the papers.

Consideration

- 18 For the reasons that follow, I am not persuaded that I should grant the Applications.
- 19 The Tribunal is not a court of pleading. Clause 29 of Schedule 1 of the WHS Act provides that various provisions of the IR Act apply to the exercise of jurisdiction by the Tribunal with any necessary modifications. They include s 26(1) and 27 of the IR Act. Broadly, this means that the Tribunal, like the Commission, may allow amendments on any terms it thinks fit, correct, amend or waive errors, defects or irregularities and generally give all such direction and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.
- 20 As the Full Bench in *Civil Service Association of Western Australia Incorporated v Director General as the employing authority, Department of Justice* [2023] WAIRC 00793 said at [19]:

While the discretion will be exercised having regard to the particular facts and circumstances of each case, some of the factors which are ordinarily relevant when dealing with an application to amend grounds of appeal are:

- (a) the time when notice was first given to the Full Bench and the respondent of the intention to apply for the amendment;
 - (b) the explanation, if any, for seeking amendment;
 - (c) whether the proposed amendment constitutes a reasonably arguable ground of appeal;
 - (d) the consequences to the appellant of not granting leave to amend;
 - (e) the extent of any prejudice to the respondent;
 - (f) any measures which may be taken to eliminate or reduce the prejudice to the respondent; and
 - (g) issues of delay and costs.
- 21 Mr Simmonds has had ample time and opportunity to articulate his claims. In effect, Mr Simmonds has already had several opportunities and considerable time to amend his application. Further, Mr Simmonds was aware of the amended application filed by his representative in early February 2024 and is bound by his representative's actions. After his amended application was filed on 2 February 2024, Mr Simmonds took nearly two months to give notice of his intention to apply for this further amendment. In the context of this matter, that is a long period of time. I am not persuaded that there is an adequate reason for the length of time, nor for seeking the amendments. I accept that Western Power would be prejudiced as set out above at [16] if the Applications were upheld. Granting the Applications would also mean the hearing dates would be lost. This matter is currently listed for five days' hearing. Further, granting the Applications would likely double, if not triple, the time needed to hear this matter. That would flow on in delay and costs as well. Generally, such costs are not recoverable in this jurisdiction: *Consolidated Pastoral Company Pty Ltd; Hancock Prospecting Pty Ltd v WorkSafe Commissioner* [2024] WAIRC 00101.
- 22 Even if the proposed amendments constituted a reasonably arguable ground of appeal, in all the circumstances of this matter, I am not persuaded that the amendments sought are necessary or expedient for the expeditious and just hearing and determination of the matter. It would not be in accordance with s 26(1) of the IR Act to grant leave for Mr Simmonds to amend his application and replace his witness statement.
- 23 Programming orders for evidence in chief to be given by witness statement were made on the basis that the parties were represented. Given the issues already raised with Mr Simmonds' Original Statement, the likelihood of Western Power objecting to content in the proposed replacement witness statement, and that Mr Simmonds is unrepresented, I consider it appropriate and preferable to treat Mr Simmonds' Original Statement as an outline of evidence. Mr Simmonds will be able to give his evidence in chief orally and the Tribunal will ensure that Mr Simmonds has a fair and proper opportunity to present his case.
- 24 For these reasons, leave is not granted and the Applications are dismissed. An order has issued accordingly.

2024 WAIRC 00783

**APPLICATION FOR AN ORDER IN RELATION TO ENGAGING IN OR INDUCING DISCRIMINATORY OR
COERCIVE CONDUCT PURSUANT TO SECTION 112 OF THE WORK HEALTH AND SAFETY ACT 2020**

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	JUSTIN SIMMONDS	APPLICANT
	-v-	
	ELECTRICITY NETWORKS CORPORATION T/A WESTERN POWER	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 27 AUGUST 2024	
FILE NO/S	WHST 8 OF 2023	
CITATION NO.	2024 WAIRC 00783	

Result	Application dismissed	
Representation		
Applicant	In person	
Respondent	Ms H Millar (of counsel)	

Order

HAVING heard from the applicant on his own behalf and Ms H Millar (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred by the *Work Health and Safety Act 2020* (WA), orders –

THAT application WHST 8 of 2023 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2024 WAIRC 00160

**APPLICATION FOR AN ORDER IN RELATION TO ENGAGING IN OR INDUCING DISCRIMINATORY OR
COERCIVE CONDUCT PURSUANT TO SECTION 112 OF THE WORK HEALTH AND SAFETY ACT 2020**

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	JUSTIN SIMMONDS	APPLICANT
	-v-	
	ELECTRICITY NETWORKS CORPORATION T/A WESTERN POWER	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 16 APRIL 2024	
FILE NO/S	WHST 8 OF 2023	
CITATION NO.	2024 WAIRC 00160	

Result	Applications dismissed	
Representation		
Applicant	On his own behalf	
Respondent	Mr G Giorgi (of counsel)	

Order

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) orders –

THAT the applicant's applications for leave to amend his amended Form 6 – Application to the Work Health and Safety Tribunal and to file a replacement witness statement are dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]