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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2024 WAIRC 00942

[2023] WASCA 51

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	A -v- MINISTER FOR CORRECTIVE SERVICES [No 2] [2023] WASCA 51
CORAM	:	BUSS J MURPHY J SMITH J
HEARD	:	22 FEBRUARY 2023
DELIVERED	:	30 MARCH 2023
FILE NO/S	:	IAC 3 of 2022
BETWEEN	:	A Appellant AND MINISTER FOR CORRECTIVE SERVICES Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	S J KENNER, CHIEF COMMISSIONER R COSENTINO, SENIOR COMMISSIONER T B WALKINGTON, COMMISSIONER
Citation	:	2022 WAIRC 00327
File Number	:	FBA 3 OF 2022

Catchwords:

Industrial law - Appeal from Full Bench of Western Australian Industrial Relations Commission - Where employer failed to provide procedural fairness to employee in deciding to suspend employee without pay - Referral of industrial matter to Commission - Where Full Bench found Commissioner failed to assess whether, on balance of probabilities, a different outcome was realistically possible and that an assessment of that consideration was required in determining the industrial matter referred to Commission - Where Full Bench found that had Commissioner addressed that question, Commissioner would have found no evidentiary basis on which to conclude employee had established, on balance of probabilities, that a different outcome was realistically possible - Where appeal from Full Bench decision alleged errors of statutory construction by Full Bench and denial of procedural fairness by Full Bench - Whether Full Bench erred in statutory construction - Whether Full Bench denied employee procedural fairness on issue of statutory construction - No error demonstrated in appeal as alleged

*Legislation:**Industrial Relations Act 1979* (WA), s 7, s 23(1), s 26(1)(a) - (c), s 26(2), s 29(1), s 90*Public Sector Management Act 1994* (WA), s 78(2), s 78(5), s 81(1)(a), s 82*Result:*

Appeal dismissed

Category: B

Representation:*Counsel:*

Appellant : Ms P Giles SC & Mr C K Fordham

Respondent : Mr C Bydder SC & Mr J Carroll

Solicitors:

Appellant : Slater & Gordon

Respondent : State Solicitor's Office

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

Applicant v Minister for Corrective Services [2022] WAIRC 00143

Health Services Union of Western Australia (Union of Workers) v Director General of Health [2008] WAIRC 00215; (2008) 88 WAIG 543

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Minister for Corrective Services v A [2022] WAIRC 00327

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17; (2021) 390 ALR 590

Nathanson v Minister for Home Affairs [2022] HCA 26; (2022) 96 ALJR 737

Re Loty v Australian Workers' Union [1971] AR (NSW) 95

Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

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BUSS & MURPHY JJ:

Introduction

1 This is an appeal by the appellant (A) against the respondent (**employer**) in relation to orders made by the Full Bench of the Western Australian Industrial Relations Commission (**Full Bench**) on 3 August 2022. The orders were made by the Full Bench pursuant to a decision in *Minister for Corrective Services v A*¹ (**Full Bench decision**). The Full Bench set aside an earlier decision of Commissioner Emmanuel in *Applicant v Minister for Corrective Services*² (**Commissioner's decision**).

2 In this appeal, A contends that the Full Bench erred by misconstruing certain provisions of the *Industrial Relations Act 1979* (WA) and the *Public Sector Management Act 1994* (WA), and, in the former case, erred by denying her procedural fairness by not hearing from A on the question of construction. For the reasons which follow, the Full Bench did not address, and thereby did not misconstrue, the particular provisions referred to by A, and, consequently, there was no denial of procedural fairness on the topic of the proper construction of these particular provisions. Accordingly, the appeal should be dismissed.

Background - overview

3 In general terms, A is, and at all material times was, engaged as a senior prison officer under s 13(2) of the *Prisons Act 1981* (WA). There was a work-place incident in 2018. On 13 August 2020, A was notified that the employer had decided to deal with a suspected breach of discipline in relation to the incident. Pursuant to s 82 of the *Public Sector Management Act 1994* (WA) (**PSM Act**) A was suspended from duty immediately on full pay, with an opportunity to provide a submission as to whether the suspension should continue.

4 In November 2020, A was charged with a criminal offence relating to making a false record as a public officer. On or about 8 December 2020, A was charged with disclosing a restricted matter, contrary to s 167(3) of the *Corruption, Crime and Misconduct Act 2003* (WA).

5 On 4 December 2020, the employer proposed that A's suspension be without pay. Following certain correspondence with A's union, on 23 December 2020, A was informed that the suspension would continue to be *with pay* for the immediate future.

6 The following year, in November 2021, the employer again proposed that the suspension be on terms of suspension on partial pay or without pay. A replied, including to the effect that she could not respond substantively because of the criminal proceedings.

7 On 19 November 2021, the employer decided and implemented the decision that A's suspension would continue *without pay* with effect from 3 December 2021 (**19 November 2021 decision**).

8 On 29 November 2021, A's union filed an application on behalf of A in the Western Australian Industrial Relations Commission (**Commission**) challenging the 19 November 2021 decision and seeking a conference under s 44 of the *Industrial Relations Act* (**CR 36 of 2021**). The industrial matter was not settled at the conference, and the Commissioner referred the dispute to a hearing. The union and the employer agreed the relevant facts set out in a 'Memorandum of Matters Referred for Hearing and Determination' (**Memorandum**).

9 Following a jurisdictional issue raised by the Commission, CR 36 of 2021 was subsequently discontinued.

10 On 3 March 2022, A commenced proceedings in her own right (**APPL 8 of 2022**) under s 29(1)(a) of the *Industrial Relations Act* and s 78(2) of the PSM Act to set aside the 19 November 2021 decision. In APPL 8 of 2022, A sought to rely on the grounds and materials in CR 36 of 2021, including the Memorandum.

11 The proceedings in APPL 8 of 2022 were heard by Commissioner Emmanuel. Commissioner Emmanuel upheld A's application and set aside the 19 November 2021 decision.

12 The employer appealed the orders of Commissioner Emmanuel. There were two grounds of appeal, only one of which is relevant for present purposes:

1. The Commissioner erred in deciding there had been a denial of procedural fairness which merited the setting aside of the employer's decision to vary the terms of the suspension from with pay to suspension without pay.

13 The other ground, not material for present purposes, was to the effect that Commissioner Emmanuel had not afforded procedural fairness to the employer in relation to a finding as to the effect of the denial of procedural fairness.

14 The Full Bench upheld ground 1 and thereby overturned the Commissioner's decision. Ground 2 was dismissed. The Full Bench ordered:

¹ *Minister for Corrective Services v A* [2022] WAIRC 00327.

² *Applicant v Minister for Corrective Services* [2022] WAIRC 00143.

- (1) THAT the appeal be and is hereby upheld[.]
- (2) THAT the decision of the Commission at first instance in matter APPL 8 of 2022 given on 11 April 2022 is quashed.

The Commissioner's decision

- 15 On 28 March 2022, Commissioner Emmanuel heard APPL 8 of 2022. Reasons were delivered on 8 April 2022.
- 16 The Commissioner said that:³
- [A] referred this application to the Commission pursuant to s 29(1)(b) of the [*Industrial Relations Act*] in accordance with s 78(2)(b)(iii) of the PSM Act.
- 17 The Commissioner noted that the parties had agreed that the application would be heard and determined on the basis of the agreed facts set out in the Memorandum, documents and submissions filed in application CR 36 of 2021, and that the employer had subsequently confirmed that one agreed fact set out in the Memorandum was included in error and was not agreed.⁴
- 18 The Commissioner said:⁵
- [8] The parties say that to resolve this matter I must decide:
1. Did the [employer] exercise its lawful right under s 82(1) of the PSM Act to suspend [A] without pay:
 - a) in breach of procedural fairness;
 - b) without having regard to a relevant consideration; or
 - c) contrary to the legislative and regulatory framework which applies to a decision to suspend an employee without pay,

such that a fair go all round requires that the decision be set aside and a new decision be made in its place?
 2. If so, on what terms should [A's] suspension continue?
- [9] It is not in dispute that [A's] suspension should continue. Even if the decision to suspend without pay is set aside, the question for the Commission is on what terms that suspension should continue. Accordingly, this decision does not deal with the merits of the decision to suspend [A]. Further, [A] submitted: 'The Commission in this case is not asked to consider or deal with an issue of backpay for [A]'. (emphasis added)
- 19 The relevant considerations which A alleged were disregarded were her claim of financial hardship and that she could not address the related criminal proceedings.⁶
- 20 The Commissioner rejected the claim that the employer had failed to take into account hardship as a relevant consideration.⁷
- 21 However, the Commissioner found a denial of procedural fairness, in that there were three matters that were not put to A in connection with the proposal to stop her pay:⁸
- 1 the criminal matters were ongoing and [A] had yet to enter a plea;
 2. [A] had already received 15 months of pay; and
 3. the seriousness of the allegations meant that a serious outcome was warranted if [A] was convicted or if the allegations were found to be made out on the balance of probabilities[.]
- 22 Commissioner Emmanuel said that A seemed to argue that her right to silence meant that she could not respond to points 1 and 3 above. The Commissioner found, in effect, that whilst that may be true of point 3, it was not necessarily true of points 1 and 2. The Commissioner said:⁹
- [H]ad point 1 been put to [A], perhaps she could have responded in some way. That [A] had yet to enter a plea could well have been for reasons that had nothing to do with [A], her case or the legal advice she had received. [A] could have also responded to the inference that 15 months was a sufficient period to be paid while on suspension in the circumstances. (emphasis added)*
- 23 The Commissioner concluded, relevantly:¹⁰

³ Commissioner's decision [11].

⁴ Commissioner's decision [12].

⁵ Commissioner's decision [8] - [9].

⁶ Commissioner's decision [58].

⁷ Commissioner's decision [87].

⁸ Commissioner's decision [81].

⁹ Commissioner's decision [82].

¹⁰ Commissioner's decision [73], [83] - [85].

[73] My decision in this case is finely balanced. It turns on its own facts. *Ultimately, I consider that the decision to suspend [A] without pay was exercised in a way that means a fair go all round requires that the decision be set aside[.]*

...

[83] *By failing to properly put to [A] the reasons why it proposed to change her suspension to be without pay, [the employer] failed to afford [A] procedural fairness. I do not consider that breach of procedural fairness to have been minor or without impact.*

[84] In my view, it follows that [the employer] did not comply with a legislative and regulatory framework that clearly requires procedural fairness to be afforded.

[85] *I consider that [the employer] exercised its lawful right under s 82(1) of the PSM Act to suspend [A] without pay, in breach of procedural fairness and contrary to the legislative and regulatory framework which applies to a decision to suspend an employee without pay, such that a fair go all round requires that the decision be set aside.*

24 On the question of relief, the Commissioner said:¹¹

[90] The decision should be set aside. Accordingly, [A's] suspension should return to being on full pay.

[91] I will order that the decision to change [A's] suspension from being on full pay to being without pay be set aside. [A] will return to being suspended on full pay. (emphasis added)

25 Commissioner Emmanuel made orders on 11 April 2022 as follows:

(1) THAT the [19 November 2021 decision] to change [A's] suspension from being on full pay to being without pay be set aside; and

(2) THAT order (1) above is to come into effect at 4 pm on Friday 29 April 2022.

The Full Bench decision

26 In the appeal to the Full Bench, the employer did not seek to disturb the Commissioner's finding that there was a failure to provide A with adequate notice of certain factors identified as reasons for its decision to stop paying A during the period of suspension. Rather, the appeal grounds were directed to whether the employer's failure to provide procedural fairness in respect of those matters warranted the Commission's intervention in the decision.¹²

27 The reasons of decision of the Full Bench were given by Cosentino SC (Kenner CC & Walkington C agreeing). The Senior Commissioner said at the outset:¹³

[2] This appeal concerns how the Commission is to approach the resolution of an industrial dispute in accordance with industrial fairness arising from a denial of procedural fairness.

[3] The employer's decision to change [A's] suspension with pay, to suspension without pay, was referred to the Commission as an industrial matter pursuant to s 78(2)(b)(iii) of the [PSM Act] and s 29(1)(b) of the [*Industrial Relations Act*][.]

28 The Senior Commissioner noted that no evidence was led or tendered at the hearing at first instance, and that, at first instance, the matter proceeded on the basis of agreed facts embodied in the Memorandum, and documents and submissions filed in the related proceedings CR 36 of 2021.¹⁴

29 The Senior Commissioner, apparently principally in connection with the employer's second ground of appeal that it had been denied procedural fairness by Commissioner Emmanuel, found, in effect, that:¹⁵

1. The consequences of the failure to provide A with adequate notice of the factors on which the employer relied to suspend without pay was raised by the employer at first instance, albeit not given great attention in submissions.
2. A's case was that there was no need to address the consequences of a failure to give notice, and that the failure of procedural fairness was itself sufficient to render the decision a nullity.
3. A did not concede that she would not have responded in some way, had notice been given.
4. A did not advance any positive case that the provision of adequate notice of the factors which were considered relevant to the decision to suspend without pay would have created the possibility of a different resulting decision about the conditions of A's suspension.

30 In relation to ground 1 of the appeal, the Senior Commissioner observed that it concerned the Commissioner's reasoning to her conclusion that the failure to provide procedural fairness had consequences, which as a matter of

¹¹ Commissioner's decision [90] - [91].

¹² Full Bench decision [7].

¹³ Full Bench decision [2], [3].

¹⁴ Full Bench decision [8].

¹⁵ Full Bench decision [32].

industrial fairness, required the decision be set aside.¹⁶ The Senior Commissioner observed:¹⁷

[58] ... The focus of the parties' respective cases led the Commission[er] to place prominence on the question of whether there was a denial of procedural fairness, and to place less significance on the practical consequences of the failure in the assessment of industrial fairness.

[59] ... I consider the learned Commissioner was erroneously drawn into this invitation to focus narrowly such that the conclusion that there was industrial unfairness warranting the decision being set aside was in error.

[60] [T]he employer relies upon principles that apply in applications for judicial review of decisions on the grounds of jurisdictional error. The principle is that, for a decision to be set aside on judicial review, the party challenging the decision must prove on the balance of probabilities such historical facts as to satisfy the court that the decision could realistically have been different had the breach of a condition of the conferral of statutory decision-making authority not occurred: *MZAPC*¹⁸ ... In other words, there is a requirement for a breach of procedural fairness to be material in its ultimate effect, in order to result in a decision being remitted for redetermination or retrial.

31 The Senior Commissioner further observed:¹⁹

1. The matter before the Commissioner was not an application for judicial review of a decision for jurisdictional error, but, rather, the determination of an industrial matter, in accordance with the Memorandum. The Commissioner was required to 'deal with' an industrial matter, not review a decision for illegality or consider ordering a retrial.²⁰
2. A finding that there is a denial of procedural fairness is not an end in itself, but one step in determining how the industrial matter is to be dealt with.²¹
3. Nevertheless, general law principles as to the content of the duty to afford procedural fairness, and the legal consequences of a failure in that duty, in the determination of remedies, were matters binding on the Commissioner.
4. Accordingly, whilst the Commissioner could not ignore the substantive common law, the Commissioner was bound to consider how to deal with the industrial matter within the constraints of the law, the Memorandum, and how the hearing was conducted by the parties.²²
5. The Commissioner was required to consider what a fair go all round required. This referred to the principle of industrial fairness as enunciated in the case law in this area²³ - whether the employer exercised its lawful right (in this case, to cease pay during suspension) so harshly or oppressively as to amount to an abuse of that right. This question involved assessing the industrial fairness of the decision.

32 The Senior Commissioner also referred to the reasoning of the majority in *MZAPC*.²⁴

33 The Senior Commissioner referred to A's arguments on the appeal, and said that A had not addressed 'what evidence there was before the Commission at first instance as to what she would have done with the opportunity had it been given to her, or how the agreed facts would have enabled the learned Commissioner to be satisfied on the balance of probabilities of a realistic possibility that a different decision could have been made had [A] been given proper notice of the relevant factors which ultimately informed the decision'.²⁵

34 The Senior Commissioner, in upholding the employer's appeal, said:²⁶

[75] It is implicit in the learned Commissioner's reasons at first instance at [83] that she considered the impact of the procedural flaw was relevant to determining whether there had been a fair go all round. *However, in assessing the impact, the learned Commissioner considered only the question of whether [A] could, had she been given proper notice, responded to the relevant factors.* The learned Commissioner did not apparently further consider what if any different outcome might have resulted, had the opportunity to respond been taken up. *Nor does the*

¹⁶ Full Bench decision [57].

¹⁷ Full Bench decision [58] - [60].

¹⁸ *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 390 ALR 590 [60].

¹⁹ Full Bench decision [61] - [67].

²⁰ The Senior Commissioner referred in this regard to *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00215; (2008) 88 WAIG 543 (*Moodie*) [176].

²¹ Referring to *Moodie* [177].

²² Referring to *Moodie* [177] - [178].

²³ *Re Loty v Australian Workers' Union* [1971] AR (NSW) 95; *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.

²⁴ Full Bench decision [72] - [74].

²⁵ Full Bench decision [55].

²⁶ Full Bench decision [75] - [76], [78] - [79].

reasoning disclose any assessment of whether the possibility of a different outcome was realistic.

[76] *The learned Commissioner's reasons do not disclose a determination of whether the result could realistically have been different had [A] been given the relevant opportunity to respond. Accordingly, the learned Commissioner failed to determine whether a fair go all round required the Commission's intervention in the suspension adjustment decision.*

...

[78] *The conclusion that [A] could have responded 'in some way' to the relevant factors is obvious and virtually goes without saying. However, that some response might have been given remains some distance away from any destination in terms of an ultimate impact. If all the learned Commissioner did was to determine that the absence of the ability to utilise an opportunity to respond is the impact, then the learned Commissioner has, in effect, not considered the matter beyond its procedural elements. The industrial fairness destination has not been reached.*

[79] *The learned Commissioner did not consider whether, had [A] been given notice of the relevant factors, it would have produced the same or a different resulting decision. The learned Commissioner's conclusion as to the impact of the procedural failure was not directed at the outcome: the industrial fairness of the decision to cease pay. It was inconsistent therefore with the general principles laid down by the majority of the High Court in *MZAPC* as set out above. Had the learned Commissioner assessed whether [A] had established on the balance of probabilities that a different outcome was realistically possible, the learned Commissioner must necessarily have found an absence of an evidentiary basis to find it was, bearing in mind [A] bore the onus. (emphasis added)*

35 In substance, although the language used by the Full Bench to express the point was not always consistent, ultimately it appeared that the Full Bench concluded that:

1. the Commissioner had failed to assess whether, on the balance of probabilities, a different outcome was realistically possible;
2. an assessment of that consideration was required in the determination of the industrial matter referred to the Commission, in order to determine whether A had received a 'fair go all round' in having her suspension changed to one without pay; and
3. had the Commissioner addressed that question, she would have found an absence of an evidentiary basis upon which to conclude that A had established, on the balance of probabilities, that a different outcome was realistically possible.

Statutory provisions

36 For present purposes, the most relevant statutory provisions are those outlined below.

The Industrial Relations Act

37 Section 23(1) of the *Industrial Relations Act* provides:

Subject to this Act, the Commission has cognisance of and authority to enquire into and deal with any industrial matter.

38 The term 'industrial matter' is defined by s 7 to include 'any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee in the industry ...'.

39 Section 26(1)(a), (b), (c) and (2) provide:

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

...

- (2) In granting relief or redress under this Act the Commission is not restricted to the specific claim made or to the subject matter of the claim.

40 Section 29(1)(b) provides:

- (1) An industrial matter may be referred to the Commission -

...

- (b) except as provided in section 51Q(2), in the case of an equal remuneration order - by an application made by any of the following -
 - (i) an employee to be covered by the order;

- (ii) an organisation in which employees to be covered by the order are eligible to be enrolled as members;
- (iii) an organisation in which employers of employees to be covered by the order are eligible to be enrolled as members;
- (iv) UnionsWA[.]

41 The relevant appeals provisions of the *Industrial Relations Act* are referred to in [50] - [51] below.

PSM Act

42 Part 5 of the PSM Act is headed 'Substandard performance and disciplinary matters', and comprises s 76 - s 93A. Division 1 of pt 5 contains s 76 - s 78 and is headed 'General'. Division 2 of pt 5 is headed 'Substandard performance' and contains s 79. Division 3 of pt 5 is headed 'Disciplinary matters' and includes s 80A - s 92.

43 It was common ground in this appeal that s 78(2) of the PSM Act applied as A was not a 'Government officer' for the purposes of s 78 of the PSM Act. Section 78(2) of the PSM Act provides:

- (2) *Despite section 29 of the [Industrial Relations Act], but subject to subsection (3), an employee or former employee who -*
 - (a) *is not a Government officer* within the meaning of section 80C of that Act; *and*
 - (b) *is aggrieved by -*
 - (i) a decision made in respect of the employee under section 79(3)(b) or (c) or (4); or
 - (ii) a finding made in the exercise of a power under section 87(3)(a)(ii); or
 - (iii) *a decision made under section 82 to suspend the employee on partial pay or without pay; or*
 - (iv) a decision to take disciplinary action made under section 82A(3)(b), 88(b) or 92(1),

may refer the decision or finding mentioned in paragraph (b) to the Industrial Commission as if that decision or finding were an industrial matter mentioned in section 29(b)²⁷ of that Act, and that Act applies to and in relation to that decision accordingly. (emphasis added)

44 In s 78(2)(b)(i), the reference to a decision under s 79(3)(b) or (c) or (4) is, relevantly in effect, a reference to decisions by the employing authority to reduce the level of classification of the employee or to terminate the employment of the employee where the employing authority is of the opinion that the employee's performance is substandard.

45 In s 78(2)(b)(ii), the reference to s 87(3)(a)(ii) is to a finding made at the conclusion of a 'special disciplinary inquiry' that the employee has committed a breach of discipline other than a 'section 94 breach of discipline'. Section 87 of the PSM Act provides that the Commissioner may, in specified circumstances, direct that a 'special disciplinary inquiry' be held into the suspected breach of discipline. Under such an inquiry certain powers are conferred on the person or body holding the inquiry in accordance with s 24I and s 24J of the PSM Act.

46 Section 82, to which s 78(2)(b)(iii) refers, includes a reference to s 81(1)(a) of the PSM Act. Section 81(1)(a) and s 82 of the PSM Act provide:

81. Suspected breach of discipline, employing authority's options as to

- (1) If an employing authority of an employee is made aware, or becomes aware, by any means that the employee may have committed a breach of discipline, the employing authority may -
 - (a) decide to deal with the matter as a disciplinary matter under this Division in accordance with the Commissioner's instructions[.]

...

82. Suspending employee pending decision on breach of discipline or criminal charge

- (1) If -
 - (a) an employing authority has decided to act under section 81(1)(a) in relation to an employee; or
 - (b) an employee is charged with having committed a serious offence,
 the employing authority may, in accordance with the Commissioner's instructions, suspend the employee on full pay, partial pay or without pay.
- (2) Subject to subsection (3) -
 - (a) a suspension arising from a decision referred to in subsection (1)(a) has effect until a decision is made under section 82A(2) or (3) or 88 in respect of the suspected breach; or

²⁷ sic - s 29(1)(b) of the *Industrial Relations Act*.

(b) a suspension arising from a charge referred to in subsection (1)(b) has effect until the criminal charge or any action that the employing authority is considering taking under section 92 has been finalised.

(3) The employing authority may at any time remove, or vary the terms of, the suspension.

47 Section 78(2)(b)(iv) refers to 'a decision to take disciplinary action'²⁸ made under s 82A(3)(b), s 88(b) or s 92(1). A decision to take disciplinary action under s 82A(3)(b) may be made, relevantly in effect, where the employing authority finds, after dealing with a matter as a disciplinary matter, that the employee has committed a breach of discipline that is not a section 94 breach of discipline. Under s 88(b), the employing authority may decide to take disciplinary action where, on receiving a report under s 87(3), the person holding a special disciplinary inquiry finds that the employee has committed a breach of discipline other than a section 94 breach of discipline. Section 92(1) provides that if an employee is convicted or found guilty of a serious offence, the employing authority may take disciplinary action.

48 Section 78(5) of the PSM Act was introduced by the enactment of s 95 of the *Public Sector Reform Act 2010* (WA). Section 78(5) provides:

(5) If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner's instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board -

(a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or

(b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process. (emphasis added)

49 The Explanatory Memorandum in relation to the Bill for the *Public Sector Reform Act* stated:

Section 78 amended

Provides for employees as well as former employees to appeal against a decision or finding as defined in the new subsection (1)(b).

Replaces 'decision' with 'direction' in subsection 78(4), to more accurately reflect the employing authority's requirement to dismiss an employee if he or she is found to have committed a section 94(4) breach of discipline.

Subsection (5) clarifies that an employer's technical non-compliance with the statute, or principles of natural justice, of itself would not render the decision or finding invalid but that the Industrial Relations Commission may either:

- decide the matter on its merits, or
- quash the agency's decision/finding and direct the agency to re-commence at the point directed by the [Industrial Relations Commission], should the agency choose to continue with the disciplinary matter.

Appeals provisions

50 Section 49 of the *Industrial Relations Act* provides for an appeal from the Commission to the Full Bench.

51 Section 90 provides for an appeal from the Full Bench to this court. Section 90(1)(b) and (c) of the *Industrial Relations Act* provides, relevantly for present purposes:

(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the Full Bench ... -

...

(b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or

(c) on the ground that the appellant has been denied the right to be heard, but upon no other ground.

A's grounds of appeal

52 A's grounds of appeal to this court were as follows:

1. The Full Bench erred in law in finding that the terms of s 26(2) of the [*Industrial Relations Act*] did not permit the Commission to deviate from addressing each of the specific terms of a

²⁸ The term 'disciplinary action' is defined in s 80A of the PSM Act to mean, in general terms, a reprimand, the imposition of a fine, transferring the employee to another public sector body, transferring the employee to another office position or post in which the employee is employed, a reduction in the monetary remuneration of the employee, a reduction in the employee's level of classification, and dismissal.

[Memorandum] prepared in separate proceedings pursuant to regulation 31 of the *Industrial Relations Commission Regulations 2005 (Regulations)* in granting relief or redress under the *Industrial Relations Act*.

Particulars

- a) The unanimous reasons of the Full Bench are articulated in the reasons of the Senior Commissioner at [2] to [94] of the [Full Bench decision] that was delivered on 3 August 2022.
 - b) At [4] of the [Full Bench decision], the Senior Commissioner noted that [the Memorandum] had been prepared for related proceeding, CR 36 of 2021.
 - c) In the subsequent proceeding commenced under s 78(2) of the PSM Act (APPL 8 of 2022), the parties relied upon certain facts that had already been agreed ... and set out within the [Memorandum].
 - d) At [40] of the [Full Bench decision], the Senior Commissioner held that the Commission was required to undertake a specific process as dictated by the [Memorandum] in order to deal with APPL 8 of 2022.
 - e) At [61] of the [Full Bench decision], the Senior Commissioner repeated her finding that the referral made in APPL 8 of 2022 must be made in accordance with the [Memorandum] which was prepared for CR 36 of 2021.
 - f) At [65] of the [Full Bench decision], the Senior Commissioner further held that the Commission was 'bound' to consider how to deal with APPL 8 of 2022 within the constraints of the [Memorandum].
 - g) The effect of the findings of the Senior Commissioner is to construe the referral provision in section 78(2) of the PSM Act as ousting or limiting the discretionary power of the Commission provided by s 26(2) of the *Industrial Relations Act*.
 - h) It was not open on any reasonable construction of s 26(2) of the *Industrial Relations Act* or of section 78(2) of the PSM Act for the Senior Commissioner to find that a referral made by reference to section 78(2) ... was strictly subject to mandatory constraints associated with the subject matter of the claim made by [A].
 - i) Having erred in finding that the Commission at first instance was strictly bound to the terms of the [Memorandum], the Senior Commissioner then erred in holding that it was incumbent upon [A] to produce specific evidence or otherwise articulate a particular course of action that would or could realistically have changed the [19 November 2021 decision].
2. [A] was denied the right to be heard on the question of whether the Commission at first instance was restricted to dealing with [A's] referral with strict regard to the terms set out in the [Memorandum].
 3. The Full Bench erred in law in finding, in effect, that the discretionary power provided by the Commission by section 78(5)(b) of the PSM Act is subject to an implied condition for [A] to establish the nature of additional evidence or argument that may have been presented in support of her case before the Commission can act in accordance with that subsection.

Particulars

- a) At [61] to [65] of the [Full Bench decision], the Senior Commissioner adopted the approach of the Full Bench in the matter of *Moodie* in relation to the application of judicial review principles to the process of enquiring into and dealing with an industrial matter under the *Industrial Relations Act*.
- b) At [64] of the [Full Bench decision] the Senior Commissioner held that the Commission was bound by specific requirements when dealing with a matter referred under section 78(2) of the PSM Act.
- c) At [77] of the [Full Bench decision], the Senior Commissioner noted the failure of [A] to produce evidence as to what she would have said in support of her case had procedural fairness been provided to her.
- d) At [78] of the [Full Bench decision], the Senior Commissioner incorrectly inferred that the failure of the Commission at first instance to identify or make a determination as to a specific course of action for [A] to achieve a different outcome evidenced a failure to consider the issue of materiality.
- e) The only answer reasonably open on the proper application of section 78(5)(b) of the PSM Act to the facts of this case is that it was open to the Commission to set aside the [19 November 2021 decision] given the failure to comply with the rules of procedural fairness and given other factors such as -

- i. The [employer] had misled [A], or had allowed [A] to be misled up to the date of the hearing at first instance as to the [employer's] actual reasons behind the [19 November 2021 decision].
 - ii. Only during the close of oral argument did the [employer] notify [A] that a critical factor going to the disputed decision of the [employer] was no longer agreed.
 - iii. The [employer's] conduct influenced the manner in which [A] conducted her case when it was before the [employer], and also when her case was conducted at the Commission.
 - iv. The conduct of the [employer] and the unclear reasons behind the [19 November 2021 decision] gave rise to reasonable conjecture that, if given a fair opportunity, [A] may have achieved a favourable outcome.
- f) It was not open for the Senior Commissioner to find that the true meaning of section 78(5)(b) of the PSM Act implied an unwritten requirement for the Commission to apply specific requirements of evidence and argument to establish a basis to set the impugned decision aside. (footnotes omitted)

Parties' submissions

A's submissions

53 A's submissions, with respect, lacked clarity and their nature and effect are not easily distilled. They are set out verbatim below.

Ground 1 - construction of *Industrial Relations Act* s 26(2)

2. Ground 1 contends that there is only one answer reasonably open on the application of s 26(2) of the *Industrial Relations Act* to [A's] case, namely, that it was allowable for the Commission at first instance to determine [A's] referral with regard to the circumstances and power referred to by s 78(5)(b) of the PSM Act and not strictly by the particulars referred to in [A's] initiating claim.
3. By finding that the Commission was duty-bound to follow a specific process and to address particular questions that were put in [A's] initiating claim ([Memorandum]), the inescapable inference arises that the Full Bench incorrectly construed the discretion given by s 26(2) of the *Industrial Relations Act* as being subject to those matters.
4. During the hearing at first instance, [A] raised with the Commission that [A] sought the outcome referred to at 78(5)(b) of the PSM Act.
5. The hearing of FBA 3 of 2022 was also conducted on the basis that it was open to the Commission to rely on the terms and discretion conferred by s 78(5) in dealing with [A's] referral.
6. At all material times, [A's] position was based on prior authorities concerning s 26(2) of the *Industrial Relations Act*, the effect of which propose that the Commission is not restricted to the terms or to the particulars of the claim as initially framed in granting relief or redress under the Act.
7. By incorrectly finding that the Commission was bound to follow the questions put in the [Memorandum], the Full Bench further held that the Commission was obligated to adopt the principles of judicial review, and ultimately Full Bench applied the principles of judicial review in such a way as to make an error of law as identified in *Nathanson*.²⁹

Ground 2 - No hearing on the nature and effect of the Memorandum

8. Ground 2 of this appeal relies upon the principle articulated by Mason CJ in *Pantorno v The Queen* (1989) CLR 466 that an agreement of the parties regarding the conduct of a matter does not bind the trial judge; And that in the event that a decision-maker determines the law to be different from the manner in which the parties have conducted their respective cases, the trial judge must inform the parties of the view that has been formed.
9. The principle in *Pantorno* is supported by s 26(3) of the *Industrial Relations Act* which provides -
 - '3) Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission must, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.'

²⁹ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 [2], [46] - [47], [59], [77].

10. Ground 2 relates to the Full Bench determination that the Commission at first instance was bound to follow the terms of a [Memorandum] which had been prepared for a closely-related but separate proceeding.
11. The [Memorandum] was prepared for referral CR36 of 2021 pursuant to regulation 31 of the [Regulations].
12. The parties to APPL 8 of 2022 subsequently agreed that [A's] claim would be heard and determined on the basis of the facts that were agreed in the [Memorandum].
13. During the hearing at first instance Counsel for [A] asked the Commission to hear and determine APPL 8 of 2022 in the manner contemplated by s 78(5) of the PSM Act.
14. Relevantly, a fact that was considered significant by [A] recorded at paragraph 23(d) of the [Memorandum] was then withdrawn by the [employer] during the hearing of APPL 8 of 2022.
15. Counsel for the [employer] at first instance also appeared to accept that [A's] claim was not governed by the terms of the [Memorandum] as would ordinarily be the case for an application under s 44 of the [*Industrial Relations Act*].
16. At the hearing at first instance, and upon learning that a significant fact contained in the [Memorandum] had been withdrawn by the [employer], [A] notified the Commission of the fact that the case of [A] had been formulated based on a set of facts that were no longer agreed.
17. The position that had ostensibly been accepted by the parties during the hearing at first instance was that the [Memorandum] no longer reflected an agreed document, and in any event was not binding upon the Commission in the way that would ordinarily be the case for a referral made under s 44 of the [*Industrial Relations Act*].
18. Contrary to that position, the Senior Commissioner proceeded to deal with the appeal to the Full Bench on the basis that the terms of the [Memorandum] were in fact binding upon the Commission, and that the terms of the [Memorandum] set out very particular steps that needed to be followed to resolve the claim.
19. The findings that the [Memorandum] was in the nature of a document that was binding upon the Commission was an assumption made by the Senior Commissioner. The substance of those assumptions were fundamental to the Senior Commissioner's ultimate finding that the first ground of FBA 3 of 2022 had been made out.
20. [A] contends that the essential proposition that the [Memorandum] was binding and instructed the necessary approach to the determination of APPL 8 of 2022 was not raised squarely with the parties.
21. The Senior Commissioner's findings with respect to the nature and effect of the [Memorandum] materially affected her decision with respect to the first ground of appeal in FBA 3 of 2022.

Ground 3 - construction of PSM Act s 78(5)

22. In addition or in the alternative to ground 1, the third ground of this appeal contends that the only answer that is reasonably open on the application of s 78(5)(b) of the PSM Act to the facts of this case is that it was allowable for the Commission at first instance to determine [A's] referral based on the findings that were made and the case presented at hearing.
23. At [61] to [63] of the [Full Bench decision], the Full Bench adopted the principles articulated in *Moodie* which distinguish a merits-based enquiry under the [*Industrial Relations Act*] from the strict principles of a judicial review.
24. In accepting that [A's] claim could not be determined solely on the fact of denied procedural fairness, it was held by the Full Bench that the Commission was bound to act within the constraints of law, the [Memorandum] and how the hearing was conducted by the parties.
25. The relevant provisions of law in this case included s 78(5) of the PSM Act.
26. On the plain words of s 78(5)(a) of the PSM Act, the Act provides an option for the Commission to hear and determine an industrial matter on the merits of the particular case at hand even where a failure of procedural fairness has been identified.
27. The second option evident on the plain words of s 78(5)(b) of the PSM Act strongly imply that a merits-based enquiry is not required for the Commission to make a determination to quash the impugned decision or finding and remit a disciplinary process back to the relevant employing authority.
28. On a proper construction of s 78(5)(b) of the PSM Act, and contrary to the finding of the Full Bench, the Commission at first instance was not strictly required to carry out a particular type of merit-based assessment to identify whether the principle of industrial fairness warranted a determination to set aside the decision to cease the payment of [A's] wages.
29. Having regard to s 78(5)(b) of the PSM Act and s 26(1) of the [*Industrial Relations Act*], the Commission was required to act according to equity, good conscience, and the substantial merits of the case, and also having regard to the interests of [A].

30. In the circumstances, [A] contends that the Commission at first instance was reasonable to find that the breach of procedural fairness was not minor or without impact.
31. [A] further contends that the [employer's] late change of position with respect to facts that had been initially agreed by the parties provided further basis for the Commission to exercise the discretion provided by s 78(5)(b) of the PSM Act, and without the need for the Commission to address the specific issue of industrial fairness.

The employer's submissions and notice of contention

54 The employer contended, in effect, that having regard to the terms of the Full Bench decision and the history of the matter, the Full Bench did not make the errors alleged in the grounds of appeal. The employer also raised two further matters.

55 First, the employer submitted that s 78(5)(b) is only engaged when the decision the subject of appeal or referral is made following the *conclusion* of a 'disciplinary process', rather than being engaged by any decision that could be the subject of appeal or referral under s 78. The employer submitted that a decision to suspend on partial pay or no pay does not cause a disciplinary process to come to an end, and that, to the contrary, a suspension under s 82(1) remains in place whilst a disciplinary process remains on foot: s 82(2).³⁰ In that regard, the employer:

1. referred to the wording of s 78(5), with its reference to 'recommended' in the context of directions upon remitter;
2. referred to s 81(1)(a), where the 'matter' referred to in that provision is evidently a disciplinary matter; and
3. submitted that it is doubtful that any directions would need to be made under s 78(5)(b) if it applied to a decision to suspend on partial pay or without pay, thereby indicating that it has no application to a decision to suspend on partial pay or without pay.

56 Secondly, the employer filed a notice of contention in the following terms:

[T]he decision of the Full Bench should be confirmed for reasons other than those decided by the Full Bench, namely [A] failed to establish that she was denied a fair go all round because:

- i. contrary to the finding of the Full Bench at [77], the Full Bench should have found that [A] would not have responded to the factors of which she was not given notice if those factors had in fact been put to her by the [employer], and
- ii. No practical injustice arose because [A] would not have so responded.

Disposition

57 Ultimately, grounds 1 and 3 turn upon the proper construction of the Full Bench's reasons for decision. That is because each of those grounds alleges, in effect, that it is apparent from the Full Bench decision that it misconstrued a statute. In the case of ground 1, the alleged misconstruction is said to be of s 26(2) of the *Industrial Relations Act*, and in the case of ground 3, the alleged misconstruction is said to be of s 78(5)(b) of the PSM Act.

58 These grounds and their submissions invite attention to what was decided by the Full Bench having regard to the issues that were in dispute before the Full Bench, including in the context of the issues for determination by Commissioner Emmanuel. These matters are addressed in [59] - [70] below.

The issues before the Commission

59 There was no reference to s 26(2) of the *Industrial Relations Act* in the parties' submissions to the Commissioner.

60 In CR 36 of 2021, the parties' provided written submissions in response to the jurisdictional issue raised by the Commission. In addition to addressing the jurisdictional issue, those submissions also included submissions on the substantive dispute between the parties.

61 In her written submissions dated 7 February 2022, A submitted:³¹

1. [A] seeks an order to quash the [19 November 2021 decision] by the [employer] ... to cease pay to [A].
2. [A] contends that the nullification of the [19 November 2021 decision] will result in [A] being returned to the position that she was in immediately before the decision was made, being on suspension with full pay.
3. A fundamental point that is contended by [A] is that [she] was unable to speak to all the relevant factors that were considered in the [employer's] assessment of the proposal to cease pay. In particular, [A] was not able to address the key factors that apparently weighed most heavily against her in the final decision.

...

What have the parties asked the Commission to 'deal with'?

26. [A] contends that [she] was denied procedural fairness in the decision to change the terms of the suspension to cease pay.

³⁰ Employer's written submissions 17 October 2022, pars 51 - 56.

³¹ A's submissions, 7 February 2022, pars 1 - 3, 26, 28, 32 - 33, 36, 39.

...

28. The consequences of an administrative decision made absent the required standard of procedural fairness is that the decision is to be treated as a nullity.

...

32. In relation to a challenge against a decision to suspend without pay, the consequences of a failure to afford procedural fairness were considered in depth by the [Full Bench] in a 2008 appeal judgement [sic] relating to an application under s 44 of the [*Industrial Relations Act*] (*Moodie*).

33. In *Moodie*, support was given to the proposition that an administrative decision that was affected by a denial of procedural fairness was 'void' and was to be treated as if it was of no effect.

...

36. *The effect of the decision in Moodie and the substance of the parties' agreement are reflected in the question and the remedy sought in the Memorandum wherein the Commission is asked to decide the terms on which [A's] suspension should continue as from the date of any order.*

...

39. [A] does not seek any order that otherwise would have the effect of preventing the [employer] from dealing with [A's] suspension in the ordinary fashion going forward. (emphasis added)

62 There were two brief references to s 78(5)(b) in the parties' oral submissions at the hearing before Commissioner Emmanuel on 28 March 2022. In oral submissions, counsel for A first referred to s 29(1)(b) of the *Industrial Relations Act* and s 78(2) of the PSM Act, and said that the decision being 'appealed against' was the decision to suspend without pay made under s 82. Counsel said as to this 'appeal':³²

I use the word 'appeal', but it is not a rehearing, we're not hearing the decision on the merits, *we're seeking an outcome, more or less, that's referred to in s 38(5) [sic - s 78(5)] of the [PSM Act], which is to quash the decision* and revert the disciplinary process back to the [employer].

And I think s 78(5)(b) answers the questions about the powers of the Commission to deal with this matter. (emphasis added)

63 Counsel for A did not contend that s 78(5) of the PSM Act operated on the basis that it was not necessary for A to establish industrial unfairness, or that A was seeking to depart from the matters in the Memorandum. On the question of relief, counsel for A submitted:³³

[A] doesn't ask for this matter to be dealt with on the merits, so we haven't changed our stance in that regard. We say it's not a merit-based case, it's being dealt with purely on the basis of denying procedural fairness. [*Moodie*] is authority for the fact that procedural fairness is enough on its own to justify the quashing of the decision. It's going to be open to [the employer] to revisit the process again straight away, after a - in the event an order is made. So if [A] is simply returning to a position of being on suspension with pay, [the employer] can simply issue her with another letter and reinstitute a process, if that's what it wants to do, so there's no prejudice to [the employer] from that point of view.

64 Counsel for the employer also briefly referred to s 78(5) of the PSM Act, when he submitted, in effect, that if an applicant challenged a decision only on a procedural fairness ground and lost, it would not be open to the Commission to decide the matter based on its view of the substantive fairness'.³⁴

65 The agreed issues for determination by the Commissioner Emmanuel were agreed by the parties and are those referred to in [18] above. In substance, the issues were (1) whether there was a failure to provide procedural fairness (or take into account relevant considerations) in relation to the 19 November 2021 decision, (2) if so, whether a 'fair go all round' required the decision to be set aside and a new decision to be made in its place, and (3) if so, on what terms A's suspension should continue.

66 No reference was made by Commissioner Emmanuel in her reasons for decision to s 26(2) of the *Industrial Relations Act*, or to s 78(5) of the PSM Act.

The issues before the Full Bench

67 The parties filed written submissions before the hearing by the Full Bench. Neither the employer's written submissions (dated 26 May 2022) nor A's written submissions (dated 1 June 2022) referred to s 26(2) of the *Industrial Relations Act* or s 78(5) of the PSM Act.

68 A's written submissions dated 1 June 2022 included:

33. From [73] to [85] of the [Commissioner's decision], the Commissioner considered the material issues that she identified as necessary to deal with the industrial matter.

³² Hearing 28 March 2022, ts 3.

³³ Hearing 28 March 2022, ts 31.

³⁴ Hearing 28 March 2022, ts 16.

34. After noting that procedural fairness was a requirement for a decision to cease pay to a suspended employee, the Commissioner held that procedural fairness could still be afforded even where circumstances are complicated by a related criminal proceeding.

...

36. The Commissioner ... identified that the notice that was actually given to [A] had failed to provide any real grounds for the proposal to cease pay, noting that there were 'at least' three reasons that were obviously omitted from the notice.

37. Of those three reasons ... the Commissioner considered that [A] could reasonably have provided a fulsome or partial response to two of the reasons if they had been properly put.

38. Accordingly the Commissioner held that the failure to provide adequate notice in this particular case was not minor and without impact and was enough of a factor on its own to warrant an order that the decision to cease pay be set aside.

...

55. APPL 8 of 2022 was determined in favour of [A] on the basis that [the employer] failed to provide adequate notice, and that the breach of procedural fairness was not minor or without impact.

69 In oral submissions on 8 June 2022, counsel for A made the following references to s 78(5) of the PSM Act:³⁵

In relation to the first ground of the appeal, on the generous reading, we think it's asserting a mixed error of fact and law ... That's how we read the reference to practical injustice, and we think there's an assertion of an error of fact in the finding that there was practical injustice. That's how we read ground 1.

... [W]e agree that the principles of judicial review are relevant and they have application, but they're not strictly determinative, particularly in a case of a claim application under section 78 of the [PSM Act], and I'm referring to section 78(5).

... We say section 78(5) is a direct amendment, if you like, to the law that could otherwise be applied for judicial review. On our reading of section 78(5), the Commission has the power to simply intervene in the - in a decision - a disciplinary decision purely on the basis of identifying procedural defect or a defect in procedural fairness.

The Commission's not required to go that extra step to identify whether or not there's been practical injustice ... in the appeal ... so I'm referring to the High Court decision in [MZAPC].

...

[T]he majority in that case refer to the need to have materiality in the deciding of a judicial review. ...

That's how we read the majority judgment. And we say that section 78(5) specifically addresses that, and it allows the Commission to look at the entirety of a case and if it's satisfied that there's procedural defect, then it doesn't need to go any further if it doesn't wish to, or it may consider other circumstances. [W]e agree that the strict processes of judicial review don't apply in this case, particularly, to an application under section 78, because of section 78(5). It's gone out of their way to amend the law, if you like, under judicial review, on that point.

KENNER CC: And of course, regardless of what is in [s] 78(5), given that section 78 enables a referral of a matter as if it were an industrial matter, ... the terms of section 26 of the *Industrial Relations Act* apply to that matter.

FORDHAM, MR: Yes.

KENNER CC: And that is the equity and good conscience provision as to how the Commission should deal with it, and hence my question to you and your friend about the nature of the approach overall, and whether it might've been overly restrictive in strictly applying, on the fact of it at least, those administrative review - judicial review[-]type principles and whether a more - generous is not the right word, but an assessment of the industrial fairness of the overall decision-making - - -

FORDHAM, MR: It's a different question - - -

- - - I - we agree. The - it's a different question to a judicial review under the context of the [*Industrial Relations Act*] and the [PSM Act].

...

So we say there's no error of law. we say that the judgment is - the determination was open to the Commission based on section 78(5) alone, she didn't even need to, in our view, to have determined whether or not it was minor or whether it was - had impact or not. We say that's not necessary under section 78(5). It's open for the Commissioner simply to say, 'Well, look, it's not good enough for a public sector body of this type to go through this kind of process. It needs to go back and be re-determined'. We say that that's what section 78(5) is intended to do to empower the Commission to make that kind of

³⁵ Hearing 8 June 2022, ts 11 - 14.

determination and whether or not there's been any material impact on the outcome based on the procedural defect.

COSENTINO SC: So are you saying that the finding that the Commissioner made, that the breach of procedural fairness was not minor or without impact, you were saying that that was unnecessary of her to have made that finding at all?

[FORDHAM], MR:³⁶ Yes, that the decision would hold, even without that finding. It's sufficient, in our view, under section 78(5), that there be a significant defect or a significant failing in the process, in that, in the Commissioner's view, it's enough to warrant it being sent back and done again.

COSENTINO SC: So the referral - the [Memorandum] required the Commissioner to consider whether there had been a breach of the regulatory framework - the requirements of procedural fairness, but it then went on to refer to a fair go all round, what do you say the Commissioner was required to [decide in] respect of the fair go all round?

FORDHAM, MR: Well, whether there's been fairness between the parties. So I think that does broaden the question. So arguably, the insertion of that in the memorandum would have an effect and would be guiding for the Commission under an application under section 44, but things changed in February and then March, when a new application was made.

Now, the way the parties proceeded was to use the agreed facts and the submissions and the materials that had been submitted already in CR 36 of 2021, but ... an application under section 78 is not the same as an application under section 44. And to the extent that the parties may have agreed a question, the Commission's not bound by that question, and that doesn't overrule the ability of the Commission under section 78(5) to simply say, 'Well, I've identified a serious procedural defect, it's enough for me to set this decision aside and send it back to the employer'.

70 By these submissions, although there was no notice of contention,³⁷ A appeared to contend that even if ground 1 before the Full Bench were established, Commissioner Emmanuel's decision should be upheld on the alternative ground that, on the proper construction of s 78(5) of the PSM Act, the (unchallenged) finding of the failure to provide procedural fairness was itself sufficient to justify Commissioner Emmanuel's orders, and that it was unnecessary to consider whether the failure involved any failure to provide A with a 'fair go all round'.

Analysis

Ground 1

71 The Full Bench, in its reasons, does not appear to have addressed A's alternative submission referred to in preceding paragraph. Whether it should have, absent a notice of contention, is not a matter which arises in this appeal. Nevertheless, the omission does not, in our opinion, imply anything about the Full Bench's view as to the proper construction of s 26(2) of the *Industrial Relations Act*.

72 The Full Bench determined the issues in the appeal on the basis of the grounds of appeal, and in the context of the evidence and the issues agreed by the parties for determination by Commissioner Emmanuel. At no stage in the appeal to the Full Bench (or, indeed, before Commissioner Emmanuel) was there a mention of, let alone an issue as to, the proper construction of s 26(2) of the *Industrial Relations Act*.

73 Insofar as the Full Bench referred to the Memorandum, it was in the context of referring to the history and conduct of the matter at first instance.³⁸ In this context, the Full Bench observed that the Commission was 'bound to consider how to deal with the industrial matter within the constraints of the law, the [Memorandum] and how the hearing was conducted by the parties'.³⁹

74 In our view, on the proper construction of the Full Bench decision, the Full Bench did not (contrary to the allegation in ground 1) find that s 26(2) of the *Industrial Relations Act* 'did not permit the Commission to deviate from addressing each of the specific terms of the [Memorandum] ... in granting relief or redress under the [*Industrial Relations Act*]'.³⁹

75 Accordingly, we would dismiss ground 1.

76 Whilst the reference in ground 1 to the misconstruction of s 26(2) of the *Industrial Relations Act* may not be a contrivance, it appears at least to involve a strained attempt to find some statutory peg, in accordance with s 90(1)(b) of the *Industrial Relations Act*, on which to hang what is in substance a complaint that the Full Bench erred in finding that A had not established that she had been denied a 'fair go all round'.

³⁶ The transcript refers to 'Mr Anderson' for the employer at this point, but it appears that this is a typographic error and that counsel addressing was Mr Fordham for A.

³⁷ Regulation 102(12) of the Regulations provides:

If a person who is a party to the proceedings before the Commission proposes to argue at the hearing of the appeal that the decision of the Commission should be upheld on grounds other than those relied on by the Commission in that decision, the person must, within 14 days after service of a copy of the appeal book, file a notice of contention in the approved form that sets out those grounds.

³⁸ See, for example, Full Bench decision [4], [8], [9], [19].

³⁹ Full Bench decision [65].

Ground 2

77 Ground 2 alleges, in substance, that A was not given the opportunity to make submissions on whether the Commission at first instance was restricted to dealing with A's referral in terms of the Memorandum. This ground should be dismissed on the basis that the Full Bench did not make that finding. As noted in [73] above, the Full Bench found in terms that the matter was to be determined in accordance with (1) the constraints of the law, (2) the Memorandum, and (3) how the hearing was conducted by the parties.

Ground 3

78 In our view, ground 3 has not been established for the following reasons.

79 First, ground 3 misstates the finding of the Full Bench. The Full Bench did not (as alleged in ground 3) find that s 78(5)(b) of the PSM Act 'is subject to an implied condition for [A] to establish the nature of additional evidence or argument that may have been presented in support of her case before the Commission can act in accordance with that subsection'. That is so for the reasons below.

80 On the proper construction of the reasons for decision of the Full Bench, the Full Bench was not directing its attention in the appeal to the operation of s 78(5)(b) of the PSM Act. Rather, in our view, the Full Bench was directing its attention to the combined operation of s 78(2)(b)(ii) of the PSM Act and s 29(1)(b) of the *Industrial Relations Act*, in the context of s 23 and s 26(1) of the *Industrial Relations Act*, in concluding that in order to set aside the 19 November 2021 decision, A was required to show not only a breach of procedural fairness, but that the failure to provide procedural fairness meant that there was a failure to provide A with a 'fair go all round'. That appears, in our view, from:

1. The fact that Commissioner Emmanuel, in granting relief to A, did not refer to s 78(5)(b) or use the statutory language of s 78(5)(b) of the PSM Act. The learned Commissioner did not 'quash the decision ... and remit the matter back to [the employer] ...'. The predicate for the appeal was not the grant of relief under s 78(5)(b) of the PSM Act.
2. The absence of any reference to s 78(5)(b) of the PSM Act in the Full Bench decision.
3. The Full Bench's reference to the application having been referred to the Commission as an industrial matter pursuant to s 78(2)(b)(iii) of the PSM Act and s 29(1)(b) of the *Industrial Relations Act*.⁴⁰
4. The Full Bench's reference to the Commissioner having outlined the relevant statutory provisions, which included the observation that A had referred the application to the Commission pursuant to s 29(1)(b) of the *Industrial Relations Act* and s 78(2)(b)(iii) of the PSM Act.⁴¹
5. The Full Bench's discussion of the principles as to whether the employer had provided to A a 'fair go all round' in changing the terms of her suspension to suspension without pay, in the context of dealing with the 'industrial matter' referred to it under s 78(2)(b)(iii) of the PSM Act and s 29(1)(b) of the *Industrial Relations Act*.⁴²

81 Secondly, in this appeal senior counsel for A accepted that (1) Commissioner Emmanuel had not proceeded under s 78(5)(b) of the PSM Act,⁴³ and (2) the Commissioner's powers under s 78(5) '[sat] alongside' the powers given to the Commission 'to determine industrial matters pursuant to s 29 of the *Industrial Relations Act*'.⁴⁴ Acceptance of these matters seems to us to undermine A's contention that the Full Bench, by necessary implication, misconstrued s 78(5)(b) of the PSM Act.

82 Thirdly, if we were wrong in concluding that the Full Bench was not construing s 78(5)(b) of the PSM Act in the Full Bench decision, then we would still dismiss ground 3. That is because, on the proper construction of the Full Bench's decision, the most that could be inferred is that the Commission found that insofar as there was a discretion under s 78(5)(b) to quash the 19 November 2021 decision, the question of whether A had established that, on the balance of probabilities, a different outcome was realistically possible, was a relevant consideration.⁴⁵

Other observations

83 The matters referred to above are sufficient to dispose of the appeal, and the appeal should be dismissed for those reasons. However, we would make the following additional observations.

84 A submitted under ground 1 that the Full Bench further held that the Commission was 'obligated to adopt the principles of judicial review, and ultimately [it] applied the principles of judicial review in such a way as to make an error of law as identified in *Nathanson*'. However, that submission sought to add an alleged error outside of the compass of ground 1. It did not provide an argument in support of the error alleged in ground 1. Insofar as A, via this argument, sought to contend that the Full Bench misapplied the reasoning of *MZAPC* having regard to the more recent decision of

⁴⁰ Full Bench decision [3].

⁴¹ Full Bench decision [34] read with Commissioner's decision [11].

⁴² Full Bench decision [61] - [66].

⁴³ Appeal ts 8 - 9.

⁴⁴ Appeal ts 12.

⁴⁵ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39 - 40.

the High Court in *Nathanson*, we are not persuaded, in any event, that, on the proper construction of the Full Bench's decision, any material error has been demonstrated.⁴⁶

85 In relation to ground 2, A appears to contend, in her submissions, that the facts were in dispute before the Commissioner. These arguments do not fall within ground 2 and, in any event, the premise for these arguments was not established.

86 In relation to ground 3, as noted earlier, A submitted in her written submissions:

27. The second option evident on the plain words of s 78(5)(b) of the PSM Act strongly imply that a merits-based enquiry is not required for the Commission to make a determination to quash the impugned decision or finding and remit a disciplinary process back to the relevant employing authority.

28. On a proper construction of s 78(5)(b) of the PSM Act, and contrary to the finding of the Full Bench, the Commission at first instance was not strictly required to carry out a particular type of merit-based assessment to identify whether the principle of industrial fairness warranted a determination to set aside the decision to cease the payment of [A's] wages.

87 Although not entirely clear, arguably, by these submissions, A sought to repeat the alternative argument referred to in [70] above. The argument appeared to be more by way of assertion than a process of legal reasoning as to the proper construction of s 78(5) of the PSM Act. Moreover, in oral submissions, senior counsel for A said:⁴⁷

It is a difficult argument to progress, and I acknowledge that, but there are two ways of reading [s 78(5)(b)] and what Commissioner Emmanuel has done is simply quash the decision, which we say, on her interpretation of [s 78(5)(b)] *may, in fact, have been open to her, because there are two ways of reading it. ... It's a matter of statutory construction. It has not been argued.* (emphasis added)

88 Accordingly, as best as we understood it, A was not contending that this court should determine that s 78(5)(b) has the operation referred to in [70] above.

89 Whilst, accordingly, it is not necessary to determine the proper construction of s 78(5)(b) for the disposition of this appeal, we would add that, in our view s 78(5)(b) does not have the meaning referred to in [70] above. Nor, however, do we accept that it has no operation to a decision to suspend on partial or no pay as contended for by the employer.

90 The language of s 78(5) in its ordinary meaning, and read in the context of s 78 as a whole, prima facie applies to each of the references to the Commission under s 78(2)(b)(i) - (iv) where it appears to the Commission that the employing authority failed to comply with the rules of procedural fairness. Whilst it may be accepted that a decision to suspend on partial pay or without pay would, at least not ordinarily, be associated with a pause in the disciplinary process, the reference in s 78(5)(b) to directions in relation to the 'recommencement' of the disciplinary process does not, in our view, govern the intended operation of s 78(5)(b). Properly construed, the power to give directions is an additional power capable of exercise in appropriate circumstances where the power to remit is exercisable, but it does not determine the scope of the power to quash and remit.

91 In our view, the effect of s 78(5) read with s 78(2) of the PSM Act is that on a referral of a decision or finding under s 78(2)(b)(i) - (iv), if in dealing with the referral as an industrial matter the Commission concludes that the employing authority denied the employee procedural fairness sufficient to warrant the decision or finding being set aside, then the Commission may:

- (a) under s 78(5)(a), proceed to decide the matter the subject of the reference on its merits; or
- (b) under s 78(5)(b), quash the decision or finding affected by the denial of procedural fairness and remit the matter the subject of the reference back for determination by the employing authority with such directions, if any, as may be appropriate for any recommencement of the disciplinary process by the employing authority.

92 More particularly, and relevantly for present purposes, the effect of s 78(5) read with s 78(2) of the PSM Act, in our opinion, is that on a referral of a decision under s 78(2)(b)(iii) to suspend the employee on partial pay or without pay, if in dealing with the referral as an industrial matter the Commission concludes that the employing authority denied the employee procedural fairness sufficient to warrant the decision being set aside, then the Commission may:

- (a) under s 78(5)(a), proceed to determine on its merits the decision to suspend on partial pay or without pay; or
- (b) under s 78(5)(b), quash the decision to suspend on partial pay or without pay and remit the decision to suspend on partial pay or without pay back for determination by the employing authority, with such directions, if any, as may be appropriate for any recommencement of the disciplinary process.

93 Further, the powers under s 78(5) are, in our view, additional to the jurisdiction of the Commission to set aside the decision to suspend

on partial pay or without pay in dealing with such a reference as an industrial matter, in accordance with s 78(2) of the PSM Act and s 29(1)(b) of the *Industrial Relations Act*.

94 It is not necessary to consider the notice of contention.

⁴⁶ See *Nathanson* [1] - [2], [31], [33] (Kiefel CJ, Keane & Gleeson JJ), [45] - [46] (Gageler J).

⁴⁷ Appeal ts 59.

Conclusion

95 The appeal should be dismissed.

SMITH J:

Summary

1 For the reasons that follow, I agree that A has not made out any of the grounds of appeal, and that the appeal should be dismissed.

Background**A's employment was suspended in 2020 pursuant to s 82 of the *PSM Act***

2 A is employed by the respondent as a senior prison officer, under s 13(2) of the *Prisons Act*.

3 In November 2018, there was an incident involving another officer against a prisoner, resulting in injury to the prisoner. It appears that this incident led to disciplinary action being taken against a number of officers, including notifying A that she was suspected of a breach of discipline. The alleged breach of discipline arose out of an investigation conducted by the Corruption and Crime Commission (CCC).

4 Section 81(1)(a) of the *PSM Act* provides that if an employing authority of an employee is made aware, or becomes aware, by any means that 'the employee may have committed a breach of discipline', the employing authority may 'decide to deal with the matter as a disciplinary matter under this Division in accordance with the Commissioner's instructions'.

5 Section 82(1) provides that if an employing authority has decided to act under s 81(1)(a) in relation to an employee, or an employee is charged with having committed a serious offence, 'the employing authority may, in accordance with the Commissioner's instructions, suspend the employee on full pay, partial pay or without pay'. Section 82(3) provides that the employing authority 'may at any time remove, or vary the terms of, the suspension'.

1

6 By letter dated 13 August 2020, A was suspended with pay while the respondent began a disciplinary investigation under the *PSM Act*.

7 In August 2020, the investigation for the breach of discipline was put on hold because CCC proceedings prevented A from responding to any allegations.

8 In November 2020, A was charged with a criminal offence for making a false record as a public officer in November 2018 and later, in December 2020, she was charged with disclosing a restricted matter contrary to s 167(3) and s 167(2)(a) of the *Corruption, Crime and Misconduct Act*.⁴⁸

9 In November 2021, the respondent altered the suspension decision by suspending A without pay.

The applications before the Commission at first instance

10 As a result of the decision by the respondent to alter the suspension decision, an application was filed by A's union under s 44 of the *Industrial Relations Act* (for a compulsory conference). The application was not resolved at conciliation and it was referred for hearing. Pursuant to s 44(9), the Commission referred the questions in dispute for hearing in a 'Memorandum of Matters Referred for Hearing and Determination under Section 44' (Memorandum). The Memorandum contained a number of facts set out in pars [2] - [31] which the parties had agreed were agreed facts. The s 44 hearing did not proceed. It was discontinued following an issue of jurisdiction being raised.

11 A then referred an application to the Commission pursuant to s 78(2)(b)(iii) of the *PSM Act*.

12 Section 78(2)(b)(iii) provides that, despite s 29 of the *Industrial Relations Act*, but subject to s 78(3), an employee who is aggrieved by a decision made under s 82 to suspend the employee on partial pay or without pay 'may refer the decision ... to the Industrial Commission as if that decision ... were an industrial matter mentioned in section 29(b) [sic: s 29(1)(b)] of that Act, and that Act applies to and in relation to that decision accordingly'.

13 Section 78(5) is to the effect that if it appears to the Commission that an employer has failed to comply with the rules of procedural fairness in making the decision (referred to the Commission), the Commission is not required to determine the reference solely on that basis and may proceed to decide the reference on its merits, or may quash the decision and remit the matter to the employer with directions as to the stage at which the disciplinary process is to recommence if the disciplinary process is continued by the employer.

The procedure and questions for determination agreed by the parties in the hearing at first instance of the matter referred pursuant to s 78(2)(b)(iii) of the *PSM Act*

14 Of importance in the disposition of the appeal to the Full Bench is that at the hearing before the Commission at first instance, the parties agreed not to adduce any evidence.⁴⁹

15 The parties agreed that the application would be heard and determined on the basis that the agreed facts set out in pars [2] - [31] of the Memorandum and the documents and submissions filed in the s 44 application be taken to have been

⁴⁸ Commissioner's decision [3].

⁴⁹ Commissioner's decision [12] - [13].

filed in relation to the s 78(2)(b)(iii) of the *PSM Act* referral.⁵⁰ One paragraph of the Memorandum, par 23(d), was subsequently withdrawn by the respondent on the basis that it was included in error and was not agreed.⁵¹

16 The parties also agreed the questions that the Commissioner was to decide in determining the matter referred. These were the same questions which were in the Memorandum, and were as follows:⁵²

1. Did the respondent exercise its lawful right under s 82(1) of the *PSM Act* to suspend the applicant without pay:
 - a) in breach of procedural fairness;
 - b) without having regard to a relevant consideration; or
 - c) contrary to the legislative and regulatory framework which applies to a decision to suspend an employee without pay,
 such that a fair go all round requires that the decision be set aside and a new decision be made in its place?
2. If so, on what terms should the applicant's suspension continue?

17 From these questions, it was clear that the dispute between the parties was whether A had been denied procedural fairness by the respondent when the decision was made to vary the terms of A's suspension, and whether that decision was fair.

The relevant agreed facts relating to the decision in November 2021 to vary the terms of A's suspension, to suspension without pay

18 The respondent wrote to A by letter dated 11 November 2021 informing her that altering her suspension from duty from suspension on full pay to suspension on partial pay or without pay was being considered and a decision would be made within seven days from receipt by her of the letter. The letter invited A to submit a written submission in respect of the terms of her suspension.

19 In the letter dated 11 November 2021, the respondent stated that:⁵³

- a) [A] had been charged with a criminal offence which the respondent regards as serious;
- b) the ongoing criminal proceeding has caused the disciplinary process to be stayed;
- c) [A] had remained on suspension with pay for 15 months, during which the criminal proceeding has been ongoing for some 12 months, and the proceeding remains ongoing;
- d) [withdrawn];
- e) the procedural history of the criminal matter as referred to in paragraph 21 above [that the criminal charges were listed for mention on approximately a monthly basis and A was yet to enter a plea to the charges]; and
- f) other matters that are referred to in the letter of 4 December 2020.⁵⁴

20 A sent two undated responses in writing to the respondent in which she had said she should remain suspended with pay and also said that:⁵⁵

1. she still could not respond to the allegations because of the criminal proceedings;
2. she has not been found guilty;
3. suspension without pay would cause considerable hardship for her family;
4. the impact on her mental health of waiting for the criminal matters to be finalised is debilitating and she has had minimal support with this; and
5. the last time she appeared in court it was delayed 'due to the DPP not having full disclosure'.

21 On 19 November 2021, the respondent sent A a letter in which she was informed that her suspension would be varied to suspension without pay and gave the following reasons:⁵⁶

1. it considered the applicant's responses and understood her objections to be that she remains unable to respond to the allegation [S] and that suspension without pay would cause her financial hardship;
2. the criminal proceedings have been ongoing since she was charged on 17 November 2020 and she has not yet entered a plea;
3. the criminal charges are serious (and there are consequences under the *PSM Act* if she is found guilty);
4. if proven, her conduct would amount to a serious breach of discipline; and

⁵⁰ Commissioner's decision [12].

⁵¹ Commissioner's decision [12].

⁵² Commissioner's decision [8].

⁵³ Memorandum par 23.

⁵⁴ Commissioner's decision [37].

⁵⁵ Commissioner's decision [40].

⁵⁶ Commissioner's decision [41].

5. in circumstances where the applicant 'has already received full pay for 15 months' the respondent determined the suspension would be altered to be a suspension without pay.

A's submissions at first instance

22 At the hearing before the Commission at first instance, A argued that there was a breach of procedural fairness because the respondent failed to give her sufficient notice of the factors the respondent would consider in making the decision whether to vary the terms of her suspension to suspension without pay.

23 A claimed that the factors that she did not have an opportunity to respond to were the length of time that the criminal proceedings were taking, the outcomes of the criminal proceedings relating to the other prison officers involved in the incident, and the fact that at the time the suspension with pay was being reviewed in 2021, she had not yet entered a plea in the criminal proceedings. A also claimed that it should have been put to her that in responding to the proposal to stop her pay that she would need to provide the respondent with a preliminary explanation of her defence along with any reasons as to why her case may differ from others that have gone before her.⁵⁷

24 A also submitted that the respondent had failed to comply with the relevant legislative regulatory framework because contrary to the Public Sector Commission *Commissioner's Instruction No 3: Discipline - General* (Instruction No 3) she was not given sufficiently detailed notice of the important factors that she needed to address, and a reasonable opportunity to respond to the proposal.⁵⁸

The Commissioner's decision at first instance

25 Commissioner Emmanuel found that Instruction No 3 sets out the minimum procedural requirements that employing authorities must follow when dealing with discipline which procedural requirements include the requirement to comply with the rules of procedural fairness. However, Instruction No 3 does not set out what considerations an employer should take into account when deciding the terms of a suspension.⁵⁹

26 The parties also referred to another Public Sector Commission policy. The policy was titled '*Guide to the disciplinary provisions contained in Part 5 of the Public Sector Management Act 1994*'. This document was also an agreed document. It contains specific guidelines for an employing authority to follow when determining which form of suspension to impose.

27 Commissioner Emmanuel did not consider these guidelines to be part of the regulatory framework for the purposes of making her decision on the basis that: (a) the guide notes stated it was not part of the disciplinary framework for disciplinary processes conducted under pt 5 of the *PSM Act*; and (b) it was suggested practice only and was not binding on agencies.⁶⁰

28 Commissioner Emmanuel found that there were three matters that were not put to A as part of the proposal for stopping her pay which were at least among the reasons why the respondent decided to alter the suspension to be without pay. These three matters were:⁶¹

- 1 the criminal matters were ongoing and the applicant had yet to enter a plea;
2. the applicant had already received 15 months of pay; and
3. the seriousness of the allegations meant that a serious outcome was warranted if the applicant was convicted or if the allegations were found to be made out on the balance of probabilities,

29 Commissioner Emmanuel observed that A seemed to argue that because of maintaining her right to silence and the CCC suppression order, she could not respond to points 1 and 3. The Commissioner found that that may be true of point 3, however, had point 1 been put to A, perhaps she could have responded in some way. The Commissioner went on to observe that the fact that A had yet to enter a plea could well have been for reasons that had nothing to do with her, her case or the legal advice she had received and she could have responded also to the inference that 15 months was a sufficient period to be paid while on suspension in the circumstances.⁶²

30 Commissioner Emmanuel found that the respondent failed to afford A procedural fairness by not properly putting to A the reasons why the respondent proposed to change her suspension to be without pay and the breach was not minor or without impact.⁶³

31 Commissioner Emmanuel also found that although the respondent had exercised its lawful right under s 82(1) of the *PSM Act* to suspend A without pay, the respondent had done so in breach of procedural fairness, and contrary to the legislative and regulatory framework that applies to a decision to suspend an employee without pay, such that a 'fair go all-round' required that the decision be set aside.⁶⁴

⁵⁷ Commissioner's decision [42] - [43].

⁵⁸ Commissioner's decision [61].

⁵⁹ Commissioner's decision [22] - [27].

⁶⁰ Commissioner's decision [28].

⁶¹ Commissioner's decision [81].

⁶² Commissioner's decision [82].

⁶³ Commissioner's decision [83].

⁶⁴ Commissioner's decision [85].

The Full Bench appeal by the respondent

32 In the appeal to the Full Bench, the respondent did not challenge the finding by the Commissioner that it had denied A procedural fairness, instead its grounds were that:

1. The Commissioner erred in deciding there had been a denial of procedural fairness which merited the setting aside of the employer's decision to vary the terms of the suspension from with pay to without pay.
2. In the alternative, the Commissioner erred in failing to 'afford the [employer] procedural fairness in determining that there was a denial of procedural fairness by the [Commission] which was not minor or without impact'.

33 The point at the heart of the respondent's appeal to the Full Bench in ground 1 was that the Commission at first instance erred in finding that the denial of procedural fairness merited the decision being set aside because no different decision would have resulted, such that no practical injustice had occurred. In such circumstances, the respondent argued it was an error to find that a fair go all-round required the decision to be set aside.⁶⁵

34 The particulars of ground 2 of the appeal were to the effect that the Commission at first instance had disregarded concessions by A that if the factors which she alleged she was not given notice of had been put to her, she would not have responded to those factors, and the respondent was not given notice of, or an opportunity be heard, of the intention to disregard those concessions.

35 Ground 1 of the appeal was upheld, and the appeal was allowed. Ground 2 was dismissed. The Senior Commissioner delivered the reasons of the Full Bench, with both the Chief Commissioner and Walkington C agreeing.

36 The reasons why ground 1 of the appeal was upheld by the Full Bench were as follows.

37 The Senior Commissioner had regard to how the case unfolded at first instance, by regard to the following issues:⁶⁶

- (a) To what extent was the issue of the consequence of the failure to provide the officer with adequate notice of the factors which the employer relied upon for its decision 'in play' at first instance?
- (b) What were the parties' respective cases as to the consequence of such failure?
- (c) What concessions, if any, were made in this regard?
- (d) If concessions were made, how far did those concessions go?

38 The Senior Commissioner observed that there were two limbs to A's case: first, she claimed that she was denied procedural fairness because not all of the material factors relevant to the respondent's decision were made clear to her in advance of the decision, and second, she claimed she was denied procedural fairness because the respondent did not have regard, or proper regard to the fact that she could not speak to any of the facts of her case in the criminal matter.⁶⁷ As to the consequences of the breach, A had submitted that the required standard of procedural fairness was such that the decision was to be treated as a nullity.⁶⁸

39 The Senior Commissioner observed that A's written submissions did not squarely address the question of whether the procedural fairness was such that a fair go all-round required that decision be set aside and a new decision be made in its place.

40 The Senior Commissioner found that less attention was given in A's case to the precise content of the duty to accord procedural fairness, or the impacts of a failure to provide notice of factors in the efficacy of the opportunity A had to respond to the proposed alteration in the terms of the suspension. Further, that nothing was really said that was directed at the questions posed by the Memorandum about the industrial fairness of the decision to cease pay.⁶⁹

41 In respect of the respondent's case, the Senior Commissioner observed that the respondent also conducted its case on a narrow basis describing the decision-making process as the primary issue.

42 The Senior Commissioner also observed that during the hearing at first instance, counsel for the respondent discouraged the Commission from embarking on an enquiry into the merits of the suspension decision, but that counsel for the respondent did submit the merits may still be relevant if procedural unfairness was found, but not if there was no procedural unfairness.⁷⁰

43 The Senior Commissioner then went on to find that this point was not addressed by A in reply submissions and at no time did A seek to positively suggest that she could have or would have said anything further had she been given the notice which was ultimately found to be lacking. Nor did the evidence before the Commission in the form of the agreed facts and documents, shed any light on what outcome could have resulted, had proper notice been given.⁷¹

44 Importantly, the Senior Commissioner observed that at the hearing at first instance the Commissioner had properly raised with the parties the question of whether she ought to be confined to considering the matter on the basis of

⁶⁵ Full Bench decision [45(a)].

⁶⁶ Full Bench decision [12].

⁶⁷ Full Bench decision [13].

⁶⁸ Full Bench decision [14].

⁶⁹ Full Bench decision [18] - [19].

⁷⁰ Full Bench decision [22] - [23].

⁷¹ Full Bench decision [25].

procedural fairness only, or whether the matter should be determined on its substantive merits. A's response was that A could not speak to or address the merits of the decision to suspend her (at least while she was maintaining her right to silence).⁷²

45 A's counsel also made a submission that the cases of the other officers who had been charged was relevant because all of their cases had been dealt with, but the fact that her case was ongoing and seemed to be moving very slowly and why that was the case was a question she could not answer at this point.⁷³

46 The Senior Commissioner summarised the conduct of the hearing by the parties at first instance as follows:⁷⁴

- (a) The consequences of the failure to provide the officer with adequate notice of the factors which the employer relied upon for its decision was an issue that the employer raised at first instance, although it was not given a great deal of attention in submissions by the employer.
- (b) The officer's case was that there was a need to address the consequences of the failure to give notice, and that the failure of procedural fairness was enough on its own to render the decision a nullity.
- (c) The officer did not concede that she would not have responded in some way had she been given notice that the duration of the suspension and the uncertainty of the duration of the criminal proceedings were factors that were considered relevant to the decision.
- (d) The officer did not advance any positive case that the provision of adequate notice of the factors which were considered relevant to the decision would have created the possibility of a different resulting decision about the conditions of the officer's suspension.

47 After summarising the submissions that were made on behalf A in the appeal, the Senior Commissioner observed that A did not address what evidence there was before the Commission at first instance as to what she would have done with the opportunity had it been given to her, or how the agreed facts would have enabled the Commission at first instance to be satisfied on the balance of probabilities of a realistic possibility that a different decision could have been made had A been given proper notice of the relevant factors which ultimately informed the decision.⁷⁵

48 The Senior Commissioner then turned to consideration of ground 1 of the appeal and observed that the Memorandum required the Commission to undertake a two-step process. The first was to determine whether the employer complied with the requirements of procedural fairness and/or the regulatory framework that applied in making the decision. If these procedural requirements had not been complied with, the Commission was additionally required to embark on a second step, in determining whether the failure was such that a fair go all-round required the decision be set aside.⁷⁶ The Senior Commissioner observed that the appeal before the Full Bench only concerned the second stage.⁷⁷

49 The Senior Commissioner then went on to observe that the focus of the parties' respective cases led the Commission to place prominence on the question of whether there was a denial of procedural fairness, and to place less significance on the practical consequences of the failure in the assessment of industrial fairness and that this narrow focus erroneously drew the Commissioner into error.⁷⁸

50 Of importance to the disposition of this appeal before this Court, the Senior Commissioner went on to find that:

- (a) the authorities establish that a finding that there is a denial of procedural fairness is not an end in itself, but is one step in determining how the industrial matter is to be dealt with;⁷⁹
- (b) to the extent that judicial review questions turn on points of general principle as to the content of the duty to afford procedural fairness, the legal consequences of a failure in that duty, and the determination of any remedy, the Commission is bound by those same principles;⁸⁰
- (c) while the Commission could not ignore the substantive common law as to whether or not a decision was void for lack of procedural fairness, that enquiry was not determinative of the application of whether the orders sought should be made, as the Commission remains bound to consider how to deal with the industrial matter within the constraints of the law, the Memorandum, and how the hearing was conducted by the parties;⁸¹
- (d) the Commission was required to consider what a fair go all-round required. A 'fair go all-round' refers to the principle of industrial fairness as enunciated in *Re Loty v Australian Workers' Union*,⁸² and *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and*

⁷² Full Bench decision [27] - [28].

⁷³ Full Bench decision [26] - [28].

⁷⁴ Full Bench decision [32].

⁷⁵ Full Bench decision [55].

⁷⁶ Full Bench decision [56].

⁷⁷ Full Bench decision [57].

⁷⁸ Full Bench decision [58] - [59].

⁷⁹ Full Bench decision [61] - [63]; applying the principles considered by the Full Bench in *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00215; (2008) 88 WAIG 543 (*Moodie*).

⁸⁰ Full Bench decision [63] - [64].

⁸¹ Full Bench decision [65].

⁸² *Re Loty v Australian Workers' Union* [1971] AR (NSW) 95.

Miscellaneous, WA Branch.⁸³ That is, whether the employer has exercised its lawful right (in this case to cease pay during suspension) so harshly or oppressively against the employee so as to amount to an abuse of that right. The question posed is one of assessing the industrial fairness of the decision,⁸⁴ and

- (e) the general principles variously referencing materiality [in judicial review proceedings], futility and practical injustice, properly inform the assessment of industrial fairness and whether the breach of procedural fairness deprived the decision of a fair go all round so as to merit the decision being set aside.⁸⁵

51 In light of these principles, the Senior Commissioner said the question is, how should the Commission determine whether there is futility, and whether it should step in?⁸⁶

52 After considering observations made in the decision of the Full Bench in *Moodie*, and where the onus lies to establish that overturning a decision to suspend a person without pay would or would not be futile, the Senior Commissioner found:⁸⁷

It is implicit in the learned Commissioner's reasons at first instance at [83] that she considered the impact of the procedural flaw was relevant to determining whether there had been a fair go all round. However, in assessing the impact, the learned Commissioner considered only the question of whether the officer could, had she been given proper notice, responded to the relevant factors. The learned Commissioner did not apparently further consider what if any different outcome might have resulted, had the opportunity to respond been taken up. Nor does the reasoning disclose any assessment of whether the possibility of a different outcome was realistic.

The learned Commissioner's reasons do not disclose a determination of whether the result could realistically have been different had the officer been given the relevant opportunity to respond. Accordingly, the learned Commissioner failed to determine whether a fair go all round required the Commission's intervention in the suspension adjustment decision.

To the extent that the learned Commissioner disregarded what the employer describes as the officer's repeated concessions to the effect that she would not have responded, the learned Commissioner was correct to do so. I agree with the officer that in their proper context, the statements by counsel during the hearing at first instance should not be viewed as concessions that the officer would not have responded to those factors which the learned Commissioner ultimately found were reasons that were not put to her. There really was no evidence before the Commission at all as to what if anything the officer would have said had she been given notice.

The conclusion that the officer could have responded 'in some way' to the relevant factors is obvious and virtually goes without saying. However, that some response might have been given remains some distance away from any destination in terms of an ultimate impact. If all the learned Commissioner did was to determine that the absence of the ability to utilise an opportunity to respond is the impact, then the learned Commissioner has, in effect, not considered the matter beyond its procedural elements. The industrial fairness destination has not been reached.

The learned Commissioner did not consider whether, had the officer been given notice of the relevant factors, it would have produced the same or a different resulting decision. The learned Commissioner's conclusion as to the impact of the procedural failure was not directed at the outcome: the industrial fairness of the decision to cease pay. It was inconsistent therefore with the general principles laid down by the majority of the High Court in *MZAPC* as set out above. Had the learned Commissioner assessed whether the officer had established on the balance of probabilities that a different outcome was realistically possible, the learned Commissioner must necessarily have found an absence of an evidentiary basis to find it was, bearing in mind the officer bore the onus.

53 The central point that emerges from these reasons is that the decision of the Commission at first instance was set aside by the Full Bench because it was found the Commissioner erred in failing to consider the industrial fairness of the decision to cease pay, including whether A had established on the balance of probabilities that a different outcome was realistically possible if the failure to accord procedural fairness had not occurred.

The grounds of appeal to the Court and the notice of contention

54 The grounds of appeal to the Court, excluding the particulars to grounds 1 and 3 are as follows:

1. The Full Bench erred in law in finding that the terms of s 26(2) of the [*Industrial Relations Act*] did not permit the Commission to deviate from addressing each of the specific terms of a memorandum prepared in separate proceedings pursuant to regulation 31 of the *Industrial Relations Commission Regulations 2005* (Regulations) in granting relief or redress under the IR Act.
2. [A] was denied the right to be heard on the question of whether the Commission at first instance was restricted to dealing with [A's] referral with strict regard to the terms set out in the

⁸³ *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.

⁸⁴ Full Bench decision [66].

⁸⁵ Full Bench decision [67].

⁸⁶ Full Bench decision [68].

⁸⁷ Full Bench decision [75] - [79].

memorandum.

3. The Full Bench erred in law in finding, in effect, that the discretionary power provided to the Commission by section 78(5)(b) of the [*PSM Act*] is subject to an implied condition for [A] to establish the nature of additional evidence or argument that may have been presented in support of her case before the Commission can act in accordance with that subsection.

55 Lengthy particulars to grounds 1 and 3 are set out in the notice of appeal. Unfortunately, the particulars are in the main either not relevant to the issues raised in grounds 1 or 3, or are in the nature of submissions.

56 The respondent filed a notice of contention in the following terms:

[T]he decision of the Full Bench should be confirmed for reasons other than those decided by the Full Bench, namely [A] failed to establish that she was denied a fair go all round because:

- i. contrary to the finding of the Full Bench at [77], the Full Bench should have found that [A] would not have responded to the factors of which she was not given notice if those factors had in fact been put to her by the [employer], and
- ii. No practical injustice arose because [A] would not have so responded.

Grounds 1 and 2

57 A's written submissions in respect of ground 1 are difficult to understand. However, what can be distilled from the written submissions appears to be as follows.

58 A makes a submission that ground 1 contends there is only one answer reasonably open on the application of s 26(2) of the *Industrial Relations Act* to A's case, namely, that the Commission at first instance was entitled to determine A's referral with regard to the circumstances and power referred to by s 78(5)(b) of the *PSM Act*, and not strictly by the particulars referred to in A's initiating claim, which claim included a schedule containing the Memorandum. Implicit in this submission appears to be a submission that the Full Bench incorrectly found that the Commission at first instance was bound to determine A's referral solely by addressing the questions or issues raised by the Memorandum.

59 Section 26(2) of the *Industrial Relations Act* provides:

In granting relief or redress under this Act the Commission is not restricted to the specific claim made or to the subject matter of the claim.

60 Ground 1 of the appeal must fail because not only did the Full Bench make no reference to s 26(2) of the *Industrial Relations Act*, it did not find that the Commission was not permitted to deviate from addressing the questions or issues raised in the Memorandum. In any event, it was not suggested by counsel for A in the appeal before the Full Bench that A was seeking relief that was different from the questions or issues raised by the Memorandum.

61 In addition, A made no mention in the hearing before the Commission at first instance that she did not seek that the Commissioner answer the agreed questions in the Memorandum.

62 The Senior Commissioner's findings were to the effect that the Commission was bound to consider how to deal with the 'industrial matter' the subject of the referral under s 78(2)(b)(iii) of the *Public Management Sector Act*: (1) within the constraints of the law (which required the Commission to consider the industrial fairness of the decision); (2) having regard to the evidentiary materials in the Memorandum; and (3) with regard to how the hearing was conducted by the parties.

63 Contrary to the point put in ground 1 of the appeal, the Senior Commissioner made it clear that the Commission was required to determine: (1) first, whether the respondent's decision to vary A's suspension to suspension without pay was made without observing the rules of procedural fairness; and (2) if so, then to decide what should be done about that decision on the basis that the matter had been referred to the Commission as if it were an 'industrial matter' pursuant to s 78(2)(b)(iii) of the *PSM Act* and s 29(1)(b) of the *Industrial Relations Act*.

64 The Senior Commissioner made it clear in her reasons that a finding of a breach of procedural fairness was not of itself sufficient to properly deal with the decision that had been referred to the Commission as if it were an 'industrial matter'.

65 A finding that it was necessary for the Commission to move to the second stage of the enquiry and determine what was an appropriate outcome, including any remedy, for the failure to provide procedural fairness, cannot be construed as a finding by the Full Bench that the Commission at first instance was not permitted to deviate from addressing the questions or issues raised by the Memorandum.

66 For these reasons, it cannot be found that the Full Bench's approach to the construction of the statutory task of hearing and determining a referral made pursuant to s 78(2)(b)(iii) of the *Public Management Sector Act* was in error.

67 A in her written submissions also contends that, by incorrectly finding that the Commission was bound to determine A's referral solely by addressing the questions or issues raised by the Memorandum, the Full Bench further held that the Commission was obligated to adopt the principles of judicial review, and ultimately the Full Bench applied the principles of judicial review in such a way as to make an error of law as identified in *Nathanson v Minister for Home Affairs*.⁸⁸ However, as ground 1 is framed, this submission is not open to be made. In any event, this submission has no foundation. The principles enunciated in *Nathanson v Minister for Home Affairs*⁸⁹ are considered below.

⁸⁸ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737.

⁸⁹ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737.

68 For these reasons, ground 1 is not made out. For these reasons also, ground 2 is not made out because it cannot be found that A was denied the right to be heard on the question of whether the Commission at first instance was not permitted to deviate from addressing the questions or issues raised by the Memorandum, in circumstances where:

- (a) the Full Bench did not make such a finding; and
- (b) A did not seek to depart from the matters and issues set out in the Memorandum in the hearing before the Commission at first instance.

Ground 3

69 Ground 3 is expressed in terms that the Full Bench erred in law in finding, in effect, that the discretionary power provided to the Commission by s 78(5)(b) of the *PSM Act* is subject to an 'implied condition' for A to establish the nature of additional evidence or argument that may have been presented in support of her case, before the Commission can act in accordance with that provision.

70 However, the Full Bench made no finding that the power to quash a decision and remit under s 78(5)(b) is conditioned by the referring party establishing the nature of the additional evidence or argument that he or she would seek to rely upon.

71 In addition, it appears that Commissioner Emmanuel did not act under s 78(5)(b), because she simply set aside the decision and did not quash and remit.

72 A relies on ground 3, in addition to, or in the alternative to ground 1. In respect of ground 3, A contends that the only answer that is reasonably open on the application of s 78(5)(b) of the *PSM Act* to the facts of this case is that a finding of a denial of procedural fairness was all that was necessary for the decision of the respondent to be quashed.

73 Inherent in this contention may be a submission that such a finding of itself was a circumstance in respect of which it was properly open to the Commission at first instance to find A had been denied a 'fair go all-round'.

74 A says that it follows on the proper construction of s 78(5)(b), and contrary to the findings of the Full Bench, that the Commission at first instance was not required to carry out a particular type of merit-based assessment or any assessment at all to identify whether the principles of industrial fairness warranted setting aside the decision to vary A's suspension to suspension without pay.

75 The statement in s 78(2) of the *PSM Act* that the *Industrial Relations Act* applies to and in relation to a decision as if that decision were an 'industrial matter' includes a decision made under s 82 of the *PSM Act* to suspend an employee on partial pay or without pay.

76 An 'industrial matter' is defined in s 7(1) of the *Industrial Relations Act* to mean 'any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry ... and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to – (a) the wages, salaries, allowances, or other remuneration of employees ...'. Pursuant to s 23(1) of the *Industrial Relations Act*, the Commission is provided with the jurisdiction to have cognizance of and authority to enquire into and deal with any industrial matter.

77 Section 78(5) of the *PSM Act* provides:

If it appears to the Industrial Commission ... that the employing authority failed to comply with a Commissioner's instruction or the rules of procedural fairness in making the decision ... the subject of a referral ..., the Industrial Commission ...-

- (a) is not required to determine the reference ... solely on that basis and may proceed to decide the reference ... on its merits; or
- (b) may quash the decision ... and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

78 Section 78(5) applies if, relevantly, it appears to the Commission that the employing authority failed to comply with the rules of procedural fairness in making the decision the subject of a referral. In those circumstances, the Commission is not required (that is, the Commission is not obliged) to determine the reference 'solely' on that basis. The Commission is empowered, in addition, to decide the reference on its merits. The power to decide the reference on its merits is discretionary. The Commission is not bound to decide the reference on its merits. The Commission has a discretion. Alternatively, the Commission may quash the decision and remit the matter back to the employing authority with the directions specified in s 78(5)(b).

79 This construction is confirmed by the explanatory memorandum to the *Public Sector Reform Bill 2009* when s 78(5) was introduced to Parliament. Section 78(5) was enacted by s 95 of the *Public Sector Reform Act 2010*. The explanatory memorandum states in relation to s 78(5) that the provision clarifies that an employer's technical non-compliance with the principles of natural justice of itself would not render the decision invalid, but that the Commission may either:

- (a) decide the matter on its merits; or
- (b) quash the agency's decision and direct the agency to recommence at the point directed by the Commission, should the agency choose to continue with the disciplinary matter.

80 The respondent makes a submission that s 78(5)(b), properly construed, has no application to the present proceedings. The respondent argues that the reference in s 78(5)(b) to a disciplinary process being 'recommenced' indicates that the provision is only engaged when the decision the subject of an appeal referral is made following the conclusion of a 'disciplinary process' rather than being engaged by any decision that could be the subject of an appeal referral under s 78.

- 81 I do not agree. The power to suspend an employee with or without pay pursuant to s 82 of the *PSM Act* only arises when a disciplinary process has been commenced, by an employing authority deciding to act under s 81(1)(a) after an employer is made aware, or becomes aware, by any means that the employee may have committed a breach of discipline. Alternatively, pursuant to s 81(1)(b) an employer may suspend an employee with or without pay if an employee is charged with having committed a 'serious offence' (as defined in s 80A). If an employee is convicted of a serious offence the employer may take disciplinary action and dismiss the employee.⁹⁰
- 82 Despite the fact that counsel for A in the hearing at first instance raised s 78(5)(b), counsel for A did not seek the outcome in s 78(5)(b) of the *PSM Act*. While the outcome sought by A was to quash the decision made by the respondent to vary her suspension to suspension without pay, A did not seek to have the matter remitted back to the respondent with directions as contemplated by s 78(5)(b).
- 83 This position of A was made clear from the following submission her counsel put to Commissioner Emmanuel:⁹¹
But going back to what Mr Pack had to say at the start, the Applicant doesn't ask for this matter to be dealt with on the merits, so we haven't changed our stance in that regard. *We say it's not a merit-based case, it's being dealt with purely on the basis of denying procedural fairness.* The case involving Mr Moody [Moodie] is authority for the fact that procedural fairness is enough on its own to justify the quashing of the decision. *It's going to be open to the respondent to revisit the process again straight away, after a - in the event an order is made. So if the applicant is simply returning to a position of being on suspension with pay, the respondent can simply issue her with another letter and reinstitute a process, if that's what it wants to do, so there's no prejudice to the respondent from that point of view.* (my emphasis)
- 84 It is clear from this submission that what A sought was that the decision made by the respondent to vary the terms of her suspension be quashed. The effect of what A was seeking was that the earlier decision that her suspension was with pay continue. A did not seek that the matter be remitted to the respondent with directions. What was put to the Commissioner on behalf of A was only that it would be open for the respondent to reconsider whether the terms of A's suspension should be varied, not that the matter was to be remitted to the respondent and the respondent should be given directions as to the stage at which that process was to be recommenced if the respondent chose to reconsider the matter afresh.
- 85 A also attempts to argue in support of this ground that the Full Bench erred in holding that the Commission was obligated to adopt the principles of judicial review, and ultimately the Full Bench applied the principles of judicial review in such a way as to make an error of law as identified in *Nathanson v Minister for Home Affairs*.⁹² This contention is not correct.
- 86 In *Nathanson v Minister for Home Affairs*, the plurality held that:⁹³
- (a) the Administrative Appeals Tribunal's error in failing to afford A procedural fairness will have involved jurisdictional error only if that failure was material to the Tribunal's decision;
 - (b) materiality is established if the error deprived A of a realistic possibility of a different outcome; and
 - (c) A bore the onus of demonstrating that the denial of procedural fairness was material in this sense.
- 87 Their Honours in *Nathanson v Minister for Home Affairs* also held that a realistic possibility of a different outcome was demonstrable from the record of the Tribunal's decision. A was not required to articulate a specific course of action which could realistically have changed the result.⁹⁴
- 88 Similarly, Gageler J held that, in order to meet the threshold of materiality, an applicant for relief does not have to establish any part of what *would* have occurred on the balance of probabilities had a fair opportunity to be heard been afforded. The onus which the applicant bears to establish materiality is no greater than to show that, as a matter of reasonable conjecture within the parameters set by the historical facts established on the balance of probabilities, the decision *could* have been different had a fair opportunity to be heard been afforded.⁹⁵ Establishing that threshold of materiality is not onerous.⁹⁶
- 89 In the present case, the Full Bench referred to the notion of a 'fair go all round'. The Full Bench said that a 'fair go all round' refers to the principle of industrial fairness as enunciated in a number of decisions. That is, whether the employer has exercised its lawful right (in the present case to cease pay during suspension) so harshly or oppressively against the employee as to amount to an abuse of that right. The question requires assessing the industrial fairness of the decision, which the Full Bench found the Commission at first instance did not do.⁹⁷

⁹⁰ *PSM Act 1994* (WA) s 92.

⁹¹ ts of proceedings at first instance, 28 March 2022, 31; It should be noted that the decision in [*Moodie*], *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00215; (2008) 88 WAIG 543 was decided prior to the enactment of s 82 of the *PSM Act* which provision expressly empowers an employer to suspend an employee with or without pay.

⁹² *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737.

⁹³ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 [1].

⁹⁴ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 [2].

⁹⁵ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 [46].

⁹⁶ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 [47].

⁹⁷ Full Bench decision [66].

90 The Senior Commissioner found that the failure to consider whether the result could realistically have been different had A been given a relevant opportunity to respond meant that the Commission at first instance failed to determine whether a fair go all round required the Commission's intervention in the decision to vary the terms of A's suspension.

91 By asking the question of whether the result could realistically have been different is not inconsistent with the principles enunciated by the majority in *Nathanson v Minister for Home Affairs*.

92 As I have mentioned, ground 3 alleges, in essence, that the Full Bench erred in law in finding, in effect, that the discretionary power provided to the Commission by s 78(5)(b) is subject to an implied condition for A to establish the nature of additional evidence or argument that may have been presented in support of her case before the Commission can act in accordance with that provision.

93 Commissioner Emmanuel did not proceed under s 78(5)(b) or, for that matter, s 78(5)(a). The Commissioner made the quashing order in relation to the respondent's decision pursuant to her finding that the rules of procedural fairness had been breached. The Commissioner did not make a finding as to whether the respondent's error in failing to afford A procedural fairness deprived A of a realistic possibility of a different outcome.

94 In any event, the Full Bench did not err in law in finding, in effect, that the discretionary power conferred by s 78(5)(b) does not override the common law principle that ordinarily a decision made in breach of the rules of procedural fairness will not be quashed unless the error in failing to afford procedural fairness was material to the decision; in particular, the error deprived the person aggrieved of a realistic possibility of a different outcome.

95 It is an incident of that common law principle that the person aggrieved bears the onus of demonstrating that the denial of procedural fairness was material in that sense.

96 For these reasons, ground 3 is not made out.

Conclusion

97 Having found that A has not made out any of her grounds of appeal, it is not necessary to consider the respondent's notice of contention.

1

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

JL

Associate to the Honourable Justice Murphy

30 MARCH 2023

2024 WAIRC 00941

[2022] WASCA 146

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION : A -v- MINISTER FOR CORRECTIVE SERVICES [2022] WASCA 146
CORAM : MURPHY J
HEARD : 1 NOVEMBER 2022
DELIVERED : 4 NOVEMBER 2022
FILE NO/S : IAC 3 of 2022
BETWEEN : A
Appellant
AND
MINISTER FOR CORRECTIVE SERVICES
Respondent

Catchwords:

Industrial relations - Interim order - Application for stay pending appeal - Whether appeal has reasonable prospects of success - Balance of convenience

Legislation:

Industrial Relations Act 1979 (WA), s 23, s 26(2), s 29(1), s 44, s 82, s 87(3), s 90(1)

Public Sector Management Act 1994 (WA), s 78(2), s 78(5)

Result:

Application dismissed

Category: B

Representation:*Counsel:*

Appellant : P Giles SC
Respondent : F B Seaward SC

Solicitors:

Appellant : Slater & Gordon
Respondent : State Solicitor's Office

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

Applicant v Minister for Corrective Services [2022] WAIRC 00143

Health Services Union of WA (Union of Workers) v Director General of Health in Right of the Minister for Health [2008] WAIRC 00215; (2008) 88 WAIG 543

Minister for Corrective Services v A (2022) WAIRC 00327

Nathanson v Minister for Home Affairs [2022] HCA 26; (2022) 403 ALR 398

State School Teachers' Union of WA (Incorporated) v Director General, Department of Education [2015] WAIRComm 875

The Commissioner of Police v Ferguson [2019] WASCA 14; (2019) 54 WAR 177

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance T/A Chemist Warehouse Perth [2020] WASCA 36

MURPHY J:**Introduction**

1 This matter came on for hearing on Tuesday, 1 November 2022 to consider an application by the appellant (A) that the orders of the Full Bench of the Western Australian Industrial Relations Commission dated 4 August 2022 be stayed pursuant to the power in s 87(3) of the *Industrial Relations Act 1979* (WA) (**IR Act**).

2 The application for a stay was an interlocutory application in an appeal by A against the respondent (**employer**) in relation to orders made by the Full Bench of the Western Australian Industrial Relations Commission (**Full Bench**) on 4 August 2022. The orders were made by the Full Bench pursuant to a decision in *Minister for Corrective Services v A*¹ (**Full Bench Decision**). In that regard, the Full Bench set aside an earlier decision of Commissioner Emmanuel in *Applicant v Minister for Corrective Services*² (**Commissioner's Decision**).

3 In broad terms, at all material times, A was employed by the employer. There was a work-place incident in 2018. On 13 August 2020, A was notified that the employer had determined to deal with a suspected breach of discipline in relation to the incident, and that she was suspended from duty immediately on full pay, with an opportunity to provide a submission as to whether the suspension should continue.

4 On 21 August 2020, A asked the employer not to proceed any further with the disciplinary process but she accepted that her suspension should continue while an investigation was conducted.

5 A was charged in November 2020 with a criminal offence in relation to the incident.

6 On 4 December 2020, the employer proposed that A be suspended without pay. Following certain correspondence with A's union, on 23 December 2020, A was told by email that the suspension would continue to be *with pay* for the immediate future, and that the employer would await the outcome of certain court proceedings.

7 The following year, in November 2021, the employer again proposed that the suspension be on terms of suspension without pay. A replied, including to the effect that she could not respond because of the criminal proceedings.

8 On 19 November 2021, the employer decided and implemented the decision that A's suspension would continue *without* pay with effect from 3 December 2021 (**19 November 2021 decision**).

9 On 29 November 2021, A's Union commenced proceedings on behalf of A (**CR 36 of 2021**) under s 44 of the IR Act to challenge the 19 November 2021 decision to cease her pay. As part of CR 36 of 2021, the Union and the employer agreed to a 'Memorandum of Matters Referred for Hearing and Determination' (**the Memorandum**).

10 CR 36 of 2021 was subsequently discontinued due to a jurisdictional issue.

11 On 3 March 2022, A commenced proceedings in her own right (**APPL 8 of 2022**) under s 78(2) of the *Public Sector Management Act 1994* (WA) (**Public Sector Act**). In APPL 8 of 2022, A sought, by ground 11, to rely on the grounds and materials filed in referral CR 36 of 2021 (including the Memorandum).

12 On 28 March 2022, Commissioner Emmanuel heard APPL 8 of 2022. The Commissioner said:³

[8] The parties say that to resolve this matter I must decide:

1. Did the [employer] exercise its lawful right under s 82(1) of the [Public Sector Act] to suspend [A] without pay:

¹ *Minister for Corrective Services v A* (2022) WAIRC 00327.

² *Applicant v Minister for Corrective Services* [2022] WAIRC 00143.

³ Commissioner's Decision [8] - [9].

- a) in breach of procedural fairness;
- b) without having regard to a relevant consideration; or
- c) contrary to the legislative and regulatory framework which applies to a decision to suspend an employee without pay,

such that a fair go all round requires that the decision be set aside and a new decision be made in its place?

2. If so, on what terms should [A's] suspension continue?

[9] It is not in dispute that [A's] suspension should continue. Even if the decision to suspend without pay is set aside, the question for the Commission is on what terms that suspension should continue. Accordingly, this decision does not deal with the merits of the decision to suspend [A]. Further, [A] submitted: 'The Commission in this case is not asked to consider or deal with an issue of backpay for [A]'. (emphasis added)

13 On 8 April 2022, Commissioner Emmanuel, in her reasons for decision, found, in effect, that the employer had breached its duty of procedural fairness by not putting to A that it proposed stopping her pay by reason of three specified matters.⁴ Commissioner Emmanuel continued:⁵

[84] In my view, it follows that the [employer] did not comply with a legislative and regulatory framework that clearly requires procedural fairness to be afforded.

[85] I consider that the [employer] exercised its lawful right under s 82(1) of the [Public Sector Act] to suspend [A] without pay, in breach of procedural fairness and contrary to the legislative and regulatory framework which applies to a decision to suspend an employee without pay, *such that a fair go all round requires that the decision be set aside.* (emphasis added)

14 Commissioner Emmanuel made orders on 11 April 2022 as follows:

- (1) THAT the [employer's] decision dated 19 November 2021 to change [A's] suspension from being on full pay to being without pay be set aside; and
- (2) THAT order (1) above is to come into effect at 4 pm on Friday 29 April 2022.

15 The employer appealed the orders of Commissioner Emmanuel (**FBA 3 of 2022**). There were two grounds of appeal:⁶

- 1. The Commissioner erred in deciding there had been a denial of procedural fairness which merited the setting aside of the employer's decision to vary the terms of the suspension from with pay to suspension without pay.
- 2. In the alternative, the Commissioner erred in failing to 'afford the [employer] procedural fairness in determining that there was a denial of procedural fairness by the [employer] which was not minor or without impact'.

16 On appeal, the Full Bench noted that the 19 November 2021 decision 'was referred to the Commission as an industrial matter pursuant to s 78(2)(b)(iii) of the [Public Sector Act] and s 29(1)(b) of the [IR Act]'.⁷ The Full Bench also noted that no evidence was led or tendered at the hearing at first instance, and that the first instance hearing proceeded on the basis of agreed facts embodied in the Memorandum, and documents and submissions in CR 36 of 2021.⁸ The Full Bench upheld ground 1 and thereby overturned the Commissioner's Decision. Ground 2 was dismissed.

17 The Full Bench observed that the employer did not challenge the finding by Commissioner Emmanuel that it had denied A procedural fairness.⁹ The Full Bench said:¹⁰

[56] The Memorandum of Referral required the Commission to undertake a two-step, process. The first step was to determine whether the employer complied with the requirements of procedural fairness and/or the regulatory framework that applied in making the decision. If these procedural requirements had not been complied with, the Commission was additionally required to embark on a second step, in determining whether the failure was such that a fair go all round required that the decision be set aside.

[57] The grounds of appeal only concern the second stage. Ground one concerns the learned Commissioner's reasoning to her conclusion that the failure to provide procedural fairness had consequences which, as a matter of industrial fairness, required the decision be set aside.

[58] The parties' conduct of the matter at first instance made the Commissioner's task very difficult.
...

⁴ Commissioner's Decision [81].

⁵ Commissioner's Decision [84] - [85].

⁶ Full Bench Decision [44].

⁷ Full Bench Decision [3].

⁸ Full Bench Decision [8].

⁹ Full Bench Decision [7].

¹⁰ Full Bench Decision [56] - [61], [63], [65], [67], [75] - [76], [78] - [79].

- [59] Ultimately, for the reasons that follow, I consider the learned Commissioner was erroneously drawn into this invitation to focus narrowly such that the conclusion that there was industrial unfairness warranting the decision being set aside was in error.
- [60] By invoking the notion of 'no practical injustice,' the employer relies upon principles that apply in applications for judicial review of decisions on the grounds of jurisdictional error. The principle is that, for a decision to be set aside on judicial review, the party challenging the decision must prove on the balance of probabilities such historical facts as to satisfy the court that the decision could realistically have been different had the breach of a condition of the conferral of statutory decision-making authority not occurred: *MZAPC* per Kiefel CJ, Gageler, Keane, Gleeson JJ at [60]. In other words, there is a requirement for a breach of procedural fairness to be material in its ultimate effect, in order to result in a decision being remitted for redetermination or retrial.
- [61] The matter before the learned Commissioner was not an application for judicial review of a decision for jurisdictional error. It was, rather, the determination of an industrial matter, in accordance with the Memorandum of Referral. As Ritter AP observed in [*Moodie*¹¹] at [176], the nature of the Commission's enquiry is not the same as judicial review. The Commission was required to 'deal with' an industrial matter, not review a decision for illegality, nor consider ordering a retrial.
- ...
- [63] [In *Moodie* the] Full Bench upheld the appeal against the Public Service Arbitrator's decision. Beech CC observed at [290] - [291] citing *Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244; (2005) 149 IR 160, that the judicial review jurisdiction is of a kind quite different from the merits-based enquiry, involved in enquiring into and dealing with an industrial matter under the IR Act. So, a finding that there is a denial of procedural fairness is not an end in itself, but is one step in determining how the industrial matter is to be dealt with: ie, one relevant circumstance in dealing with an industrial matter: see also *Moodie* per Ritter AP at [177].
- ...
- [65] Accordingly, while the Commission could not ignore the substantive common law as to whether or not a decision was void for lack of procedural fairness, that enquiry was not determinative of the application of whether the orders sought should be made, as the Commission remains bound to consider how to deal with the industrial matter within the constraints of the law, the Memorandum of Referral and how the hearing was conducted by the parties: *Moodie* per Ritter AP at [177] - [178].
- ...
- [67] In the present context, the general principles variously referencing materiality, futility, and practical injustice, properly inform the assessment of industrial fairness and whether the breach of procedural fairness deprived the decision of a fair go all round such as to merit the decision being set aside. As Ritter AP stated in *Moodie* at [200]:
- '... Futility can step in at the point of deciding whether a remedy will be granted for a breach of procedural fairness ...'
- ...
- [75] It is implicit in the learned Commissioner's reasons at first instance at [83] that she considered the impact of the procedural flaw was relevant to determining whether there had been a fair go all round. However, in assessing the impact, the learned Commissioner considered only the question of whether the officer could, had she been given proper notice, responded to the relevant factors. The learned Commissioner did not apparently further consider what if any different outcome might have resulted, had the opportunity to respond been taken up. Nor does the reasoning disclose any assessment of whether the possibility of a different outcome was realistic.
- [76] The learned Commissioner's reasons do not disclose a determination of whether the result could realistically have been different had the officer been given the relevant opportunity to respond. Accordingly, the learned Commissioner failed to determine whether a fair go all round required the Commission's intervention in the suspension adjustment decision.
- ...
- [78] The conclusion that the officer could have responded 'in some way' to the relevant factors is obvious and virtually goes without saying. However, that some response might have been given remains some distance away from any destination in terms of an ultimate impact. If all the

¹¹ *Health Services Union of WA (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service, The South West Health Board and The WA Country Health Service* [2008] WAIRC 00215; (2008) 88 WAIG 543.

learned Commissioner did was to determine that the absence of the ability to utilise an opportunity to respond is the impact, then the learned Commissioner has, in effect, not considered the matter beyond its procedural elements. The industrial fairness destination has not been reached.

- [79] The learned Commissioner did not consider whether, had the officer been given notice of the relevant factors, it would have produced the same or a different resulting decision. The learned Commissioner's conclusion as to the impact of the procedural failure was not directed at the outcome: the industrial fairness of the decision to cease pay. It was inconsistent therefore with the general principles laid down by the majority of the High Court in *MZAPC* as set out above. Had the learned Commissioner assessed whether the officer had established on the balance of probabilities that a different outcome was realistically possible, the learned Commissioner must necessarily have found an absence of an evidentiary basis to find it was, bearing in mind the officer bore the onus.

18 The Full Bench ordered (**Full Bench Orders**):

- (1) THAT the appeal be and is hereby upheld
- (2) THAT the decision of the Commission at first instance in matter APPL 8 of 2022 given on 11 April 2022 is quashed.

The appeal to this court

19 The grounds of appeal to the Industrial Appeal Court appear in Form 1, filed 23 August 2022. They are as follows:

1. The Full Bench erred in law in finding that the terms of s 26(2) of the [IR Act] did not permit the Commission to deviate from addressing each of the specific terms of a memorandum prepared in separate proceedings pursuant to regulation 31 of the *Industrial Relations Commission Regulations 2005 (Regulations)* in granting relief or redress under the IR Act.

Particulars

- a) The unanimous reasons of the Full Bench are articulated in the reasons of the Senior Commissioner at [2] to [94] of the [Full Bench Decision] that was delivered on 3 August 2022 ...
 - b) At [4] of the [Full Bench Decision], the Senior Commissioner noted that a Memorandum of Matters Referred for Hearing and Determination ... had been prepared for related proceeding, CR 36 of 2021.
 - c) In the subsequent proceeding commenced under s 78(2) of the [Public Sector Act] (APPL 8 of 2022), the parties relied upon certain facts that had already been agreed ... and set out within the memorandum.
 - d) At [40] of the [Full Bench Decision], the Senior Commissioner held that the Commission was required to undertake a specific process as dictated by the memorandum in order to deal with APPL 8 of 2022.
 - e) At [61] of the [Full Bench Decision], the Senior Commissioner repeated her finding that the referral made in APPL 8 of 2022 must be made in accordance with the memorandum which was prepared for CR 36 of 2021.
 - f) At [65] of the [Full Bench Decision], the Senior Commissioner further held that the Commission was 'bound' to consider how to deal with APPL 8 of 2022 within the constraints of the memorandum.
 - g) The effect of the findings of the Senior Commissioner is to construe the referral provision in section 78(2) of the [Public Sector Act] as ousting or limiting the discretionary power of the Commission provided by s 26(2) of the IR Act.
 - h) It was not open on any reasonable construction of s 26(2) of the IR Act or of section 78(2) of the [Public Sector Act] for the Senior Commissioner to find that a referral made by reference to section 78(2) ... was strictly subject to mandatory constraints associated with the subject matter of the claim made by [A].
 - i) Having erred in finding that the Commission at first instance was strictly bound to the terms of the memorandum, the Senior Commissioner then erred in holding that it was incumbent upon [A] to produce specific evidence or otherwise articulate a particular course of action that would or could realistically have changed the [employer's] decision of 19 November 2021.
2. [A] was denied the right to be heard on the question of whether the Commission at first instance was restricted to dealing with [A's] referral with strict regard to the terms set out in the memorandum.
 3. The Full Bench erred in law in finding, in effect, that the discretionary power provided by the Commission by section 78(5)(b) of the [Public Sector Act] is subject to an implied condition for

[A] to establish the nature of additional evidence or argument that may have been presented in support of her case before the Commission can act in accordance with that subsection.

Particulars

- a) At [61] to [65] of the [Full Bench Decision], the Senior Commissioner adopted the approach of the Full Bench in the matter of *Moodie* in relation to the application of judicial review principles to the process of enquiring into and dealing with an industrial matter under the IR Act.
- b) At [64] of the [Full Bench Decision] the Senior Commissioner held that the Commission was bound by specific requirements when dealing with a matter referred under section 78(2) of the [Public Sector Act].
- c) At [77] of the [Full Bench Decision], the Senior Commissioner noted the failure of [A] to produce evidence as to what she would have said in support of her case had procedural fairness been provided to her.
- d) At [78] of the [Full Bench Decision], the Senior Commissioner incorrectly inferred that the failure of the Commission at first instance to identify or make a determination as to a specific course of action for [A] to achieve a different outcome evidenced a failure to consider the issue of materiality.
- e) The only answer reasonably open on the proper application of section 78(5)(b) of the [Public Sector Act] to the facts of this case is that it was open to the Commission to set aside the [employer's] decision of 19 November 2021 given the failure to comply with the rules of procedural fairness and given other factors such as -
 - i. The [employer] had misled [A], or had allowed [A] to be misled up to the date of the hearing at first instance as to the [employer's] actual reasons behind the decision of 19 November 2021.
 - ii. Only during the close of oral argument did the [employer] notify [A] that a critical factor going to the disputed decision of the [employer] was no longer agreed.
 - iii. The [employer's] conduct influenced the manner in which [A] conducted her case when it was before the [employer], and also when her case was conducted at the Commission.
 - iv. The conduct of the [employer] and the unclear reasons behind the decision of 19 November 2021 gave rise to reasonable conjecture that, if given a fair opportunity, [A] may have achieved a favourable outcome.
- f) It was not open for the Senior Commissioner to find that the true meaning of section 78(5)(b) of the [Public Sector Act] implied an unwritten requirement for the Commission to apply specific requirements of evidence and argument to establish a basis to set the impugned decision aside. (footnotes omitted)

20 The employer has also filed a notice of contention in the following terms:

[T]he decision of the Full Bench should be confirmed for reasons other than those decided by the Full Bench, namely [A] failed to establish that she was denied a fair go all round because:

- i. contrary to the finding of the Full Bench at [77], the Full Bench should have found that [A] would not have responded to the factors of which she was not given notice if those factors had in fact been put to her by the [employer], and
- ii. No practical injustice arose because [A] would not have so responded.

The stay application and the evidence

21 By her Notice of Motion dated 12 September 2022, A sought an order that the Full Bench Orders be stayed pending the hearing and determination of IAC 3 of 2022 or until further order. A emphasised that:¹²

In practical terms and given the particular sequence of events in this case, [A] contends that the grant of a stay would only have an effect as from 4 August 2022.

22 At the hearing of the application, it was agreed that if a stay order were made, it should be in the following terms:

The orders of the Full Bench dated 4 August 2022, insofar as they would otherwise operate to entitle the [employer] to continue A's suspension without pay with effect from 4 August 2022, are not to be acted upon or relied on by the [employer] until the determination of this appeal, or earlier further order.

23 A's application was supported by an affidavit sworn by A's solicitor, Mr Fordham, on 8 September 2022. Mr Fordham's affidavit in support in essence outlined the procedural history of the dispute.

24 A also sought to rely on an affidavit sworn by her and filed 31 October 2022. Although the affidavit was late and provided outside of earlier programming directions made by the court, there was no objection to its receipt and it was

¹² Appellant's written submissions, 6 October 2022, par 9.

ordered that it be received for the purposes of the application. The employer also sought to rely on a responsive affidavit of Mr Carroll, dated 31 October 2022. Again, there was no objection and the employer was given leave to file and rely upon that affidavit for the purposes of the application.

25 Amongst other things, in her affidavit of 31 October 2022, A annexed a copy of an email outlining the procedural history of the criminal proceedings, which indicated that the criminal matter would be heard in June 2023 and that the timing for the criminal proceedings had been completely out of A's control. This email was later provided to the employer.

26 A also swore to the truth of the matters contained in a letter which she sent to the employer on or about 18 October 2022. In oral submissions, senior counsel for A drew particular attention to the matters referred to in the letter concerning A's financial position. The letter relevantly stated:

Aside from other ordinary living expenses, I also have a mortgage of just under \$300,000. My household only has one income and the costs of living are quickly moving well beyond my ability to pay, especially as interest rates have risen and the amount of mortgage repayments has increased along with many other costs. I am not sure how I will be able to manage financially between now [and] the hearing of the criminal matters in mid 2023.

Parties' submissions on the stay application

A's submissions - strength of appellant's case

27 A submitted that she had a very strong case on the basis that the Full Bench erred having regard to the High Court's decision in *Nathanson v Minister for Home Affairs*.¹³ *Nathanson* was handed down two weeks after the Full Bench Decision. A submitted, in effect, that:¹⁴

1. In *Nathanson*, the High Court held the Full Court of the Federal Court had misapplied the principles of judicial review in finding that the appellant was required to show how the denial of procedural fairness also denied the appellant from taking a specific course of action which had the realistic possibility of resulting in a different outcome. The reasons of the Full Bench indicate that the Full Bench Decision is attended by the same misapplication of principle.
2. Pursuant to s 90(1)(b) of the IR Act, A has made an application alleging the Full Bench Decision is also erroneous in law in that there was a denial of a right to be heard and two errors of construction of the IR Act and or the Public Sector Act.
3. In light of *Nathanson*, the Full Bench erred in (1) misapplying the principles of judicial review, and (2) 'effectively [implying] those incorrect principles [into] the operation of the [Public Sector Act] and/or the IR Act'.

28 In oral submissions, A contended that the error in ground 1 was evident from [56] and [65] of the Full Bench Decision.¹⁵ In her written submissions filed on 6 October 2022, A addressed grounds 1 and 3 together, and submitted that:¹⁶

1. Grounds 1 and 3 assert, respectively, that an inference arises that s 26(2) of the IR Act, and/or s 78(5) of the Public Sector Act have been 'misunderstood or misconstrued by the Full Bench'. This inference is said to arise because the Full Bench made findings which are not permissible on the proper construction of the IR Act or the Public Sector Act. See *The Commissioner of Police v Ferguson*.¹⁷
2. It appears the Full Bench has approached this matter as if APPL 8 of 2022 was a referral made under s 44 of the IR Act when it was not.
3. The initiating claim for APPL 8 of 2022 did seek to rely upon the grounds and materials that had already been filed in referral CR 36 of 2021 given the circumstances of urgency.
4. However, during the hearing of APPL 8 of 2022, it was revealed that the Memorandum 'was no longer an agreed document'.¹⁸
5. In any event, A asked the Commission to consider dealing with the referral under s 78(5) of the Public Sector Act.
6. Given the parties' conduct at the hearing of APPL 8 of 2022, the first ground contends the only conclusion open on the application of s 26(2) of the IR Act was that the Commission was not strictly bound to follow the process prescribed by the Memorandum as referred to in the initiating claim.¹⁹

¹³ *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 403 ALR 398.

¹⁴ Notice of Motion, pars 8 - 10.

¹⁵ Application ts 17.

¹⁶ Appellant's written submissions, 6 October 2022, pars 25 - 30.

¹⁷ *The Commissioner of Police v Ferguson* [2019] WASCA 14; (2019) 54 WAR 177 [179] (Le Miere J).

¹⁸ Reference was made to the Commissioner's Decision [12], in which the Commissioner noted that the agreed fact at par 23(d) of the Memorandum was included in error and was not agreed.

¹⁹ See initiating claim, page 100 of Fordham affidavit.

7. Further, given APPL 8 of 2022 was a referral under s 78(2)(b)(iii) of the Public Sector Act, ground three asserts the Commission was empowered by s 78(5) with a discretion to allow the referral on the basis of the failure to comply with the rules of procedural fairness and without any further need to satisfy common law principles applicable to judicial review.
- 29 In relation to ground 2, A submitted:²⁰
1. The Full Bench Decision proceeded on the basis that the terms of the Memorandum prepared for CR 36 of 2021 were binding upon the Commission. See Full Bench Decision [56], [61] - [65].
 2. A fair reading of the Full Bench Decision is that the Full Bench found the terms of the Memorandum did not allow for the referral to be resolved in the manner contemplated by s 78(5)(b) of the Public Sector Act, whereas the appeal to the Full Bench was not conducted on that basis.

A's submissions on the balance of convenience

- 30 A submitted that the balance of convenience favoured granting a stay for the following reasons:²¹
1. It was and still is open for the employer to re-evaluate the terms of A's suspension to reconsider whether A's pay ought to be ceased and to do so in a procedurally fair manner.
 2. The strength of A's case.
 3. If a stay were not granted, A would likely be 'unjustly deprived of an income in circumstances where there is no guarantee ... she will recoup her unpaid wages'.
 4. A cooperated with the employer at first instance and during the appeal proceeding. That cooperation has now put A in a vulnerable position as she has exhausted all of her accrued leave entitlements.
 5. A has 'foreshadowed' that 'significant hardship' will result from the stoppage of her pay.
 6. A has 'expressed a willingness to cooperate in the allocation of meaningful alternative duties'.
 7. A is 56 years of age and unlikely to find suitable alternative employment given the competitive market and her particular circumstances.
 8. The decision to cease A's pay was significant.
 9. The procedural fairness deficiency afforded to A was significant.
- 31 A also submitted that:²²
1. First, even in light of *Nathanson*, A seems likely to be prevented from re-agitating the same issues arising from the same set of facts and the denial of procedural fairness in the variation decision by the doctrine of *res judicata*.²³
 2. A seems unable to address the injustice caused by the wrong application of judicial review principles other than by this appeal.
 3. By contrast, the employer has an express power under s 82(3) of the Public Sector Act to remove or vary the terms of A's suspension 'at any time'. Accordingly, the employer can immediately 're-approach the issue of whether to cease pay to [A] while she is suspended'.
 4. The relative position of the employer is that the employer is empowered to mitigate the financial consequences of these proceedings.
 5. Secondly, contrary to the employer's submissions, A has submitted evidence as to the financial stress and hardship that cessation of wages would cause.
 6. A's claim as to the financial impact of being without pay has not been denied at any previous point.²⁴
 7. There is no evidence that any hardship will result to the employer if a stay is granted.
 8. Thirdly, there is still no definitive timeframe in relation to the term of the suspension and no certainty that A will recover withheld wages.
 9. Once the related criminal proceedings are resolved, A will need to answer the alleged breach of discipline and may receive disciplinary action ranging from reprimand up to dismissal from employment.
 10. By s 82(4) of the Public Sector Act, there are two conditions under which pay withheld during a suspension will be forfeited. A's withheld pay is surrendered if either (1) A is ultimately convicted, or (2) the employer chooses to take any form of disciplinary action.

²⁰ Appellant's written submissions, 6 October 2022, pars 31 - 33.

²¹ Notice of Motion, par 11.

²² Appellant's written submissions, 6 October 2022, par 22.

²³ *State School Teachers' Union of WA (Incorporated) v Director General, Department of Education* [2015] WAIRComm 875 [46].

²⁴ See, for instance, the comment in respondent's letter of 19 November 2021, page 6 of Fordham affidavit.

11. Fourthly, A has contended she has been placed in a vulnerable position by reason of the fact that she has effectively agreed to exhaust all her accrued leave. This is a vulnerability in the sense that A has already been caused to deplete the most obvious source from which she could withstand a prolonged cessation of her ordinary wages.

32 A's senior counsel also placed emphasis on the matters in A's affidavit of 31 October 2022 referred to in [25] - [26] above.

The employer's submissions - strength of the appellant's case

33 The employer noted that A's Form 3 application for a stay alleged that the first issue raised by the grounds is:²⁵

In light of the decision in Nathanson, did the Full Bench fall into error in deciding that the Appellant failed to demonstrate that the denial of procedural fairness deprived her of a realistic possibility of a different outcome?

34 The employer submitted that this issue does not arise on the grounds as currently framed because:²⁶

1. grounds 1 and 3 allege an error in construction of the IR Act and Public Sector Act; and
2. ground 2 alleges A was denied the right to be heard.

35 The employer submitted that ground 1 is without merit for the following reasons:²⁷

1. The Full Bench Decision made no reference to s 26(2) of the IR Act.
2. In substance, A's underlying complaint is that the Full Bench Decision said the Commission was 'strictly bound' or 'constrained' by the terms of the Memorandum and that this is at odds with the terms of s 26(2) of the IR Act.
3. However, the Full Bench Decision included no such finding. The basis for ground 1 therefore falls away.
4. Rather, the Full Bench Decision said the Commission is bound to consider the industrial matter within the constraints of the law, the Memorandum and how the hearing was conducted by the parties. This meant considering whether A was afforded a 'fair go all round'. The Full Bench held it was necessary for A to establish, on the balance of probabilities, whether a different outcome was realistically possible.

36 The employer submitted that ground 2 is without merit essentially for the reasons in the preceding paragraph.²⁸

37 In relation to ground 3, the employer submitted that it lacked merit because the Full Bench Decision made no reference to s 78(5)(b) of the Public Sector Act. Also, s 78(5)(b), on its proper construction, has no application to the referral of a decision to suspend an employee without pay. Even if s 78(5)(b) could apply to an appeal or referral against a decision to suspend without pay, the Full Bench Decision does not suggest that the Full Bench construed s 78(5)(b) in the way alleged or at all.²⁹

The employer's submissions - balance of convenience

38 The employer addressed each of A's submissions set out in [30] above:³⁰

1. In relation to [30.1] - [30.3], the employer submitted that it is not clear what is alleged by way of this submission or how it relates to the balance of convenience. Further, the employer submitted that if A succeeds in the appeal, then the employer will be obliged to pay A as though she was always suspended with pay and will re-credit A's leave in accordance with the agreements between the parties.
2. In relation to [30.4], the employer submitted that it is unclear how A's cooperation has put her in a vulnerable position, given that the agreements for A to access her leave entitlements were made when each party was represented.
3. In relation to [30.5], the employer submitted that there was no evidence in support of this submission in Mr Fordham's affidavit, and the evidence in A's affidavit of 31 October 2022 was insufficient in detail and cogency.
4. In relation to [30.6], the employer submitted that it is irrelevant. If the stay is granted, A will remain suspended and not performing other duties.
5. In relation to [30.7], the employer submitted that there is no evidence that A has sought alternative employment, or that her circumstances suggest she is unlikely to obtain such employment.
6. In relation to [30.8] - [30.9], the employer 'accepts that the decision to cease [A's] pay was significant and that there was a failure to accord procedural fairness'. However, the employer submitted that this is not sufficient to shift the balance of convenience in A's favour.

²⁵ Respondent's written submissions, 28 September 2022, par 20.

²⁶ Respondent's written submissions, 28 September 2022, pars 21 - 24.

²⁷ Respondent's written submissions, 28 September 2022, pars 25 - 30.

²⁸ Respondent's written submissions, 28 September 2022, pars 31 - 32.

²⁹ Respondent's written submissions, 28 September 2022, pars 33 - 37.

³⁰ Respondent's written submissions, 28 September 2022, pars 38 - 48.

39 The employer also submitted that the matters referred to in [31] above were of no assistance to A on the question of the balance of convenience.

40 In relation to the matters referred to in [32] above, the employer contended, in effect, that the fact that the criminal proceedings were out of A's control was not germane to the question of the balance of the convenience in relation to whether there should be a stay of the Full Bench Orders, and that A's evidence in relation to her financial position was lacking any detail or cogency.

Disposition

41 It was accepted by both A and the employer that an applicant for a stay in this context is required to demonstrate special or exceptional circumstances, and that the power should be exercised sparingly and with caution. Those principles ordinarily require close attention to the strength of the appellant's case on appeal and the balance of convenience.³¹

42 Albeit, of course, on a necessarily preliminary basis and without the benefit of full argument, I have not been persuaded by A of the proposition advanced in this application that the merits of A's appeal are 'very strong'.³² It is inappropriate in the circumstances for me to address that conclusion in detail. It is sufficient for present purposes to make the following brief observations.

43 In relation to ground 1 of the appeal, the Full Bench Decision made no reference to s 26(2) of the IR Act. The Full Bench referred to the referral of the 19 November 2021 decision as an industrial matter pursuant to s 78(2)(b)(iii) of the Public Sector Act and s 29(1)(b) of the IR Act. Section 78(2)(b)(iii) of the Public Sector Act provided, relevantly in effect, that the referral of the decision operated 'as if that decision ... were an industrial matter mentioned in s 29(b) of [the IR Act] and that [the IR Act] applies to and in relation to that decision accordingly'. In this context, the Full Bench appears to have decided the appeal by reference to the question for determination that was raised before, and decided by, Commissioner Emmanuel, namely whether the employer exercised its lawful right under s 82(1) of the Public Sector Act to suspend without pay in breach of procedural fairness 'such that a fair go all round requires that the decision be set aside and a new decision be made in its place'.³³ The Full Bench appears to have considered the appeal on the basis of what 'a fair go all round' required, and, in that context, considered the question of the effect of the denial of procedural fairness.³⁴ In that connection, the Full Bench concluded that the learned Commissioner had failed to assess whether A had established, on the balance of probabilities, that a different outcome was 'realistically possible', and further found that, on the materials, she had not established that.³⁵ The Full Bench's reasons do not appear, prima facie, to demonstrate that it found, erroneously, that, on its proper construction, s 26(2) of the IR Act 'did not permit the Commission to deviate from addressing each of the specific terms' of the Memorandum.

44 The Full Bench's observations at [65] appear to be to the effect that the Commission was bound to consider how to deal with the 'industrial matter' the subject of the referral under s 78(2)(b)(iii) of the Public Sector Act (1) within the constraints of the law, (2) having regard to the evidentiary materials in the Memorandum, and (3) with regard to how the hearing was conducted by the parties. At least the first and third of those observations appear prima facie inconsistent with ground 1, and the second is prima facie unremarkable given that the parties tendered no evidence at first instance and relied on the agreed facts in the Memorandum.

45 Insofar as A contended that the error in ground 1 was illustrated by the fact that the Memorandum was itself not accurate or complete because it included, in par 23(d), a fact which was later withdrawn, the contention appears to be not without its difficulties. That is because the Full Bench expressly referred to the fact of its withdrawal in its recitation of par 23(d) at [9] of the Full Bench Decision.

46 In *Nathanson*, Kiefel CJ, Keane and Gleeson JJ (Gageler J agreeing) held that jurisdictional error had been established in that case because the denial of procedural fairness was material to the decision-maker's decision. The applicant in that case had discharged the onus of demonstrating that the decision-maker's denial of procedural fairness deprived the applicant of a 'realistic possibility of a different outcome'. That realistic possibility was demonstrable from the record of the decision-maker's decision, and the applicant 'was not required to articulate a specific course of action which could realistically have changed the result'.³⁶ In the present matter, A appears, at least implicitly, to seek to contend that the Full Bench (1) erred in principle in failing to apply the correct test of materiality under the common law with respect to jurisdictional error, and (2) thereby erred in fact in finding that A had not established that a different outcome was realistically possible. Neither contention is itself a ground of appeal (perhaps because it might be difficult to fit either within s 90(1) of the IR Act). Nor was it reasonably clear, on this application, how either error could yield the conclusion that the Full Bench misconstrued s 26(2) of the IR Act as alleged in ground 1.

47 In light of the above matters and when the Full Bench Decision is read as a whole, my necessarily preliminary impression is that A may have difficulty in establishing the error alleged in ground 1.

48 In relation to ground 2, that appeared effectively to depend, or at least largely to depend, upon an acceptance of the contention in ground 1.

³¹ *The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance T/A Chemist Warehouse Perth* [2020] WASCA 36 [29] - [35].

³² Application ts 11.

³³ Full Bench Decision [4]. See also Commissioner's Decision [8], [73], [85].

³⁴ Full Bench Decision [7], [36], [42], [56] - [59], [61], [63], [65] - [67], [75], [78] - [79].

³⁵ Full Bench Decision [79].

³⁶ *Nathanson* [1] - [2], [59].

49 Ground 3 appears to allege, in effect, that the Full Bench erred in construing s 78(5)(b) of the Public Sector Act as containing 'an unwritten requirement ... to apply specific requirements of evidence and argument to establish a basis to set the impugned decision aside'. In her written submissions in the appeal, A explained ground 3 as follows:³⁷

In addition or in the alternative to ground 1, the third ground of this appeal contends that the only answer that is reasonably open on the application of s 78(5)(b) of the [Public Sector] Act to the facts of this case is that it was allowable for the Commission at first instance to determine [A's] referral based on the findings that were made and the case presented at hearing.

50 The explanation appears to be directed to the proposition that Commissioner Emmanuel's finding of fact that the denial of procedural fairness was such that 'a fair go all round require[d] that the decision be set aside'³⁸ was the only finding of fact open on the evidence. To that extent, it appears to assume no error of principle in considering what 'a fair go all round' required. Also in the course of oral submissions, A appeared to contend that Commissioner Emmanuel, and the Full Bench, were required to deal with the referred industrial matter by reference to what a 'fair go all round' required.³⁹ However, at least on one view of A's written submissions in the appeal,⁴⁰ and in other oral submissions on the stay application,⁴¹ A appeared to contend that in dealing with the referral of the decision under s 78(2)(b)(iii) of the Public Sector Act, in accordance with the IR Act, the Commission, and the Full Bench, are precluded, by s 78(5)(b), from giving any consideration to whether there had been 'a fair go all round'. If that be the contention (and prima facie it may be doubted that either Commissioner Emmanuel or the Full Bench understood that to be the contention), it would seem to require a detailed consideration of (at least) the true scope of s 78(5)(b) read in the context of s 78(5)(a) and the concluding words of s 78(2) of the Public Sector Act, and the interaction of those provisions with s 23 and s 26 of the IR Act. On one view of it, A's submissions in the appeal do not, at least in any real detail, explore and explain those issues.

51 Again, my preliminary impression is that on ground 3 as formulated, A may have difficulty in establishing its merits. It is unnecessary, for present purposes, to consider the strength of the notice of contention.

52 On the question of the balance of convenience, the issue seems to me to ultimately turn on whether it is just in all the circumstances to make an order the effect of which would be to require the employer to resume pay in the period from 4 August 2022 to the determination of the appeal. On one hand, if such an order were made and A failed in her appeal, the employer may well have difficulty in recovering the moneys from A if, as A contended, her financial resources were limited. On the other hand, if the order were not made, and A succeeded on the appeal, appropriate restorative orders could be made against the employer, and the employer would no doubt be good for the money. In this context, the question is ultimately whether and to what extent A would suffer financial hardship if a stay order were not made pending the determination of the appeal.

53 A provided no evidence of her financial position prior to A's affidavit of 31 October 2022. The relevant evidence in her affidavit of 31 October 2022 has been referred to in [26] above. The evidence, objectively speaking, lacked detail other than the reference to the existence of the mortgage, and was essentially conclusory in nature. Ordinarily, in a matter requiring the applicant to demonstrate special or exceptional circumstances, there would be some direct evidence in this context of the applicant's financial position in relation to assets, liabilities, income and expenses from which the court could form its own conclusion as to the existence and degree of any hardship to the applicant if the stay were not granted. The evidence in this case, however, effectively invited the court to accept A's own conclusions on those matters. That might have been less significant in the overall assessment if the appeal were shown to have strong prospects of success. I have not been persuaded of that in this application, although, of course, I accept that with the fullness of argument, the position might be otherwise on a substantive hearing of the appeal. Having regard to the limited nature of the evidence and the observations on prospects in [42] - [51] above, my overall assessment at this stage is that A has not demonstrated special or exceptional circumstances to justify the grant of a stay order having the mandatory effect of requiring the employer to pay A pending the determination of the appeal.

54 The other matters referred to by A do not, in my view, assist her. I accept, of course, the fundamental importance of the presumption of innocence and the right to silence afforded to an accused, and I also accept, for present purposes, that A has not caused or contributed to the delays in the criminal proceedings. But those matters do not seem to me to have any material bearing on whether the balance of convenience favours the grant of a stay. I also accept the employer's submissions referred to in [38] above.

55 In relation to the matters in [31] above, the matters in [31.1] - [31.2] indicate that A's scope for redress from what she contends to be error in the Full Bench Decision depends upon the success of this appeal. That may be accepted but it does not, in my view, contribute to a balancing of the scales one way or another in an assessment of the balance of convenience. I also accept that the employer's power referred to in [31.3] exists, but it is not clear to me how that assists A in this application, given that the employer already has the benefit of the judgment of the Full Bench. The matters referred to in [31.4] - [31.6] and [31.11] essentially relate to the question of A's financial position, which has been discussed earlier. As to the matter in [31.7], if A has the resources to meet any restorative orders in favour of the employer if the appeal failed, her case for a stay is undermined. If she does not, as she contends, albeit on slight affidavit

³⁷ Appellant's submissions, par 22.

³⁸ Commissioner's Decision [85].

³⁹ Application ts 11 - 12, 28.

⁴⁰ Appellant's written submissions, 21 September 2022, pars 26 - 29.

⁴¹ Application ts 12 - 13.

evidence, the effectiveness of any restorative orders in favour of the employer would be compromised. In relation to the matters referred to in [31.8] - [31.10], the question for present purposes is only whether there should be a stay pending the determination of the appeal. The disciplinary process will presumably take its course whatever order is made on the question of a stay.

Conclusion

56 For the above reasons, I would dismiss A's stay application. Nothing in these reasons would, of course, preclude A from seeking an order for expedition of the hearing of the appeal if she were so advised.

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

RW

Associate to the Honourable Justice Murphy

4 NOVEMBER 2022

2024 WAIRC 00915

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 3/2023

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

PENELOPE ANNE FAGAN

APPELLANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM

BUSS J

SEAWARD J

SMITH J

DATE

MONDAY, 21 OCTOBER 2024

FILE NO/S

IAC 1 OF 2024

CITATION NO.

2024 WAIRC 00915

Result

Appeal Dismissed

Representation

Appellant

Mr TJ Hammond (Of Counsel)

Mr D Stojanoski (Of Counsel)

Respondent

Mr J Misso (Of Counsel)

Mr Z Clifford (Of Counsel)

Order

1. The appellant has leave to amend ground of appeal 1 by deleting 'pursuant to s 29(1)(c) of the *Industrial Relations Act 1979* (WA) (the **IR Act**),' in lines 1 and 2.
2. The appellant has leave to amend para (d) of ground of appeal 1 by deleting 's 29(1)(c)' in line 2 and substituting 's 26(1)(a) and 26(1)(b)'.
3. Appeal dismissed.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

COMMISSION IN COURT SESSION—Unions—Application for Orders under Section 72A—

2024 WAIRC 00907

APPLICATIONS PURSUANT TO S 72A

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

- CITATION** : 2024 WAIRC 00907
- CORAM** : CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T EMMANUEL
- HEARD** : WEDNESDAY, 16 OCTOBER 2024
- DELIVERED** : THURSDAY, 17 OCTOBER 2024
- FILE NO.** : CICS 5 OF 2023
- BETWEEN** : WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
Applicant
THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
Respondent
LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
First Intervenor
WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
Second Intervenor
- FILE NO.** : CICS 8 OF 2023
- BETWEEN** : THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
Applicant
and
WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
Respondent
LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
First Intervenor
WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
Second Intervenor
- FILE NO.** : CICS 9 OF 2023
- BETWEEN** : WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
Applicant
and
THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
Respondent
LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)
First Intervenor
WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION
Second Intervenor

-
- Catchwords** : Industrial Law (WA) – Application for production of documents – Granted in part
- Legislation** : *Industrial Relations Commission Regulations 2005* (WA) r 21
- Result** : Order issued
- Representation:**
- Counsel:**
- Applicant** : Mr J Blackburn SC of counsel and with him Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Respondent	:	Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
First Intervenor	:	Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
Second intervenor	:	Mr N Ellery of counsel on behalf of the Western Australian Local Government Association

Case(s) referred to in reasons:

Reasons for Decision

THE COMMISSION IN COURT SESSION

- 1 Towards the end of the proceedings on 16 October 2024, counsel for the CFMEU made an application for an order under reg 21 of the *Industrial Relations Commission Regulations 2005* (WA) requiring the production of documents by each of the WASU and the WALGA in the following terms:
 - (a) all communications however described between the WASU and the WALGA concerning these proceedings or evidence given or expected to be given in these proceedings;
 - (b) all communications however described between the WASU and the LGRCEU concerning these proceedings or evidence given or expected to be given in these proceedings; and
 - (c) all communications however described between the WALGA and the LGRCEU concerning these proceedings or evidence given or expected to be given in these proceedings.
- 2 The basis for the application was an assertion of collusion between the WASU and the WALGA, said to be relevant to the question of whether the WASU should continue to be permitted to ask questions of WALGA witnesses. Secondly, it was said they are relevant or potentially relevant to the credit of the WALGA witnesses, as they may disclose whether evidence that has been given is being or has been prepared in collaboration with the cross-examiner. Thirdly, such documents are said to be relevant in relation to a submission that the CFMEU will ultimately make in these proceedings, that being that the WASU is unable or unwilling to effectively represent local government employees, as it is in a position of conflict due to its close collaboration with local government employers. The application does not extend to documents which have already been produced in these proceedings, or any that involve communications that the CFMEU is a party to.
- 3 The application was opposed by both the WASU and the WALGA. The WASU contended that such communications could go back many months and most, if not all of them, would be privileged in any event. The risk of further delay in the proceedings was also raised as a basis to resist the order for production. Furthermore, whether or not the WASU should continue to be permitted to ask questions of the WALGA witnesses ought to be assessed on a case by case basis, as has already been determined by the Commission in Court Session in an earlier interlocutory application. It was also contended that the grounds alleged in support of the application do not involve the LGRCEU, and there is no basis for an order against it, as was contended by the LGRCEU in its response to the application.
- 4 The WALGA submitted that such an application was inappropriate and disproportionate, and the question of cross-examination and the limits to be imposed has already been dealt with by the Commission in Court Session at the outset of these proceedings. The WALGA also submitted that the CFMEU request would be met by a claim for privilege, and there is a significant potential to disrupt the proceedings, which has already occurred thus far.
- 5 The apparent trigger for the application by the CFMEU was email communications between Ms Miller of the WALGA and Ms Harrison of the City of Wanneroo on 26 July 2024. This referred to evidence given by the LGRCEU some days earlier, concerning an incident at the City in 2021. Reference in the email is made to both the WALGA and the WASU wanting to 'probe and clarify the matter'. The response received by the WALGA from the City of Wanneroo appears to then have been forwarded to the WASU or the WASU's solicitors. The emails were sought to be put by the WASU to Ms Miller, a witness for the WALGA, in the proceedings in cross-examination.
- 6 The CFMEU contended that this gives rise to a grave concern as to the integrity of such evidence. The CFMEU submitted that despite the ruling of the Commission in Court Session at the outset of these proceedings, regarding cross-examination of witnesses, that a different position should now be adopted.
- 7 We have considered this matter overnight and have formed the following views. Firstly, we do not consider there is any basis on the evidence for an order for production of documents to be made involving the LGRCEU. Secondly, as to the WASU and the WALGA, we do not consider there is any basis for an order for production of documents of whatever kind in relation to the proceedings generally as, in our opinion, this is far too broad a request. It is to be expected that in the ordinary course, parties involved in proceedings will communicate about various aspects of the proceedings, including for the purpose of narrowing issues, conferring in relation to case management steps, and for settlement of the proceedings. Cooperation and courtesy is to be encouraged, not discouraged.
- 8 However, we do consider that there is a basis to make more limited orders in this matter, confined to such documents as relate to the evidence in the proceedings only. That is because we are satisfied such documents are relevant to the first and second issues identified by the CFMEU. We are doubtful that the documents are relevant to the third issue, the foreshadowed submission that WASU has a conflict due to its close collaboration with the WALGA. The CFMEU has not yet demonstrated why the WASU's conduct of an aspect of these proceedings causes its ability to independently represent and advocate for it members in industrial matters is in any way compromised.
- 9 We are also very conscious of delay, given the three month delay which has already occurred in the conduct of these proceedings, no doubt causing additional time and costs to be incurred by the parties. We are not prepared to countenance any

further delay given the Commission's obligation to hear and determine matters before it with as much speed as the requirements of the *Act* and a proper consideration of the matter permit.

10 Having regard to what is before us we therefore propose to make the following orders:

- (a) That as to the evidence that has been given or is to be given in these proceedings any documents passing between the WASU and the WALGA that relate to that evidence and which are not subject to a claim of legal professional privilege are to be produced by the WASU and the WALGA for inspection by the CFMEU by no later than 4.00 pm Friday, 18 October 2024.
- (b) That any claim of legal professional privilege by either the WASU or the WALGA is to be the subject of affidavit evidence identifying by list the documents the subject of the claim of privilege, such affidavit to be put on by 4.00 pm Friday, 18 October 2024.
- (c) That otherwise the proceedings will continue to be heard subject to:
 - (i) the WASU examination of the WALGA remaining witnesses is not to involve leading questions and is to be confined to matters arising in the witnesses' evidence in chief;
 - (ii) the CFMEU being given leave to seek to recall any WALGA witness(es); and
 - (iii) there be liberty to apply on short notice.

2024 WAIRC 00930

APPLICATIONS PURSUANT TO S 72A

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES <p style="text-align: right;">APPLICANT</p> <p style="text-align: center;">-v-</p> THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS <p style="text-align: right;">RESPONDENT</p> LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) <p style="text-align: right;">FIRST INTERVENOR</p> WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION <p style="text-align: right;">SECOND INTERVENOR</p>
FILE NO/S	CICS 5 OF 2023
PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS <p style="text-align: right;">APPLICANT</p> <p style="text-align: center;">-v-</p> WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES <p style="text-align: right;">RESPONDENT</p> LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) <p style="text-align: right;">FIRST INTERVENOR</p> WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION <p style="text-align: right;">SECOND INTERVENOR</p>
FILE NO/S	CICS 8 OF 2023
PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES <p style="text-align: right;">APPLICANT</p> <p style="text-align: center;">-v-</p> THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS <p style="text-align: right;">RESPONDENT</p> LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA) <p style="text-align: right;">FIRST INTERVENOR</p> WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION <p style="text-align: right;">SECOND INTERVENOR</p>
FILE NO/S	CICS 9 OF 2023
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 23 OCTOBER 2024
FILE NO.	CICS 5 OF 2023, CICS 8 OF 2023, CICS 9 OF 2023
CITATION NO.	

Result	Order issued
Representation	
Applicant	Mr J Blackburn SC on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Respondent	Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
First Intervenor	Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
Second Intervenor	Mr N Ellery of counsel on behalf of the Western Australian Local Government Association

Order

HAVING heard Mr J Blackburn SC of counsel on behalf of the WASU, Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the CFMEUW, Mr K Trainer as agent on behalf of the LGRCEU, and Mr N Ellery of counsel on behalf of the WALGA, the Commission in Court Session, for reasons to be published in due course, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application by the CFMEUW made on 23 October 2024 for an order under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) that these proceedings be dismissed be and is hereby dismissed.

(Sgd.) S J KENNER,
Chief Commissioner,

By the Commission in Court Session.

[L.S.]

2024 WAIRC 00910

APPLICATIONS PURSUANT TO S 72A

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	APPLICANT
	-v-	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION	SECOND INTERVENOR
FILE NO/S	CICS 5 OF 2023	
PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	APPLICANT
	-v-	
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION	SECOND INTERVENOR
FILE NO/S	CICS 8 OF 2023	
PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	APPLICANT
	-v-	
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	RESPONDENT
	LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)	FIRST INTERVENOR
	WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION	SECOND INTERVENOR

FILE NO/S	CICS 9 OF 2023
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
DATE	THURSDAY, 17 OCTOBER 2024
CITATION NO.	2024 WAIRC 00910

Result	Order issued
Representation	
Applicant	Mr J Blackburn SC of counsel and with him Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Respondent	Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers
First Intervenor	Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)
Second Intervenor	Mr N Ellery of counsel on behalf of the Western Australian Local Government Association

Order

HAVING heard Mr J Blackburn SC of counsel and with him Mr C Fogliani of counsel on behalf of the WASU, Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the CFMEUW, Mr K Trainer as agent on behalf of the LGRCEU, and Mr N Ellery of counsel on behalf of the WALGA, the Commission in Court Session pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT as to the evidence that has been given or is to be given in these proceedings any documents passing between the WASU and the WALGA that relate to that evidence and which are not subject to a claim of legal professional privilege are to be produced by the WASU and the WALGA for inspection by the CFMEU by no later than 4.00 pm Thursday, 24 October 2024.
- (2) THAT any claim of legal professional privilege by either the WASU or the WALGA is to be the subject of affidavit evidence identifying by list the documents the subject of the claim of privilege, such affidavit to be put on by 4.00 pm Thursday, 24 October 2024.
- (3) THAT otherwise the proceedings will continue to be heard subject to:
 - (a) the WASU examination of the WALGA remaining witnesses is not to involve leading questions and is to be confined to matters arising in the witnesses' evidence in chief; and
 - (b) the CFMEU being given liberty to apply to recall any WALGA witness(es).
- (4) THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner,

By the Commission in Court Session.

[L.S.]

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

2024 WAIRC 00960

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	:	2024 WAIRC 00960
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER T KUCERA
HEARD	:	TUESDAY, 3 SEPTEMBER 2024
DELIVERED	:	WEDNESDAY, 7 NOVEMBER 2024
FILE NO.	:	CICS 3 OF 2024
BETWEEN	:	WESTERN AUSTRALIAN POLICE UNION OF WORKERS Applicant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial Law (WA) – Application pursuant to s 71 – Declaration sought – Qualifications of persons for memberships of a State branch of a federal organisation and offices that exist within the State organisation – Declaration issued
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) <i>Police Act 1892</i> (WA)
Result	:	Declaration issued
Representation:		
Counsel:		
Applicant	:	Mr D Stojanoski of counsel
Solicitors:		
Applicant	:	Slater & Gordon Lawyers

Case(s) referred to in reasons:

Jones v Civil Service Association Inc [2003] WASCA 321; (2003) 84 WAIG 4
 McGee v Western Australian Police Union of Workers [2023] WAIRC 00968; (2023) 104 WAIG 141
 Re an application by the Civil Service Association (1993) 73 WAIG 2931
 Re Bonny [1986] 2 Qld R 80
 Western Australian Police Union of Workers (2018) WAIRC 00725; (2023) 98 WAIG 1111
 Western Australian Police Union of Workers [2006] WAIRC 03610; (2016) 86 WAIG 402
 Western Australian Police Union of Workers [2018] WAIRC 00738; (2018) 98 WAIG 1111
 Western Australian Police Union of Workers [2024] WAIRC 00797; (2024) 104 WAIG 1857

*Reasons for Decision***THE COMMISSION IN COURT SESSION:****Background**

- 1 The application before the Commission in Court Session sought declarations under s 71 of the *Industrial Relations Act 1979* (WA) in the following terms:
 10. The applicant seeks the following declarations be made:
 - a. A declaration pursuant to section 71(2) and section 71(3) of the IR Act that the Police Federation of Australia – Western Australia Police Branch is the counterpart federal body of the Western Australian Police Union of Workers;
 - b. A declaration pursuant to section 71(2) and section 71(3) that the rules of the Police Federation of Australia – Western Australia Police Branch relating to the qualifications of persons for membership are deemed to be the same as the qualifications of persons for membership within the Western Australian Police Union of Workers; and
 - c. A declaration pursuant to section 71(4) that the offices within the Police Federation of Australia – Western Australia Police Branch are deemed to be the same as the offices within the Western Australian Police Union of Workers.
- 2 The applicant is a State organisation registered under the *Act*. It has a counterpart federal body, the Police Federation of Australia – Western Australia Police Branch, an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). The State organisation has held a certificate under s 71 of the *Act*, in conjunction with the federal Branch. As a consequence of amendments made to the registered rules of the federal Branch on 2 November 2023, there was no longer alignment between the offices in the State organisation and the federal Branch. Offices in the federal Branch no longer had a corresponding office in the State organisation. As a result, doubt existed over the continued effectiveness of the s 71 certificate.
- 3 In order to enable the State organisation to conduct its affairs, and to take the necessary steps to alter its Rules to bring them back into alignment with the federal Branch, the Chief Commissioner made an order on 18 December 2023 creating an Interim Board of Directors: *McGee v Western Australian Police Union of Workers* [2023] WAIRC 00968; (2023) 104 WAIG 141. Alterations to the Rules of the State organisation were certified by the Registrar on 6 March 2024. The applicant contended that for the purposes of s 71(2) of the *Act* the qualifications of persons for membership between the State organisation and the federal Branch are substantially the same. Secondly, it contended that for every office in the State organisation, there is a corresponding office in the federal Branch, as required by s 71(4) of the *Act*.
- 4 At the hearing of this application on 3 September 2024, the Commission in Court Session was satisfied that the requirements of the *Act*, for the declarations sought, were met. We concluded that for reasons to be published in due course, declarations would

be made: *Western Australian Police Union of Workers* [2024] WAIRC 00797; (2024) 104 WAIG 1857. These are our reasons for so concluding.

- 5 Previously, the Full Bench has made declarations under s 71 of the *Act* in relation to the State organisation and federal Branch. This first occurred in January 2006 when the Full Bench made declarations under ss 71(2) and 71(4): *Western Australian Police Union of Workers* [2006] WAIRC 03610; (2016) 86 WAIG 402. Later, in 2018, the Full Bench again made declarations and a s 71 certificate was issued, following alterations to the State organisation's Rules, restoring their alignment: *Western Australian Police Union of Workers* [2018] WAIRC 00738; (2018) 98 WAIG 1111.
- 6 In this matter, the application was accompanied by a statement from Mr Paul Gale, the President of the State organisation and the federal Branch at the time the application was made. Mr Gale stated that changes to the federal Branch Rules meant that there was no longer alignment with the State organisation's Rules, and that the then s 71(5) certificate may no longer have been effective. Mr Gale referred to subsequent alterations to the Rules of the State organisation to restore the alignment with the federal Branch.
- 7 Given the realignment of the rules of the State organisation with the federal Branch, the applicant seeks a new s 71 certificate.

Statutory provisions

- 8 The relevant provisions of the *Act* for the purposes of this application are ss 71(2) and 71(4). They are in the following terms:

71. State branches of Federal organisations, rules as to membership and offices

...

- (2) The rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Commission in Court Session, they are substantially the same.

...

- (4) The rules of a counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.

- 9 The first issue to consider is whether the qualifications of persons for membership of the State organisation and the federal Branch are substantially the same.

Qualifications of persons for membership

- 10 It is well settled that for the purposes of s 71(2) of the *Act*, 'substantial' means 'real or of substance as distinct from ephemeral or nominal' or 'considerable' or 'in the main or essentially': *Western Australian Police Union of Workers* (2018) WAIRC 00725; (2023) 98 WAIG 1111 citing *Re an application by the Civil Service Association* (1993) 73 WAIG 2931 at 2932 and *Re Bonny* [1986] 2 Qld R 80 at 82.
- 11 To be a member of the State organisation, under r 5.1(a) or (b), a person must be either appointed under the *Police Act 1892* (WA) and employed by the Commissioner of Police or, be a police recruit. The terms of r 3 – Eligibility for Membership of the federal Branch are much broader than the terms of r 5 of the State organisation, reflecting its national scope of coverage. However, by r 3(ii), (iii) and (iv), the eligibility for membership of the federal Branch substantially reflects the requirements for membership of the State organisation in r 5.1(a) and (b).
- 12 The fact that the federal Branch may admit persons as members who are not eligible to be members of the State organisation, is not a disqualifying factor. Section 71(3)(b) of the *Act* makes this clear. In particular, we note that r 3(iii) of the federal Branch Rules is virtually identical to r 5.1(a) and (b) of the Rules of the State organisation.
- 13 Accordingly, it is clear that the rules of the State organisation and the federal Branch in relation to the qualifications of persons for membership are substantially the same. The requirement in s 71(2) of the *Act* is met.

Offices in each organisation

- 14 The next issue to determine is whether for every office in the State organisation, there exists a corresponding office in the federal Branch.
- 15 For the purposes of determining whether the requirement of s 71(4) of the *Act* is met, it is necessary to focus on the functions and powers of the offices in both the State organisation and the federal Branch, in terms of the similarity or otherwise of the content of the Rules of the respective organisations: *Jones v Civil Service Association Inc* [2003] WASCA 321; (2003) 84 WAIG 4 per Pullin J at [35].
- 16 Under r 6.1 of the State organisation, provision is made for the constitution of an elected Board of Directors, responsible for the overall management and governance of the organisation. The Board of Directors consists of 15 directors, of whom 11 are to be from the metropolitan region and one member from each of the northern (Kimberly/Pilbara) region, the central (Midwest/Gascoyne/ Wheatbelt) region, the eastern (Goldfields/Esperance) region and the southern (South-West/Great Southern) region. It is from the Board of Directors, that the senior office holders of President, Senior Vice-President, Vice-President and Treasurer are elected.
- 17 Under the federal Branch Rules, r 52A provides for the establishment of an elected Branch Executive. As with the State organisation Board of Directors, the Branch Executive consists of 15 directors, broken down into the metropolitan and regional areas on the same basis as for the Board of Directors under r 6.1 of the State organisation. As with the State organisation, the federal Branch President, Senior Vice-President, Vice-President and Treasurer are elected from the Branch Executive.

- 18 The State organisation Rules and the federal Branch Rules establish and set out the duties of the various office holders. For the purposes of comparing the functions and powers of each office, it is convenient to compare them in the following manner:

WA Police Union Rules	PFA WA Police Branch Rules - Part CA
Office Holder Duties	
President	
<p>Rule 7.3 The President shall:</p> <p>(a) provide leadership to the Board of Directors, create board meeting agendas, ensure the Board stays focused on key duties, and be chairperson at all meetings of the Board and the Union to maintain order and administer these Rules impartially;</p> <p>(b) report to the Board of Directors on all matters impacting on the objects of the Union and make appropriate recommendations to the Board of Directors;</p> <p>(c) on behalf of the Board of Directors, provide direction to the Chief Executive Officer on the business and affairs of the Union in accordance with these Rules including, but not limited to, policy matters, liaison between the Board and the Chief Executive Officer, and media liaison;</p> <p>(d) sign all Industrial Agreements, deeds or other instruments made on behalf of the Union by the Board;</p> <p>(e) in conjunction with the Chief Executive Officer contribute to the preparation of an annual budget for approval by the Board;</p> <p>(f) present a report on behalf of and as approved by the Board of Directors to each Annual Conference;</p> <p>(g) on behalf of the Board of Directors, delegate to a Director, member, agent, or the Chief Executive Officer all such tasks and duties as may be necessary to properly conduct the affairs, financial and otherwise, of the Union and to pursue its Objects; and</p> <p>(h) If employed, comply with the conditions and obligations within their contractual executive remuneration and employment contract.</p> <p>Rule 8.2</p> <p>(a) If the President or a majority of Branches consider that the Board is acting contrary to the best interests of the Union then they shall be empowered to instruct the Secretary to summon a Special Conference, and the Secretary shall within 30 days convene such a Conference.</p> <p>(b) Entitlement to attend and vote at a Special Conference shall be the same as at an Annual Conference.</p> <p>(c) At a Special Conference, at least twenty (20) Members entitled to attend and vote at the Special Conference must be present to form a quorum.</p> <p>(d) The Board may be removed from office on the vote of a majority of those present at a Special Conference called for the purpose, and upon such removal those present shall elect a Governing Board of four (4) Members to conduct the affairs of the Union until only such time as an election has been conducted in accordance with these Rules.</p> <p>Rule 8.4</p>	<p>Rule 52AG The President shall:</p> <p>(1) be an ex officio member of all Committees;</p> <p>(2) preside at all meetings of the Executive or of the Branch to maintain order and administer the Rules impartially, and upon the minutes being confirmed to sign the Minute Book in the presence of the meeting;</p> <p>(3) on behalf of the Executive, provide direction to the Chief Executive Officer on the business and affairs of the Branch in accordance with these Rules including, but not limited to, policy matters, liaison between the Executive and Chief Executive Officer, and media liaison;</p> <p>(4) sign all Industrial Agreements, deeds or other instruments made on behalf of the Branch by the Executive;</p> <p>(5) in conjunction with the Chief Executive Officer, contribute to the preparation of an annual budget for approval by the Executive.</p> <p>(6) present a report to each Annual Conference;</p> <p>(7) be the appropriate officer to notify the Commission (in writing) of any industrial disputes involving the Branch or its members only of which he or she becomes aware, consistent with rule 28 (d);</p> <p>(8) have the power to summon either a Special Executive or a Special Conference Meeting by reason of extraordinary circumstances existing, and shall state the special business requiring attention. Where such meetings have been called the business upon which such meetings were called must be dealt with; and</p> <p>(9) delegate to the Chief Executive Officer, Senior Vice President, Vice President, Treasurer or an Executive Member all such tasks and duties as may be necessary to properly conduct the affairs, financial and otherwise, of the Branch and to pursue its Objects.</p>

<p>...</p> <p>(e) Special meetings of the Board must be convened by the:</p> <p>(1) President whenever considered necessary by the President;</p> <p>(2) Secretary, or in the absence of the Secretary then either the President, Senior Vice President or Vice President, within seven days of a requisition signed by at least five (5) Directors setting out the object of the meeting. No other business shall be transacted at the special meeting of the Board than that set out in the request for the meeting.</p> <p>...</p>	
<p>Senior Vice President and Vice President</p>	
<p>Rule 7.4</p> <p>(a) During any absence or incapacity of the President, the Senior Vice President has the authority to act for and on behalf of the President, and when so acting, shall have all the rights, powers, duties and responsibilities of the President whether implied or expressed under these Rules.</p> <p>(b) In the absence or incapacity of both the President and the Senior Vice President from any meeting the Vice President shall take the chair and shall have all the rights, powers, duties and responsibilities of the President, whether implied or expressed under these Rules.</p> <p>(c) The Senior Vice President and the Vice President shall be members, ex officio, of each Committee established by the Board.</p> <p>(d) The Senior Vice President, if employed, shall comply with the conditions and obligations within their contractual executive remuneration and employment contract.</p> <p>(e) In the absence or incapacity of the Treasurer from any meeting, the Vice President shall have all the rights, powers, duties and responsibilities of the Treasurer, whether implied or expressed under these Rules.</p>	<p>Rule 52AH</p> <p>(1) During any absence or incapacity of the President the Senior Vice President has the authority to act for, and on behalf of the President when so acting, and shall have all the rights, powers, duties and responsibilities of the President, whether implied or expressed under the Rules.</p> <p>(2) In the absence or incapacity of both the President and the Senior Vice President from any meeting the Vice President shall take the chair and shall have all the rights and responsibilities specified in sub rule (1) of this rule.</p> <p>(3) The Senior Vice President and the Vice President shall be members, ex officio, of each Committee established by the Executive.</p> <p>(4) The Senior Vice President, if employed, shall comply with the conditions and obligations within their senior executive contracts.</p> <p>(5) In the absence or incapacity of the Treasurer from any meeting, the Vice President shall have all the rights, powers, duties and responsibilities of the Treasurer, whether implied or expressed under these Rules.</p>
<p>Treasurer</p>	
<p>Rule 7.5</p> <p>The Treasurer shall:</p> <p>(a) keep a general oversight of the financial position of the Union;</p> <p>(b) exercise proper control over the management of Union funds;</p> <p>(c) ensure accounting records are kept in accordance with proper accounting principles and truly record and explain the financial transactions and financial position of the Union;</p> <p>(d) present to each meeting of the Board appropriate accounting reports indicating the status of the funds and financial position of the Union, or other relevant reports as required by the Board;</p> <p>(e) present to each Annual Conference an audited balance sheet of the assets and liabilities, a statement of the receipts and expenditure and a statement of the sources and application of funds of</p>	<p>Rule 52AI</p> <p>The Treasurer shall:</p> <p>(1) keep a general oversight of the financial position of the Branch and exercise proper control over the management of its funds and ensure accounting records are kept in accordance with proper accounting principles and truly record and explain the financial transactions and financial position of the Branch;</p> <p>(2) present to each meeting of the Executive appropriate accounting reports indicating the status of the funds and financial position of the Branch, or other relevant reports as required by the Executive for the preceding period;</p> <p>(3) present to each Annual Conference an audited balance sheet of the assets and liabilities, a statement of the receipts and expenditure and a statement of the sources and application of funds of the Branch;</p> <p>(4) be entitled to inspect the books of the Branch at any</p>

<p>the Union;</p> <p>(f) be entitled to inspect the books of the Union at any time and in the event of any irregularity shall immediately make a report to the Board of Directors;</p> <p>(g) be an ex officio member of each committee established by the Board of Directors;</p> <p>(h) chair the Union’s Risk and Audit Committee;</p> <p>(i) assist the President prepare a report for the Annual Conference;</p> <p>(j) assist the President in the preparation of an annual budget as well as the monitoring and control of the approved budget;</p> <p>(k) be entitled to call for a full audit at any given time; and</p> <p>(l) be responsible for senior executive contracts including:</p> <p style="padding-left: 20px;">(i) establishment of contracts on commencement; and</p> <p style="padding-left: 20px;">(ii) establishing a reporting, recording mechanism that enables the Board to adequately monitor, review and report on the performance of the President, the Chief Executive Officer, and Secretary against their key positional descriptions and/or contractual obligations.</p>	<p>time and in the event of any irregularity shall immediately make a report to the Branch Executive;</p> <p>(5) be an ex officio member of each Committee established by the Executive;</p> <p>(6) in conjunction with the President prepare an annual report;</p> <p>(7) assist the President in the preparation of an annual budget as well as the monitoring and control of the approved budget; and</p> <p>(8) be entitled to call for a full audit at any given time.</p> <p>(9) be responsible for senior executive contracts including:</p> <p style="padding-left: 20px;">(i) establishment of contracts on commencement; and</p> <p style="padding-left: 20px;">(ii) establishing a reporting, recording mechanism that enables the Board to adequately monitor, review and report on the performance of the President, the Chief Executive Officer, and Secretary against their positional descriptions and/or contractual obligations.</p>
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- 19 A comparison of the above offices clearly shows that the functions and powers of the respective offices in the State organisation and the federal Branch are substantially the same. In the case of r 52AG(8) of the federal Branch, enabling the President to summon meetings, the same duty of the State organisation President is to be found in r 8.2 and 8.4(e) of the State organisation’s Rules. In the case of the Treasurer of the State organisation, whilst under r 7.5(h), the Treasurer chairs the organisation’s Risk and Audit Committee, no such committee exists under the federal Branch Rules. Therefore, this difference is not material.
- 20 On the basis of the above, the Commission in Court Session formed the opinion that for each office in the State organisation, there is a corresponding office in the federal Branch.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2024 WAIRC 00893

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

KELMEC SEVICES, DOMINIC RIGGIO, DRAKE INDUSTRIAL, MACKENZIE ELECTRICAL SERVICE, INDUSTRELEC PTY LTD, PROGRAMMED SKILLED WORKFORCE PTY LTD, J & S CASTLEHOW ELECTRICAL SERVICES, WORMALD FIRE SYSTEMS

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

THURSDAY, 10 OCTOBER 2024

FILE NO/S

APPL 143 OF 2024

CITATION NO.

2024 WAIRC 00893

Result

Award varied

Representation

On the papers

Order

WHEREAS the Electrical Trades Union WA (ETU) applied on 12 September 2024 to vary the *Electrical Contracting Industry Award R 22 of 1978* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (IR Act);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to:

- (a) Increase a number of the allowances in the Award by the percentage increase ordered in the 2024 State Wage case ([2024] WAIRC 00345; (2024) 104 WAIG 752), that is an increase of 4%; or by relevant CPI rates from June 2023 to June 2024; and
- (b) Update the superannuation provisions of the Award;

AND WHEREAS the variations were not opposed by any respondent;

AND BEING satisfied that:

- (a) The amendments proposed do not effect any substantive change to the scope of the Award or its area of operation;
- (b) The application is not made within a term specified in the Award; and
- (c) The requirements for varying the Award are met;

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

THAT the *Electrical Contracting Industry Award R 22 of 1978* be varied in accordance with the following schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE

1. **Clause 12. - Overtime: Delete paragraph (e) of subclause (2) of this Clause and insert in lieu thereof the following:**
 - (e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid **\$17.80** for such meal and for a second or subsequent meal if so required.
 - (ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.
 - (iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, **\$17.80**.
2. **Clause 18. - Special Rates and Provisions:**
 - A. **Delete subclauses (1), (2), (3), (4) and (5) and insert in lieu thereof the following:**
 - (1) **Height Money:** An employee shall be paid an allowance of **\$3.60** for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.
 - (2) **Dirt Money:** An employee shall be paid an allowance of **74 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
 - (3) **Grain Dust:** Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding **\$1.24** per hour.
 - (4) **Confined Space:** An employee shall be paid an allowance of **87 cents** per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
 - (5) **Diesel Engine Ships:** The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of **\$1.24** per hour whilst so engaged.
 - B. **Delete subclause (7) and insert in lieu thereof the following:**
 - (7) **Hot Work:** An employee shall be paid an allowance of **74 cents** per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.
 - C. **Delete subclauses (9), (10), (11) and (12) and insert in lieu thereof the following:**
 - (9) **Percussion Tools:** An employee shall be paid an allowance of **48 cents** per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.
 - (10) **Chemical, Artificial Manure and Cement Works:** An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of **\$18.30** per week. The allowance shall be paid

during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

- (11) **Abattoirs:** An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of **\$24.80** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.
- (12) **Phosphate Ships:** An employee shall be paid an allowance of **\$1.09** for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

D. Delete subclause (19) and insert in lieu thereof the following:

- (19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **\$14.60** per week in addition to their ordinary rate.

E. Delete subclause (21) and insert in lieu thereof the following:

- (21) **Nominee:** A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of **\$91.10** per week.

3. Clause 19. – Car Allowance: Delete this Clause and insert in lieu thereof the following:

19. – CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of **\$1.08** per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

4. Clause 20. – Allowance for Travelling and Employment in Construction Work: Delete paragraph (a) of subclause (2) and insert in lieu thereof the following:

- (a) On jobs measured by radius from the General Post Office, Perth situated within the area of:

	Per Day \$
(i) Up to and including 50 kilometre radius OR	23.25
(ii) Over 50 kilometres up to and including 60 kilometre radius OR	29.50
(iii) Over 60 kilometres up to and including 75 kilometre radius OR	45.40
(iv) Over 75 kilometres up to and including 90 kilometre radius OR	64.15
(v) Over 90 kilometres up to and including 105 kilometre radius	83.35

5. Clause 21. – Distant Work:

A. Delete subclause (6) and insert in lieu thereof the following:

- (6) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of **\$45.55** for any weekend that they return to their home from the job but only if –
- (a) The employee advises the employer or their agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
- (b) The employee is not required to work during that weekend;
- (c) The employee returns to the job on the first working day following the weekend; and
- (d) The employer does not provide or offer to provide suitable transport.

B. Delete subclause (9) and insert in lieu thereof the following:

- (9) Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **\$20.15** per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 27. - Grievance Procedure and Special Allowance: Delete subclause (3) of this Clause and insert in lieu thereof the following:

- (3) (a) Subject to paragraph (e) of this subclause, a special allowance of **\$45.20** per week shall be paid as a flat amount each week except where direct action takes place.
- (b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as nonadherence to the disputes procedure Clause or affect the payment of this allowance.
- (c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and **\$45.20** shall be paid.

- (d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.
- (e) An apprentice shall be paid a percentage of **\$45.20** being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

7. Clause 30. - Special Provisions - Western Power Corporation: Delete subclauses (2), (3), (4) and (5) of this Clause and insert in lieu thereof the following:

- (2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:
 - (a) **\$2.92** per hour for each hour worked if employed at Muja;
 - (b) **\$1.73** per hour for each hour worked if employed at Kwinana;
- (3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:
 - (i) An allowance of **\$23.25** per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;
 - (ii) An allowance of **\$63.05** per day if the employee resides outside that radius; in lieu of the allowance prescribed in the said Clause.
- (b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.
- (4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid **\$39.85** on each occasion upon which the employee returns home at the weekend but only if –
 - (a) The employee has completed three months' continuous service with the employer;
 - (b) The employee is not required for work during the weekend;
 - (c) The employee returns to the job on the first working day following the weekend;
 - (d) The employer does not provide or offer to provide suitable transport;
 and such payment shall be deemed to compensate for a periodical return home at the employer's expense.
- (5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -
 - (a) Shall be paid an amount of **\$107.05** and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and
 - (b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid **\$107.05** and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service; and the provisions of subclause (3) and subclause (4) of Clause 21. - Distant Work shall not apply to such an employee.

8. Clause 36: - Superannuation:

A. Delete paragraphs (a) and (b) of subclause (2) and insert in lieu thereof the following:

- (a) Adult Employees

Each employer shall, on behalf of each full time, part time or casual employee as defined in Clause 5. – Definitions of this Award, pay a weekly contribution into an approved occupational superannuation fund on the following basis:

 - (i) For employees not engaged on construction work, a weekly contribution of 11.5% of the employee's weekly earnings.
 - (ii) Provided that
 - (aa) An employee who is entitled to be paid a Leading Hand and/or Commissioning Allowance as prescribed in First Schedule – Wages of this Award, shall have an amount calculated as 11.5% of those allowances added to their weekly contribution.
 - (bb) An employee who is entitled to be paid shift loadings including weekend and public holiday rates where the shift work is part of the employee's ordinary hours of work, shall have an amount calculated at 11.5% of such loading added to their weekly contribution.
 - (iii) Provided further that part time and casual employees will have pro-rata payments made on their behalf.
- (b) Apprentices

Each employer shall, on behalf of apprentices, pay a weekly contribution into an approved occupational superannuation fund on the following basis:

- (i) For apprentices not engaged on construction work, a weekly contribution calculated as 11.5% of the rate of pay prescribed in the First Schedule – Wages of this Award as follows:

	Four Year Term	Three and a Half Year Term		Three Year Term	
1st Year	\$48.50	Six Months	\$48.50		
2nd Year	\$63.40	Next Year	\$63.40	1st Year	\$63.40
3rd Year	\$83.30	Next Year	\$83.30	2nd Year	\$83.30
4th Year	\$98.20	Final Year	\$98.20	3rd Year	\$98.20

- (ii) Provided that adult apprentices receive an 11.5% contribution based on their actual rate of pay.
 (iii) Provided further that apprentices engaged on construction work shall, in addition to the contributions provided in (i) hereof, have an amount calculated as 11.5% of the applicable Construction Allowance as provided in First Schedule – Wages of this Award added to their weekly contribution.

9. First Schedule - Wages:

A. Delete subclause (3) of this Clause and insert in lieu thereof the following:

- (3) **Leading Hands** - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -
- | | | |
|-----|--|----------------|
| (a) | If placed in charge of not less than three and not more than ten other employees | \$38.10 |
| (b) | If placed in charge of more than ten and not more than twenty other employees | \$58.40 |
| (c) | If placed in charge of more than twenty other employees | \$75.60 |

B. Delete subclauses (5) and (6) of this Clause and insert in lieu thereof the following:

(5) **Tool Allowance:**

- (a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:
- \$22.00** per week to such tradesperson, or
 - In the case of an apprentice a percentage of **\$22.00** being the percentage which appear against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(6) **Construction Allowance:**

- (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:
- \$67.90** per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.
 - \$61.20** per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
 - \$36.10** per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.
- (b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

C. Delete subclauses (9) and (10) of this Clause and insert in lieu thereof the following:

(9) **Licence Allowance:**

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid **\$32.30** per week.

(10) **Commissioning Allowances:**

An "Electrician Commissioning" as defined shall be paid at the rate of **\$49.40** per week in addition to rates prescribed in this schedule.

2024 WAIRC 00918

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

CHUBB AUSTRALIA PTY LTD FORMERLY KNOWN AS CHUBB AUSTRALIA LTD T/AS
CHUBB ALARMS, IDAMENEO (NO. 789) LTD FORMERLY MAYNE NICKLESS LIMITED
T/AS METROPOLITAN SECURITY SERVICES

RESPONDENTS**CORAM** SENIOR COMMISSIONER R COSENTINO**DATE** MONDAY, 28 OCTOBER 2024**FILE NO/S** APPL 146 OF 2024**CITATION NO.** 2024 WAIRC 00918**Result** Award varied**Representation** On the papers*Order*

WHEREAS the Electrical Trades Union WA (ETU) applied on 17 September 2024 to vary the *Electrical Trades (Security Alarms Industry) Award 1980* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2024 State Wage case ([2024] WAIRC 00345; (2024) 104 WAIG 752), that is an increase of 4% and by relevant CPI rates from June 2023 to June 2024;

AND WHEREAS the variations were not opposed by any respondent;

AND BEING satisfied that:

- (a) The amendments proposed do not effect any substantive change to the scope of the Award or its area of operation;
- (b) The application is not made within a term specified in the Award; and
- (c) The requirements for varying the Award are met;

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

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

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

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

- (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$17.05 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid \$11.70 for each meal so required.

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

- (1) Height Money: An employee shall be paid an allowance of \$3.85 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.
- (2) Dirt Money: An employee shall be paid an allowance of 78 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- (3) Confined Space: An employee shall be paid an allowance of 99 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
- (4) Hot Work: An employee shall be paid an allowance of 78 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

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

(6) Percussion Tools:

An employee shall be paid an allowance of 50 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

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

(13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$16.10 per week in addition to their ordinary rate.

(14) A Serviceperson – Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the *Electricity Act 1945* shall be paid an allowance of \$32.30 per week.

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

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

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

Area And Details	Engine Displacement (In Cubic Centimetres)		
	Over 2600cc	1600cc - 2600cc	1600cc & Under
	Rate per Kilometre (cents)		
Metropolitan Area	106.6	95.2	82.7
South West Land Division	109.1	97.5	84.7
North of 23.5° South Latitude	120.4	107.5	93.5
Rest of the State	112.0	101.0	87.5
Motor Cycle (In All Areas)	36.5 cents per Kilometre		

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

(4) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of \$44.55 for any weekend that they return to their home from the job but only if –

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

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$19.85 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

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

- (3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of \$22.40 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.
 - (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.
 - (c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.
 - (d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.
- (4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid –
- (i) \$72.10 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.
 - (ii) \$65.40 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
 - (iii) \$37.80 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. – Definitions of this Award.
- (b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

- (c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. – Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.
- (5) Leading Hand: In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid -
- | | | |
|-----|--|---------|
| (a) | If placed in charge of not less than three and not more than ten other employees | \$41.10 |
| (b) | If placed in charge of more than ten but not more than twenty other employees | \$62.40 |
| (c) | If placed in charge of more than twenty other employees | \$80.60 |

2024 WAIRC 00926

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

THE MINISTER FOR AGRICULTURE, BOARD OF MANAGEMENT, ROYAL PERTH HOSPITAL, BOARD OF MANAGEMENT, PRINCESS MARGARET HOSPITAL, BOARD OF MANAGEMENT, SIR CHARLES GAIRDNER HOSPITAL, BOARD OF MANAGEMENT, KING EDWARD MEMORIAL HOSPITAL, BOARD OF MANAGEMENT, FREMANTLE HOSPITAL, GOLDEN EGGS, PUBLIC TRANSPORT AUTHORITY, ROTTNEST ISLAND AUTHORITY, AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, THE MINISTER FOR COMMERCE, THE MINISTER FOR EDUCATION, THE MINISTER FOR HEALTH, THE MINISTER FOR TRANSPORT, THE MINISTER FOR POLICE, THE MINISTER FOR HOUSING, THE MINISTER FOR THE ENVIRONMENT, COMMISSIONER OF MAIN ROADS

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO
DATE TUESDAY, 29 OCTOBER 2024
FILE NO/S APPL 148 OF 2024
CITATION NO. 2024 WAIRC 00926

Result Award varied
Representation On the papers

Order

WHEREAS the Electrical Trades Union WA (ETU) applied on 17 September 2024 to vary the *Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962* pursuant to s 40 of the *Industrial Relations Act 1979 (WA) (IR Act)*; AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2024 State Wage case ([2024] WAIRC 00345; (2024) 104 WAIG 752), that is an increase of 4% and by relevant CPI rates from June 2023 to June 2024;

AND WHEREAS the variations were not opposed by any respondent;

AND BEING satisfied that:

- (a) The amendments proposed do not effect any substantive change to the scope of the Award or its area of operation;
- (b) The application is not made within a term specified in the Award; and
- (c) The requirements for varying the Award are met;

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

THAT the *Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE**1. Clause 14. – Overtime:****A. Delete paragraph (e) of subclause (3) of this Clause and inset in lieu thereof the following:**

- (e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more

than one hour shall be supplied with a meal by the employer or be paid \$16.65 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, they shall be supplied with each such meal by the employer or be paid \$11.75 for each meal so required.

B. Delete paragraph (h) of subclause (3) of this Clause and inset in lieu thereof the following:

- (h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid \$7.75 for breakfast.

2. Clause 17. – Special Rates and Provisions:

A. Delete subclauses (1), (2), (3), (4) and (5) of this Clause and insert in lieu thereof the following:

- (1) Height Money: An employee shall be paid an allowance of \$3.60 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.
- (2) Dirt Money: Dirt Money of 75 cents per hour shall be paid as follows:-
- (a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.
- (b) Bitumen Sprayers - Large Units:
- (i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.
- (ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 82 cents per hour shall be paid.
- (c) Bitumen Sprayers - Small Units:
- (i) To employees for work done on main tank, its fittings, pump and spray arms.
- (ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.
- (d) To employees on all other dirty tar sprays and kettles.
- (e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.
- (f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.
- (g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.
- (3) Confined Space:
97 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.
- (4) Any employee actually working a pneumatic tool of the percussion type shall be paid 49 cents per hour extra whilst so engaged.
- (5) Hot Work: An employee shall be paid an allowance of 75 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.
- B. Delete subclauses (8), (9), (10), (11), (12), (13), (14), (15) and (16) of this Clause and insert in lieu thereof the following:**
- (8) Any employee working in water over their boots or, if gumboots are supplied, over the gumboots, shall be paid an allowance of \$2.35 per day.
- (9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 75 cents.
- (10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of \$4.60 for such examination and \$1.65 per hour extra thereafter for fixing, renewing or repairing such work.
- (11) Ship Repair Work: Any employee engaged in repair work on board ships shall be paid an additional \$8.25 per day for each day on which so employed.
- (12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of \$3.16 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 26 cents per hour, with a minimum payment of \$2.15 per day.

(14) Abattoirs -

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of \$25.60 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to \$24.00 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 79 cents per hour, with a minimum payment for four hours.

(16) Morgues -

An employee required to work in a morgue shall be paid 79 cents per hour or part thereof, in addition to the rates prescribed in this clause.

C. Delete subclause (19) of this Clause and insert in lieu thereof the following:

(19) An employee required to repair or maintain incinerators shall be paid \$4.90 per unit.

D. Delete subclauses (21), (22), (23), and (24) of this Clause and insert in lieu thereof the following:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 56 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including gravity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of \$31.40 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of \$1.01 per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) Towing Allowance: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of \$7.10 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

E. Delete subclauses (26), (27), (28) and (29) of this Clause and insert in lieu thereof the following:

(26) First Aid Allowance: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid \$15.30 per week in addition to their ordinary rate.

(27) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of \$3.16 per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of \$27.20 per week.

(29) Hospital Environment Allowance:

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

- (a) (i) \$22.00 per week for work performed in a hospital environment; and
- (ii) \$7.40 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -
 - Princess Margaret Hospital
 - King Edward Memorial Hospital
 - Sir Charles Gairdner Hospital
 - Royal Perth Hospital
 - Fremantle Hospital
- (b) \$16.10 per week for work performed in a hospital environment at -
 - Kalgoorlie Hospital
 - Osborne Park Hospital
 - Albany Hospital
 - Bunbury Hospital
 - Geraldton Hospital
 - Mt. Henry Hospital
 - Northam Hospital
 - Swan Districts Hospital
 - Perth Dental Hospital
- (c) \$10.50 per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	Port Hedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital
Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

3. Clause 19. - Fares and Travelling Allowances: Delete paragraphs (a), (b) and (c) of subclause (1) and insert in lieu thereof the following:

- (a) On places within a radius of fifty kilometres from the General Post Office, Perth - \$22.45 per day;
- (b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth \$1.18 per kilometre;
- (c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employee with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of \$1.18 per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

4. Clause 20. - Distant Work - Construction: Delete subclauses (6) and (7) of this Clause and insert in lieu thereof the following:

- (6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of \$46.15 and for any weekend that he/she return to his home from the job but only if -
 - (a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
 - (b) He/she is not required for work during that weekend;
 - (c) The employee returns to the job on the first working day following the weekend; and
 - (d) The employer does not provide or offer to provide suitable transport.
- (7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, they shall be provided with suitable transport to and from that job or be paid an allowance of \$20.20 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 21. - District Allowances:

A. Delete subclause (6) of this Clause and insert in lieu thereof the following:

- (6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

- (b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than 10 other employees.
- (c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.
- (d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	\$
Manjimup, Collie	97.00
Harvey, Dwellingup, Mundaring, Yanchep	48.30
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	24.40
Jarrahdale	24.40

C. Delete subclauses (10), (11), and (12) of this Schedule and insert in lieu thereof the following:

(10) Construction Allowance

- (a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -
 - (i) \$69.50 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;
 - (ii) \$62.50 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.
 - (iii) \$36.90 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. – Classification Structure and Definitions of this Award.
- (b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.
- (c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. – Special Rates and Provisions of this Award.

(11) Tool Allowance

- (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -
 - (i) \$22.00 per week to such tradesperson; or
 - (ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.
- (c) An employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through the negligence of such employee.

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional \$3.65 per hour whilst so engaged.

7. Fifth Schedule – Building Management Authority Wages and Conditions:

A. Delete paragraphs (c), (d) and (e) of subclause (5) of this Schedule and insert in lieu thereof the following:

- (c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all-purpose payment of \$41.50 per week.
- (d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.
- (e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all-purpose allowance of \$56.10 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule – Wages of this Award.

B. Delete subclause (7) of this Schedule and insert in lieu thereof the following:**(7) Computing Quantities:**

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid \$5.95 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2024 WAIRC 00899

**MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021 AND LOCAL GOVERNMENT OFFICERS'
(WESTERN AUSTRALIA) AWARD 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2024 WAIRC 00899
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	FRIDAY, 16 AUGUST 2024
DELIVERED	:	FRIDAY, 11 OCTOBER 2024
FILE NO.	:	APPL 3 OF 2023, APPL 4 OF 2023
BETWEEN	:	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND CITY OF KALAMUNDA AND OTHERS Respondents

CatchWords	:	Industrial Relations (WA) – Production of Documents – Redaction – Reliance on Undertakings – Power to Vary Orders
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Application to Vary Orders Denied
Representation:		
Applicant	:	Mr Z Doherty (of counsel) Mr R Knox
Respondents	:	Ms S Lyon (of counsel) Ms J Love Mr K Trainer (as agent) Mr M Fitzgerald (as agent) Mr I Holland

Reasons for Decision

- 1 On 8 February 2023, Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**WASU**) filed an application in the Western Australian Industrial Relations Commission (**the Commission**) to amend the *Municipal Employees WA Award 2021*. The 25 respondents to the award were variously served on 9 February 2023, 20 February 2023, 21 February 2023, 22 February 2023, 23 February 2023, and 24 February 2023.
- 2 On 27 February 2023, a copy of the application was served on the West Australian Local Government Association (**WALGA**). Consequentially, as per s 29B of the *Industrial Relations Act 1979* (WA) (**the IR Act**), WALGA became a party to these proceedings.
- 3 On 3 March 2023, the Shire of Dalwallinu and the Shire of Yalgoo notified the Commission that WALGA commenced to act for them.
- 4 On 8 March 2023, the Shire of Bruce Rock, the Shire of Boddington, the Shire of Murray, the Shire of Kondinin, the Shire of Narembeen, the Shire of Dowerin, the Shire of Halls Creek, the Shire of Harvey, the Shire of Three Springs, and the Shire of Woodanilling notified the Commission that WALGA represented them in these proceedings.
- 5 On 10 March 2023, the Shire of Yalgoo and the Shire of Wagin notified the Commission that WALGA commenced to act for them.
- 6 On 16 March 2023, the Shire of Nannup notified the Commission that WALGA commenced to act for them.
- 7 On 13 March 2023, the Shire of Greenbushes, the Shire of Laverton, the Shire of Sandstone, the Shire of Victoria Plains and the Shire of Leonara filed responses in the Commission and nominated Mr Fitzgerald to represent them in proceedings.
- 8 On 15 March 2023, the Shire of Kalamunda notified the Commission that WALGA commenced to act for them.

- 9 On 16 March 2023, the Shire of Ravensthorpe notified the Commission that WALGA commenced to act for them.
- 10 On 16 March 2023, the Shire of Carnamah notified the Commission that WALGA commenced to act for them.
- 11 On 19 March 2023, the Shire of Goomalling filed a response in the Commission and nominated Mr Fitzgerald.
- 12 On 16 August 2023, the Shire of Wandering notified the Commission that WALGA commenced to act for them.
- 13 On 20 December 2023, WALGA notified the Commission that it ceased to represent the Shires of Kalamunda, Boddington, Bruce Rock, Carnamah, Harvey, Kondinin, Murray, Nannup, Narembeen, Ravensthorpe, Three Springs, Wagin, Wandering, Woodanilling, and Yalgoo.
- 14 On 29 January 2024, the Commission issued orders:
- WHEREAS on 23 January 2024, the Commission issued directions in this matter: [2024] WAIRC 00027;
- AND WHEREAS on 25 January 2024, the Western Australian Local Government Association (WALGA) notified the Commission that at the hearing on 17 January 2024, it had opposed the directions sought and that the Direction [2024] WAIRC 00027 issued was not “by consent” as described;
- NOW THEREFORE the Commission notes the error in the direction issued and now pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act) and hereby directs:
1. THAT the Direction [2024] WAIRC 00027 issued on 23 January 2024 be vacated.
 2. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, the relevant respondents (City of Kalamunda, Shire of Boddington, Shire of Bruce Rock, Shire of Carnamah, Shire of Dowerin, Shire of Goomalling, Shire of Halls Creek, Shire of Harvey, Shire of Kondinin, Shire of Murray, Shire of Nannup, Shire of Narembeen, Shire of Ravensthorpe, Shire of Three Springs, Shire of Wagin, Shire of Wandering, Shire of Woodanilling, and Shire of Yalgoo) are to file with Registry a copy of the Equal Employment Opportunity Annual Workforce Data Spreadsheet that the relevant respondent completed and provided to the Public Sector Commission for the period of 2022-2023.
 3. THAT before 29 January 2024, and in accordance with sections 27(1)(o) and 27(1)(v) of the Act, WALGA shall file all documents relating to its ‘sector survey’ concerning proposed amendments to the Municipal Employees (Western Australia) Award 2021 (Award). This includes:
 - (a) The survey documents distributed by WALGA to local governments concerning the proposed amendments to the Award.
 - (b) The unredacted, individual responses received by WALGA from local governments.
 4. THAT the disclosure of documents at direction 3 be limited to the representatives of the parties and officers of the parties’ organisations.
 5. THAT the applicant’s application to vary the Award be listed for a hearing of 10 days, starting on a date not before 1 March 2024.
 6. THAT no later than 14 days before the hearing date, the applicant shall file an outline of opening submissions.
 7. THAT no later than 7 days before the hearing date, the respondents shall file an outline of opening submissions.
 8. THAT the parties have liberty to apply on short notice.
- 15 At this time, WALGA was a party to the proceedings and represented the Shire of Dalwallinu and the Shire of Halls Creek in the proceedings.
- 16 WALGA appealed Direction 3 of the orders and applied for a stay of Direction 3.
- 17 On 22 February 2024, Chief Commissioner Kenner granted the stay of Direction 3 and issued the following orders:
- This matter having come before me on the papers on 20 February 2024, and having heard Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA) and Ms S Lyon as agent on behalf of the Western Australian Local Government Association, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), I hereby declare and order by consent as follows —
- (1) THAT the applicant has a sufficient interest as required by s 49(11) of the *Act* to apply for the orders set out herein.
 - (2) THAT appeal FBA 4 of 2024 has been instituted within the meaning of s 49(11) of the *Act*.
 - (3) THAT the operation of direction 3 of the directions made on 29 January 2024 in APPL 3 of 2023 be and is hereby stayed pending the hearing and determination of appeal FBA 4 of 2024.
 - (4) THAT the Western Australian Local Government Association undertakes that in the event the appeal in FBA 4 of 2024 is dismissed, the documents referred to in direction 3 of the directions made on 29 January 2024 in APPL 3 of 2023 will be filed within two working days of the disposition of the appeal.
 - (5) THAT the parties have liberty to apply on short notice.
- 18 On 3 July 2024, the Full Bench dismissed the appeal [2024] WAIRC 00398.
- 19 On 5 July 2024, WALGA applied to the Commission for a variation of the orders issued in [2024] WAIRC 00043:
- APPL 3 & 4 of 2023 - Request for redaction directions**
- Dear Associate to Commissioner T B Walkington
- I confirm WALGA has now complied with the Commissioner’s Directions 3 in:

- APPL 3/2023, Municipal Employees (Western Australia) Award 2021, Direction issued, 2024 WAIRC 00043; and
- APPL 4/2023, Local Government Officers' (Western Australia) Award 2021, Direction issued, 2024 WAIRC 00044 (29 January 2024 Directions).

We understand that WALGA's obligation was to file no later than 4.30pm, Friday 5 July 2024, the survey documents distributed and the unredacted individual responses concerning the proposed amendments to the ME Award and LGO Award in APPL 3 and 4 of 2023 which include variations under a s. 40 of the IR Act to:

- Casual employment;
- Employment equity;
- Redundancy;
- Annual leave for shift workers;
- Flexible working arrangements; and
- Cultural and ceremonial leave (for the LGO Award only).

We confirm WALGA has now filed with the WAIRC Registry:

- 'Sector Survey – Questions'; and
- 'Survey Responses All'.

Having had the Full Bench confirm in 2024 WAIRC 00391 on 3 July 2024 that 29 January 2024 Directions were for production of documents and not discovery, WALGA relies on Directions 8 of the 29 January 2024 Directions, which provide parties liberty to apply on short notice, to seek further directions to redact parts of these documents before they are inspected by/distributed to the other 'representatives of the parties and officers of the parties' organisations' in APPL 3 and 4 of 2024.

WALGA seek these further directions under sections 27(1)(o), 27(1)(m) and 27(1)(v) of the *Industrial Relations Act 1979* (WA) and regulation 21 of the *Industrial Relations Commissions Regulations 2005* (WA).

Directions for redaction of information

1. WALGA seeks to redact the personal information of each Local Government employee at Question 1 of the 'Survey Responses All':
 - Full name
 - Job title
 - Email address
 - Phone number

See paragraphs 63 to 66 2024 WAIRC 00391 including:

63 *As to the confidentiality considerations, WALGA rightly concedes that this was not a reason of itself not to order production or discovery of otherwise relevant documents. It is a factor which might be relevant to the exercise of the Commission's discretion. Confidentiality considerations might also inform the form of orders made.*

...

66 *WALGA submitted that because the directions require the unredacted documents to be produced, the names of the individuals who completed the surveys on behalf of the local governments would be revealed. It was said that this would expose those individuals' interests to officers of the union who those individuals may regularly deal with. This submission is inconsistent with the evidence. The outline of evidence sets out the survey questions, which make it clear that the survey questions are asking for a response about the local government's position, not the position of the individual who completes the survey on behalf of the local government.*

2. WALGA also seeks to redact the information provided by Local Governments who are not parties to these proceedings from the 'Survey Responses All'.
3. Finally WALGA seeks to redact information that is outside the scope of these proceedings including about award modernisation and changes to the *Local Government (Long Service Leave) Regulations* (WA) from both the 'Sector Survey – Questions' and 'Survey Responses All'.

We note the confidentiality Directions 4 as part of the 29 January 2024 Directions, however without the ability to redact the above information, adequate protection may not be afforded to Local Government employers. For example, WALGA is concerned that this information may provide the unions with information that is outside the scope of these proceedings which could advance its position with regard to award variations and agreement negotiations, or hinder WALGA's ability to consult with its members.

WALGA has provided the attached 'Sector Survey – Questions (Redacted)', to assist the Commission in the determination of our submissions.

- 20 On 8 July 2024, WASU objected to the proposed redactions, except for those concerning the long service leave matters and responded by email:

There are three types of information that WALGA is asking to be redacted from the documents it has produced to the Registry. I have not yet seen those documents, so I am operating only on what is set out in WALGA's below email.

Issue 1: Details of the persons who submitted the survey responses

It is unclear what WALGA's basis is for its request to redact the identity and contact details of the persons who filled out the sector surveys for their respective local government.

There is no logical need or basis to redact that information. The Full Bench has made clear that the sector survey responses reflect the relevant local government employer's response, not the individual employee's response.

That being said, the WASU may wish to contact the people referred to in the survey responses to better understand their local government's responses to the WALGA survey. It is information that falls within the *Peruvian Guano* test as it may lead to a chain of inquiry which either assists the WASU's case or damages WALGA's case.

The WASU's view is that the Commissioner's direction [4] dated 29 January 2024 adequately protects the confidentiality of the documents filed.

Issue 2: Redacting responses of non-respondent employers

There is no logical need or basis to redact the information provided by non-respondent employers to WALGA's sector survey. Redacting that information would circumvent the whole purpose of the document being produced in the first place.

In its evidence, WALGA has held out that the survey responses of the non-respondent employers are relevant to the just determination of the matter. Again, it fits within the scope of the *Peruvian Guano* test as it may lead to a chain of inquiry which either assists the WASU's case or damages WALGA's case.

The WASU's view is that the Commissioner's direction [4] dated 29 January 2024 adequately protects the confidentiality of the documents filed.

Issue 3: Information outside of the scope of the award changes

The WASU is unsure what additional information WALGA is seeking to have redacted from its filed documents.

This is because:

1. the WASU has not seen the documents;
2. WALGA has not said with sufficient precision what information it is seeking to have redacted.
 - a. On this point, WALGA has said:

*Finally WALGA seeks to redact information that is outside the scope of these proceedings **including** about award modernisation and changes to the Local Government (Long Service Leave) Regulations (WA) from both the 'Sector Survey – Questions' and 'Survey Responses All'.*

- b. That sentence is ambiguous because it suggests there could be three things that WALGA is seeking to be redacted (1) information about award modernisation, (2) changes to the *Local Government (Long Service Leave) Regulations*, and (3) other information that presumably WALGA believes is outside the scope of the proceedings.

The WASU has an objection to the information about award modernisation being redacted because it does not know what is meant by 'award modernisation' or what information falls under that concept.

The WASU has no objection to information that is wholly confined to the *Local Government (Long Service Leave) Regulations* being redacted as that is self-evidently not relevant to the proceedings.

The WASU has an objection to any other information being redacted which has not otherwise been described by WALGA.

It may be of some assistance if

1. WALGA could provide to the Commission the filed documents with highlighting to show what information it wants redacted; and
2. the parties' legal representatives (or advocate as the case may be) being permitted to view the documents with the highlighting so that they can indicate to the Commission whether the proposed redaction is consented to or not.

The WASU's view is that the Commissioner's direction [4] dated 29 January 2024 adequately protects the confidentiality of the documents filed plus any highlighting.

- 21 The Local Government, Racing and Cemeteries Union (WA) (LGREU) and the Shires of Bridgetown, Greenbushes, Goomalling, Laverton, Leonora, Sandstone, Victoria Plains, and Waroona notified the Commission of their objections to WALGA's application. At the hearing on the redaction application, LGREU was represented by one of its officers and the Shires were all represented by the same industrial agent.
- 22 The Shires of Goomalling, Narembeen, Nannup, Kondinin, Carnamah, and Harvey informed the Commission and parties to the proceedings they supported WALGA's application but did not take part in the hearing.
- 23 At the hearing WALGA represented itself only.
- 24 The Shire of Yalgoo was represented by their Chief Executive Officer.

Commission Lacks Power

- 25 LGREU contends that the Commission is without power to make the variations sought by WALGA because the orders were issued by another authority and the Commission lacks the power to vary the orders issued on 22 February 2024.
- 26 WALGA did not address the issues of whether the undertaking given in the stay proceedings and the fact of a consent order, and its terms having been issued in the stay proceedings precluded the Commission from now making further orders or varying orders.
- 27 WALGA refers the Commission to s 27 of the *IR Act* and submits that the Commission may vary the orders previously issued. However, WALGA did not address the power of the Commission to vary orders made out of stay proceedings.
- 28 An application to stay orders of the Commission is made pursuant to s 49(11) of the *IR Act* and is made in the process of an appeal to the Full Bench. Section 29(2) of the *IR Act* requires that an application of this nature must be heard by the presiding Commissioners of the Full Bench, who are allocated the appeal against the primary Commissioner's decision.
- 29 This Commission does not have the power to vary an order made by the Chief Commissioner pursuant to s 49(11) of the *IR Act*. The stay orders must stand. This Commission cannot vary orders that are contrary to the orders issued in the disposal of an appeal and stay applications.

Reliance on Undertakings

- 30 WASU and LGRECU both contend that they relied on the undertaking as it was expressed by WALGA. The undertaking proposed by WALGA was that it would file the documents within 2 working days, and it did not make any limitations or seek to reflect the variations it now seeks.
- 31 In its application for a stay of the orders pending the outcome of its appeal, WALGA stated it 'is prepared to offer an undertaking that in the event that the Appeal is not successful, and the Appealed Direction is upheld, it will file the documents within 2 working days of the outcome of the Appeal.'
- 32 The undertaking was a commitment freely given by WALGA in order to exercise a right. Even if the Commission has the power to vary orders contrary to orders issues from a stay application, which it does not, it would be unfair to the parties in the proceedings who relied on WALGA's undertakings for the Commission to grant WALGA's subsequent application.

Res Judicata

- 33 In relation to the proposal by WALGA to redact parts of the documents provided to other parties, it is clear this issue was ventilated at the hearing at first instance, subsequently considered by the Full Bench in the appeal and addressed in their reasons for decision. The scope of the orders, the information setting out the identity and work contact details and the application to organisations not parties to the award and/or proceedings, was also considered by the Full Bench in the appeal and addressed in their reasons for decision.
- 34 The Shire of Yalgoo submitted that the employee who completed the survey would have answered from an operational perspective, which may differ from the views of the Shire's Council which would respond from a strategic perspective. If this is the case, then, I would consider this favours the identity and contact details of the employee who completed the survey being made available to all parties so that they may ascertain the rationale and basis for the answers given to the survey questions.
- 35 The variations sought by WALGA are effectively a rehearing of issues that have been previously agitated at both the first instance hearing and the appeal. The doctrine of *res judicata* precludes the Commission from rehearing issues previously decided.

Conclusion

- 36 For the reasons set out the application to vary orders is denied.

2024 WAIRC 00898

**MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021 AND LOCAL GOVERNMENT OFFICERS'
(WESTERN AUSTRALIA) AWARD 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESWESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES
UNION OF EMPLOYEES**APPLICANT**

-v-

CITY OF KALAMUNDA AND OTHERS

RESPONDENTS**CORAM**

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 11 OCTOBER 2024

FILE NO/S

APPL 3 OF 2023, APPL 4 OF 2023

CITATION NO.

2024 WAIRC 00898

Result	Application to Vary Orders Denied
Representation	
Applicant	Mr Z Doherty (of counsel) Mr R Knox
Respondents	Ms S Lyon (of counsel) Ms J Love Mr K Trainer (as agent) Mr M Fitzgerald (as agent) Mr I Holland

Order

HAVING heard from Mr Doherty and Mr Knox on behalf of the applicant and Ms Lyon, Ms Love, Mr Trainer, Mr Fitzgerald, and Mr Holland on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application to vary orders be denied.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00919

RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

ALBANY TV SERVICES, TAHAL PTY LTD FORMERLY AMALGAMATED WIRELESS
(AUSTRALASIA) LIMITED, HILLS LIMITED

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO
DATE MONDAY, 28 OCTOBER 2024
FILE NO/S APPL 147 OF 2024
CITATION NO. 2024 WAIRC 00919

Result	Award varied
Representation	On the papers

Order

WHEREAS the Electrical Trades Union WA (**ETU**) applied on 17 September 2024 to vary the *Radio and Television Employees' Award* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2024 State Wage case ([2024] WAIRC 00345; (2024) 104 WAIG 752), that is an increase of 4% and by relevant CPI rates from June 2023 to June 2024;

AND WHEREAS the variations were not opposed by any respondent;

AND BEING satisfied that:

- (a) The amendments proposed do not effect any substantive change to the scope of the Award or its area of operation;
- (b) The application is not made within a term specified in the Award; and
- (c) The requirements for varying the Award are met;

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

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

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

Schedule

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

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$17.05 or a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid \$11.50 for each meal so required.

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

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

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

Area And Details	Engine Displacement (in Cubic Centimetres)		
	Over 2600cc	1600cc - 2600cc	1600cc & Under
Metropolitan Area	106.3	94.9	82.6
South West Land Division	108.7	97.3	84.5
North of 23.5° South Latitude	119.3	107.0	93.4
Rest of the State	112.0	100.4	87.6
Motor Cycle (In All Areas)	36.4 cents per Kilometre		

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

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$19.85 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 29. – Wages:

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

(2) Leading Hands:

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

	\$
(a) If placed in charge of not less than three and not more than ten other employees	\$40.60
(b) If placed in charge of more than ten but not more than twenty other employees	\$61.80
(c) If placed in charge of more than twenty other employees	\$79.90

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

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

- (i) \$22.30 per week to such Serviceperson, Installer or Assembler; or
- (ii) In the case of an apprentice a percentage of \$22.30 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause, for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through their negligence.



NOTICES—Award/Agreement matters—

2024 WAIRC 00936

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. CICS 23 OF 2022

COMMISSION'S OWN MOTION PURSUANT TO SECTION 37D TO VARY THE *BUILDING TRADES AWARD 1968*

NOTICE is given by the Commission's Own Motion pursuant to section 37D of the *Industrial Relations Act 1979* (WA) of the Commission's intention to vary the scope of the *Building Trades Award 1968*.

The proposed variations are published in the annexed table.

A copy of the application and proposed variations may be inspected at my office by appointment at 111 St Georges Terrace, Perth.

A hearing for the purpose of affording interested persons an opportunity to be heard in relation to the proposed variations will be held at the Commission, Level 18, 111 St Georges Terrace Perth on 10 December 2024 at 10:30am.

Any person who wishes to be heard in relation to the proposed variations should contact Chief Commissioner Kenner's Chambers by email at Chambers-Kenner@waipc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

29 OCTOBER 2024

BUILDING TRADES AWARD 1968

Current Award	Proposed variations
<u>1. - TITLE</u>	<u>1. - TITLE</u>
This award shall be known as the "Building Trades Award 1968" and it shall replace Award No. 24 of 1958 as amended, Award No. 1 of 1965 and Award No. 30 of 1965.	This award is known as the "Building Trades and Labourers (General) Award".
<u>3. - SCOPE</u>	<u>3. - SCOPE</u>
<p>This award shall apply -</p> <p>(1) (a) Employees in "Schedule B – Common Rule":</p> <p style="padding-left: 40px;">To all employees (including apprentices) employed in a calling or callings set out in Clause 10. – Wages, of this award in the industries carried on by the respondents set out in the schedule attached to this award, and</p> <p style="padding-left: 40px;">(b) Employers in "Schedule C – Named Employers Only – No Common Rule":</p> <p style="padding-left: 40px;">To all employees (including apprentices) employed in a calling or callings set out in Clause 10. – Wages, of this award employed only by those named employers.</p> <p>(2) To all employers employing those employees, but the Award shall not apply -</p> <p style="padding-left: 40px;">(a) to an employee covered by the Painters' (Government Shipping) Award (No. 32A of 1961) as amended or replaced from time to time;</p> <p style="padding-left: 40px;">(b) to an employee employed in sandblasting or in painting structural steel work in an establishment of an employer bound by the provisions of the Metal Trades (General) Award 1966 (No. 13 of 1965) as amended or replaced from time to time;</p> <p style="padding-left: 40px;">(c) (i) in respect to employers in "Schedule B – Common Rule":</p> <p style="padding-left: 80px;">to an employee employed on work</p>	<p>(1) This award applies to:</p> <p style="padding-left: 40px;">(a) All employees employed in any classification mentioned in Clause 10. – Wages and Clause 16. – Apprentices of this award, except where that work is covered by another State award containing a classification which is more appropriate to the work performed by the employee; and</p> <p style="padding-left: 40px;">(b) Employers of employees mentioned in subclause (a).</p> <p>(2) This award also applies to:</p> <p style="padding-left: 40px;">(a) Employers that supply labour on an on-hire basis to host employers in respect of on-hire employees employed in any classification mentioned in this award, and those on-hire employees, while engaged in the performance of work covered by this award; and</p> <p style="padding-left: 40px;">(b) Employers that provide group training services for apprentices and/or trainees in respect of apprentices and/or trainees working in one or more of the classifications mentioned in this award, and those apprentices and trainees, while engaged by a host employer in the performance of work covered by this award.</p> <p>(3) This award does not apply to:</p> <p style="padding-left: 40px;">(a) Employers and employees who are</p>

<p>coming within the scope of any award or industrial agreement in force at the date of this award or to an employee whose conditions of employment are regulated by any such award or industrial agreement;</p> <p>(ii) in respect to employers in "Schedule C – Named Employers Only – No Common Rule":</p> <p>to employees employed on work coming within the scope of any award or industrial agreement of the Western Australian Industrial Relations Commission in force as at 6 July 1998 being the date upon which the employers were named as respondents to this Award;</p> <p>(d) to an employee, not employed by a painting contractor or by a building contractor or not usually employed as a painter under the award, who is employed on work in which only one coat of paint or any other preparation used for preservative purposes is applied;</p> <p>(e) to an employee who paints petrol or oil containers not exceeding fifty gallons capacity; or</p> <p>(f) to an employee employed by Di-Met (WA) Pty Ltd in painting or applying protective coating in its workshop, to any plant, machinery, object or structure, not being a building or a part, in situ, of a building.</p> <p>(g) Notwithstanding the exclusions contained in paragraphs (a) to (f) above and without limiting in any way the operation of those paragraphs, the award shall not apply to work performed by any employee falling within the scope of the following awards and registered industrial agreements:</p> <p>(i) Pipe, Tile and Pottery Manufacturing Industry Award (No. R 34 of 1978)</p> <p>(ii) Bristle Clay Tiles Enterprise Agreement 1995 (No. AG 287 of 1995)</p> <p>(iii) Heat Containment Industries (Refractory Specialties) Award No. 3 of 1981</p> <p>(iv) Heat Containment Industries Enterprise Agreement 1993 (No. AG 59 of 1993)</p> <p>(v) Cement Tile Manufacturing Award No. 3 of 1966</p> <p>(vi) Porcelain Workers' Award, 1970 (No. 1 of 1970)</p> <p>(vii) Brick Manufacturing Award 1979 (No. R 19 of 1979)</p>	<p>subject to the national industrial relations system;</p> <p>(b) Employees, not employed by a painting contractor or by a building contractor or not usually employed as a painter under the award, who are employed on work in which only one coat of paint or any other preparation used for preservative purposes is applied;</p> <p>Note: The <i>Building Services (Registration) Act 2011</i> regulates the registration of painters in Western Australia based on the value of the work undertaken.</p> <p>(c) Employees who paint petrol or oil containers not exceeding fifty gallons (227 litres) capacity;</p> <p>(d) Employees employed in sandblasting or painting structural steel work in an establishment of an employer bound by the provisions of the <i>Metal Trades General Award</i>;</p> <p>(e) Employees who are covered by another State award, including the:</p> <p>(i) <i>Pipe, Tile and Pottery Manufacturing Industry Award</i></p> <p>(ii) <i>Furniture Trades Industry Award</i></p> <p>(iii) <i>Building Trades and Labourers (Construction) Award</i></p> <p>(iv) <i>Building Trades (Government) Award 1968</i></p> <p>(v) <i>Brick Manufacturing Award 1979</i></p> <p>(vi) <i>Industrial Spraypainting and Sandblasting Award</i></p> <p>(vii) <i>Monumental Masonry Industry Award, 1989</i></p>
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<p>(viii) Metro Brick (Cardup) (Enterprise Bargaining) Agreement 1994 (No. AG 37 of 199)</p> <p>(ix) Metro Brick Armadale (Enterprise Bargaining) Agreement 1994 (No. AG 96 of 1995)</p> <p>(x) Geraldton Brickworks Pty Ltd Enterprise Agreement 1996 (No. AG 172 of 1996)</p> <p>(xi) Appendix 4 of the Metal Trade (General) Award 1966 (No. 13 of 1965)</p> <p>(xii) Furniture Trades Industry Award (No. A 6 of 1984).</p>	
<p style="text-align: center;"><u>4. - AREA</u></p> <p>This award shall operate throughout the State of Western Australia.</p>	<p style="text-align: center;"><u>4. - AREA</u></p> <p>(1) This award has effect throughout Western Australia.</p> <p>(2) This award also has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this award.</p> <p>Note: For a non-exhaustive list of indicators of when an employer may be connected to the State of Western Australia, see section 3(2) of the <i>Industrial Relations Act 1979</i> (WA). Indicators include, but are not limited to, whether the employer is:</p> <ul style="list-style-type: none"> • Domiciled or resident in, or has an office or place of business in, the State; or • Registered, incorporated or established under a law of the State; or • The holder of a licence, lease, tenement, permit, or other authority granted under a law of the State or by a public authority.
<p style="text-align: center;"><u>6(3)(a)(iv). - DEFINITION</u></p> <p>(3) Builders Labouring:</p> <p>(a) "Builders Labourer" means a worker engaged -</p> <p>...</p> <p>(iv) in general labouring (excluding production and processing) not provided for herein. Provided that such work is covered by the Constitution Rule of the WABLPPU and had such work been performed on 6/2/2001, was not at that date covered by any other award of the Western Australian Industrial Relations Commission.</p>	<p style="text-align: center;"><u>6(3)(a)(iv). - DEFINITION</u></p> <p>(3) Builders Labouring:</p> <p>(a) "Builders Labourer" means a worker engaged -</p> <p>...</p> <p>(iv) in general labouring (excluding production and processing) not provided for herein.</p>

	<p style="text-align: center;"><u>INSERT NEW 6(10) – DEFINITION</u></p> <p>(10) “On-hire” means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.</p>														
<p style="text-align: center;"><u>CLASSIFICATION COLUMN CLAUSE 10(1)(a)(i). - WAGES</u></p> <p>The rates of wages payable to the employees covered by the award (other than duly registered apprentices) shall be as follows:</p> <p>(1) Base Rate and Supplementary Payment (per week)</p> <p>(a) (i) Bricklayers, stoneworkers, carpenters, joiners, painters, signwriters, glaziers, plasterers and plumbers as defined in Clause 6 of this award</p>	<p style="text-align: center;"><u>CLASSIFICATION COLUMN CLAUSE 10(1)(a)(i). – WAGES</u></p> <p>The rates of wages payable to the employees covered by the award (other than duly registered apprentices) shall be as follows:</p> <p>(1) Base Rate and Supplementary Payment (per week)</p> <p>(a) (i) Bricklayers, stoneworkers, carpenters, joiners, painters, signwriters, glaziers, plasterers, plumbers, concrete tradesperson (Certificate III trade qualification), and stonemason as defined in Clause 6 of this award</p>														
<p style="text-align: center;"><u>10(7) – WAGES</u></p> <p>(7) (a) Junior employees may be employed in the classification of Joiner - Assembler A but in no other classification and shall be paid the following percentages of the base rate and special payment applicable to that classification:</p> <table style="margin-left: 40px;"> <tr> <td></td> <td style="text-align: right;">%</td> </tr> <tr> <td>Up to 16 years</td> <td style="text-align: right;">38</td> </tr> <tr> <td>16 – 17</td> <td style="text-align: right;">46</td> </tr> <tr> <td>17 – 18</td> <td style="text-align: right;">53</td> </tr> <tr> <td>18 – 19</td> <td style="text-align: right;">73</td> </tr> <tr> <td>19 – 20</td> <td style="text-align: right;">88</td> </tr> <tr> <td>20 +</td> <td style="text-align: right;">100</td> </tr> </table> <p>(b) In addition to the above rates a junior employee shall be paid the tool allowance specified in subclause (3) hereof if required by the employer to supply tools.</p> <p>(c) This subclause shall not operate to reduce the wages of any employee who is paid more than the rate prescribed herein for such employee nor shall the same permit the reduction of any such wages.</p> <p>(d) Junior employees employed in the classification of Joiner - Assembler A may perform any of the duties of a Joiner - Assembler A and/or Joiner - Assembler B as defined in Clause 6. - Definitions and shall not perform work ordinarily carried out by any other classification of employee covered by this award.</p> <p>(e) Junior employees shall be employed at a ratio of one junior employee to each five adult employees or part thereof.</p>		%	Up to 16 years	38	16 – 17	46	17 – 18	53	18 – 19	73	19 – 20	88	20 +	100	<p style="text-align: center;"><u>10(7) - WAGES</u></p> <p>(7) The minimum rates of pay and conditions of employment applicable to trainees will be those set out in Schedule E – National Training Wage of the <i>Joinery and Building Trades Award 2020</i> as amended from time to time. Provided that any reference to “this award” in Schedule E to the <i>Joinery and Building Trades Award 2020</i> is to be read as referring to the <i>Building Trades and Labourers (General) Award</i>.</p> <p style="margin-left: 40px;">Note: The <i>Joinery and Building Trades Award 2020</i> is a modern award that applies to employers and employees in the national industrial relations system. The rates of pay for trainees are usually adjusted from 1 July each year.</p>
	%														
Up to 16 years	38														
16 – 17	46														
17 – 18	53														
18 – 19	73														
19 – 20	88														
20 +	100														

<u>SCHEDULE B – COMMON RULE</u>	<u>DELETE SCHEDULE</u>
<p>Aerated Water Manufacturers</p> <p>Crystal Softdrinks Clune Street, BAYSWATER WA 6053</p> <p>Agricultural Societies</p> <p>Royal Agricultural Society of WA Royal Showgrounds, CLAREMONT WA 6010</p> <p>Aluminium Pre-fabrication</p> <p>Jason Industries Walsh's Glass Pty Ltd 200 Bannister Road, CANNING VALE WA 6155</p> <p>Copral Aluminium 8-10 Bradford Street, KEWDALE WA 6105</p> <p>Avanti Glass 24 Port Kembla Drive, BIBRA LAKE WA 6163</p> <p>Frontline Aluminium Windows 21 Wellard Street, BIBRA LAKE WA 6163</p> <p>Breweries</p> <p>Swan Brewery Co. Pty Ltd 25 Baile Road, CANNING VALE WA 6155</p> <p>Brick Manufacturers</p> <p>Cardup Metro Bricks Pty Ltd Kiln Road, BYFORD WA 6201</p> <p>Caterers</p> <p>Fisher Catering Services Suite 23-25 Walters Drive, OSBORNE PARK WA 6017</p> <p>P & O Catering Services 243 Beaufort Street, PERTH WA 6000</p> <p>Ceiling Board Manufacturers</p> <p>CSR Building Materials 21 Sheffield Road, WELSHPOOL WA 6106</p> <p>Brady's Building Products 18 Railway Parade, BAYSWATER WA 6053</p> <p>Cement Manufacturers</p> <p>Swan Portland Cement Ltd 175 Burswood Road, BURSWOOD WA 6100</p> <p>Private Colleges</p> <p>Wesley College 40 Coode Street, SOUTH PERTH WA 6151</p> <p>Christ Church Grammar School (Inc) Queenslea Drive, CLAREMONT WA 6010</p> <p>Methodist Ladies College 365 Stirling Highway, CLAREMONT WA 6010</p>	

Confectionary Manufacturers

Blackpool Rock Candies
16 Keegan Street, O'CONNOR WA 6163

Fresh Food Industries
10 Knock Place, JANDAKOT WA 6164

Perth Candy
3/50 Howe Street, OSBORNE PARK WA 6017

Concrete Tank Builders

AAA Tiger Concrete Tanks Pty Ltd
Lot 101 Byron Road, ARMADALE WA 6112

Amalgamated Concrete Tanks Pty Ltd
16 Little John Road, ARMADALE WA 6112

Dairy Produce Processors

Peters & Brownes Group
22 Geddes Street, BALCATTWA WA 6021

Brownes Dairy Ltd
299 Charles Street, NORTH PERTH WA 6006

Fonti Dairy Foods Pty Ltd
27 Howe Street, OSBORNE PARK WA 6017

Earth Moving Contractors,

Thiess Contractors Pty Ltd
256 St George's Terrace, PERTH WA 6000

Western National Earthmoving Corporation Pty Ltd
Unit 7, 15-21 Collier Road, MORLEY WA 6062

Fertiliser Manufacturers

Pivot Agriculture Ltd
10 Fargo Way, WELSHPOOL WA 6106

Organic 2000
59 Safari Place, WANNEROO WA 6065

Fish Processors

Kailis Bros
23 Catalano Road, CANNING VALE WA 6155

Del Pty Ltd
55 Armadale Crescent, COOLBINIA WA 6050

Horse Racing Associations

WA Trotting Association
Nelson Crescent, EAST PERTH WA 6004

WA Turf Club
70 Grandstand Road, BELMONT WA 6104

Hotels

Sheraton Hotel
207 Adelaide Terrace, PERTH WA 6000

Hyatt Hotel
99 Adelaide Terrace, PERTH WA 6000

The Vines Resort
Verdelho Drive, THE VINES WA 6069

The Lord Forrest Hotel
Symmons Street, BUNBURY WA 6230

House Repairers & Renovators

Apex Construction & Maintenance Pty Ltd
10 Cleaver Street, WEST PERTH WA 6005

McAlister & McAlister Pty Ltd
17 Pearson Way, OSBORNE PARK WA 6017

Industrial Gas Manufacturers

Air Liquide WA Pty Ltd
276 Leach Highway, MYAREE WA 6154

Oxair Australia Pty Ltd
355 Victoria Road, MALAGA WA 6062

Insulation Materials Manufacturers

Australian Fibre Glass Pty Ltd
12 Dobra Road, YANGEBUP WA 6164

Thermacon 88 Insulation
23 Faulkner Avenue, BELMONT WA 6104

Total Wool Insulation
29 Welshpool Road, WELSHPOOL WA 6106

Bellis Australia Pty Ltd
16 Keegan Place, O'CONNOR WA 6163

Insurance Companies

AMP
140 St George's Terrace, PERTH WA 6000

Prudential Corporation Australia Ltd
76 Kings Park Road, WEST PERTH WA 6005

Joinery Manufacturers

Canning Joinery & Cabinet Manufacturers
22-24 Faulkner Avenue, BELMONT WA 6104

Mapp Bros Pty Ltd
56 Edward Street, OSBORNE PARK WA 6017

Newmarket Joinery
11 Rockingham Road, HAMILTON HILL WA 6163

Del Riccio N & Son
16 John Street, BAYSWATER WA 6063

Kewdale Joiners Pty Ltd
34 Stanhope Gardens, MIDVALE WA 6056

Local Government Authorities

Albany Council
Mercer Road, ALBANY WA 6330

Fremantle City Council
8 William Street, FREMANTLE WA 6160

Perth City Council
141 St George's Terrace, PERTH WA 6000

Subiaco City Council
241 Rokeby Road, SUBIACO WA 6008

Meat Exporters & Frozen Food Storers

Australasian Country Fresh Meat Exporters Pty Ltd
9/17 Boag Place, MORLEY WA 6062

Floreat Meat Exporters Pty Ltd
17 McLaren Street, SOUTH FREMANTLE WA 6162

Harvey Meat Exporters
Seventh Street, HARVEY WA 6220

Motor Vehicle Distributors

Scarboro Toyota
297 Scarborough Beach Road, OSBORNE PARK WA 6017

City Motors
505 Newcastle Street, PERTH WA 6000

Neon Sign Manufacturers

Rainbow Neon Signs
178 Colin Place, WEST PERTH WA 6005

Claude Neon (Aust) Pty Ltd
1/30 Walters Drive, OSBORNE PARK WA 6017

Petrol & Oil Distributors

Ampol Petroleum Pty Ltd
220 St George's Terrace, PERTH WA 6000

Amgas Pty Ltd
178 St George's Terrace, PERTH WA 6000

BP Oil
543 Abernethy Road, KEWDALE WA 6105

Plastic Fabricators

Acrifab Display Products
101 Albany Highway, VICTORIA PARK WA 6100

Plastic Fabricators & Welders
Unit 5/40 Oxleigh Drive, MALAGA WA 6062

BCJ Plastic Products
Unit 4/96 Hector Street, VICTORIA PARK WA 6100

Poultry Processors

Aussie Chicken
Unit 6, 11 Vale Road, MALAGA WA 6062

Bohemia Food Distributors Pty Ltd
71 Howe Street, OSBORNE PARK WA 6017

Retail & Wholesale Distributors

Aherns
622 Hay Street, PERTH WA 6000

Roofing Contractors

The Federation Roofing Co. (WA)
19a Guildford Road, MT LAWLEY WA 6050

Bower Roof Plumbing
79 Essex Street, WEMBLEY WA 6014

Ship Builders & Repairers

Austal Ships Pty Ltd
100 Clarence Ceach Road, HENDERSON WA 6166

Fremantle Shipwriting Co. WA Pty Ltd
8 Slip Street, FREMANTLE WA 6160

Key Engineering
41 Wood Street, FREMANTLE WA 6160

Sail Power Marine Chandlery
23 Carrington Street, NEDLANDS WA 6009

Shop Fronts & Office Fitting Manufacture

Associated Shop Fitters Pty Ltd
395 Victoria Street, MALAGA WA 6162

Dakota Interiors
23 Ruse Street, OSBORNE PARK WA 6017

Co-ordinated Shop & Office Fit-outs
Unit 8/11 Milford Street, EAST VICTORIA PARK WA 6101

Ivo Industries Cabinet Makers
Unit 8/42 Collingwood Road, OSBORNE PARK WA 6017

Focus Shopfitters Pty Ltd
139 Winton Road, JOONDALUP WA 6027

K & R Jennings
Unit 5/42 Prendiville Drive, WANGARA WA 6065

Architectural Shopfitters
5 Paddington Road, BAYSWATER WA 6053

Lane Industries Pty Ltd
20 Thurso Road, MYAREE WA 6154

Small Goods Manufacturers

Watsonia
71 High Street, FREMANTLE WA 6160

Roediger Bros Pty Ltd
182 Fitzgerald Street, NORTHAM WA 6401

Swimming Pool Manufacturers & Equipment Suppliers

Southside Pool Service Unit 6, Cnr South Street & Bannister Road,
CANNING VALE WA 6155

Pool Doctor
25 Peregrine Drive, KINGSLEY WA 6026

<p>Buccaneer Pools & Spas 28 Belmont Avenue, BELMONT WA 6104</p> <p>Aqua Technics 10 Ferguson Street, KEWDALE WA 6105</p> <p>Freedom Pools 63 Winton Road, SOUTH JOONDALUP WA 6027</p> <p>Textile Manufacturers</p> <p>Birkmyre Pty Ltd 16 Murchison Terrace, EAST PERTH WA 6004</p> <p>Grange Jaquard Pty Ltd Unit 1, 73 Holder Way, MALAGA WA 6062</p> <p>Ace Cinemas Pty Ltd</p> <p>1002 Hay Street, PERTH WA 6000</p> <p>Greater Union Organisation Liege Street, INNALOO WA 6017</p> <p>His Majesty's Theatre 825 Hay Street, PERTH WA 6000</p> <p>Hoyts Cinemas Ltd 580 Hay Street, PERTH WA 6000</p>	
<p><u>SCHEDULE C – NAMED EMPLOYERS ONLY – NO COMMON RULE</u></p> <p>Glass Cutting & Fitting</p> <p>All Style Glass and Aluminium Unit 5, 40 Prendiville Drive, WANGARA WA 6065</p> <p>Glass Repairs Unit 5, 40 Prendiville Drive, WANGARA WA 6065</p> <p>Action Glass & Aluminium 83 Crocker Drive, MALAGA WA 6062</p> <p>Modern Glass 1 Gary Road, MADDINGTON WA 6109</p> <p>Peters Glazing Service</p> <p>12 Haller Road, BALCATTWA WA 6021</p> <p>Tudor Glass & Glazing Unit 2, 31 Yampi Way, WILLETTON WA 6155</p> <p>Better Glass Co. 399 Sevenoaks Street, CANNINGTON WA 6107</p> <p>Clearview Glass & Aluminium 18 Ilumba Way, NOLLAMARA WA 6061</p> <p>Cooling Bros Glass Co Pty Ltd 170 Oxford Street, LEEDERVILLE WA 6007</p> <p>Mr Glass Repairs 10 Petrel Court, HUNTINGDALE WA 6110</p>	<p><u>DELETE SCHEDULE</u></p>

<p>M & S Glass & Shower Screens Unit 2, 1919 Beach Road, MALAGA WA 6062</p> <p>Mt Lawley Glass 1070 Beaufort Street, BEDFORD WA 6052</p> <p>Aardvark Holdings WA Unit 8/211 Bannister Road, CANNING VALE WA 6155</p> <p>Pilkington Victor Glass 79 McCoy Street, MYAREE WA 6154</p> <p>Walsh's Glass 200 Bannister Road, CANNING VALE WA 6155</p> <p>Accord Glass 52 Peel Road , O'CONNOR WA 6163</p> <p>All Aussie Aluminium & Glass 345 Belmont Avenue, BELMONT WA 6104</p> <p>All Suburbs Glass & Glazing Unit 2, 201 Carr Place, LEEDERVILLE WA 6007</p> <p>Allied Glass Pty Ltd 47 Duxon Road, ROCKINGHAM WA 6168</p> <p>Avanti Glass 24 Port Kembla Drive, BIBRA LAKE WA 6163</p> <p>Williams Glass & Glazing Unit 5, 7 Cusack Road, MALAGA WA 6062</p> <p>Balcatta Glass & Glazing 58 Erindale Road, BALCATT A WA 6021</p> <p>Glass Doctor 882 Albany Highway, EAST VICTORIA PARK WA 6101</p> <p>Benora Glass & Aluminium Unit 7, 87 Erindale Road, BALCATT A WA 6021</p> <p>Glazewell Unit 1/2/10,15 Dellamarta Road, WANGARA WA 6065</p> <p>Glass Service 82 Belmont Avenue, BELMONT WA 6104</p> <p>Bentley Glass Unit 4, 27 Sevenoaks Street, BENTLEY WA 6102</p> <p>Buckingham Glass Shop 7, Cnr Railway Avenue & Gillam Drive, KELMSCOTT WA 6111</p> <p>Carousel Glass & Glazing Service 1A Gary Road, MADDINGTON WA 6109</p> <p>Centurion Glass Unit 6, 11 Townsend Street, MALAGA WA 6062</p> <p>Classic Glass 4/24 Poletti Road, JANDAKOT WA 6164</p> <p>Concept Glass Unit 5, 39 Delawney Street, BALCATT A WA 6021</p>	
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<p>Davey Glass 404/396 Scarborough Beach Road, OSBORNE PARK WA 6017</p> <p>Design Glass Pty Ltd 367 Sevenoaks Street, CANNINGTON WA 6107</p> <p>Quality Glass & Maintenance 772 Beaufort Street, MT LAWLEY WA 6050</p> <p>Speedy Glass 106 Norma Road, MYAREE WA 6154</p> <p>Dial-A-Glass Unit 2, 6 Ismail Street, WANGARA WA 6065</p> <p>Don Mok Glass & Aluminium Windows Unit 7, 16 Vale Street, MALAGA WA 6062</p> <p>Doubleview Glass 253 Scarborough Beach Road, OSBORNE PARK WA 6017</p> <p>Freeway Screens & Windows 2 Ledgar Road, BALCATTA WA 6021</p> <p>Fremantle Glass Pty Ltd 149 South Terrace, FREMANTLE WA 6160</p> <p>General Glass Unit 4, 123 Burslem Drive, MADDINGTON WA 6109</p> <p>Stirling Glass & Aluminium 19 O'Malley Street, OSBORNE PARK WA 6017</p> <p>Kelmac Glass 73 Forsyth Street, O'CONNOR WA 6163</p> <p>K.T.S. Glass & Glazing Unit 4, 91 Champion Drive, KELMSCOTT WA 6111</p> <p>Maida Glass Unit 4, 27 Sevenoaks Street, BENTLEY WA 6102</p> <p>Midland Glass 173 Great Eastern Highway, MIDLAND WA 6056</p> <p>Modern Glass 376 Scarborough Beach Road, OSBORNE PARK WA 6017</p> <p>Premier Glass & Mirrors 198 Star Street, WELSHPOOL WA 6106</p> <p>Prompt Glass Unit 8, 211 Bannister Road, CANNING VALE WA 6155</p> <p>Showerama Unit 2, 11 Yampi Way, WILLETTON WA 6155</p> <p>Uniglaze 4 Gordon Road (West), OSBORNE PARK WA 6017</p> <p>Vic's Glass & Maintenance Service Pty Ltd 399 Sevenoaks Street, CANNINGTON WA 6107</p> <p>Lakeside Glass Unit 10/7 Delage Street, JOONDALUP WA 6027</p> <p>Port Glass & Glazing Service 24 Mullings Way, MYAREE WA 6154</p>	
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Recycled Glass
Unit 4, 27 Sevenoaks Street, BENTLEY WA 6102

Machinery Hire Companies

AAA Spot On Hire Services
69 Norma Road, MYAREE WA 6154

Belmont Hire
149 Francisco Street, BELMONT WA 6104

Bayswater Builders Hire Pty Ltd
239 Gnangara Road, WANGARA WA 6065

Bees Hire & Sales Kenwick
1726 Albany Highway, KENWICK WA 6107

Lees Hire
36 Railway Road, SUBIACO WA 6008

Crommelins Handyman Hire & Sales
139 Welshpool Road, WELSHPOOL WA 6106

Wreckair Hire
140 Welshpool Road, WELSHPOOL WA 6106

Malaga Handy Hire
6 Carson Road, MALAGA WA 6062

Hire-all & Sales
3 Winton Road, JOONDALUP WA 6027

Smart Hire & Sales
Cnr Bulwer & Fitzgerald Street, PERTH WA 6000

Signwriting

A Sign Company
16 Vahland Avenue, RIVERTON WA 6148

Alphabetter Computer Cutting Services
10 Drake Street, OSBORNE PARK WA 6017

Anderson's Signs
22/1 Baden Street, OSBORNE PARK WA 6017

Authentic Signs Pty Ltd
11 Anvill Way, WELSHPOOL WA 6106

Artform
23 Buckingham Drive, WANGARA WA 6065

Total Sign Co
Unit 2 & 3, 194 Balcatta Road, BALCATTWA WA 6021

Norfolk Signs
7 Sackville Terrace, SCARBOROUGH WA 6019

Bullet Signs
Shop 11/443 Albany Highway, VICTORIA PARK WA 6100

Autographics WA
26A Collingwood Street, OSBORNE PARK WA 6017

Budget Signs
Unit 5/96 President Street, WELSHPOOL WA 6106

<p>Bulldog Signs 18 King Edward Road, OSBORNE PARK WA 6017</p> <p>Compac Marketing 6 Packard Street, JOONDALUP WA 6027</p> <p>Custom Signs 27 Leake Street, NORTH PERTH WA 6006</p> <p>Datawest Unit 1/24 Irvine Drive, MALAGA WA 6062</p> <p>Down Under Signs 31 Owen Road, KELMSCOTT WA 6111</p> <p>Dynamic Signs Unit 1, 72 Clavering Street, BELMONT WA 6104</p> <p>Express Signs 38A Sundercombe Street, OSBORNE PARK WA 6017</p> <p>Hall & Myer Signs 5 Camden Street, BELMONT WA 6104</p> <p>Indian Head Sign Co 291 Fitzgerald Street, NORTH PERTH WA 6006</p> <p>JetCut 7-11 Catalano Road, CANNING VALE WA 6155</p> <p>Jiffy Signs Unit 2, 11-13 Gimpie Way, WILLETTON WA 6155</p> <p>Nancarrow Signs 208 Grand Promenade, BEDFORD WA 6052</p> <p>Peardon Signs Unit 5/79 Howe Street, OSBORNE PARK WA 6017</p> <p>Rockingham Signwriters 38B Hurrell Way, ROCKINGHAM WA 6168</p> <p>Signwrite 196 Carrington Road, HILTON WA 6163</p> <p>The Sign Shop 3/1297 Hay Street, WEST PERTH WA 6005</p> <p>Sign Supermarket Unit 14/22 Farrell Road, MIDVALE WA 6056</p> <p>Signlite Australia 71 Buckingham Drive, WANGARA WA 6065</p> <p>Signs R Us 323 Great Eastern Highway, MIDVALE WA 6056</p> <p>Signtalk Unit 8/354 Victoria Road, MALAGA WA 6062</p> <p>Signtek Fabricators 8 Midas Road, MALAGA WA 6062</p> <p>Timbo Sign Co Unit 2/35 Elmsfield Road, MIDVALE WA 6056</p> <p>Toucan Sign & Design Unit 401/396 Scarborough Beach Road, OSBORNE PARK WA</p>	
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<p>6017</p> <p>Varisigns 55 McDonald Street (East), OSBORNE PARK WA 6017</p> <p>Vital Line Corporate Signage Unit 5/92 Beechboro Road, BAYSWATER WA 6053</p> <p>WA Signs 73 Holder Way, MALAGA WA 6062</p> <p>Woodpecker Signs & Graphics Unit 6, 40 Prendville Drive, WANGARA WA 6065</p> <p>Stonemasonry</p> <p>Atlas Limestone 356 Kew Street, CLOVERDALE WA 6105</p> <p>Limestone Resources Parkland Road, OSBORNE PARK WA 6017</p> <p>Limestone City Lot 66, Parkland Road, OSBORNE PARK WA 6017</p> <p>Exclusive Sandstone Products 6 McDonald Crescent, BASSENDEAN WA 6054</p> <p>Meteor Stone 14 Furniss Road, LANDSDALE WA 6065</p> <p>Formstone Australia Pty Ltd 7 Winchester Road, SPEARWOOD WA 6163</p> <p>Ausita Constructions Pty Ltd 181 Hay Street, SUBIACO WA 6008</p> <p>Classic Solid Surfaces 41 Sarich Court, OSBORNE PARK WA 6017</p> <p>Classical Stone Company Unit 10, 50 Banksia Road, WELSHPOOL WA 6106</p> <p>Creative Marble Constructions 2 Jade Street, MADDINGTON WA 6109</p> <p>Exclusive Marble & Granite Pty Ltd Unit 2, 9 Sundercombe Street, OSBORNE PARK WA 6017</p> <p>Marble & Granite Expo 12 Rowallan Street, OSBORNE PARK WA 6017</p> <p>Granite Construction Co 8 Koojan Avenue, SOUTH GUILDFORD WA 6055</p> <p>Interceramics 357 Oxford Street LEEDERVILLE WA 6007</p> <p>Sogenco Pty Ltd 62 Winchester Road, MALAGA WA 6062</p> <p>Status Marble & Granite 16 Cocos Industrial Park, BIBRA LAKE WA 6163</p> <p>WA Marble & Granite Co 419 Scarborough Beach Road, OSBORNE PARK WA 6017</p> <p>Indo Expo</p>	
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<p>7/33 Hector Street, OSBORNE PARK WA 6017</p> <p>United Stone Gallery Unit 3, 21 Stanford Way, MALAGA WA 6062</p> <p>Marble & Cement Work (WA) Pty Ltd 25 Felspar Street, WELSHPOOL WA 6106</p> <p>GC Smith & Co Lot 12 Stockdale Road, O'CONNOR WA 6163</p> <p>Ital Marble & Granite Unit 5, 28 Vale Street, MALAGA WA 6062</p> <p>Fraser Range Granite NL Lot 3, Cnr Esplanade & Manning Street, SCARBOROUGH WA 6019</p> <p>Granite Construction Co 8 Koojan Avenue, SOUTH GUILDFORD WA 6055</p> <p>Historium Furniture 41 Sarich Court, OSBORNE PARK WA 6017</p> <p>Rock Solid Products Pty Ltd 10 O'Connor Way, WANGARA WA 6065</p> <p>Silestone Unit 10/43 Hutton Street, OSBORNE PARK WA 6017</p> <p>Universal Marble & Granite Unit 3, 33 Hector Street, OSBORNE PARK WA 6017</p> <p>Ceramic Floor & Wall Tiling</p> <p>Tiles Expo 324 Charles Street, NORTH PERTH WA 6006</p> <p>Bathroom International 199 Balcatta Road, BALCATT'A WA 6021</p> <p>Bannister Tile Gallery Unit 3/180 Bannister Road, CANNING VALE WA 6155</p> <p>Crosby Tiles 46 Hector Road, OSBORNE PARK WA 6017</p> <p>Ceramic Tiles 10 Gibberd Road, BALCATT'A WA 6021</p> <p>Ceramics International 636 King Edward Road, OSBORNE PARK WA 6017</p> <p>Trend Ceramics Pty Ltd 98 Hector Street, OSBORNE PARK WA 6017</p> <p>Federation Tile Factory 1 Thorley Street, OSBORNE PARK WA 6017</p> <p>Interceramics 357 Oxford Street, LEEDERVILLE WA 6007</p> <p>Lucy Simich 52 Hector Street, OSBORNE PARK WA 6017</p> <p>European Ceramics 18 Hector Street, OSBORNE PARK WA 6017</p>	
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<p>Myaree Ceramics 91 Norma Road, MYAREE WA 6154</p> <p>Fremantle Tile Gallery 289 Stock Road, O'CONNOR WA 6163</p> <p>O'Meara's 28 Sundercombe Street, O'CONNOR WA 6163</p> <p>Imported Ceramics 59 Fitzgerald Street, NORTH PERTH WA 6006</p> <p>Craft Decor 1448 Albany Highway, CANNINGTON WA 6107</p> <p>House of Ceramics 267 Scarborough Beach Road, MT HAWTHORN WA 6016</p>	
<p style="text-align: center;"><u>SCHEDULE D – RESERVED LIST</u></p> <p>1.Reserved Employers</p> <p>Whitford City Glass 27 Buckingham Drive, WANGARA WA 6065</p> <p>Joondalup Glass & Glazing 27 Buckingham Drive, WANGARA WA 6065</p> <p>Armadale Glass & Mirrors 253 Railway Avenue, KELMSCOTT WA 6111</p> <p>Action Glass & Aluminium 83 Crocker Drive, MALAGA WA 6062</p> <p>Alpha Armour 3-5 Zanni Street, CANNING VALE WA 6155</p> <p>Alpha Marine 3-5 Zanni Street, CANNING VALE WA 6155</p> <p>Nu-look Glass & Aluminium Windows 62 McCoy Street, MYAREE WA 6154</p> <p>Direct Glass & Aluminium 2/11 Macadam Place, BALCATTWA WA 6021</p> <p>Double Glazing Australasia 6 Chalkley Place, BAYSWATER WA 6053</p> <p>Glass Services Pty Ltd 82 Belmont Avenue, BELMONT WA 6104</p> <p>Diamond Glass 2/24 Irvane Drive, MALAGA WA 6062</p> <p>Glass Products WA Cnr Albany Highway and George Way, CANNINGTON WA 6107</p> <p>Independant Glass & Glazing Pty Ltd 3/164 Abernethy Road, BELMONT WA 6104</p> <p>Morley Glass & Aluminium 49 Bassendean Road, BAYSWATER WA 6053</p> <p>Glazewell Unit 1, 2 & 10/15 Dellamarta Road, WANGARA WA 6065</p>	<p style="text-align: center;"><u>DELETE SCHEDULE</u></p>

<p>Altona Industries 6A Baratta Road, WANGARA WA 6065</p> <p>Jason Signmakers 54-58 Kurnall Road, WELSHPOOL WA 6106</p> <p>Bernini Stone & Tiles 181 Hay Street, SUBIACO WA 6008</p> <p>Coates Hire 18 Wheeler Street, BELMONT WA 6104</p> <p>Cockburn Hire 6 Hargraves Street, BELMONT WA 6104</p> <p>Ascot Sign & Display 14 Rio Street, BAYSWATER WA 6053</p> <p>Coca-Cola Bottlers (Perth) Pty Ltd 19-21 Milne Road, KEWDALE WA 6105</p> <p>Big W Discount Stores Karrinyup Shopping Centre, Karrinyup Road, KARRINYUP WA 6018</p> <p>2. The Naming of Respondents under the heading of Estate Developers in Schedule B</p> <p>DATED at Perth this 19th day of December, 1968.</p>	
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2024 WAIRC 00937

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. CICS 11 OF 2022

COMMISSION’S OWN MOTION PURSUANT TO SECTION 37D TO VARY THE *BUILDING TRADES (CONSTRUCTION) AWARD 1987*

NOTICE is given by the Commission’s Own Motion pursuant to section 37D of the *Industrial Relations Act 1979* (WA) of the Commission’s intention to vary the scope of the *Building Trades (Construction) Award 1987*.

The proposed variations are published in the annexed table.

A copy of the application and proposed variations may be inspected at my office by appointment at 111 St Georges Terrace, Perth.

A hearing for the purpose of affording interested persons an opportunity to be heard in relation to the proposed variations will be held at the Commission, Level 18, 111 St Georges Terrace Perth on 10 December 2024 at 10:30am

Any person who wishes to be heard in relation to the proposed variations should contact Chief Commissioner Kenner’s Chambers by email at Chambers-Kenner@waire.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

29 OCTOBER 2024

BUILDING TRADES (CONSTRUCTION) AWARD 1987

Current Award	Proposed variations
<u>1. - TITLE</u>	<u>1. – TITLE</u>
This award shall be known as the "Building Trades (Construction) Award 1987",and shall replace Award No. 14A of 1975, as amended and the Building Trades (Construction) Award 1977, Nos. 24 of 1976 and 14 of 1975, as amended.	This award shall be known as the “Building Trades and Labourers (Construction) Award”.
<u>3. - SCOPE</u>	<u>3. – SCOPE</u>
This award shall apply: (1) to all employees usually employed on or employed as	(1) This award applies to employees working in the “on-site building and construction industry” (as defined) in any classification mentioned in this award and to all

<p>casual employees on construction work as defined in Clause 7. - Definitions of this award in any of the callings set out in Clause 8. - Rates of Pay of this award and who are employed in the building construction industry; and</p> <p>(2) to all apprentices usually employed on construction work as defined in Clause 7. - Definitions of this award and taken to any of the trades to which this award relates and who are employed in the building construction industry; and</p> <p>(3) without affecting the operation of subclauses (1) and (2) hereof, to all employees including apprentices usually employed on or employed as casual employees on construction work as defined in Clause 7. - Definitions of this award in any of the callings (except each and every builders' labourers classification) set out in Clause 8. - Rates of Pay of this award, who are employed in the construction industry (other than the building construction industry) and whose work if it had been performed on the 27th day of November 1989, was not covered by any other award of the Western Australian Industrial Relations Commission; and</p> <p>(4) to all employers employing those employees and/or apprentices; and</p> <p>(5) to all principal contractors and project managers referred to in Clause 30. - Amenities of this award for the purposes only of that clause.</p>	<p>employers employing those employees.</p> <p>(2) This award also applies to:</p> <p>(a) Employers that supply labour on an on-hire basis to host employers in the on-site building and construction industry in respect of on-hire employees employed in any classification mentioned in this award, and those on-hire employees, while engaged in the performance of work covered by this award;</p> <p>(b) Employers that provide group training services for apprentices and/or trainees in the on-site building and construction industry in respect of apprentices and/or trainees working in one or more of the classifications mentioned in this award, and those apprentices and trainees, while engaged by a host employer in the performance of work covered by this award; and</p> <p>(c) Principal contractors and project managers referred to in Clause 30. - Amenities of this award (for the purposes only of that clause).</p> <p>(3) This award does not apply to:</p> <p>(a) Employers and employees who are subject to the national industrial relations system;</p> <p>(b) Employees who are covered by another State award, including the:</p> <p>(i) Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002;</p> <p>(ii) Building Trades and Labourers (General) Award;</p> <p>(iii) Building Trades (Government) Award 1968;</p> <p>(iv) Foreman (Building Trades) Award 1991;</p> <p>(v) Industrial Spraypainting and Sandblasting Award;</p> <p>(vi) Earth Moving and Construction Award;</p> <p>(vii) Engine Drivers' (General) Award;</p> <p>(viii) Metal Trades (General) Award</p>
<p style="text-align: center;"><u>4. - AREA</u></p> <p>This award shall operate throughout the State of Western Australia</p>	<p style="text-align: center;"><u>4. - AREA</u></p> <p>(1) This award has effect throughout Western Australia.</p> <p>(2) This award also has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this award.</p> <p>Note: For a non-exhaustive list of indicators of when an</p>

	<p>employer may be connected to the State of Western Australia, see section 3(2) of the Industrial Relations Act 1979 (WA). Indicators include, but are not limited to, whether the employer is:</p> <ul style="list-style-type: none"> • Domiciled or resident in, or has an office or place of business in, the State; or • Registered, incorporated or established under a law of the State; or • The holder of a licence, lease, tenement, permit, or other authority granted under a law of the State or by a public authority.
<p style="text-align: center;"><u>7(1)(a)(iv). - DEFINITION</u></p> <p>(1) Builders' Labouring</p> <p>(a) "Builders' Labourer" means an employee engaged -</p> <p style="text-align: center;">...</p> <p>(iv) in general labouring not provided for herein provided that such work had it been performed on 23 September 1997 was not at that date covered by any other award of the Western Australian Industrial Relations Commission.</p>	<p style="text-align: center;"><u>7(1)(a)(iv). - DEFINITION</u></p> <p>(1) Builders' Labouring</p> <p>(a) "Builders' Labourer" means an employee engaged -</p> <p style="text-align: center;">...</p> <p>(iv) in general labouring not provided for herein.</p>
<p style="text-align: center;"><u>7(1)(3) - DEFINITION</u></p> <p>(3) "Construction Work" means -</p> <p>(a) all work "on-site" in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or other structures of any kind whatsoever;</p> <p>or</p> <p>(b) all work which the union and the employer concerned agree is construction work but only if the agreement is approved by the Board of Reference;</p> <p>Or</p> <p>(c) all work which, in default of an agreement as aforesaid, is declared by the Board of Reference to be construction work.</p>	<p style="text-align: center;"><u>7(1)(3) - DEFINITION</u></p> <p>(3) the "on-site building and construction industry" means:</p> <p>(a) the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent, and maintenance undertaken by employees of such buildings, structures or works;</p> <p>(b) the installation in any building, structure or works of fittings and services;</p> <p>(c) other construction work not mentioned in part (a) or (b) of this subclause.</p>
	<p style="text-align: center;"><u>ADD NEW CLAUSE 7(15) - DEFINITION</u></p> <p>(15) "On-hire" means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.</p>
<p style="text-align: center;"><u>CLASSIFICATION COLUMN 8(2)(a)(i). - RATES OF PAY</u></p> <p>(2) Weekly Rate: The following amounts shall be applied for the purpose of the calculation in subclause (4) of</p>	<p style="text-align: center;"><u>CLASSIFICATION COLUMN 8(2)(a)(i). - RATES OF PAY</u></p> <p>(2) Weekly Rate: The following amounts shall be applied for the purpose of the calculation in subclause (4) of</p>

<p>this clause of the hourly rate to apply under this Award.</p> <table border="1" data-bbox="328 280 750 448"> <tr> <td data-bbox="328 280 391 324">(a)</td> <td data-bbox="391 280 470 324">(i)</td> <td data-bbox="470 280 750 448">Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, and plasterers roof tile fixers</td> </tr> </table>	(a)	(i)	Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, and plasterers roof tile fixers	<p>this clause of the hourly rate to apply under this Award.</p> <table border="1" data-bbox="885 280 1508 448"> <tr> <td data-bbox="885 280 949 324">(a)</td> <td data-bbox="949 280 1029 324">(i)</td> <td data-bbox="1029 280 1508 448">Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, plasterers roof tile fixers, and concrete tradesperson (Certificate III trade qualified)</td> </tr> </table>	(a)	(i)	Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, plasterers roof tile fixers, and concrete tradesperson (Certificate III trade qualified)
(a)	(i)	Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, and plasterers roof tile fixers					
(a)	(i)	Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, plasterers roof tile fixers, and concrete tradesperson (Certificate III trade qualified)					
	<p align="center"><u>ADD NEW SUBCLAUSE 8(17) RATES OF PAY</u></p> <p>(17) Trainees</p> <p>The minimum rates of pay and conditions of employment applicable to trainees will be those set out in Schedule D - National Training Wage of the Building and Construction General On-site Award 2020 as amended from time to time. Provided that any reference to “this award” in Schedule D to the Building and Construction General On-site Award 2020 is to be read as referring to the Building Trades and Labourers (Construction) Award.</p> <p>Note: The Building and Construction General On-site Award 2020 is a modern award that applies to employers and employees in the national industrial relations system. The rates of pay for trainees are usually adjusted from 1 July each year.</p>						
<p align="center"><u>45. - PROHIBITION OF JUNIOR EMPLOYEES</u></p> <p>(1) Except as provided in subclauses (2)-(9) inclusive hereof, the employment of junior employees (except apprentices) on any work which, if performed by an adult employee, would be subject to the provisions of this award is prohibited unless the consent of the union is in each case first obtained. If any junior employee (except an apprentice) is so employed such employee shall be paid not less than the rate of pay of an adult performing similar work.</p> <p>(2) A junior employee employed on work for which an apprenticeship is provided for in this award and who is not registered as a probationer pursuant to regulation 6 of the Industrial Training Act Regulations, shall be paid not less than the wage prescribed in Clause 8 of this award for an adult employee performing similar work.</p> <p>(3) Junior employees may be employed as roof tile fixers in the proportion of 2 juniors to 1 adult employee.</p> <p>(4) (a) A junior employee employed as a roof tile fixer shall, upon attaining the age of 20 years, be classed as an improver and be paid as such, provided that the time worked prior to his 20th birthday shall be counted as time worked as an improver.</p> <p>(b) Notwithstanding subclause (a) hereof, after 3 years service a junior employee may request a trade test and if he passes shall receive full adult rates.</p> <p>(5) An employee commencing in the industry after his</p>	<p align="center"><u>DELETE CLAUSE 45.</u></p>						

20th birthday shall be classed as an improver and shall be paid as provided in subclause (7) hereof, provided that after 2 years service an improver may request a trade test and if he passes shall receive full adult rates.

- (6) (a) The ordinary rates of pay to be paid to junior employees shall be in accordance with the percentages set out below applied to the sum of the tradesperson's weekly rate set out in Clause 8(2)(a) and the appropriate special allowance prescribed in 8(5).

	%
Between 16 and 17 years	42
Between 17 and 18 years	55
Between 18 and 19 years	75
Between 19 and 20 years	88
Over 20 years of age	100

- (b) Industry Allowance

Where a junior employee works in circumstances which would entitle a tradesperson to the industry allowance prescribed in Clause 8(3) the following extra rates, expressed as a percentage of that industry allowance, shall be paid.

	%
Between 16 and 17 years	40
Between 17 and 18 years	72
Between 18 and 19 years	95
Over 19 years of age	100

- (7) The ordinary rates of pay to be paid to improvers shall be in accordance with the percentages set out below applied to the sum of the tradesperson's weekly rate set out in Clause 8(2)(a) - Rates of Pay and the appropriate special allowance set out in Clause 8(5).

	%
First 6 months' service	60
Second 6 months' service	65
Second year of service	75
Third year of service	88
Thereafter	100

- (8) Where an improver works in circumstances which would entitle a tradesperson to the industry allowance prescribed in Clause 8(3) the following extra rates, expressed as a percentage of that industry allowance shall be paid.

	%
First 6 months service	40
Second 6 months service	72
Second year of service	95
Third year of service	100

<p>(9) A tool allowance of one-third of the amount payable to a tradesperson shall be paid to a junior employee or improver in that trade of his first year of service and of two-thirds of that amount in his second year of service and of the same amount as is payable to a tradesperson in the remaining period of his service as a junior employee or improver.</p>	
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2024 WAIRC 00939

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 28 OF 2024

**APPLICATION FOR A NEW AGREEMENT TITLED
“MOERLINA SCHOOL (ENTERPRISE BARGAINING) AGREEMENT 2024”**

NOTICE is given that an application has been made to the Commission by the *The Independent Education Union Of Western Australia, Union Of Employees* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

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

3. SCOPE OF AGREEMENT

- 1) This agreement shall apply to all staff who are employed within the scope of the Independent Schools' Teachers' Award 1976; the Independent Schools Administrative and Technical Officers Award 1993 and the Teachers' Aides (Independent Schools) Award 1988.
- 2) The number of staff covered by this agreement is 23.

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

30 OCTOBER 2024

2024 WAIRC 00947

NOTICE**VARIATION OF THE STATE RESEARCH STATIONS, AGRICULTURAL SCHOOLS AND COLLEGE WORKERS
AWARD 1971 PURSUANT TO SECTION 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)**

Notice is given of an application on the motion of the Western Australian Industrial Relations Commission to vary the *State Research Stations, Agricultural Schools and College Workers Award 1971* with a view to:

- (a) ensuring the Award does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993 (WA) (MCE Act)*;
- (b) ensuring the Award does not contain provisions that are obsolete or need updating; and
- (c) ensuring the Award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of the industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.

A For Mention and Directions hearing has been listed before Senior Commissioner Cosentino for the purpose of ascertaining who might seek to be heard and what steps should be taken to ensure such parties may be heard in relation to the proposed variations. The hearing will take place:

AT: 11:30 AM
ON: Tuesday, the 10th day of December 2024
LOCATION: Level 18, 111 St Georges Terrace, Perth

Any person wishing to appear at this hearing should provide notice to the Senior Commissioner's Associate on (08) 9420 4455 or at chambers-cosentino@wairc.wa.gov.au by no later than Tuesday, 3 December 2024. For further information please contact the Senior Commissioner's Associate

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

1 NOVEMBER 2024

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2024 WAIRC 00948

APPEAL AGAINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 9 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRETT MORGAN PALMER

APPELLANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER

COMMISSIONER T B WALKINGTON

COMMISSIONER T KUCERA

DATE

MONDAY, 4 NOVEMBER 2024

FILE NO/S

APPL 151 OF 2024

CITATION NO.

2024 WAIRC 00948

Result Appeal discontinued

Representation

Appellant In person

Respondent Mr N John of counsel

Order

HAVING heard the appellant on his own behalf and Mr N John of counsel 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 appeal be and is hereby discontinued.

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

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2024 WAIRC 00904

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DENIS CLUNE

APPLICANT

-v-

BABA DEEP SINGH WA PTY LTD

RESPONDENT

CORAM

COMMISSIONER T KUCERA

DATE

TUESDAY, 15 OCTOBER 2024

FILE NO/S

B 54 OF 2024

CITATION NO.

2024 WAIRC 00904

Result Order issued

Representation

Applicant Mr L Slaney

Respondent No appearance

Order

WHEREAS the applicant on 7 August 2024 filed a *Form 3 - Contractual Benefit Claim*, (**application**) in which he alleged that he was denied a benefit to which he was entitled, under a contract of employment that he had with the respondent;

AND WHEREAS the applicant by way of relief sought orders requiring the respondent to pay the following;

- i. wages in the total amount of \$1,214.72 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 24 September 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 failure to appear before the Commission, minded to make orders, requiring the respondent to pay \$1,214.72 plus interest (**orders**);

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

AND WHEREAS the Applicant's representative in an email dated 1 October 2024, provided the interest calculations to the Commission;

AND WHEREAS the respondent in an email from the Commission dated 2 October 2024, was by close of business Friday 11 October 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 an order requiring the respondent to pay the contractual payments to the applicant;

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 \$1,214.72, within 14 days of the date of this order.
2. THAT the respondent pay the applicant interest in the sum of \$48.47, within 14 days of the date of this order.

(Sgd.) T KUCERA,
Commissioner.\

[L.S.]

2024 WAIRC 00944

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2024 WAIRC 00944
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	WEDNESDAY, 19 JUNE 2024
DELIVERED	:	FRIDAY 1 NOVEMBER 2024
FILE NO.	:	U 22 OF 2024, U 20 OF 2024
BETWEEN	:	MARK KOSTNER & PETER NEWTON FREY Applicant AND SMALL BUSINESS DEVELOPMENT CORPORATION Respondent

CatchWords	:	Industrial Relations (WA) – Unfair Dismissal – Casual – Government Officer – Salaried Staff – Jurisdiction
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Small Business Development Corporation Act 1983</i> (WA) <i>Public Sector Management Act 1994</i> (WA)
Result	:	Application Dismissed
Representation:		
Applicant	:	Mr M Kostner Mr P Frey
Respondent	:	Mr R Andretich (of counsel)

Case(s) referred to in reasons:

The Totalisator Agency Board v Edith Fisher (1997) 77 WAIG 1889

Kathleen Margaret Fenton v WA Country Health Services – SW [2021] WAIRC 00214

Gerad McGinty v Department of Corrective Services [2012] WAIRC 00054

Joyce Capewell v Department of Corrective Services [2013] WAIRC 00390; 93 WAIG 1454

Ronald Thomas Bellamy v Chairman, Public Service Appeal Board (1986) 66 WAIG 1579

Matthew Crowley v Chief Executive Officer, Department of Commerce [2017] WAIRC 00262; (2017) 97 WAIG 545

Reasons for Decision

- 1 Mr Mark Kostner's employment with the Small Business Development Corporation (SBDC) concluded on 29 February 2024. Mr Kostner says that he was unfairly dismissed and applied to the Western Australian Industrial Relations Commission (**the Commission**) on 12 March 2024 pursuant to s 29(1)(c) of the *Industrial Relations Act 1979* (WA) (**the IR Act**) for relief. The SBDC opposes the application and submits that Mr Kostner's casual employment arrangement was ended with appropriate notice being given and his application ought to be dismissed.
- 2 Mr Peter Frey's employment with SBDC was concluded on 7 March 2024. Mr Frey says he was unfairly dismissed and applied to the Commission on 12 March 2024 pursuant to s 29(1)(c) of the *IR Act* for relief. On 9 May 2024, SBDC informed the Commission that it objected to the application on the basis of jurisdiction because the application concerns unfair dismissal of a Government Officer which is within the exclusive jurisdiction of a Public Service Appeal Board by s 80I(d) of the *Industrial Relations Act 1979*. SBDC requested that the jurisdictional question be determined before any further proceedings.
- 3 On 30 May 2023, the Commission notified Mr Frey and SBDC that a hearing on the jurisdictional objection was set down for 19 June 2024.
- 4 On 14 June 2024 Mr Kostner requested that the issue of jurisdiction raised by SBDC in his matter be heard at the same hearing set down for Mr Frey's application.
- 5 Mr Frey and SBDC agreed to the hearing of the two matters together.

Mr Kostner's Case

- 6 Mr Kostner was employed by SBDC as a Business Advisor. Mr Kostner commenced in March 2015 and regularly worked one day per fortnight since November 2022. Prior to this, Mr Kostner worked one day each week except for a break between 16 November 2018 and 11 January 2019.
- 7 On 8 February 2024, Mr Kostner was informed that a review of operations had identified that the SBDC no longer wished to engage casuals and advised him that his current engagement would cease at the end of that month. The SBDC informed Mr Kostner it intended to offer him a fixed term contract for 7.5 hours per week until 30 June 2024. The SBDC intended to commence permanent recruitment within the financial year and that the current casual arrangement and work roster would remain in place until 29 February 2024.
- 8 Subsequently, on 27 February 2024, Mr Kostner received a copy of the proposed fixed term contract for a period ending on 30 June 2024.
- 9 On 29 February 2024, Mr Kostner informed SBDC he was not willing to sign the contract as he was concerned for the effect it may have on his rights as an employee in respect of entitlements to conversion from casual to permanent appointment.
- 10 On the same day, Mr Kostner requested a review for conversion to permanent part-time employment. Mr Kostner claims his employment was regulated by *The Public Sector CSA Agreement 2022* (**CSA Agreement 2022**) and he was entitled to be converted from a casual employment arrangement to a permanent part-time under cl 19 Casual Employment.
- 11 On 7 March 2024, SBDC informed Mr Kostner that he was not permitted to attend the workplace the following day as previously rostered because he had not signed the fixed term contract. SBDC contends that the rostered workday of 8 March 2024 had been scheduled when it was believed Mr Kostner would be engaged under a fixed term contract of employment. However, because he had not signed the fixed term contract, and his casual engagement had ceased, consequently, he was no longer employed.

- 12 On 12 March 2024, Mr Kostner applied to the Commission for orders that he be reinstated as a permanent part-time employee, in accordance with cl 19 of the CSA Agreement 2022, and be compensated for any loss of income. Mr Kostner also seeks an apology in writing from the individuals involved.
- 13 The SBDC denies Mr Kostner was unfairly dismissed. SBDC say that a review of the staffing model identified that the engagement of casual staff no longer met its operational needs and Mr Kostner was provided with three weeks' notice of the cessation of his casual employment. SBDC submits that Mr Kostner's application ought to be dismissed because the relief sought by him is not within the powers of the Commission to grant.

Unfair Dismissal Application – Remedy

- 14 In his application made under s 29(1)(c) of the *IR Act* (unfair dismissal) Mr Kostner seeks orders from the Commission for:
1. Conversion to permanent part-time
 2. Compensation for lost income
 3. A personally signed, public apology to be circulated to work colleagues acknowledging the error on SBDC's side from each individual involved.
- 15 The respondent says that the remedy sought by Mr Kostner is not able to be made by the Commission. The respondent submits that the Commission may only reinstate Mr Kostner to the position from which he was terminated, being a casual employee.
- 16 Mr Kostner maintains his employment was regulated by the CSA Agreement 2022 and that the SMDC breached the terms of the *Public Sector CSA Agreement 2021 (CSA Agreement 2021)* by:
- a. Failure to conduct a review of his employment in accordance with clause 19.9 between September 2021 and December 2021;
 - b. Failure to conduct a review of his employment in accordance with clause 19.9 within three months
 - c. On 30 March 2024, determination that he was not eligible for conversion to permanent status on review conducted at this request made on 29 February 2024, despite an earlier determination in 2022 that he was eligible;
 - d. Failure to respond to his concerns within the timeframe required by clause 61.3 of the CSA Agreement 2022;
 - e. Failure to create a permanent position as required by clause 19.9 CSA Agreement 2022;
 - f. Failure to provide proper notice of termination as required by clause 20.2 of the CSA Agreement 2022.
- 17 At the hearing, Mr Kostner maintained that he seeks reinstatement to a part-time permanent role in the SBDC and loss of income for the period between his termination and reinstatement. Mr Kostner argues that cl 19.10 of the CSA Agreement 2022 required that his employment arrangements be reviewed and cl 19.12 entitled him to be appointed to a newly created permanent position.
- 18 SBDC submits that the Commission does not have the power to make the orders Mr Kostner seeks and consequentially Mr Kostner's application ought to be dismissed. The SBDC contends that the power available to the Commission is to order reinstatement to the employment Mr Kostner was engaged in prior to his dismissal. That is, a casual appointment of 7.5 hours per week.
- 19 Mr Kostner's contract of employment dated 7 January 2019 states he was employed by SBDC, as a 'casual Public Sector employee' under s 15 of the *Small Business Development Corporation Act 1983* and remunerated in accordance with the *Public Service and Government Officers General Agreement 2017* and successor agreements. The Job Description Form for the position of Business Advisor refers to the 'PSCSA Agreement 2022.'
- 20 Section 23A of the *IR Act* sets out the orders that the Commission is authorised to make if it finds that an employee has been unfairly dismissed:

23A. Unfair dismissal claims, Commission's powers on

- (1) The Commission may make an order under this section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair.
- (2) In determining whether the dismissal of an employee was harsh, oppressive or unfair the Commission must have regard to the following —
 - (a) whether, at the time of the dismissal, the employee —
 - (i) was employed for a probationary period agreed between the employer and employee; and
 - (ii) had been employed on that basis for a period of less than 3 months;
 - (b) whether, at the time of the dismissal, the employee was employed in a private home to provide services directly to the employer or a member of the employer's family or household. (3) The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal. (4) If the Commission considers that reinstatement would be impracticable, the Commission may order the employer to re-employ the employee in another position that the Commission considers — (a) the employer has available; and (b) is suitable. (5) The Commission may, in addition to making an order under subsection (3) or (4), make either or both of the following orders — (a) an order it considers necessary to maintain the continuity of the employee's employment;

Application of CSA Agreement 2022

- 21 Mr Kostner claims he was unfairly dismissed when he was effectively denied a permanent position. Mr Kostner argues that cl 19.10 of the CSA Agreement 2022 required that his employment arrangements be reviewed and cl 19.12 entitled him to be appointed to a newly created permanent position.
- 22 Clause 5 Application and Parties Bound of the CSA Agreement 2022 sets out to whom the provisions of the CSA Agreement 2022 apply:
- 5. APPLICATION AND PARTIES BOUND**
- 5.1 This agreement cancels and replaces the Public Sector CSA Agreement 2021.
- 5.2 The parties bound by this Agreement are listed in Schedule 6 – Parties to this Agreement.
- 5.3 (a) Subject to clause 5.3 (b), this Agreement applies to:
- (i) all public service officers and executive Employees, employed under Part 3 or Part 8, section 100 of the Public Sector Management Act 1994 (WA) or continuing as such by virtue of clause 4 (c) of Schedule 5 of that Act, and covered by the Public Service Award 1992; and
 - (ii) all government officers, within the meaning of the Industrial Relations Act 1979 (WA), employed by an Employer party listed in Item (3) of Schedule 6 – Parties to this Agreement of this Agreement and covered by the Government Officers Salaries, Allowances and Conditions Award 1989.
- who are members of or eligible to be members of the Union.
- (b) This Agreement does not apply to:
- (i) a chief executive officer as defined in section 3 (1) of the Public Sector Management Act 1994 (WA);
 - (ii) those government officers listed in Schedule B of the Government Officers Salaries, Allowances and Conditions Award 1989;
 - (iii) employees whose remuneration payable is determined or recommended pursuant to the Salaries and Allowances Act 1975 (WA); or
 - (iv) employees whose remuneration is determined by an Act to be at a fixed rate, or is determined by the Governor pursuant to the provisions of any Act.
- 5.4 As at the date of registration the approximate number of Employees bound by this Agreement is 33,365.
- 5.5 This Agreement must be read in conjunction with the Applicable Award.
- 5.6 Provisions in the Applicable Award that deal with subject matters not otherwise dealt with by this Agreement are preserved at the date of registration. For the purposes of this clause, these provisions are referred to as the “preserved provisions”.
- 5.7 Subsequent to the registration of this Agreement, any variations to provisions of the Applicable Award issued through orders of the WAIRC prevail over the preserved provisions to the extent of any inconsistency.
- 5.8 Subject to clause 5.7, where the provisions of the Applicable Award and this Agreement are inconsistent, this Agreement prevails.
- 5.9 The ASAs listed at Schedule 5 – Agency Specific Agreements of this Agreement continue in force unless replaced by a subsequent agreement or a party withdraws from the agreement.
- 23 Cl 5.3(i) of the CSA Agreement 2022 applies to all public service officers *who are* employed under Part 3 or Part 8 s 100 of the *Public Sector Management Act 1994* (WA) (**PSMA**). A person must be a casual engaged under s 100 of the PSMA and a public service officer to be within the scope of this clause.
- 24 The second category of persons, the CSA Agreement 2022 by cl 5.3(ii), applies to is that of ‘all government officers, within the meaning of the *Industrial Relations Act 1979* (WA).’
- 25 Mr Kostner argues that he is neither a public service officer nor a government officer.
- 26 If Mr Kostner’s contention that he is not a government officer is accepted, then his employment is not within the scope of the CSA Agreement 2022 and its terms do not apply to him and his assertion that he had an entitlement to be appointed to a permanent position in accordance with cl 19.9 of the CSA Agreement 2022 is incorrect.
- 27 Clearly Mr Kostner must be either a public service officer or a government officer for the CSA Agreement 2022 to apply to him.
- 28 SBDC does not possess the authority to employ public service officers, Mr Kostner cannot be a public service officer.
- 29 The terms of the CSA Agreement 2022 will only apply to Mr Kostner if he was a ‘government officer.’

Is Mr Kostner a Government Officer?

- 30 The SBDC is authorised to employ staff by s 15 of the *Small Business Development Corporation Act 1983* (WA) (**SBDC**):

15. Staff of Corporation, employment of

- (1) Subject to this Act, the Corporation may employ persons as staff of the Corporation —
- (a) to enable the Corporation to carry out its functions; and

- (b) to assist the Commissioner to carry out his or her functions.
- (2) Persons employed under subsection (1) may be employed on a full time or part time basis.
- (3) Subject to any relevant award or industrial agreement 1 under the *Industrial Relations Act 1979*², the Corporation may determine the remuneration and other terms and conditions of service of persons employed under subsection (1).
- (4) Part 3 of the *Public Sector Management Act 1994* does not apply to or in relation to a person employed under subsection (1).
- (5) Subsection (1) does not affect the power of the Corporation to engage a person under a contract for services or appoint a person on a casual employment basis under the *Public Sector Management Act 1994* section 100.
- 31 Section 15 of the *SBDC Act* refers to the engagement of a person on a casual employment basis under s 100 of the *PSMA*:
- 100. Engaging people by contracts for services and casual employees, powers for**
- (1) An employing authority may in accordance with the Commissioner's instructions engage a person under a contract for services on such terms and conditions, including the rate of remuneration, as the employing authority determines.
- (2) An employing authority may in accordance with the Commissioner's instructions appoint a person on a casual employment basis on such terms and conditions as the employing authority, subject to any relevant written law or any binding award, order or industrial agreement under the *Industrial Relations Act 1979*, determines.
- (3) If the chief executive officer or chief employee of a department or organisation is not its employing authority, the employing authority of the department or organisation may, in writing and either generally or as otherwise provided by the instrument of delegation, delegate to that chief executive officer or chief employee any of its powers or duties under this Act.
- (4) Section 33 applies to and in relation to a chief executive officer or chief employee to whom a power or duty is delegated under subsection (3) as if the power or duty were one of his or her own powers or duties under this Act.
- (5) The powers conferred on an employing authority by this section are in addition to, and not in derogation from, any powers conferred on the employing authority by any other written law.
- 32 Government officer is defined in s 80C(1) of the *IR Act*:
- government officer** means —
- (a) every public service officer; and
- (aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*; and
- (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*; and
- (b) every other person employed on the salaried staff of a public authority; and
- (c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984*,
- but does not include —
- (d) any teacher; or
- (e) any railway officer as defined in section 80M; or
- (f) any member of the academic staff of a post-secondary education institution.
- 33 The only category which may apply to the applicant is that of a 'person employed on the salaried staff of a public authority' (s 80C(1)(b)). Clearly Mr Kostner is not a member of the Governor's Establishment and therefore, the provisions of s 80C(1)(aa) are not relevant. Similarly, s 80C(1)(ab) are not met because Mr Kostner is not a member of staff of Parliament nor an electorate officer.
- 34 The SBDC is a public authority, and the question to be answered is whether he was employed on the 'salaried staff.'
- 35 Mr Kostner contends that his casual employment does not come within the meaning of 'salaried staff.' Mr Kostner submits that casual employment is characterised by hourly payments and even where these are regular are not consistent with the definition of salaried employment. Mr Kostner refers to the decision of the Western Australian Industrial Appeal Court (IAC) in *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889 (*Totalisator Agency Board*). Mr Kostner says the lack of permanent employment status and fixed periodic payments do not align with the definition of salaried staff. In support of his contentions, Mr Kostner refers the Commission to the decision of the Public Service Appeal Board (PSAB) in *Kathleen Margaret Fenton v WA Country Health Services – SW* [2021] WAIRC 00214 (*Fenton*).
- 36 Mr Kostner argues that casual employment lacks the job security, fixed periodic payments, and benefits typical of salaried employment. Mr Kostner submits these elements align more closely with the decisions of the Public Service Appeal Boards in *Gerad McGinty v Department of Corrective Services* [2012] WAIRC 00054 (*McGinty*) and in *Joyce Capewell v Department*

of Corrective Services [2013] WAIRC 00390; 93 WAIG 1454 (*Capewell*) where Mr Kostner submits the form and nature of the employment contract were critical.

- 37 A review of the authorities cited by Mr Kostner identifies that consideration is directed toward both the nature of remuneration and the nature of the services provided by the employee.
- 38 The Industrial Appeal Court in *Totalisator Agency Board*, considered the meaning of the term ‘salary,’ concluding that it applied to persons who received ‘a fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind.’ This matter concerned the categorisation of an employee who was remunerated by way of commission. The IAC found that the employee was ‘not paid for her services in a manner computed by time,’ and therefore was not on the salaried staff. In this matter the question of remuneration concerned a distinction between regular payments linked to time worked and that of commissions linked to a form of sales regardless of time worked. The remuneration received by Mr Kostner is linked to time worked and not to commissions on sales.
- 39 In *McGinty* the PSAB noted the decision in *Totalisator Agency Board* and considered whether a Vocational Support Officer was employed on the ‘salaried staff’ and observed at [11]:
- ‘Further, s 80C of the Act does not just refer to the payment of a “salary” to a person. The statute refers to a person employment of the “salaried staff” of a public authority. Whilst the distinction between “wages employees” and “salaried staff” in terms of somewhat anachronistic “blue collar” and “white collar” employment may no longer have the connotations it once may have had, nonetheless, the legislature has sought to confine the jurisdiction of the Arbitrator to those specific employees in s 80C of the Act. They are generally those in administrative, technical and professional ranks of the public sector.’
- 40 In *Fenton*, the PSAB considered the meaning of ‘salaried staff’ in relation to the definition of ‘government officer’ in a series of decisions by the IAC, PSAB and the Commission and concluded that it is important to consider the frequency of payments and the services for which payment is made:
- [45] ...The legislature intended for the reference in the definition of “government officer” to “salaried staff” should delineate a particular group of employees, that is, to set a group of employees apart from employees as a whole. Equating “salaried staff” to those employees who are paid an amount fixed by reference to, or computed in time, does not achieve any effective delineation. It would be difficult to envisage an employee whose earnings do not fall into such a broad meaning
- [46] It must be remembered that when Anderson J adopted the phrase “computed by time” used by Fry LJ in *Re Shine*, his Honour subordinated it to the ordinary and natural meaning, which involved a “fixed regular payment”. His Honour also placed it within the requirement for “definite payment for personal services”, effectively paraphrasing and adding to the other three characteristics identified by Fry LJ. This would exclude from the meaning of salary an amount computed on an hourly basis (by time) which, because of the variability in hours worked or the circumstances such work is performed, results in indefinite periodical payments. As Kenner C identified in *McGinty*, the concept of a fixed payment is central.
- [47] We therefore return to what is the ordinary and natural meaning of the phrase “salaried staff”. The earlier decisions we have referred to above refer to various dictionary definitions, and it is helpful to briefly revisit those. The Macquarie Dictionary meaning of “salary” is:
- ...a fixed periodical payment paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind.
- [48] The Oxford English Reference Dictionary definition of “salary” is:
- A fixed regular payment, usually monthly or quarterly, made by an employer to an employee, esp. a professional or white-collar worker (cf wage).
- [49] The Oxford definition references the definition of wage for clarification of meaning. “Wage”, then, is defined:
- ...a fixed regular payment, usually daily or weekly, made by an employer to an employee, especially to a manual or unskilled worker (cf salary).
- [50] We consider these definitions are most helpful in understanding the phrase “salaried staff” in s 80C. From these definitions one can appreciate the subtlety of difference between “salary” and “wages”. Once it is accepted that the words are intended to limit the class of employees to whom it applies, it follows that the dichotomy between salary and wages is important. Contrasting these two concepts, wages and salary, assists to clarify where the focus of the difference between wages employees and salaried staff lies. Both are paid a fixed, regular/periodical payment. Accordingly, a focus on computation of earnings by time is of little utility. Rather, the key differences are in the frequency of payments and the services for which the payment is made. Commissioner Kenner arrived at this point in *McGinty* when he succinctly described salaried staff as “generally those in the administrative, technical and professional ranks of the public sector”.
- 41 In determining whether Mr Kostner is on the ‘salaried staff’ of the SBDC, it is necessary to consider both the structure of the remuneration he received and the nature of the services he provided.
- 42 Mr Kostner agrees that he worked a regular and systematic pattern of hours, initially 7.5 hours per week and later 7.5 hours per fortnight. Accordingly, the remuneration he received was regular and referenced to the number of hours he worked. Unlike, the circumstances of the employee in *Capewell*, Mr Kostner’s hours of work were regular and consistent and, therefore, payment did not fluctuate. This element is only part of the picture.
- 43 A second consideration is the nature of the services provided by Mr Kostner.

- 44 Mr Kostner was employed as a Business Advisor and his duties were to provide advice, information, referrals and guidance to small businesses on a range of topics. The nature of the advice included well-conceived, clearly articulated, pragmatic solutions and guidance to solve business problems, including complex matters. The role required Mr Kostner to promote SBDC services and programs, engage and build positive relationships with relevant internal and external stakeholders, represent the SBDC at meetings, public functions and seminars including undertaking public speaking engagements and workshop presentations as required. Mr Kostner was to undertake research and investigation to analyse and resolve complex small business issues and contribute to SBDC policy submissions. Under the heading of 'Administration' Mr Kostner's Job Description Form lists duties including the maintenance of the Client Relationship Management system and contribute to the establishment and maintenance of policies, processes and systems to support program and service delivery outcomes.
- 45 In my view, these duties are of a professional, technical and administrative nature and consistent with the decisions in *Fenton and McGinty*. The nature of the services provided by Mr Kostner are those of a person on the 'salaried staff.'
- 46 I find that Mr Kostner was employed on the salaried staff of a public authority and therefore, comes within the meaning and definition of a 'government officer.'

Jurisdiction of Commission under s 29

- 47 It is well established in s 80I of the *IR Act* that the Public Service Appeal Board is the proper authority to hear and determine appeals by government officers in relation to their dismissal and that the Commission's general jurisdiction cannot be engaged: *Ronald Thomas Bellamy v Chairman, Public Service Appeal Board* (1986) 66 WAIG 1579 (*Bellamy*).
- 48 As set out by Smith AP in the Full Bench decision in *Matthew Crowley v Chief Executive Officer, Department of Commerce* [2017] WAIRC 00262; (2017) 97 WAIG 545 (*Crowley*):

[40] The conferral of exclusive jurisdiction in respect of industrial matters that relate to a 'government officer' is found in the express power in s 80E(1) of the *IR Act* which provides:

Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

[41] The ousting of the general jurisdiction of the Commission in s 23(1) of the *IR Act* by s 80E(1) by the exclusive jurisdiction of the constituent authorities, one of which is the Public Service Arbitrator, is put beyond doubt by the expressed intention in the definition of 'industrial matter' in div 2 by operation of s 22 A of pt II the *IR Act*. Section 22A and s 23(1) are both found in div 2 of pt II of the *IR Act*. Section 22 A provides:

Commission means the Commission constituted otherwise than a s constituent authority

Industrial matter does not include a matter in respect of which, subject to Division 3, a constituent authority has exclusive jurisdiction under this Act.

- 49 I have found that Mr Kostner was a government officer and consistent with *Bellamy* and *Crowley*, this Commission does not possess the necessary jurisdiction to hear and determine Mr Kostner's application.

Mr Frey's Case

- 50 Mr Frey was employed as a Business Development Advisor Level 6 with the SBDC from 16 July 2016. Mr Frey was engaged as a casual. Mr Frey says he was informed on 6 March 2024 that his casual engagement would cease on the following day.
- 51 Mr Frey says his dismissal was unfair and on 12 March 2024, applied to the Commission for orders for the SBDC to pay him an amount equivalent to two days per week for a further three years.
- 52 On 9 May 2024, the SBDC informed the Commission it objects to the application on the basis that the application concerns the unfair dismissal of a Government Officer which is within the exclusive jurisdiction of a Public Service Appeal Board by s 80I(d) of the *IR Act*.
- 53 In accordance with the Western Australian Industrial Appeal Court's decision in *Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1987) 67 WAIG 325, the Commission is unable to proceed unless satisfied that the Commission has the necessary jurisdiction to do so.
- 54 Mr Frey and Mr Kostner were employed in identical roles and engaged in similar casual arrangements. Mr Frey and Mr Kostner filed identical written submissions prior to the hearing. At the hearing Mr Frey adopted Mr Kostner's submissions.
- 55 For the reasons set out above in relation to Mr Kostner's case, I find that Mr Frey is a 'government officer' and this Commission lacks the necessary jurisdiction to hear and determine his claim.

Conclusion

- 56 I have found that Mr Kostner and Mr Frey were government officers and for the reasons set out above the Commission does not have the necessary jurisdiction to hear and determine their applications and they must be dismissed.
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2024 WAIRC 00943

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARK KOSTNER & PETER NEWTON FREY

APPLICANT

-v-

SMALL BUSINESS DEVELOPMENT CORPORATION

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE FRIDAY, 1 NOVEMBER 2024

FILE NO/S U 22 OF 2024, U 20 OF 2024

CITATION NO. 2024 WAIRC 00943

Result	Application Dismissed
Representation	
Applicant	Mr M Kostner Mr P Frey
Respondent	Mr R Andretich (of counsel)

Order

HAVING HEARD from the applicants on their own behalf and Mr Andretich on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the applications U 20 of 2024 and U 22 of 2024 are dismissed.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2024 WAIRC 00839

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2024 WAIRC 00839
CORAM	:	COMMISSIONER T KUCERA
HEARD ON THE PAPERS	:	WRITTEN SUBMISSIONS FILED: TUESDAY, 13 AUGUST 2024; TUESDAY 27 AUGUST 2024; TUESDAY, 3 SEPTEMBER 2024
DELIVERED	:	TUESDAY, 24 SEPTEMBER 2024
FILE NO.	:	U 41 OF 2024
BETWEEN	:	ROMAINE RATNAWIBHUSHANA Applicant AND CITY OF NEDLANDS Respondent

Catchwords	:	Industrial Law (WA) – Application to dismiss under s 27(1)(a) <i>Industrial Relations Act 1979</i> (WA) – Whether Settlement agreement reached during conciliation is binding without a deed – Whether applicant's medical condition provided an excuse not to be bound by settlement – Principles to determine whether a binding settlement was reached – Application of the principles in <i>Masters v Cameron</i> – Substantive application dismissed
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Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
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Result	:	Substantive application dismissed
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Representation:

Applicant	:	Mr R Jones
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Respondent	:	Ms S Maddern (of counsel)
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Case(s) referred to in reasons:*Australian Postal Corporation v Gorman* [2011] FCA 975*B. Curtis v Darwin City Council* [2012] FWAFB 8021*Kristee Heydon v Maa Ambe Group Pty Ltd ATF Maa Ambe Unit Trust T/A Red Rooster* [2014] FWC 7854*Masters v Cameron* [1954] HCA 72*Romina Aida Raschilla and Others v Australian Nursing Federation Industrial Union Workers Perth* 2023 WAIRC 00891*Subeg Singh v Sydney Trains* [2017] FWCFB 4562*Zhang v Spring FG Accounting Pty Ltd* [2021] FWC 14*Zoiti-Lacastro v Australian Taxation Office* PR967544*Reasons for Decision*

- 1 This decision involves an application under s 27(1)(a) of the *Industrial Relations Act 1979* (**IR Act**) to dismiss an unfair dismissal claim, on grounds including that further proceedings are not necessary or desirable in the public interest (**respondent's application**).
- 2 To explain the context in which the respondent's application was made, it is necessary to provide a chronology of what has occurred in the proceedings to date.

Proceedings to conciliation

- 3 On 15 May 2024, Romaine Ratnawibhushana (**applicant**), made an unfair dismissal claim under s 29(1)(b) of the IR Act (**unfair dismissal claim**).
- 4 In her unfair dismissal claim the applicant alleged that on 8 April 2024, she was unfairly dismissed from her employment as a Coordinator of the Point Resolution Child Care Centre (**PRCCC**) that is operated by the City of Nedlands (**respondent**).
- 5 As was made clear in the applicant's *Form 2 – Unfair Dismissal Application* (**Form 2 application**) the applicant did not by way of relief, seek an order for reinstatement to her former position.
- 6 Rather, the applicant, as stated in in part 2.1 of the Form 2 application, sought the following:

After nearly 17 years of employment and my treatment by the City as a result of the issues raised in this claim, I do not feel comfortable seeking to work for them. I have lost trust in the ability of the City to treat me with respect and dignity.

I seek compensation of 6 month's salary in lieu of reinstatement, an apology from the City and for this apology to be provided to the parents of all current children in attendance at the Child Care and I am seeking that the termination be reframed as a resignation.
- 7 It is not in dispute the applicant was, upon termination, paid five weeks' wages in lieu of notice. Not long after her dismissal, the applicant was successful in obtaining alternative employment.
- 8 On 4 June 2024, the respondent filed its *Form 2A – Employer Response to Unfair Dismissal Application* to the unfair dismissal claim (**response**).
- 9 I have not set out in detail why the applicant in her Form 2 application says her dismissal was unfair. I have similarly opted not to describe why the respondent says the applicant's dismissal was justified and why it opposed the applicant's unfair dismissal claim. I have refrained from doing this because I do not have to canvas these matters to decide the respondent's application.

First conciliation conference

- 10 After the respondent filed its response, on 13 June 2024, the applicant's unfair dismissal claim was listed for a conciliation conference that was held on 20 June 2024 (**first conciliation conference**).
- 11 The applicant attended the first conciliation conference in person. She was represented by Ron Jones from Ron Jones Consulting, who is a registered industrial agent (**applicant's representative**).
- 12 Two staff members who work for the respondent in senior managerial roles attended the first conciliation conference. The respondent was represented by counsel Samantha Maddern from Mills Oakley (**respondent's counsel**).
- 13 During the first conciliation conference, the parties reached an agreement to resolve the unfair dismissal claim (**settlement**) on the following terms:
 - i. The respondent agreed that it would, in full and final settlement of all claims in respect of the applicant's employment with the respondent (save and except for any claims for superannuation and/or workers compensation which cannot be contracted out of in any event), record the applicant's dismissal as a resignation instead of a dismissal;
 - ii. The respondent will provide the applicant with a statement of service (**statement of service**);
 - iii. The respondent will, in response to any future inquiries regarding the applicant's employment, confirm that she resigned from her employment at the PRCCC, and is to refer to and not say anything that is inconsistent with the statement of service;
 - iv. The respondent will not provide an apology to the applicant;
 - v. The respondent will not be paying the applicant any compensation;
 - vi. The terms of the settlement will be reflected in a deed containing a mutual release and mutual terms as to non-disparagement and confidentiality (**deed**);

vii. The deed is to be prepared by the respondent's counsel;

viii. Once the deed has been signed by the parties and the applicant has received the statement of service, the applicant will file a *Form 1A - Notice of Discontinuance (Form 1A)*.

14 As is my usual practice in matters of this type, the first conciliation conference was adjourned on the basis that the Commission's file would be kept open pending the execution of the deed, the provision of the statement of service to the applicant and the filing of a Form 1A.

Correspondence following the first conciliation conference

15 Following the first conciliation conference, on 21 June 2024, the respondent's counsel sent the applicant's representative a draft deed (**draft deed**) and statement of service by way of an email. The respondent's email stated:

Dear Ron

Please see attached for your review a draft deed and statement of service which we propose to annex to the deed.

Should you wish to propose any changes, could you please do so in track changes.

16 Following this, the applicant's representative sent an email to my Associate on 27 June 2024 in the following terms:

Dear Commissioner,

I advise that the applicant has given consideration to the outcome of the Conciliation Conference and has decided to continue to pursue her claim for re-instatement.

We therefore seek to have the claim listed for hearing.

17 After receiving the email from the applicant's representative that I have referred to, my Associate emailed the respondent's counsel and requested the respondent provide its response to the applicant's request to refer her unfair dismissal claim to a hearing.

18 On 27 June 2024, the respondent's counsel emailed my Associate to advise the respondent opposed the unfair dismissal claim being referred to hearing, principally on the grounds the matter had been settled between the parties at the first conciliation conference.

Second conciliation conference

19 Noting the respondent's opposition to referring the unfair dismissal claim to hearing, on 18 July 2024, I directed the parties attend a further conciliation conference to be held on 30 July 2024 (**second conciliation conference**).

20 Except for the applicant's husband, who appeared in person together with the applicant, the same participants who attended the first conciliation conference, came to the second conciliation conference.

21 At the conclusion of the second conciliation conference, the respondent advised of its intention to pursue an application to dismiss the applicant's unfair dismissal claim. As the parties were plainly at odds as to whether they had reached a settlement, I issued the following directions by consent so that I could decide the respondent's application (**programming directions**):

1. THAT the respondent is to file an outline of submissions in support of its application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (respondent's application) by 13 August 2024;
2. THAT the applicant is to file an outline of submissions in opposition to the respondent's application by 27 August 2024 (applicant's submissions);
3. THAT the respondent is to file any reply to the applicant's submissions by 3 September 2024;
4. THAT the respondent's application is to be decided on the papers.

Submissions filed by the parties

22 The parties both complied with the programming directions. On 13 August 2024, the respondent's counsel filed an outline of submissions in support of the respondent's application (**respondent's submissions**).

23 On 27 August 2024 the applicant's representative filed the applicant's submissions. Attached to the applicant's submissions was a letter sent on behalf of Dr Louisa Lo – Oncologist, from Shankari Wijayakhanthan, who is the Medical Oncology Registrar at Sir Charles Gairdner Hospital, dated 15 August 2024 (**SCGH Letter**).

24 In reply to the applicant's submissions, on 3 September 2024, the respondent's counsel filed an outline of submissions in reply to the applicant's submissions (**respondent's reply submissions**).

Issues to be decided

25 It is clear the matter to be decided is whether the applicant's unfair dismissal claim, was at the conclusion of the first conciliation conference, the subject of a binding settlement. On this, there are two matters that I need to determine.

26 The first is whether the parties reached a binding settlement at the first conciliation conference. The second is whether the applicant's medical condition provides an excuse as to why she should not be bound by the settlement. In other words, I am being asked to decide whether the settlement was by reason of the applicant's medical condition, not validly made.

27 It follows that if I conclude a binding settlement was reached, the further hearing of the applicant's unfair dismissal claim would not only not be necessary or desirable in the public interest, but it would also be contrary to the settlement the parties reached to resolve the unfair dismissal claim.

Powers under the IR Act

28 There are two provisions in the IR Act that are relevant to determining the respondent's application. The first is s 26 of the IR Act which provides:

26. Commission to act according to equity and good conscience

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

(a) must act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and

29 The second is in respect of the Commission's powers to dismiss an application or to refrain from further hearing a matter, under s 27(1)(a) of the IR Act as are extracted below:

27. Powers of Commission

(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it –

(a) at any stage of the proceedings dismiss the matter or any part of it or refrain from further hearing or determining the matter or part if it is satisfied –

(i) that the matter or part is trivial; or

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or

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

...

30 In *Romina Aida Raschilla and Others v Australian Nursing Federation Industrial Union Workers Perth* [2023] WAIRC 00891 at [7], the Chief Commissioner set out the principles to be followed when considering an application under s 27(1)(a) of the IR Act, which I have extracted below:

7 The approach to s 27(1)(a) of the *Act* is not controversial and is well settled. As I observed in *Harry Arnott v Western Australian Police Union of Workers* [2022] WAIRC 00208; (2022) 102 WAIG 369 at [25] to [28], the s 27(1)(a) power is a broad power and is to be exercised with caution. It is a power to be used sparingly and only in a clear case: *Arnott* at [38]. Additionally, in *Robert McJannett v Construction Forestry Mining and Energy Union of Workers* [2012] WAIRC 00935; (2012) 92 WAIG 1889, Smith AP (as she then was) commented on the power to summarily dismiss proceedings under s 27(1)(a) of the *Act* and observed at [116]:

Power to summarily dismiss

116. The test to be applied when considering an application to summarily dismiss a substantive application was recently considered by me in *United Voice WA v Minister for Health* [2012] WAIRC 319; (2012) 92 WAIG 585 (*Fiona Stanley Hospital (No 2)*) wherein I observed [65]:

Exceptional caution is required by courts and tribunals when exercising the power to summarily dismiss. A claim should not be dismissed other than when it is clear there is no real question of fact or law to be tried: *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125, *Fancourt v Mercantile Credits Ltd* [1983] HCA 25; (1983) 154 CLR 87. President Steytler in *Talbot & Oliver (a firm) v Witcombe* [2006] WASCA 87 summarised the applicable principles as follows:

[21] ... An action should only be dismissed as frivolous or vexatious if it cannot possibly succeed. Moreover, in deciding whether an action could possibly succeed, a court of first instance should be astute not to risk stifling the development of law by summarily disposing of actions in respect of which there is a reasonable possibility that it will be found in the development of the law, still embryonic, that a cause of action does lie: *Hospitals Contribution Fund of Australia v Hunt* (1983) 44 ALR 365 at 373.

[22] Similar principles apply in the case of an application to strike out a statement of claim as not disclosing a reasonable cause of action: *Kimberley Downs Pty Ltd v State of Western Australia* unreported; SCT of WA; Library No 6414; 25 August 1986 at 6–7. In *Dalgety Australia Ltd v Rubin* unreported; FCt SCT of WA; Library No 5485; 24 August 1984, it was held that it is only in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff that the pleading should be struck out. It has also been held in this jurisdiction that, in a case in which an application for summary judgment is combined with an application to the Court's inherent jurisdiction and with an application under O 20 r 19(1)(a) to strike out a pleading upon the basis that it discloses no reasonable cause of action, the Court is not confined by the manner in which the plaintiff has formulated his or her case on the pleadings and may consider not only the undisputed facts but also facts which are in dispute: *Bride v Peat Marwick Mitchell* [1989] WAR 383 at 394; and see, generally, *Seaman Civil Procedure Western Australia* (Vol 1) at [16.0.1] and [20.19.6].

31 In the same way the law on the exercise of the Commission's powers under s 27(1)(a) of the IR Act is well settled, it is also accepted the settlement of an unfair dismissal application will extinguish the pre-existing cause of action and operate as a bar to the continuation of the claim: see *Australian Postal Corporation v Gorman* [2011] FCA 975 and *Kristee Heydon v Maa Ambe Group Pty Ltd ATF Maa Ambe Unit Trust T/A Red Rooster* [2014] FWC 7854 (*Kristee Heydon v Maa Ambe Group*).

32 Put another way, it is accepted an unfair dismissal claim that has been settled has no reasonable prospects of success: *B. Curtis v Darwin City Council* [2012] FWAFFB 8021 (*Curtis v Darwin City Council*) citing *Australian Postal Corporation v Gorman* [2011] FCA 975 (25 August 2011) at [33]. In these circumstances, a decision to dismiss an unfair dismissal application that has been settled would be justified, even with the requirement under s 26 of the IR Act.

Principles to determine whether a binding settlement was reached

33 In *Masters v Cameron* [1954] HCA 72 (*Masters v Cameron*) the High Court identified the circumstances where a binding settlement between parties may have been reached even where a document setting out the terms of the parties' agreement may not have been signed.

34 It was held that settlement agreements between parties who have been in negotiations and reach agreement upon terms of settlement, and also agree the terms of their settlement shall be recorded in a formal deed, contract or instrument, will fall into one of three categories. The three categories are:

- (i) The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
- (ii) It may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.
- (iii) The case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract. See *Curtis v Darwin City Council* [2012] FWAFFB 8021 (Ross J, Smith DP, Gooley C) (*Curtis*) at [61] citing *Masters v Cameron* at paras [9]-[10]. (1954) 91 CLR 353.

35 In each of the first two categories, there is a binding contract:

- (i) in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document, and
- (ii) in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

36 The High Court held that cases in the third category are fundamentally different to those in the first and second categories. They involve settlements where the terms of agreement are not intended to have, and therefore do not have any binding effect of their own: see *Curtis* at paras [62]-[63].

37 Relevant to determining whether a settlement falls into the third category, are expressions such as 'subject to contract', 'subject to the preparation of a formal contract' and others of similar import. Such terms create an overriding condition so that what has been agreed upon, must be regarded as the intended basis for a future contract, rather than constituting a contract of itself: *Curtis* at paras [62]-[63] also see *Zhang v Spring FG Accounting Pty Ltd* [2021] FWC 14 (Bissett C, 4 January 2021).

38 The question of whether the parties have reached a binding agreement is a matter of fact. Even though a party may not have signed an instrument arising from the negotiation or (as in the present context) conciliation, this does not mean that a binding agreement was not reached between the parties; see *Kristee Heydon v Maa Ambe Group*.

Respondent's submissions

39 The respondent submitted the parties reached an agreement at the end of the first conciliation conference that they were objectively committed to and that they had intended to be bound by the settlement.

40 The respondent submitted the settlement fell under the first category of cases referred to in *Masters v Cameron*. To this end the respondent submitted the preparation of a deed, when matters are settled to record parties' terms of settlement, is standard practice in matters before the Commission.

41 Consistent with this argument, the respondent submitted that it was mutually understood and agreed by both parties, that the only outstanding steps of the settlement were for terms to be reflected in a deed (that included a statement of service), which the parties agreed would be drafted by the respondent's lawyers.

42 In the alternative, the respondent submitted that if the parties' agreement at the conclusion of the first conciliation conference did not fall under the first category described in *Masters v Cameron*, it fell under the second.

43 The respondent submitted it was open to conclude the settlement fell into the second category for the reason the applicant would not provide a written statement of service unless and until a Deed was duly executed by the applicant and, presumably, the applicant would not file her Notice of Discontinuance unless a deed was executed by the respondent with the attached Statement of Service.

44 The respondent submitted, the applicant's acceptance of the settlement terms at the first conciliation conference can only be viewed as intention to create legal relations, as there were no outstanding terms of settlement to be negotiated.

45 The respondent contended the applicant is trying to have another 'bite of the apple' because she had changed her mind on issues that were canvassed during the first conciliation conference and that what was agreed between the parties, was negotiated in detail and in good faith.

46 The respondent submitted the applicant's attempt to renege on the settlement terms is contrary to the public interest and undermines the objects of the IR Act, as set out in s 6(b). The respondent argued that allowing the applicant to continue her unfair dismissal case has the potential to deter employers from engaging in settlement discussions early in proceedings, or prior to hearing, where agreements reached can be undermined by an employee having a change of heart.

- 47 The respondent submitted that it had expended significant time, money and resources in seeking to resolve this matter in good faith. It was submitted that having reached an agreement to settle the matter it would be contrary to the spirit of the IR Act, for the applicant's claim to continue to a hearing.
- 48 The respondent submitted the applicant's representative provided two contradictory but wholly inadequate explanations as to why the applicant now seeks to resile from the settlement, which the respondent said reflects poorly on the applicant's credibility.
- 49 The first of these which the respondent referred to was the applicant's claim that she was of poor health during the first conciliation conference. In response to this, the respondent noted:
- i. the applicant's representative made no mention the applicant was too unwell to participate in the first conciliation conference,
 - ii. no adjournment was sought, and
 - iii. the applicant was represented throughout by both an industrial advocate who could have explained, and presumably did explain, the meaning and effect of the proposed settlement terms and the consequences of agreeing to those terms.
- 50 The second reason the respondent submitted the applicant wants to resile from the settlement and for her unfair dismissal claim to be referred to a hearing, is because she is 'angry' with the outcome.
- 51 The respondent submitted that being angry about the outcome of a settlement is not a sufficient or reasonable basis on which to resile from the settlement terms which were negotiated and agreed to in good faith by the parties, with the assistance of their representatives. While the applicant might not have been happy with the settlement terms, she agreed to them.
- 52 The respondent submitted that it is an unfortunate by-product in matters of this nature, that parties often feel aggrieved, however, it would set an unfortunate precedent if the Commission was to entertain further dealing with an application which had been settled in good faith merely because one of the parties had a change of heart and/or is 'angry' at the outcome reached.
- 53 The respondent submitted that referring the applicant's claim to hearing in these circumstances would also be a significant waste of the Commission's time and resources.

Applicant's submissions

- 54 Relying upon the SCGH Letter, the applicant submitted that for the past 12 months, she had been receiving extensive treatment for cancer. The applicant submitted this treatment has often left her anxious and traumatised by the experience and subject to periods of short-term memory loss.
- 55 The applicant submitted that it is well-established the symptoms described in the SCGH Letter, are side effects of the various treatments available for cancer. In addition, the applicant submitted the trauma of losing her job similarly caused significant memory loss and compromised her ability to respond adequately to the conciliation process.
- 56 It was submitted that in the days immediately following the first conciliation conference the applicant had requested information from her representative as to what had happened during the conference and how she could ask for her job back.
- 57 In her submissions, the applicant disputed the respondent's characterisation of what was agreed in the first conciliation conference. The applicant contended that not all matters for a successful agreement were discussed between the parties. The applicant submitted that as a result, a binding settlement was not reached at the first conciliation conference because not all terms had been canvassed and the proposed deed was a draft and not a final document.
- 58 In relation to this, the applicant submitted that no reference was made to the significant restrictions intended by the respondent to apply to the applicant preventing her from seeking any potential redress from discrimination bodies and/or anti-corruption bodies to which complaints relating to the respondent's conduct may be referred.
- 59 The applicant submitted that it was of significance, that I had indicated the Commission's file, would be kept open pending the filing of a Form 1A. The applicant argued this should be viewed as an acknowledgment the parties were committed to achieving a settlement and not that a binding settlement had been reached.
- 60 The applicant submitted that it was not appropriate in the present case for the decision in *Masters v Cameron*, to be rigidly applied. As I understood the applicant's submission, I am required to take this path because the Commission, when exercising its jurisdiction under the IR Act, 'must act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms.'
- 61 In relation to the decision in *Masters v Cameron*, the applicant submitted the settlement reached in the first conciliation conference was not one to which both parties were objectively committed, as the respondent had since proposed terms that were not discussed and had presented the deed as a draft.
- 62 The applicant denied that the settlement fell under the first category that is referred to in *Masters v Cameron*. The applicant submitted the settlement was not 'one in which the parties had reached finality in arranging all the terms of their bargain and intended to be immediately bound to the performance of those terms.'
- 63 The applicant submitted that because the email from the respondent's counsel following the first conciliation conference referred to and attached a draft deed, which invited a response with tracked changes, I should conclude the parties had not reached a binding settlement.
- 64 In addition, the applicant submitted the requirement to file Form 1A meant the settlement was consistent with the third category established by the High Court in *Masters v Cameron* and that if I had considered the settlement between the parties was binding, I should have dismissed the applicant's claim at the conclusion of the first conciliation conference.

- 65 The applicant submitted that the terms set out in the draft deed at Clauses 1.3.2, 3, 4 and 6 go beyond the standard provisions that would otherwise appear in a deed of settlement and are overly restrictive.
- 66 The applicant submitted that I should exercise the Commission's powers under s 27 with extreme caution, having regard to the objects of the Act. In doing so I should dismiss the respondent's application and permit the applicant's unfair dismissal claim to proceed to hearing.

Respondent's reply submissions

- 67 While the respondent accepts the applicant experienced health difficulties towards the latter part of her employment, the respondent did not concede these health issues impacted on the applicant's capacity to understand what had occurred and what was agreed, at the first conciliation conference.
- 68 The respondent disputed the applicant's claims that her memory was affected to the extent that she was unable to effectively respond to the investigation that preceded her termination or participate in the first conciliation conference. In support of this submission the respondent referred to various matters that it said were inconsistent with the applicant's claimed incapacity, including that the applicant:
- (a) provided extensive material during the respondent's investigation into her conduct;
 - (b) secured alternative comparable employment in less than two weeks following her dismissal;
 - (c) engaged and instructed a representative;
 - (d) claims to have the capacity to instruct and proceed to a contested hearing; and
 - (e) claims to have the capacity of return to full-time employment as the manager of a childcare centre.
- 69 The respondent submitted the assertion '*The trauma of losing her job similarly caused significant memory loss and compromised her ability to respond adequately to the conciliation process*' is not supported by any medical evidence. In relation to the SCGH letter, the respondent contended:
- (a) It is not a medical certificate, contrary to the applicant's assertion;
 - (b) is dated 15 August 2024, which is 56 days after the First Conciliation Conference on 20 June 2024; and
 - (c) merely provides a generalised statement the applicant may experience 'troublesome symptoms'.
- and, as such, is irrelevant and should be disregarded by the Commission.
- 70 The respondent submitted the Commission should view the present case as one where the applicant has had a 'change of heart' – the applicant agreed to the key terms of the settlement at the first conciliation conference, to be reflected in a written deed, and then changed her mind.
- 71 In relation to the draft deed, the respondent submitted the provisions the applicant has objected to are standard terms and are not inconsistent with what the parties agreed at the first conciliation conference.
- 72 The respondent submitted Clause 1.3 of the draft deed which defines 'claims' to mean all claims arising out of the applicant's employment and the ending of the employment save for any statutory workers' compensation or superannuation claims, is a standard term. The respondent argued that it goes without saying the respondent would not have agreed to settle the applicant's unfair dismissal claim while leaving her with free reign to bring, for example, a discrimination complaint.
- 73 In relation to Clause 3 of the draft deed – the mutual release and discharge, the respondent submitted that it was an essential term, without which there would be no settlement.
- 74 Referring to Clause 6 – non-disparagement (which the respondent submitted was specifically sought by the applicant at the first conciliation conference and discussed at length, given her concern about the potential damage to her reputation including whether Council Minutes could be redacted etc), the respondent submitted it would be surprising the applicant has taken issue with a clause which provides protection to her by way of a standard mutual non-disparagement term.
- 75 Notwithstanding the respondent's submissions regarding the existence of a binding settlement between the parties, the respondent in its reply submissions, contended that further proceedings are neither necessary nor desirable in the public interest because the PRCCC will be closing on 9 October 2024.
- 76 Attached to the respondent's reply submissions, was a copy of an email from Keri Shannon, the respondent's CEO, dated 29 August 2024, that was sent to all staff announcing the impending closure, approved by the Council on 27 August 2024 (**all staff email**).
- 77 In addition to the all-staff email, the respondent attached a copy of a public notice that was published on its website, announcing its intention to close PRCCC (**public notice**).
- 78 The respondent submitted that because the PRCCC will be closed, there will be no position for the applicant to be returned to. As a result, the Commission, even if it was minded to, (assuming the applicant's dismissal was even found to be unfair) will be unable to issue an order for reinstatement.

Consideration

- 79 The starting point to deciding the issue of whether the applicant's unfair dismissal claim was settled, is a consideration of what was agreed between the parties at the first conciliation conference.
- 80 In relation to this, I adopt the summary of what I earlier stated in paragraphs [13] and [14] of these reasons as to what the parties agreed at the first conciliation conference. It follows that I respectfully do not accept the applicant's submission that a binding settlement was not reached.

- 81 I do not accept the applicant's submission regarding a less 'rigid application' of the decision in *Masters v Cameron* to the present case. While s 26 imposes an obligation on the Commission to take a less formal approach in the exercise of its jurisdiction, that is informed by industrial reality, there are well established public policy reasons why the Commission cannot ignore or disregard High Court authority, that it is required to follow; see *Kristee Heydon v Maa Ambe Group* at [47].
- 82 Applying the principles in *Masters v Cameron*, I am satisfied that a settlement was reached at the first conciliation conference that falls under the first category. I make this finding for the reason the settlement in this matter was not 'subject to the preparation of a deed' or conditional in any way.
- 83 All the matters relevant to concluding a settlement in respect of the relief sought by the applicant in her Form 2 application were canvassed in the settlement the parties agreed to. The preparation of a deed and a statement of service was only ever intended to reflect what the parties agreed in the settlement, that was reached at the first conciliation conference.
- 84 The respondent sought to draw similarities in the present matter with the decision of a Full Bench of the Fair Work Commission (FWC) in *Subeg Singh v Sydney Trains* [2017] FWCFB 4562 (*Singh*). In this matter the Full Bench held the parties had not reached a concluded settlement because they had not agreed amongst other things, on the content of a deed of settlement.
- 85 The circumstances in *Singh* are distinguishable from the present case. Critically, the claimed settlement at issue was not reached at conciliation. Rather the negotiations that preceded the claimed settlement in *Singh* were almost exclusively conducted by way of an exchange of correspondence between the parties.
- 86 As a result, the assessment that was undertaken by the Full Bench in *Singh* on whether a settlement was reached, involved an application of the principles in *Masters v Cameron*, to a review of the correspondence that had passed between the parties.
- 87 Additionally, while the parties in *Singh* had agreed 'in-principle' to Mr Singh's reinstatement, the terms of his return to work and related matters were still to be finalised. For this reason, the Full Bench was not satisfied the parties had made a concluded agreement to settle Mr Singh's application for an unfair dismissal remedy; see *Singh* at [75].
- 88 In contrast to the decision in *Singh* the circumstances in the present case are more comparable to those under consideration in *Curtis* and *Kristee Heydon v Maa Ambe Group*. Both involve situations where the applicants who had resolved their unfair dismissal claims in conciliation, sought to resile from the settlements they had reached and have their claims referred to hearing.

Curtis v Darwin City Council

- 89 A Full Bench of the FWC in *Curtis* was asked to consider on appeal, whether a Commissioner at first instance, had erred in dismissing an unfair dismissal claim, after deciding the matter was the subject of a binding settlement.
- 90 Like the present case, the decision involved an unfair dismissal case that was resolved in conciliation, on the basis the applicant would be permitted to resign from her employment, receive a statement of service and the settlement would be recorded in a deed of release that included a mutual non-disparagement term.
- 91 One of the matters to be determined in the appeal in *Curtis* was whether the settlement was conditional upon the parties executing a deed in terms to be agreed. In deciding the appeal the Full Bench held the settlement fell under either first or second categories described in *Masters v Cameron*. In reaching this view, the Full Bench relied upon an earlier Full Bench decision in *Zoiti-Lacastro v Australian Taxation Office* PR967544 (*Zoiti-Lacastro*).
- 92 At [65] the Full Bench set out the facts from *Zoiti-Lacastro*:
- “[4] The evidence concerning the settlement discussions is set out in the Senior Deputy President's decision. It is not necessary to repeat it all. It is clear that following discussions on 3 March 2005 between Mr Dowling on behalf of the appellant and Mr Niall on behalf of the ATO agreement was reached on the following terms:
- (i) the ATO would pay the appellant \$17,000 (\$12,000 on the presentation of invoices for legal costs and \$5,000 as an eligible termination payment);
 - (ii) a statement of service would be provided to the appellant;
 - (iii) payment would occur within 14 days of signing terms of settlement;
 - (iv) the appellant would adjourn the proceedings pending receipt of payment.
- [5] Despite this level of agreement, the appellant contended that there was no completed agreement. She relied on two related issues. The first was that when a formal agreement was drawn up by the ATO's solicitor for signature it contained provisions by which each party released the other from further liability in relation to the termination of employment. Mr Dowling maintained that a mutual release provision had not been discussed, let alone agreed upon, in the settlement discussions on 3 March 2005. Mr Niall testified that although it was unlikely, it was possible that no express reference had been made to mutual releases in the discussions. Nevertheless he regarded mutual releases as standard in settlements of the kind being discussed.
- [6] The second matter relied upon by the appellant was that any agreement which had been made was conditional on written terms being agreed. Although there was no evidence of this condition being discussed, it appears that it was accepted by both sides that there would be a signed agreement in due course.”
- 93 *Zoiti-Lacastro* is of relevance to this matter, as it involved the application of the principles in *Masters v Cameron* to the settlement of an unfair dismissal case, where the terms included in a written instrument that were not specifically discussed during the conciliation conference where the settlement was reached.
- 94 It is helpful to extract the relevant parts from *Curtis* where at [68] – [69] the Full Bench adopted and applied *Zoiti-Lacastro*;

[68] The Full Bench dismissed the appeal in respect of this issue, stating:

“We are satisfied that there was no relevant error in the Senior Deputy President’s reasoning on the release issue. It would be most unlikely, as the Senior Deputy President himself pointed out, that the ATO would pay money in settlement without receiving a release of some kind. Furthermore, the release contained in the settlement agreement drafted by the ATO’s solicitors was in substance a release of the kind which Mr Dowling had advised the appellant she would have to accept in order to settle the case. It is not necessary that we comment further on the Senior Deputy President’s decision, because, regardless of the breadth of the release, nothing arising in connection with the question of the release casts doubt on the conclusion that there was a completed agreement.”

[69] The second issue relied upon by the appellant in *Zoiti-Licastro* was that the agreement reached between Counsel was “*subject to written terms*”. It was submitted that the agreement could not be said to be completed until a document had been signed by both parties. The Full Bench also rejected this challenge to the Senior Deputy President’s decision also, in these terms:

“It is clear that the settlement agreement drafted by the ATO’s solicitors contained mutual releases and those had not been specifically agreed in the discussions on 3 March. There were other terms included as well, such as a request for confidentiality. But the appellant’s focus on the settlement document seems to us to miss the point. The real question is what was agreed on 3 March between counsel. It is clear enough that a completed agreement was reached and that it was not conditional in any sense on an agreement being signed. Terms relating to mutual releases and confidentiality could hardly be said to be unusual. Even so, if they were objected to the proper course would be for the appellant to simply indicate that they were not part of the agreement. No such indication was given, at least not until after 31 March 2005.”

95 Having followed the ratio in *Zoiti-Licastro*, the Full Bench in *Curtis* held:

[70] In the present matter the Appellant submitted that the decision in *Zoiti-Licastro* was distinguishable and that the circumstances in this matter fall into the third category in *Masters v Cameron*.

[71] Contrary to the Appellant’s submission the *ratio* of the decision in *Zoiti-Licastro* is relevant to the present matter. In that matter, a draft deed was prepared which went beyond the terms of the parties’ agreement. The Full Bench held that such a circumstance did not mean that the agreement reached was not binding. The same issue arises in this case and we are not persuaded that we should depart from the decision in *Zoiti-Licastro*.

[72] Nor are we persuaded that the Commissioner erred in his characterisation of the agreement between the parties. The settlement agreement was not expressed to be ‘subject to contract’ or an expression of similar import such as to create an overriding condition to the effect that what was agreed was the intended basis of a future contract, rather than constituting a contract of itself.

[73] The agreement in this case fell within either the first or second category in *Masters v Cameron*, in either case there was a binding contract.

Kristee Heydon v Maa Ambe Group

96 In *Kristee Heydon v Maa Ambe Group* an applicant sought to re-agitate her unfair dismissal claim 2-3 weeks after she had resolved it in conciliation. This was because the applicant became aware of evidence, she claimed would have supported a conclusion that she was unfairly dismissed.

97 After applying the principles in *Masters v Cameron* to the settlement that was reached in conciliation, SDP Richards at [48] - [50] held:

[48] The question of whether or not there was a binding agreement reached between the parties is a matter of fact. Even though the Applicant did not sign the agreement arising from conciliation this does not mean that a binding agreement was not reached. The question to be determined is if any agreement of the types described in *Masters v Cameron* was reached between the parties in conciliation. If the agreement reached is of the first or second category it would, following *Masters v Cameron*, be a binding agreement.

[49] I am satisfied that an agreement was reached in conciliation and that the agreement reached falls into the first category described in *Masters v Cameron*. Ms Blakey says an agreement was reached. The applicant says an agreement was reached but says it was an agreement in principle only and that this is evidenced by the terms of the agreement not being read out. In either scenario it is clear agreement was reached.

[50] That the precise terms of the agreement were not read out during the conciliation conference or that it was not ultimately signed does not mean an agreement was not reached. I am satisfied that the terms were agreed that the parties intended to be bound by those terms and that the parties intended that those terms be formalised in a form ‘more precise but not different in effect’ to those discussed.

98 Like the Full Bench in *Curtis*, SDP Richards in *Kristee Heydon v Maa Ambe Group* also referred to *Zoiti-Licastro*. At [54] SDP Richards stated:

[54] The circumstances in this case are not substantially different to those of *Zoiti-Licastro*. On the basis of the principles in *Zoiti-Licastro* it can be concluded that the failure to read out, during conciliation, the precise working of the terms of the agreement reached between the parties does not mean that a concluded agreement was not reached. Concentration on the words of the agreement ‘miss the point.’ On the evidence before me nothing was said in conciliation of this application that suggests the agreement was conditional in any case.

99 In this matter, the terms of the settlement that I earlier referred to were read out to the parties. It is my view therefore that application of the authorities to which I have referred in the present case is on all fours with a finding, the parties reached a binding settlement at the first conciliation conference.

Further observations

- 100 It is worthwhile noting some further observations regarding the path this matter followed, as they serve to reinforce my conclusion that the settlement the parties reached fell within the first category of settlements described in *Masters v Cameron*.
- 101 The first of these is that this matter followed a normal trajectory that most unfair dismissal claims that come before this Commission follow, resulting in the parties' reaching agreement on what are well understood terms of settlement.
- 102 In her Form 2 application, the applicant sought to have her dismissal converted to a resignation. It is well established and accepted that the conversion of a dismissal to resignation is a common feature of unfair dismissal settlements and that it is of value to a dismissed employee: see *Curtis* at paragraph [57]. The applicant secured this outcome through the settlement.
- 103 It is trite that 'full and final settlement of all claims' means all potential claims that may be made in respect of an employee's employment save and except for any claims for workers' compensation and/or superannuation.
- 104 I have reviewed the draft deed, together with the draft statement of service. I respectfully agree with the respondent's submission that the terms of the draft deed are standard terms. They are also not inconsistent with what the parties agreed in their settlement.
- 105 While a much less detailed document could have been generated and signed then and there at the completion of the conciliation conference, the draft deed does not impose any terms that exceed those that were agreed at the first conciliation conference. The parties also agreed the respondent would be tasked with preparing the deed.
- 106 The applicant sought the protection of a non-disparagement provision, mutual terms as to confidentiality and a statement of service to assist her when pursuing future employment opportunities. These terms are contained in the draft deed.
- 107 In addition to these observations, the terms of the draft deed are consistent with those the parties agreed to in the settlement and are consistent with those that are typically accepted by parties in the usual course of resolving unfair dismissal and other employment claims.
- 108 In other words, I do not consider the respondent has sought to impose something upon the applicant or to slip something into the draft deed that was not agreed at the first conciliation conference.
- 109 If the applicant had wanted to pursue a separate discrimination claim against the respondent, the applicant's representative should have raised this matter in negotiations between the parties. I accept the respondent's submission that the applicant's representative is sufficiently skilled and experienced to have known the settlement would operate as bar to bringing this claim and that he ought to have advised his client that this would be the case.

Applicant's medical condition

- 110 I do not accept the SCGH Letter, which was not obtained by the applicant until well after the first and second conciliation conferences provides a basis upon which the applicant can assert that she should not be bound by the settlement.
- 111 Firstly, the SCGH Letter does not specifically deal with the issue of whether the applicant's capacity to provide instructions during the first conciliation conference, was impaired because of the treatment she received.
- 112 In so far as it provides an evidentiary basis for the applicant to invalidate the settlement the SCGH Letter is equivocal. I have extracted the relevant paragraph relied upon by the applicant, regarding her health at the time of the conciliation conference.
- As a result of both her cancer and ongoing treatment she may experience troublesome symptoms which include fatigue, low mood, pain, headaches, nausea and vomiting, hot flushes fluid retention, arthralgia and myalgia, brain fog and visual changes.
- 113 While I do not doubt the applicant may, at some stage, have experienced some of the symptoms referred to in the SCGH Letter, the generalised nature of the information described in the paragraph referred to, is not sufficient to justify a finding the applicant lacked the capacity to agree to the settlement.
- 114 Secondly, the impact of the applicant's medical condition was not raised contemporaneously as the reason the applicant was seeking to resile from the settlement. Rather, the applicant's medical condition was not substantively raised as a reason to invalidate the settlement until after the respondent had filed its submissions.
- 115 If the applicant's judgement or capacity to make decisions at the time of the first conciliation conference was either impaired or adversely affected by her medical condition, it was incumbent upon the applicant's representative to have raised it at the time.
- 116 If the applicant's capacity to provide instructions was as impaired as is now being suggested, there were options that would have been available but were not raised. For example, the applicant's representative could have sought an adjournment. He could have asked for the settlement to be subject to a 'cooling off period.'
- 117 More importantly the applicant's representative should have raised that there was an issue of his client's capacity to provide instructions to settle her claim, immediately following the first conciliation conference, which did not happen.
- 118 For the reasons outlined in the preceding paragraphs [110] – [117] above, I am not satisfied the contents of the SCGH Letter provide a basis to conclude the settlement is not binding. Having reached this conclusion, it would be wrong for me to permit the applicant's unfair dismissal claim to proceed to hearing, in circumstances where the parties have agreed to settle the applicant's unfair dismissal claim.

Reinstatement unlikely

- 119 While the findings I have reached in relation to the settlement and the SCGH Letter, on their own, are sufficient to justify the decision to dismiss the applicant's unfair dismissal claim, I will note as an aside that even if I had permitted the applicant's claim to proceed to a hearing, she would have faced significant difficulty in securing an order for re-instatement.
- 120 There are two reasons for this. Firstly, re-instatement, contrary to what the applicant's representative stated in the email he sent to my Associate on 27 June 2024, was not originally sought as a remedy. If the applicant had always intended to pursue a claim for re-instatement, then she should have made that position clear, from the outset, in her originating Form 2 application.
- 121 In addition, the applicant, with what she stated in Part 2.1 of her Form 2 application has already conceded that reinstatement would be impracticable.
- 122 While the Commission is not a court of pleadings, it would not be unreasonable for the applicant to be held to what she declared in her Form 2 application. An order for reinstatement would be completely at odds with applicant's stated position regarding the difficulty in restoring her employment relationship with the respondent.
- 123 It is my view that in the absence of a justifiable explanation for a complete reversal of her view regarding the practicality of reinstatement, the Commission would be entitled to rely upon the position the applicant had previously and emphatically adopted in her Form 2 application.
- 124 Secondly, the position in which the applicant was employed will, because of the announced closure of the PRCCC from 9 October 2024 (which is unconnected to the applicant's unfair dismissal claim), be abolished.
- 125 Quite aside from what the applicant has stated asserted in her Form 2 application about the deterioration of her employment relationship with the respondent, the closure of the PRCCC that was announced in the all staff email and the public notice, would also render the remedy of re-instatement impractical.

Conclusion

- 126 For all the reasons outlined, I have concluded the applicant's unfair dismissal claim is the subject of a binding settlement the parties reached at the first conciliation conference.
- 127 It is open to conclude the reason the applicant now wants her claim referred to a hearing is because she has had a change of heart following the settlement. While the applicant may now have regrets about the basis upon which she decided to resolve her claim, it is not in the public interest for the applicant to be permitted to resile from the settlement.
- 128 Accordingly, I have determined that by reason of the settlement, this is a matter where it is reasonable, for an order to be made under s 27(1)(a) of the IR Act to dismiss the applicant's unfair dismissal claim.
- 129 While the applicant may not have signed the draft deed, so far as the Commission is concerned, the parties are to conduct themselves in accordance with the terms of the settlement they have reached.
- 130 To this end, I would expect the parties will adhere to the mutual provisions as to non-disparagement and confidentiality, even though the matters traversed in this decision will now be a matter of public record. I would also expect the respondent will send the applicant the statement of service.
- 131 An order in the terms I have proposed will now issue.

2024 WAIRC 00840

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROMAINE RATNAWIBHUSHANA

APPLICANT

-v-

CITY OF NEDLANDS

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

TUESDAY, 24 SEPTEMBER 2024

FILE NO/S

U 41 OF 2024

CITATION NO.

2024 WAIRC 00840

Result

Substantive application dismissed

Representation**Applicant**

Mr R Jones

Respondent

Ms S Maddern (of counsel)

Order

HAVING heard from Mr R Jones on behalf of the applicant and Ms S Maddern of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1976 (WA), hereby orders –

THAT the substantive application in U 41/2024 be dismissed.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

CONFERENCES—Matters referred—

2024 WAIRC 00951

DISPUTE RE CESSATION OF PAID SICK LEAVE FOR UNION MEMBERS WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2024 WAIRC 00951
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	ON THE PAPERS
DELIVERED	:	TUESDAY, 5 NOVEMBER 2024
FILE NO.	:	PSACR 3 OF 2024
BETWEEN	:	WESTERN AUSTRALIAN POLICE UNION OF WORKERS Applicant AND COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE Respondent

CatchWords	:	Industrial Law (WA) – s 44 referral for arbitration – representation by a legal practitioner – questions of law raised – substantial questions of law – no further claims - <i>Industrial Relations Act 1979</i> (WA) s 31
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Police Force Regulations 1979</i> (WA)
Result	:	Leave for Counsel to appear granted
Representation:		
Applicant	:	Mr S Farrell (as agent)
Respondent	:	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Civil Service Association of Western Australia Incorporated v Director General, Department of Justice (2003) 83 WAIG 503
Western Mining Corporation Ltd. v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others (1990) 70 WAIG 3525

Reasons for Decision

- 1 The Commissioner of Police, Western Australia Police Force (**the respondent**) seeks leave to be represented by counsel at the hearing in relation to this matter. The Western Australian Police Union of Workers (**the applicant**) objects to counsel appearing at the hearing.
- 2 The substantive matter before the Arbitrator concerns a decision the respondent made pursuant to reg 1304 of the *Police Force Regulations 1979* (WA) (the **Regulations**). On 26 April 2023, the applicant's member proceeded on paid sick leave. On 10 February 2024, the respondent informed the applicant's member that it would cease paid sick leave. Subsequently, on or around 22 April 2024 the respondent decided to commence the process of medically retiring the applicant's member and recommenced payment of sick leave.
- 3 The applicant seeks payment for that period and for annual leave accessed by the applicant's member during the relevant period to be restored. The applicant seeks that the Arbitrator review the cessation of payment and nullify the respondent's decision.
- 4 The respondent has applied to the Arbitrator for leave to be represented by legal counsel. As the applicant opposes the representation, I must decide whether to grant the respondent's application.

Applicant's Submissions

- 5 The applicant opposes counsel appearing in this matter for the respondent and submits that the Arbitrator ought not grant leave for the respondent to be legally represented because there is no serious issue of law to be argued in relation to this matter.

- 6 The applicant argues the only issue in dispute between the parties is the question of whether the Arbitrator should modify, nullify or vary the respondent's decision to cease the payment to the applicant's member during a period that the applicant's member was not fit to work.
- 7 The applicant contends that the respondent's decision involves an industrial matter, and the Arbitrator has the authority under s 80E (5) of the *Industrial Relations Act 1979* (WA) (**IR Act**) to review this decision. The applicant argues that the respondent's decision was unfair, and the respondent has exercised their discretion in an improper and harsh manner because the respondent did not consider relevant matters, and the respondent took into account irrelevant matters and/or made conclusions not supported by the evidence.
- 8 The applicant says that it has not argued that the respondent does not have the discretion to make the decisions it challenges nor is there any requirement to construe the regulations.

Respondent's Submissions

- 9 The respondent opposes the orders sought and submits that:
 - a. The applicant's substantive claim contravenes a 'no further claims' clause that is binding on the applicant;
 - b. The respondent's decision was not industrial unfair in all of the circumstances; and
 - c. The Arbitrator does not have the power to order the relief sought by the applicant.
- 10 The fundamental issue arising in these proceedings is whether it was industrially unfair for the respondent to refuse to grant paid leave for incapacity to the applicant's member under reg 1304 of the *Regulations*.
- 11 The respondent contends that in determining whether the impugned decision was unfair, a question concerning the proper construction of the regulations and what matters or factors the respondent may, must, or must not take into account, must be answered.
- 12 The respondent submits that a further issue arises because the discretionary power to grant paid leave for incapacity is provided for in cl 39 Entitlement to Leave and Allowances through illness or injury of the *Western Australian Police Force Industrial Agreement 2022 (2022 Agreement)*. As cl 9 of the 2022 Agreement provides that 'there shall be no further claims during the term of this Agreement', the applicant's claim seeks to improve upon matters contained in the 2022 Agreement and it is contrary to equity and good conscience to make the orders sought.
- 13 The respondent submits that if the applicant's claim for the respondent's decision to be quashed is granted, it does not follow that the respondent has then exercised their discretion to grant paid leave for incapacity. The respondent says in these circumstances, no decision would have been made at all and it follows the applicant's member would not have a basis to be paid during the period as he had been absent due to incapacity.
- 14 The respondent contends that the Arbitrator cannot grant the relief sought by the applicant. The respondent argues that the applicant is calling upon the Arbitrator to stand 'in the shoes of' the respondent and make a decision under reg 1304 that the applicant's member be granted paid leave for incapacity for a specified period which occurred in the past. This effectively is seeking the issuing of an order that has a retrospective effect which the Arbitrator is precluded from making under ss 44 (13) and 39 of the *IR Act*.

Findings and Conclusions

- 15 Section 31(4) of the *IR Act* provides as follows:

Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard.
- 16 In *Western Mining Corporation Ltd. v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others* (1990) 70 WAIG 3525 the Full Bench granted leave for counsel to appear. The Full Bench declined to set out a list of comprehensive principles for the exercise of the Commission's discretion and noted that a question of law must be raised or argued, or likely to be argued. The right of representation and the discretion to grant leave for a legal practitioner to appear is to be exercised consistent with the provisions of the *IR Act*, including the objects of the Act, and, in particular s 6(c):

to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;
- 17 Senior Commissioner Beech in *Civil Service Association of Western Australia Incorporated v Director General, Department of Justice* (2003) 83 WAIG 503 (CSA) observed at [504]:
 - [36] It may be able to be said that most, if not all, proceedings before the Commission may involve some question of law. This is because the Commission is a creature of a statute which operates in accordance with that statute and arguments may arise regarding the interpretation of the statute. Further, matters of employment law are frequently central to the issues which are brought to the Commission. The point to be made is that s.31 of the *Industrial Relations Act 1979* does not give a right to parties to be represented by counsel merely because a question of law is raised or argued or likely to be raised or argued. Therefore, the fact that a question of law may be raised of itself may not be sufficient justification for the Commission to exercise its discretion to permit counsel to appear. In other words, merely because the declaration and orders sought "relate or touch upon questions of law" (to quote from the respondent's letter of 21 February 2003) does not mean that counsel is to be given leave to appear.
 - [37] Rather, the question of law raised or argued, or likely to be raised or argued, should be a question of substance and not mere technicality. I say this because the Act provides means for settling disputes with the maximum of expedition and the minimum of legal form and technicality. The prospect of there being raised unnecessary legal

form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes may well not be the sort of consideration which would justify the exercise of discretion in favour of a legal practitioner appearing in a matter (*Western Mining Corporation v. AWU*, op.cit).

- 18 I find that it is not necessary to construe the regulations to determine whether the respondent exercised its discretion in an industrially fair manner in making the decision/s it did under reg 1304. The regulations provide a power to make the decision, and this is not contested. The memorandum of matters referred for hearing and determination under s 44 (9) of the *IR Act* set out the issues to be determined. The first issue is whether the exercise of the respondent's power under reg 1302 was industrially unfair. In reaching a determination I may need to form a view of whether the factors considered by the respondent were relevant or whether the respondent considered factors that are not relevant. However, this does not raise substantive matters of law.
- 19 Applying the observations of Beech SC in *CSA*, I find that the respondent's submissions concerning the operation and effect of the 'no further claims' clause in the 2022 Agreement, and the question of whether the Arbitrator has the necessary powers to make the orders sought by the applicant given the operation of s 39 of the *IR Act*, are matters that raise questions of law which are not insubstantial and the Arbitrator would benefit from the appearance of counsel.
- 20 Accordingly, leave is granted for the respondent to appear by legal practitioner.

2024 WAIRC 00953

DISPUTE RE CESSATION OF PAID SICK LEAVE FOR UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT**CORAM**PUBLIC SERVICE ARBITRATOR
COMMISSIONER T B WALKINGTON**DATE**

TUESDAY, 5 NOVEMBER 2024

FILE NO

PSACR 3 OF 2024

CITATION NO.

2024 WAIRC 00953

Result Leave for Counsel to appear granted**Representation****Applicant** Mr S Farrell (as agent)**Respondent** Mr J Carroll (of counsel)*Order*

HAVING HEARD from Mr Farrell on behalf on the applicant and Mr Carroll on behalf of the respondent, the Arbitrator, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the respondent's application to be represented by counsel is granted.

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

[L.S.]

UNIONS—Matters dealt with under Section 66

2024 WAIRC 00973

ORDER PURSUANT TO S.66

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
APPLICANT

-v-

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
FIRST RESPONDENT

ROMINA RASCHILLA
SECOND RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE TUESDAY, 12 NOVEMBER 2024
FILE NO/S PRES 13 OF 2024
CITATION NO. 2024 WAIRC 00973

Result Discontinued by leave
Appearances
Applicant Mr J Carroll of counsel
First Respondent Ms B Burke of counsel
Second Respondent In person

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.

[L.S.]

(Sgd.) S J KENNER,
 Chief Commissioner.

2024 WAIRC 00972

ORDER PURSUANT TO S.66

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 ROMINA RASCHILLA
APPLICANT

-v-

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH
RESPONDENT

REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INTERVENOR

CORAM CHIEF COMMISSIONER S J KENNER
DATE TUESDAY, 12 NOVEMBER 2024
FILE NO/S PRES 12 OF 2024
CITATION NO. 2024 WAIRC 00972

Result Discontinued by leave
Applicant In person
Respondent Ms B Burke of counsel
Intervenor Mr J Carroll of counsel

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.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2024 WAIRC 00887

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00887
CORAM : CHIEF COMMISSIONER S J KENNER
HEARD : THURSDAY, 3 OCTOBER 2024
DELIVERED : THURSDAY, 10 OCTOBER 2024
FILE NO. : PRES 10 OF 2024
BETWEEN :

ROMINA RASCHILLA

APPLICANT

AND

MARK OLSON

FIRST RESPONDENT

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS
PERTH

SECOND RESPONDENT

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION

INTERVENOR

Catchwords : Industrial Law (WA) – Application under s 66 *Industrial Relations Act 1979* (WA) for interim orders – Appointment of union Secretary to casual vacancy – Alleged non observance of union rules – Relevant principles applied – Serious issues to be determined and balance of convenience in favour of granting relief – Orders made

Legislation : *Health Practitioner Regulation National Law* (Cth) s 178(2)(a)
Industrial Relations Act 1979 (WA) s 6(e), s 6(f), s 26(1)(a), s 66, s 66(2)
Trade Practices Act 1974 (Cth)

Result : Order issued

Representation:

Applicant In person

First Respondent Mr N Parkinson of counsel

Second Respondent Mr M Clancy

Intervenor Mr J Carroll of counsel

Case(s) referred to in reasons:

Federated Clerks' Union of Australia (WA Branch) v Cary (1977) 57 WAIG 585

Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298

Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health [2011] WAIRC 00192; (2011) 91 WAIG 291

New South Wales Nurses' Association v Health Administration Corporation & Ors (1987) 23 IR 17

OD Transport Pty Ltd v Western Australian Government Railways Commission (1986) 13 FCR 270

Pigozzo v Mineral Resources Ltd (No 2) [2023] FCA 1489

Quickenden v Federated University Staff Association (1988) 25 IR 440

Raschilla v ANF and Registrar; Registrar v Raschilla and ANF [2024] WAIRC 00841

Re New South Wales Nurses' Association (1987) 23 IR 468

Robertson v Civil Service Association of Western Australia Incorporated [2003] WAIRC 10158; (2003) 83 WAIG 3938

Stacey v Civil Service Association of Western Australia (Incorporated) [2007] WAIRC 00568; (2007) 87 WAIG 1229

State School Teachers Union of WA (Inc) (1998) 78 WAIG 1123

World Series Cricket Pty Ltd v Parish (1977) 16 ALR 181

*Reasons for Decision***The application**

1 By an amended application made on 1 October 2024, the applicant Ms Raschilla, a Vice President and Council member of the second respondent, the Australian Nursing Federation, Industrial Union of Workers, Perth seeks an order under s 66 of the *Industrial Relations Act 1979* (WA) challenging the appointment by the Council of the ANF, of Mr Olson to the position of Secretary of the union, made on 30 August 2024. The appointment of Mr Olson by the Council to the position of Secretary, was to fill a casual vacancy arising from the resignation of the incumbent Secretary, Ms Reah, on the same date. In these proceedings, the applicant seeks interim orders, pending the final determination of the application, in the following terms:

2.1 THAT Mr Mark Olson is removed from the office of Secretary of the Australian Nursing Federation, Industrial Union of Workers Perth until further order of this Commission.

2.2 THAT the Council of the Australian Nursing Federation, Industrial Union of Workers Perth is able to fill the casual vacancy in the office of Secretary created by order (1) above by appointing an eligible member, other than Mr Mark Olson, to the casual vacancy under rule 24 of its registered rules, however, the term of any such appointment must be subject to any further order of this Commission.

2.3 THAT the parties have liberty to apply on short notice.

2 Affidavit evidence was filed by Ms Raschilla on her own behalf, by Ms Pontifex on behalf of the Registrar and by Mr Olson on his own behalf. The ANF did not file any evidence. Given the urgency of the matter, I listed the application for hearing for interim orders on 3 October 2024. The Registrar supported Ms Raschilla's application for interim orders, which were opposed by both Mr Olson and the ANF. In addition to her own affidavit, Ms Raschilla relied on the affidavit filed by Ms Pontifex.

Factual background

3 The evidentiary material filed in these proceedings was substantial, with the affidavits in support of and in opposition to the interim orders sought, running to some 744 pages of material. Whilst I have considered all of the affidavit evidence, given the nature of the present proceedings, and the relative urgency of the matter, what follows is a summary of the essential features of that evidence.

4 Ms Raschilla was elected as a Vice President and as a Council member, following the election of senior officers and half of the Council members, the results of which were declared on 17 October 2022. Ms Reah was at that time elected as the Secretary of the ANF. Both Ms Raschilla and Ms Reah were elected for a four year term.

5 Prior to this election, on 11 August 2022, the Registrar received correspondence from the ANF, to the effect that Mr Olson had resigned as the Secretary of the ANF on 28 July 2022 and Ms Reah had been appointed to fill the casual vacancy as the Secretary. At about the same time, Mr Olson was appointed to the position of Chief Executive Officer of the ANF. He subsequently resigned from this position in January 2023 and he appeared (at least initially) to cease duties in that position in about mid-July 2023. Since about late September 2023 or early October 2023, Mr Olson commenced performing casual work for the ANF, until about late July 2024.

6 In July 2024, a further election was held for offices in the ANF for the office of President, three Executive members and the other half of the Council. On 27 August 2024, the result of that election was declared. On 30 August 2024, the Secretary of the ANF, Ms Reah, resigned effective immediately. At an urgent Council meeting of the ANF held on the evening of 30 August 2024, the resignation of Ms Reah was accepted and Mr Olson was appointed by the Council to the office of Secretary, by the filling of a casual vacancy. This appointment was confirmed in a letter from the ANF to the Registrar dated 2 September 2024.

7 As the factual background from 2022 is quite complex, based on Ms Pontifex's affidavit, the Registrar provided a chronology of relevant factual matters which was annexed to her written submissions. The chronology provided a summary of relevant events from April 2022 to the most recent events in September 2024, in table form. The chronology is in date order, from the

most recent events. For the purposes of understanding the submissions made, in the context of the relevant factual history, the chronology annexed to the Registrar's written submissions will be annexed to these reasons for decision.

- 8 As this is an application for interim orders, it is not appropriate for me to make findings on contested matters of fact. The application is to be decided on the affidavit evidence, without the rigour of a contested final hearing. The statements made in the affidavit evidence, for the purposes of determining the application, are to be accepted as true, subject to certain conditions: *Pigozzo v Mineral Resources Ltd (No2)* [2023] FCA 1489 per Feutrill J at [15]. As to these matters, the evidence contained in Ms Pontifex's affidavit did not conflict with the evidence adduced by Mr Olson, and as I have already observed, there was no evidence put on by the ANF. I will return to this observation later in these reasons.
- 9 Mr Olson first joined the ANF in May 1994. He has been a registered nurse since 1984, and was registered with the Nurses Registration Board of New South Wales, and subsequently the Nurses Board of Western Australia, now the Australian Health Practitioners Regulatory Authority. Mr Olson has been a financial member of the ANF since 1994 to date. The meaning and effect of 'a financial member of the union', for the purposes of the ANF Rules, is a matter in contest in these proceedings, and I will consider it further below.
- 10 Apart from the evidence as to Mr Olson's professional and work history, I touch on some of the other evidence before me. Ms Raschilla referred to a number of allegations against Mr Olson as Secretary of the ANF, by staff of the Union. These relate to allegations of bullying and harassment over the course of 2021 and 2022, which led to regulatory bodies including WorkSafe Western Australia and the AHPRA taking some action. Additionally, workers' compensation claims were referred to by Ms Raschilla, made by staff of the ANF, arising from similar allegations.
- 11 According to Ms Raschilla, these matters led to the issuance by WorkSafe of two Provisional Improvement Notices to the ANF in February 2022, in relation to psychosocial hazards in the workplace. Reference was also made by Ms Raschilla to a caution issued to Mr Olson under s 178(2)(a) of the *Health Practitioner Regulation National Law*. Despite these events, Ms Raschilla testified that no mention of these matters has been made by Mr Olson to the Council, and she could find no record of them in Council meeting minutes, from October 2022 to date.
- 12 Some other matters were raised by Ms Raschilla. These included Mr Olson, in a meeting on 20 September 2024, proposing expenditure of \$3m for a campaign in the upcoming public health enterprise bargaining negotiations. Ms Raschilla said that at the meeting, she requested the production of a business plan as to how such a sum of money should be expended, and Mr Olson refused to do so. The Council endorsed the motion for this expenditure. Ms Raschilla maintained that as a result, Mr Olson has \$3m of ANF funds to spend without proper Council oversight. I should add that in the course of the hearing, counsel for Mr Olson tendered as an exhibit (exhibit FR1) email correspondence between Ms Raschilla and the newly elected President of the ANF, Mr Poole. In Mr Poole's email of 2 October 2024, he informs Ms Raschilla that he had followed up with Mr Olson and 'secured assurances from him that any major expenditure at and above \$50,000 for each of these campaigns, will be referred to the Executive for prior approval going forward'.
- 13 Other matters raised by Ms Raschilla concerned a general complaint regarding a lack of openness and transparency by Mr Olson, when dealing with the Council, concerning matters such as expenditure by the ANF on strata fees for holiday accommodation owned by the union; proceedings in the State Administrative Tribunal in relation to some of the holiday units; and additionally, potential liability of the ANF to the Australian Taxation Office, regarding a tax audit. Other allegations made by Ms Raschilla also include claims of nepotism, with members of the Council and Mr Olson's wife, being employed by the ANF in various positions, leading to conflicts of interest.
- 14 Much of Mr Olson's evidence in his affidavit dealt with his involvement in enterprise bargaining negotiations on behalf of the ANF, from 1998 to 2022. He referred to the industrial agreement negotiations in the public health service, as being the pace setter for the private health sector, with such industrial agreement negotiations being the most important work of the union. He said that this has been affirmed by the Council, the Executive and members of the ANF. Mr Olson referred to these industrial agreement campaigns as hard fought and of great significance for the union.
- 15 He noted that the current WA Health System industrial agreement for nurses and midwives, is due to expire on 10 October 2024. The negotiations for its replacement commenced in mid-September 2024. As the leader of the campaign, Mr Olson expressed the view that if he were to be removed from the office as Secretary, on an interim basis, then this may have a serious compromising effect on the ANF's capacity to prepare for and to negotiate the new public health industrial agreement. His evidence was this could be potentially prejudicial for the members of the ANF.
- 16 As to his appointment to fill the casual vacancy caused by Ms Reah's sudden resignation, Mr Olson testified that the then President convened an urgent meeting of the Council on 30 August 2024 at 7.00 pm. The ANF Senior Vice President, Ms Murphy, moved a motion to accept Ms Reah's resignation and to appoint Mr Olson to the casual vacancy as Secretary. The motion was seconded, and members of the Council spoke both in favour of and against the motion. The motion was put to a vote and it was carried by a majority of 10 to eight votes.

Relevant principles

- 17 Recently, in *Raschilla v ANF and Registrar; Registrar v Raschilla and ANF* [2024] WAIRC 00841, in Summons to Show Cause proceedings, I referred to the relevant principles in relation to the grant of interim orders under s 66 of the *Act* at [5] - [6] as follows:
- [5] The relevant principles to apply in relation to applications for interim orders are not in contest. A party seeking orders under s 66(2) of the *Act* must establish that the orders sought relate to the rules of an organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case. I am satisfied based on the evidence and submissions made that this requirement is met in both of these matters.
- [6] Second, the seeking of interim orders involves the application of principles applicable to the granting of interlocutory injunctions. It goes without saying of course, that the Commission must also consider the

applications and exercise its jurisdiction in accordance with equity and good conscience, as s 26(1)(a) of the *Act* requires. For present purposes, I refer to the decision in *Quickenden v Federated University Staff Association* (1988) 25 IR 440, where French J referred to the two criteria for the grant of interim orders at pp 446-447 of his judgment. These two criteria are firstly, the existence of a prima facie case or put differently, serious issues to be determined, and secondly, that the balance of convenience favours the grant of relief. This case was cited with approval by the Industrial Appeal Court in *Carter and Ors v Drake* (1991) 72 WAIG 2501 at 2846.

- 18 I adopt and apply this approach for present purposes. Of note, in considering each criterion as to a serious question to be tried, and the balance of convenience, they are not independent. As was observed by French J in *Quickenden* at 446:

The two criteria are not independent:

“ ... an apparently strong claim may lead a court more readily to grant an injunction when the balance of convenience is fairly even. A more doubtful claim (which nevertheless raises ‘a serious question to be tried’) may still attract interlocutory relief if there is a marked balance of convenience in favour of it.” - *Bullock v Federated Furnishing Trades Society of A/asia (No. 1)* (1985) 10 IR 18 at 22; 5 FCR 464, 472.

- 19 Additionally, the effect of the proposed restraint on third parties was also noted by French J at 446, in citing *OD Transport Pty Ltd v Western Australian Government Railways Commission* (1986) 13 FCR 270 at 282 – 283. In that case, brought under the then *Trade Practices Act 1974* (Cth) for the acceptance of an undertaking, resulting from an agreement between the parties in lieu of an injunction, French J noted the need for the court to consider, in proceedings under the *Trade Practices Act*, not just the interests of the parties, but also the public interest, citing *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 186 and 203 - 204.
- 20 This broad principle will be conditioned by any relevant statutory context. Under the *Act*, this is made explicitly clear in that the Commission, in the exercise of its jurisdiction, ‘must have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; ...’: s 26(1)(c) *Act*. In this case, these interests obviously include Ms Raschilla, Mr Olson and the ANF. Given that the ANF Rules in r 3 - Objects makes it clear that the organisation exists for the benefit of its members, then the impact on members of the ANF must also be considered in the exercise of my discretion in this matter. As to the public interest, it is clearly in the public interest that registered organisations under the *Act*, observe their Rules and that they be ‘kept on track’: *Stacey v Civil Service Association of Western Australia (Incorporated)*[2007] WAIRC 00568; (2007) 87 WAIG 1229. Such considerations are also consistent with the objects of the *Act* in ss 6(e) and 6(f).

Relevant rules of the ANF

- 21 A number of the ANF rules were referred to in argument by the parties in the proceedings. It is convenient to set them out now. The first is r 4 - Membership which is in the following terms:

4 - MEMBERSHIP

Membership of the Union shall be open to all persons who fall within the categories set out in sub-rules (1) and (2) below:

- (1) (a) A member shall be a person who is an employee within the meaning of the Act:
- (i) employed in the profession or industry of nursing and being registered or entitled to be registered with the Nurses Board of WA; or
- (ii) a student nurse training in a school for nurses registered with the Nurses Board of Western Australia, or persons who have left their training schools after having completed the prescribed period of training in Western Australia and who intend to sit for examinations arranged by the Nurses Board until such persons are entitled to be registered as nurses.
- (b) A person who has been appointed to a paid position as an employee of the union and who by virtue of such appointment is not eligible to be a member of any other registered organisation pursuant to the Act whether or not such person is entitled to be registered as aforesaid.
- (2) Honorary members who shall not be entitled to take any part in any elections or to vote on any matter.
- (i) who have left the profession or industry of nursing, or
- (ii) Providing that no form of honorary membership shall be open to such persons who come within the definition of "employer" within the meaning of the Industrial Relations Act 1979 as amended,
- (iii) who have had conferred upon them by the Council the title of "Distinguished Honorary Member" for distinguished service in or for the nursing profession. Not more than three persons shall be accorded this category of membership in any year.

Providing that no form of honorary membership shall be open to such persons who come within the definition of "employer" within the meaning of the Industrial Relations Act 1979 as amended.

- (3) A Member who has ceased to be an "employee" in the profession or industry of nursing shall not be entitled to retain membership under the provisions of sub rule (1) of this Rule and the Council may terminate the membership of any such member upon written advice to the member of its intention so to do.
- 22 Rule 9 - Termination of Membership deals with how a person’s membership of the ANF may cease. It is relevantly provided in r 9(1) as follows:
- (1) A member shall cease to be a member when:

- (a) he or she is expelled for a breach of these rules, or
 - (b) the period of notice of intention to resign (unless previously withdrawn) has expired, or
 - (c) he or she is unfinancial for a period of more than three months, or
 - (d) being eligible for membership solely because he or she was appointed to a paid position as an employee of the Union and is no longer so eligible, or
 - (e) he or she dies.
- 23 Qualification for election to office in the ANF is dealt with in r 19 - Qualification For Office And Nominations. The relevant sub-rule for present purposes is r 19(2) which is as follows:
- (2) A candidate for election to the office of Secretary shall have been a financial member of the Union for a period of two years immediately preceding the date of nomination for office, providing that where such a candidate has been a financial member of a nursing organisation in another state, and such membership was transferred to the Union under the provisions of Rule 8 of these Rules, one year's financial membership of the Union since the date of transfer shall suffice.

- 24 Casual vacancies in office occurring within the ANF, and how they are filled, is the subject of r 24 - Casual Vacancies. It relevantly states:

24 - CASUAL VACANCIES

- (1) Where any casual vacancy occurs in any elected office of the Union and the unexpired part of the term of the office does not exceed:
 - (a) 12 months; or
 - (b) three quarters of the term of the office, whichever is the greater, the Council may fill that casual vacancy by appointing thereto a person who is eligible to nominate for and hold the office in question.

...
 - (7) In this Rule the expression 'term', in relation to an office, means the total period for which the last person elected to the office by an election (other than an election to fill a casual vacancy in the office) was entitled by virtue of that election to hold the office without being re-elected.
- 25 Reading rules 19(2) and 24(1)(b) together, it is clear that the Council may only appoint a person to a casual vacancy as Secretary of the union, if the person has 'been a financial member of the Union for a period of two years immediately preceding the date of nomination for office'. In my view, reading the Rules sensibly, in the case of an appointment to a casual vacancy under r 24(1)(b), the words 'preceding the date of nomination for office', in s 19(2) should be read as 'preceding the date of appointment to the casual vacancy' in question. In this case, that means Mr Olson must have been eligible to be a member of the ANF for two years immediately preceding the date of his appointment to the casual vacancy on 30 August 2024.
- 26 A further issue arising in this case, is the nature of work performed by Mr Olson when he commenced undertaking casual employment with the ANF, from about late September or early October 2023. A contention advanced by both Ms Raschilla and the Registrar, was that in applying r 4(1)(b) of the ANF membership rule, the exclusion in that rule operated. The union concerned is the Western Australian Municipal, Administrative, Clerical and Services Union of Employees. Rule 5 - Membership of the WASU Rules provides relevantly:

The Union shall also consist of:

- a. persons, male or female, *engaged in any clerical capacity*, including telephonists, or in the occupation of shorthand writing or typing or calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.
- b. provided that no person shall be a member who is not an employee within the meaning of the "Industrial Relations Act, 1979". (My emphasis)

Contentions of the parties

- 27 Ms Raschilla maintained that the terms of r 4 - Membership, properly construed, requires that a person is eligible for membership of the union if the person is an employee within the meaning of the *Act*; and is employed by an employer in the industry of nursing; or is employed by an employer in the profession of nursing; and the person is registered with AHPRA or is entitled to be registered. Alternatively, that the person has been appointed to a paid position within the ANF and that person is not eligible to be a member of another organisation registered under the *Act*.
- 28 Based upon the chronology provided by the Registrar, Ms Raschilla submitted that it is evident that there are two significant gaps in Mr Olson's employment history affecting his eligibility for membership of the ANF. The first is from about 9 July 2023, when Ms Raschilla alleged Mr Olson ceased being the CEO of the union to about 4 October 2023, when he commenced casual employment, a gap of about eight weeks. Secondly, the period from when Mr Olson's casual employment seemed to have ceased, on about 23 July 2024, until he was appointed to the casual vacancy as Secretary on 30 August 2024, a further gap of about five weeks.
- 29 It was Ms Raschilla's contention that even if employment with the ANF could be characterised as employment in the industry or profession of nursing, which Ms Raschilla contests, then there is a serious question to be determined as to whether Mr Olson could have been so employed. On this basis, Ms Raschilla contended that regardless of whether one considers r 4(1)(a) or (b),

there is a serious question to be determined whether Mr Olson was employed as an employee over this entire period and therefore, whether he met the minimum two year eligibility requirement for membership.

- 30 Regardless of this, Ms Raschilla contended that employment by the ANF does not constitute employment ‘in the profession or industry of nursing’, for the purposes of r 4(1)(a)(i). She submitted that a person employed by the ANF is employed in the industry or profession of the labour movement, because the ANF provides industrial services and social benefits to members as a union, and could not be properly characterised as a body engaged in the profession or industry of nursing as such.
- 31 Ms Raschilla contended that the meaning of this subrule is that a person must be employed in the professional calling as a nurse and the terms of r 4 cannot be construed reasonably otherwise. As to the nature of employment by a union, Ms Raschilla referred to the decision of Sharkey P in *State School Teachers Union of WA (Inc)* (1998) 78 WAIG 1123, at 1126 and 1127. Reference was also made to *Re New South Wales Nurses Association* (1987) 23 IR 468 at 469-470 in relation to how a similar rule of the nurses’ union in New South Wales should be construed.
- 32 As to the terms of r 4(1)(b), Ms Raschilla contended, in reliance upon the Registrar’s submissions, that if consideration needs to be given to this subrule regarding Mr Olson’s eligibility for membership, then it is also not satisfied. This is because, as the Registrar submitted, performing the work that he did as a casual employee, could only be reasonably characterised as ‘clerical work’ for the purposes of the eligibility for membership rule of the WASU, set out above.
- 33 On these bases, Ms Raschilla contended there are serious issues to be determined as to Mr Olson’s eligibility to be a member of the ANF at the material time and thus, whether his appointment by the Council to the casual vacancy of Secretary, was a valid appointment.
- 34 As to the balance of convenience, Ms Raschilla generally adopted the submissions of the Registrar. She submitted that as the principal officer of the ANF, largely in control of the operations of the union and its finances, it is important that there be no doubt as to the validity of the appointment. Ms Raschilla also referred to the evidence, summarised above, regarding allegations that Mr Olson has a history of not fully informing the Council of significant matters affecting the union and its governance.
- 35 On behalf of the Registrar, a number of contentions were advanced. It was submitted that there are serious questions to be determined as to whether Mr Olson was eligible to be a member of the ANF under either r 4(1)(a)(i) or r 4(1)(b), over the two year period prior to 30 August 2024, when he was appointed by the Council. Reference was made to the requirements of r 19(2) and r 24(1), to the effect that when read together, Mr Olson could only have been validly appointed to the casual vacancy in the office of Secretary if he had been a ‘financial member of the (ANF) for a period of two years immediately preceding’ his appointment.
- 36 The Registrar contended that r 19(2) clearly requires, not just that a person be ‘financial’ and be on the ANF’s register of members, but they must also have been eligible for membership over the two year period. In reliance on r 9(1)(d) of the ANF Rules, the Registrar submitted that this rule is to the effect that where a person is only entitled to be a member of the ANF under r 4(1)(b), being appointed to a paid position, on any day when the person is not employed by the ANF, their membership of the union is terminated and thus, the continuity of membership for the purposes of r 19(2), is interrupted. It was accepted in the course of argument that in the case of causal employment, a person could still be regarded as an ‘employee’ as long as their usual status is such, for the purposes of the definition of ‘employee’ in s 7 of the *Act*.
- 37 The Registrar referred to three relevant time periods giving rise to serious questions to be determined as to Mr Olson’s eligibility to be a member of the ANF. The first time period was from the cessation of his service as the ANF CEO, which the Registrar, upon all of the initial evidence, appeared to be in or about late July 2023. This was based in part on a resolution of the ANF Council on 28 July 2023, to the effect that Mr Olson could retain the use of his ANF laptop computer and retain access to the ANF computer systems, in order for him to ‘assist the ANF staff when required’ (see the affidavit of Ms Pontifex annexure SP10 at p 264).
- 38 Between about 1 July 2023 and 30 June 2024, various payments were made to Mr Olson for long service leave on termination of employment and sick and annual leave entitlements for the same. The Registrar noted that in accordance with the directions made by the Commission, there had been no discovery given by Mr Olson or the ANF, of a payslip(s) identifying the actual date that any such payments were made. During the course of the hearing, further documents were produced by Mr Olson and tendered as exhibit FR2.
- 39 These documents were payslips reflecting payments made to Mr Olson by the ANF on 13 July 2023, 26 July 2023, 9 August 2023, 23 August 2023 and seemingly, a final payment on 6 September 2023, including amounts for long service leave, sick leave and annual leave on termination of employment. The Registrar therefore contended that if such payslips are evidence of work performed and not just payments made, then at the latest, Mr Olson completed his employment as the CEO on 6 September 2023. It was contended that this confirms there was a break in Mr Olson’s employment, given he did not commence any casual work until the pay period commencing on 18 September 2023 (see affidavit of Ms Pontifex at p 518).
- 40 Such a break on the Registrar’s case, would engage r 9(1)(d) of the Rules, therefore making Mr Olson ineligible for appointment as the Secretary by the Council. The Registrar contended therefore that a serious question arises as to a break in employment of Mr Olson by the ANF either from late July 2023, or from 6 September 2023, to when he first commenced casual employment.
- 41 Neither Mr Olson nor the ANF, despite the opportunity to do so, gave any evidence in relation to Mr Olson’s employment with the union up until his appointment by the Council to the casual vacancy of Secretary on 30 August 2024.
- 42 The second basis advanced by the Registrar, was that at the time of performing casual work for the ANF from about late September to early October 2023, the nature of the work performed, even given the very limited evidence, was not work performed in the profession or industry of nursing. From the discovered documents it appears that this work included a new ANF invoice system; the SAT hearing; staff pays; attache training; EBA queries and queries from staff; drafting emails to

members regarding election changes; industrial advice; holiday unit matters; finalising wording for emails to members; extracting a distribution list and sending an email; drafting a Facebook post; industrial matters; draft correspondence; AGM material; and work on Helpline etc (see affidavit of Ms Pontifex at annexure SP12 pp 516-517; p 527; pp 529-551). If reliance is placed on r 4(1)(b) to establish membership, the Registrar submitted that this gives rise to whether, in performing the above casual work, Mr Olson was ineligible to be a member of the ANF, because he was at that time engaged in the performance of 'clerical work', and eligible to be a member of the WASU.

- 43 The Registrar contended therefore, in reliance upon *Federated Clerks' Union of Australia (WA Branch) v Cary* (1977) 57 WAIG 585, that based on the broad description of the work performed by Mr Olson from the ANF records, there is a serious issue to be determined that the work performed was clerical work, bringing into play the exclusion in r 4(1)(b). Additionally, from the documentary evidence as to the casual work performed by Mr Olson, it is not clear whether the engagements were in accordance with a continuous contract or whether they were one off contracts.
- 44 The third basis for supporting a serious issue to be determined, on the Registrar's submissions, is the period from Mr Olson's cessation as a casual employee on or about 23 July 2024 on the evidence, to his purported appointment as the Secretary, on 30 August 2024. The Registrar contended that based on the material annexed to Ms Pontifex's affidavit, the conclusion is open that Mr Olson performed no further casual work for the ANF on or after this date. As to the letter from Peregrine Medical, dated 16 September 2024, (see Ms Pontifex's affidavit annexure SP10 at p 262), the Registrar submitted it raises more questions than it provides answers. At face value, it refers to Mr Olson being engaged as a casual with Peregrine Medical from August 2024 however, a serious issue arises as to what that in reality means, and whether this constituted continuous eligibility for membership of the union.
- 45 The questions arising from this letter on the Registrar's submissions, included why the letter was issued on 16 September 2024, when reference is made to alleged casual engagement from August 2024. It was contended that there is no documentary or other evidence about the offer of casual employment, nor is there any evidence before the Commission of payslips or records of hours worked. The Registrar's submission on this issue was there is simply no evidence before the Commission from Mr Olson, as to his employment, if any, by this organisation, giving rise to a further serious issue to be determined as to Mr Olson's employment status from on or about 23 July to 30 August 2024.
- 46 As to the balance of convenience criterion, the Registrar advanced four reasons why this criterion is strongly in favour of the grant of an interim order.
- 47 The first point relates to the nature of the office of Secretary of the ANF and the importance of the position to the ongoing day to day management of the organisation. In this regard, reference was made to the delegated powers to the Secretary as the principal officer of the ANF, in addition to the important responsibilities set out in the Rules themselves. It was submitted that the proposed order 2, enabling the Council to appoint a person to the casual vacancy of Secretary would protect the union and enable a Secretary to be appointed, as well as enabling Mr Olson to be returned to his position, if final relief is not granted.
- 48 As an extension of the first issue, the Registrar submitted that given the extensive powers of the office of Secretary, and the effect of the exercise of those powers on the union, its members and also third parties, then this is strongly in favour of the grant of an interim order. It was submitted that there would be serious questions over the validity of Mr Olson's decisions on behalf of the union and the members, if his appointment is ultimately held to be invalid.
- 49 The third issue raised was that whilst ordinarily, the removal of a person temporarily from a position would generally weigh against the grant of relief, the present situation is unique. It was contended that Mr Olson is only occupying a casual vacancy and has not been elected by the union's membership. Additionally, the evidence is that Mr Olson originally expressed his desire to retire from involvement with the ANF. His election as a member of the Council, was an unpaid position.
- 50 The fourth issue initially raised by the Registrar, was that a strong inference is open that discovery from Mr Olson and the ANF has not been complete. Reference was made to the absence of bank records or payslips, showing when Mr Olson was paid out his final entitlements as the CEO. As noted however, payslips relating to this issue were produced late in the day, and tendered in evidence by Mr Olson.
- 51 Also, given that there is no evidence that Mr Olson was recruited from another paying position to take up the appointment to the casual vacancy, and given the suddenness of the events following Ms Reah's unexpected and immediate resignation, Mr Olson could have had no expectation of holding the office of Secretary and earning the remuneration payable in that office, according to the Registrar's submissions.
- 52 Mr Olson firstly contended that the interim relief sought, that being his removal as the appointed Secretary of the ANF, was in reality the final relief sought. On this basis, the interim relief should not be granted. Furthermore, the contention was advanced that no serious questions to be determined had been established.
- 53 Whilst Ms Raschilla made an allegation in the amended application that there was a denial of procedural fairness at the Council meeting on 30 August 2024, this was not pressed in Ms Raschilla's submissions in support of interim orders. Mr Olson contended there was no denial of procedural fairness. Based upon the conduct of the meeting, Mr Olson submitted that the process was in accordance with the usual procedures for a Council meeting under the ANF Rules. Even if it was inappropriate for Mr Olson to remain in the meeting and to vote for himself, which arguably it was, Mr Olson submitted that this would have made no difference to the outcome, as the motion for his appointment would still have passed by a majority vote.
- 54 Secondly, Mr Olson submitted that on a proper construction of the Rules, the meaning of 'a financial member of the Union' in r 19(2), does not mean, contrary to the Registrar's submission, that a person must also be eligible to be a member of the ANF. It was contended that viewing the Rules as a whole, once a person's application for membership has been accepted by the Secretary, and that person has paid their membership fees they are a 'financial member'. This is so, as Mr Olson's submissions went, until such time as the Council, under r 4(3) of the Rules, terminates the membership of a member who has

ceased to be eligible under r 4(1). Until such time, Mr Olson contended that a person remains a 'financial member' of the ANF despite the fact that they may not be eligible to be a member.

- 55 As to the argument of the Registrar that r 9(1)(d) of the Rules operated in this case, Mr Olson submitted that this rule had no application to him. This was on the basis that Mr Olson contended that r 9(1)(d) only applies effectively on a 'one off' basis. As I understood the submission, it was that r 9(1)(d) would only operate where, at the time of an application for membership, the person was only eligible to be a member of the ANF due to being appointed to a paid position as an employee. It is only on this basis, that a person becomes ineligible for membership because they no longer hold a paid position.
- 56 It was submitted that at the time Mr Olson first became a member of the ANF, he was eligible under r 4(1)(a)(i) of the Rules, being employed as a nurse in the profession of nursing and being registered by the then Nurses Board of WA. This was his sole eligibility for membership and not his subsequent appointment to a paid position with the union. Mr Olson submitted that it is immaterial that he subsequently became eligible to be a member under r 4(1)(b), as a paid employee.
- 57 On this construction of the Rules, Mr Olson contended that the only way in which his membership could cease, is a determination of the Council under rule r 4(3) or the operative parts of r 9(1), other than (d). Accordingly, Mr Olson submitted that he was a financial member of the ANF for the required time and was eligible to be appointed to the casual vacancy of Secretary under r 24(1) on 30 August 2024.
- 58 As to the balance of convenience, Mr Olson submitted that there is no identified damage to Ms Raschilla, but Mr Olson the ANF would suffer significant damage. It was contended that Mr Olson would suffer financially in the event that the interim orders were granted. This is particularly so, given the absence of any undertaking as to damages, accepting that in this jurisdiction, there is no requirement for such and there is uncertainty as to whether any such undertaking could be received or enforced: *Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health* [2011] WAIRC 00192; (2011) 91 WAIG 291. It was contended that the failure of any such undertaking being given, weighs heavily against the grant of relief.
- 59 A major factor relied on by Mr Olson and also the ANF, was Mr Olson's expertise and experience in negotiating enterprise agreements in the WA public health system, and the importance of this role for members of the ANF. It was submitted that if Mr Olson was not able to undertake this task, this would seriously compromise the process for bargaining for a replacement industrial agreement in circumstances where such matters would be hard fought. Furthermore, given the pace setting nature of negotiating in the public health sector, the impact on the private health sector is also a matter of significance.
- 60 Mr Olson was also critical of aspects of Ms Raschilla's affidavit, raising matters such as those relating to the lack of transparency regarding strata levies for the holiday units and the SAT proceedings for example, and suggested these and some other matters were broad, vague and speculative and should not be given any weight. I should note however, that conclusions of independent bodies such as WorkSafe and AHPRA, cannot be placed in that category and are matters of some relevance. Additionally, if a tax audit, potentially exposing the union to penalties, has not been disclosed to the Council, this would be a matter of concern. The manner of obtaining the \$3m very recently, for funding the ANF enterprise bargaining campaign, is clearly of significance and is relevant to these proceedings. I will comment specially on that matter further below.
- 61 As to the allegation in Ms Raschilla's affidavit that Mr Olson did not disclose to the Council at its meeting on 20 September 2024, my reasons for decision and orders in applications PRES 12 of 2024 and PRES 13 of 2024, this was clearly of concern to me, given the orders I made in those applications, in the directions hearing listed immediately prior to the hearing in this matter commencing. I should note that Mr Olson had the opportunity, through his counsel in these proceedings, to contest Ms Raschilla's allegations in this regard, and to seek leave to put on evidence rebutting them, but no such submission or application was made.
- 62 The ANF generally adopted and supported the submissions and evidence of Mr Olson and opposed the interim orders being sought. The ANF placed emphasis on the current negotiations for a new public sector health industrial agreement to replace the current agreement, which expires on 10 October 2024. The ANF referred to Mr Olson's extensive experience in negotiating industrial agreements on behalf of the ANF, and submitted that those negotiations would be seriously compromised if the interim orders were made.
- 63 Furthermore, the ANF submitted that Mr Olson would be deprived of his income as the Secretary if the orders were made, and that the Council meeting leading to his appointment on 30 August 2024, was made in accordance with the Rules. Accordingly, the balance of convenience weighs against the grant of interim relief.

Consideration

Serious issues to be determined

- 64 Whilst Mr Olson contended that the interim orders sought in this case are tantamount to final relief, the orders sought by the Registrar (and Ms Raschilla in her amended application) are interim in nature. The orders sought enable the ANF to appoint another person to the casual vacancy created by Ms Reah's resignation, pending the final hearing of the matter. It must be borne in mind that Ms Reah's term of office of Secretary was until October 2026. In the event Ms Raschilla and the Registrar are unsuccessful in terms of final relief, there would be nothing standing in the way of Mr Olson being restored to the position of Secretary, for the remainder of the term.
- 65 In my view, for the following reasons, there are serious issues to be determined in this matter, as to whether Mr Olson was validly appointed by the ANF Council to the vacant position of Secretary, on the basis that he met the requirement to be a financial member of the ANF for two years immediately prior to the appointment. The fact that apart from the tender of some payslips in exhibit FR2, neither Mr Olson nor the ANF have sought to put on any evidence as to Mr Olson's employment with the ANF after he ceased as the CEO, when such evidence was plainly open for them to lead, leaves open a *Jones v Dunkel* ([1959] HCA 8; (1959) 101 CLR 298) inference that such evidence would not have assisted them in this matter. I draw such an inference.

- 66 It was open to Mr Olson to contest the allegations based on Ms Pontifex's affidavit as to the gaps in his employment history with the ANF in the period after he ceased as the CEO, but he elected not to provide such evidence. Nor has the ANF sought to put on any evidence before me as to these matters, when it could have done so. There is also no independent evidence from the ANF as to the importance to the union of the negotiations for a replacement industrial agreement, its campaign and its impact on members. Such evidence could have easily been led, given the evidently self-serving nature of that evidence adduced through Mr Olson.
- 67 I consider there are serious questions to be determined as to the proper construction of the ANF Rules concerning eligibility for membership under r 4. A focus of Ms Raschilla's case was that work performed by Mr Olson for the ANF was not work done as an employee 'employed in the profession or industry of nursing' for the purposes of r 4(1)(a)(i) of the Rules. I do not suggest this issue is conceded by Mr Olson. But in my view, given the nature of the ANF as a registered industrial organisation, the principal purpose of which organisation under the *Act* is to promote and protect the industrial interests of its members, and given the ordinary meaning of the phrases 'profession of nursing' and 'industry of nursing', there is a live issue as to whether an employee of the ANF can be held to be so engaged: *SSTU; New South Wales Nurses' Association v Health Administration Corporation & Ors* (1987) 23 IR 17; *Re New South Wales Nurses' Association*.
- 68 The thrust of Mr Olson's case turns on the meaning of the phrase 'financial member of the Union' for the purpose of r 19(2). As noted, once Mr Olson became a member of the union by reason of his prior employment as a nurse, and continued to pay his subscriptions, on Mr Olson's case, whatever occurred after this had no impact on his status as a financial member for the purposes of the Rules. Thus on this footing, Mr Olson contended that it was not necessary to consider the evidence led in these proceedings, as his view of the operation of the Rules provides a complete answer. This does not however, alter my view as to the drawing of an adverse inference as above, given it was open in the alternative, to both Mr Olson and the ANF to put on evidence to rebut Ms Raschilla's and the Registrar's evidentiary cases.
- 69 Mr Olson conceded that if his view of the proper interpretation of the relevant Rules is correct, then some odd results may follow. As I put to Mr Olson's counsel in the course of the hearing, it could mean that a person who was a nurse in the profession, as a member of the ANF, decided to retrain in another profession or calling, as a teacher, engineer or in a trade, that person would continue to be eligible to be a member. On Mr Olson's view of the Rules, if that person continues to pay their subscriptions, they simply continue as a 'financial member' despite patently, them no longer being eligible for membership under r 4, as not being employed in the industry or profession of nursing. It was submitted that unless the Council acts to terminate a member's membership in these circumstances under r 4(3), this will be the result. In my view this would be an extraordinary outcome. It means that the character of the ANF could be changed fundamentally, from an organisation representing nurses and midwives, to something else.
- 70 Allied to this, is the fact that such a person, on the basis of the requirements of r 19, would be entitled to nominate for election to the highest offices in the ANF, for example as the President or Secretary or other Executive office, without having any association with the profession or calling of nursing at all. I think considered from the perspective of the reasonable person, given the ANF is a democratic organisation comprised of members engaged in the industry or profession of nursing, it would be expected that senior officeholders come from the ranks of the profession or the industry in relation to which the union is registered as an organisation under the *Act*.
- 71 As to the effect of r 4(3) as advanced by Mr Olson, the Registrar contended that whilst taken literally r 4(3) confers a discretion to act to terminate a person's membership, construed in the light of the matters I have just discussed immediately above, the Registrar submitted this is a case where 'may' should be construed as 'shall', to make the Rules workable as a whole. The Registrar also submitted that the situation and outcomes contemplated on Mr Olson's case, would be inconsistent with the objects of the *Act* in s 6(e), requiring the Commission to discourage overlapping membership. Also, in the event that the Council of the ANF failed to act to terminate a membership under r 4(3), and the person sought office as purportedly eligible under r 19 of the Rules, the Registrar contended there would be a contravention of the Rules and any such appointment would be held to be void. I think there is a strong argument that this would be so.
- 72 As to the r 9(1)(d) point, I consider there is a serious issue to be determined as to whether, as on Mr Olson's case, coming into the ANF initially as a member under r 4(1)(a)(i), as a nurse, means that forever after, regardless of what employment occurs subsequently, r 4(1)(a)(i) can only apply and r 4(1)(b) can never apply. That is the import of Mr Olson's submissions. The Registrar contended that this would require reading words into r 9(1)(d), that do not exist, such as a qualification to reflect something along the lines that '*in the course of a member's entire period of membership of the ANF, the member was eligible for membership solely because ...*'. It is important to observe that whilst r 4(3) contemplates a process of giving notice to a member, r 9(1)(d) is self-executing. If the facts satisfy r 9(1)(d), as with the rest of r 9(1), the person ceases to be a member. Nothing further is required. This and the above issues, involve substantive questions of construction that require to be determined.
- 73 On the evidence before me at this stage of the matter, there are serious questions as to whether the gaps in employment of Mr Olson by the ANF, identified by the Registrar in Ms Pontifex's affidavit evidence, and in exhibit FR2, broke his continuity of membership. If so, and I think there is a substantive case for concluding that it did, Mr Olson could not have satisfied the eligibility requirement for appointment to the casual vacancy of Secretary, as required by r 19(2) of the Rules. This view is fortified by the absence of any evidence from Mr Olson as to his post CEO employment by the ANF, despite every opportunity to adduce it. As I have noted above, the same observation applies to the ANF.

Balance of convenience

- 74 I turn now to consider the balance of convenience. As noted above, the main focus of Mr Olson and the ANF in this respect, is the impact of the absence of Mr Olson from the current enterprise bargaining agreement campaign and negotiations for a replacement industrial agreement in the public health system. I accept the Registrar's criticisms, that the evidence as to these matters, is solely from Mr Olson and no other senior officer of the ANF, such as the President. To this extent, as I have noted

earlier, this evidence is self-serving and there is no independent evidence before me as to these matters, and certainly no evidence from any rank and file member(s) of the ANF, for example.

- 75 However, the larger issue with this factor is the nexus sought to be drawn by Mr Olson, between the necessity for him, as an individual, to be involved in the campaign and negotiations for the benefit of the ANF, and the associated detriment to the ANF if he is not involved. The case is not advanced on the basis of the necessity of the holder of the office of Secretary to lead the enterprise bargaining campaign and negotiations. This is an important distinction. Nowhere in r 16 - Duties of the Secretary, is it specified that it is the sole responsibility of the Secretary to undertake this work on behalf of the ANF.
- 76 The duties and responsibilities of the Secretary of the union are silent as to this. The only reference to industrial matters is r 16(1)(l), that provides that the Secretary is to provide written authority to the Industrial Relations Commission as to who may initiate matters before the Commission or appear on behalf of the union. In other respects, r 16 provides for management responsibilities of the Secretary, as one would expect of the principal officer of the union.
- 77 In my view this dichotomy, between the individual and the office, significantly undermines the balance of convenience criterion relied on by Mr Olson and the ANF. There would appear to be no reason, in the event that an interim order is made in these proceedings, precluding Mr Olson from representing the ANF in the current enterprise bargaining agreement campaign and negotiations, in another capacity. This could be either as a senior employee of the union or as an agent acting on behalf of the union. If this was to occur, it is difficult to see how the enterprise bargaining agreement campaign and negotiations would be compromised at all, and the process could largely continue without missing a beat.
- 78 Had there been an inextricable link between the occupancy of the office of Secretary, and the necessity for the occupant of the office, and only the occupant, to undertake the responsibilities regarding the enterprise bargaining agreement campaign and negotiations, then the balance of convenience criterion would be weighted more in favour of Mr Olson and the ANF, but there is no such link.
- 79 In addition to the above, there are other issues with the matter of bargaining for a replacement industrial agreement. As was contended by the Registrar, until very recently, Mr Olson would have had no involvement in the bargaining process. Mr Olson said publicly he was supportive of another person being appointed to the casual vacancy and did not initially put himself forward for the position. It was noted also that Mr Clancy has been appointed as acting State Secretary, while Ms Reah was on leave. The obvious inference to be drawn from this is that the ANF Council had sufficient confidence in Mr Clancy to do so.
- 80 I accept that if an interim order is made Mr Olson will not continue to receive his current salary as the Secretary. However, given what I have said at [77], it is not the case that Mr Olson is precluded from earning an income from the ANF as a result of an interim order being made. Secondly, I think it is relevant to note that only very recently, Mr Olson had no intention to occupy the office of Secretary, and he was not, on the evidence, persuaded to leave another position to take up the casual vacancy of Secretary of the union. Mr Olson had only recently undertaken some casual employment to complete some projects, after the time he ceased as the CEO of the union. Based on previous public statements in evidence, for all intents and purposes Mr Olson told the members of the ANF and the public, that he was going to retire, spend more time with his family, play the piano and go kite surfing (see Ms Pontifex affidavit annexure SP4A at pp 39-40).
- 81 There are therefore inconsistencies on the evidence between Mr Olson's stated indispensability to the ANF on the one hand, and his very recent statements of wanting to have no further involvement with the union, on the other.
- 82 There are significant and weighty factors in favour of Ms Raschilla and the Registrar on the balance of convenience criterion. With any registered organisation, but especially a very large and well-resourced organisation such as the ANF, there should be no question mark over the validity of the appointment of the most senior and principal officer of the organisation. This is especially the case given the very wide powers and resources at the disposal of the Secretary under the Rules. A clear illustration of this is the evidence of the \$3m allocated by the Council to Mr Olson for the enterprise bargaining campaign. Whilst this was the subject of exhibit FR1, the email from the President to Ms Raschilla, there is nothing in this email that suggests the Council has imposed conditions on the expenditure.
- 83 The point of this is however, that Mr Olson, as the Secretary, was able to obtain such a large sum of money to be expended on the campaign, it seems with relative ease. This only underscores the need for there to be no question regarding the validity of the appointment of the person in such a position of authority and influence, regarding the finances of the union.
- 84 As to Mr Olson's submission that Ms Raschilla has not demonstrated any damage she may suffer if the interim orders are not made, I make three comments. First, it is not necessary, given the statutory framework of the *Act*, for an individual member such as Ms Raschilla, under s 66 of the *Act*, to establish personal loss or damage. But second, and in any event, as a member of the ANF, along with all of the members, Ms Raschilla is entitled to expect that her union will ensure that the highest office holder is validly appointed and that decisions about the substantial resources of the organisation, contributed to by her and other members' subscriptions, are validly taken on her behalf. Thirdly, as a senior office holder herself as a Vice President of the ANF, Ms Raschilla is entitled to expect that there will be no reputational damage to the organisation if it is subsequently determined that the Secretary was never validly appointed in the first place.
- 85 As to third parties, in this respect, I include the State Government, represented by the Department of Health, when negotiating a replacement industrial agreement in the public health sector. Whilst Mr Olson referred to the doctrine of ostensible authority, as to dealings with third parties, I do not consider that this should be able to be relied on for the reasons I have mentioned above, given the statutory framework and the importance of the observance of union rules under s 66 of the *Act*. Even if the doctrine did apply, it does not operate in circumstances where the third party concerned, having dealings with the corporation or other entity, has knowledge of the lack of authority of the relevant office holder. Given the existence of these proceedings, held in public and the publication of my decision and any orders that may be made arising from the proceedings, it is doubtful that any third party would not be aware of the issue.

- 86 On the basis of the important matters Mr Olson himself and the ANF rely on for the purposes of the balance of convenience criterion, that being participation in the enterprise bargaining campaign, it is essential that there be no doubt over the validity of his appointment as the Secretary.
- 87 A further contention advanced by Mr Olson was that r 10(3) of the ANF Rules, dealing with the validity of acts of the Council, despite an informality in the election or appointment of a person to an office may apply, I do not think it would in the present circumstances. First, the issue in these proceedings does not relate to a mere informality. It relates to the fundamental non observance of the ANF rules. Second, as was accepted by counsel for Mr Olson, this provision only extends to decisions or acts of the Council, as a collective body.
- 88 Also, as I noted earlier, it is important in the public interest and in the interests of the members of the ANF, having regard to s 26(1)(c) of the *Act*, that the appointment of the principal officer of the ANF be beyond question. This is also important for the Registrar, given her responsibilities under the *Act* in relation to registered organisations, that there be compliance with the Rules of an organisation, and that senior officeholders, validly hold their offices. It is of fundamental importance for this Commission, by way of these proceedings under s 66 of the *Act*, to ensure compliance with the law and that registered organisations operate with integrity and in accordance with their Rules.
- 89 Mr Olson proffers the possibility of protective orders that could be made, such as if any major matters arise or major decisions need to be made, they could be referred to the Executive of the ANF, and limits could be imposed on expenditure, such as in exhibit FR1. However, the practicality of such orders is a matter that I would have concerns with. Who decides what is or is not a 'major matter' and if there is a dispute as to this, how would such a dispute be resolved? Exhibit FR1, if it is complied with, does not prevent expenditure, it just slows it down.
- 90 As noted earlier in these reasons, in this jurisdiction there is no requirement, and there is significant doubt as to the Commission's jurisdiction and power to accept, an undertaking as to damages. That is not the nature of a matter under s 66 of the *Act*. If it appears to the Chief Commissioner that orders under s 66(2) should be made, and the orders proposed to be made concern the observance, or non-observance or the manner of the observance of the rules of an organisation, which in this case they plainly do, then it is doubtful, if the requirements as to the grant of interim orders are met, that orders could still be refused because of the absence of an undertaking as to damages. Whilst this is the position at common law for the grant of interlocutory injunctions, there appears to be no place for such a course under s 66 of the *Act*. If it appears to the Chief Commissioner that a case is made out for orders to be made under s 66, then the discretion should be exercised and the orders should be made: *Robertson v Civil Service Association of Western Australia (Incorporated)* [2003] WAIRC 10158; (2003) 83 WAIG 3938 per EM Heenan J at [52] and [56] (Hasluck J agreeing).

Conclusion

- 91 In my view, in this case, balancing the various interests and factors I am required to take into account, the requirement for the existence of serious issues to be determined and the balance of convenience, are both weighted substantially in favour of the grant of an interim order, in the terms as sought by Ms Raschilla and the Registrar. I propose to make the orders. Additionally, given what occurred in applications PRES 12 of 2024 and PRES 13 of 2024, when interim orders restraining the Council of the ANF from proceeding against Ms Raschilla by way of a Summons to Show Cause, were seemingly not brought to the attention of the Council, I will also order that these reasons for decision and orders when made, be distributed to both members of the Council and also the membership of the ANF. As to the latter, given the significance of the issue for the organisation, the members of the union are entitled to know both the reasons for my decision, and the orders that I have made.

ANNEXURE – Chronology of relevant factual matters

	Date	Event	Evidential Reference
1	1.9.24	Mr Olson holds a media conference after being reinstated as Secretary.	Pontifex Affidavit, SP-15
2	30.8.24	Ms Reah resigns as Secretary.	Pontifex Affidavit, SP-6 (p 51)
3	30.8.24	Mr Olson appointed Secretary as casual vacancy for the remainder of the term expiring 29 September 2026.	Pontifex Affidavit, SP-6 (p 51)

4	8.24 - (date unclear)	Letter confirming offer of casual Employment as Registered Nurse at Peregrine Medical (no evidence of ever having worked any shift or been paid any salary or wages.)	Pontifex Affidavit, SP-10 (p 262) (Letter from Dr Flahive of Peregrine Medical)
5	7.8.24	Mr Olson interview with 6PR Mornings where there is a discussion of work Mr Olson has done with the ANFIUWP after finishing up as CEO (past tense): “the last job I had, the last paid job, was on the Helpline for the last 6 months fixing it and making some changes and it was great.”	Pontifex Affidavit, SP-14 (around 2:40)
6	23.7.24	Ms Reah informs Mr Olson that his casual engagement had ended and there are no more casual hours available and ‘you are no longer required to do any work for the ANF.’	Pontifex Affidavit, SP-10 (p 344) (email from Ms Reah to Mr Olson on 23 July 2024)
7	23.7.24	Ms Reah removes Mr Olson’s access/privileges to Attache	Pontifex Affidavit, SP-12 (p 561) (email from Ms Reah on 23 July 2024)
8	22.7.24	Date of approval of last / latest log of casual hours worked provided in discovery bundle (showing last date of casual hours being on 19 July 2024).	Pontifex Affidavit, SP-12 (p 511)
9	19.7.24	Council meeting: Mr Olson moves a motion that is carried which restricts the Secretary from removing or suspending ANFIUWP staff without prior approval of the ANF Executive. (Agenda Item 14)	Pontifex Affidavit, SP-10 (p 259) (ANF Council meeting minutes dated 19 July 2024)
10	24.6.24	Mr Olson hands over remaining jobs assigned to him except for the ATO	Pontifex Affidavit, SP-10 (p 350) (email on 24 June 2024)

11	20.6.24	Mr Olson emails Ms Reah asking to stay on for 4 more weeks to resolve ATO issue. Ms Reah agrees and indicates that any other remaining industrial matters are referred to the Helpline team. Mr Olson confirms he will send his casual hours at the end of each week.	Pontifex Affidavit, SP-10 (p 353) (emails on 20 June 2024)
12	18.6.24	Mr Olson's last Helpline Shift.	Pontifex Affidavit, SP-10 (p 354) (Inferred from copy of email thread between Mr Olson and Ms Reah on 16 June 2024)
13	13.6.24	Ms Reah emails Mr Olson and informs him he is relieved from Helpline duties with his last day to be 18 June 2024. Ms Reah identifies other areas he can assist with but Mr Olson declines by email and says once finished with Helpline he will finish with the ANF.	Pontifex Affidavit, SP-10 (p 356) (Email correspondence)
14	19.1.24	Ms Fowler provides a current staffing profile to Ms Raschilla.	Pontifex Affidavit, SP-7B (p 113) (email and attachment)
		Mr Olson does not appear on the list as being an employee as of that date.	
15	4.10.23	Mr Olson requests Ms Reah's approval for casual hours worked.	Pontifex Affidavit, SP-10 (p 360) (Email from Mr Olson to Ms Reah)

16	28.7.23	Council meeting where Mr Olson is permitted to retain the use of work laptop and access to the ANF computer system 'so that he is able to assist the ANF staff when required and other miscellaneous details relating to his ANF possessions. (Agenda Item 8 - last item)	Pontifex Affidavit, SP-10 (p 195-196) (ANF Council meeting minutes dated 28 July 2023)
17	31.3.23	Announcement to media of appointment of Jason Leeder as CEO.	Pontifex Affidavit, SP-7B (p 111) (ANF media release)
18	30.3.23	On 9 June 2023 ANF Council endorses executive decision to employ Mr Jason Leeder as CEO with handover period. Resolution that Council "agrees to the current CEO concluding his contract on 6 September 2023, or earlier if decided by the current CEO, and Council approves payout of all entitlements.	Pontifex Affidavit, SP-10 (p 181) (ANF Council meeting minutes dated 9 June 2023); also see SP-7B (p 109) (Executive meeting minutes dated 30 March 2023)
19	20.1.23	Council meeting where Council agrees to request from Mr Olson to conclude contract as CEO on or before 12 July 2023 - date to be determined by the CEO - Council authorised to pay out all entitlements accrued by the CEO as at his final day of his employment. (Agenda Item 8)	Pontifex Affidavit, SP-10 (p 169) (ANF Council meeting minutes dated 20 January 2023)
20	11.8.22	Ms Reah sends letter to the Registrar to inform there has been a change in Office of Secretary.	Pontifex Affidavit, SP-2 (p 36)
		Mr Olson resigned effective from 28 July 2022, and Ms Reah has been appointed from 28 July 2022.	
21	28.7.22	Mr Olson resigns as Secretary effective at 11PM, Thursday 28 July 2022.	Pontifex Affidavit, SP-10 (p 300) (Letter from Mr Olson to President of ANF)

22	28.7.22	Ms Fowler confirms offer to Mr Olson of Chief Executive Officer of the ANFIUWP. The offer is a full-time fixed term contract of 2 years, commencing 1 May 2022.	Pontifex Affidavit, SP-10 (p 296) (Letter from ANF President to Mr Olson)-
23	1.5.22	Mr Olson commences position as Chief Executive Officer, simultaneously as Secretary of ANFIUWP.	Pontifex Affidavit, SP-10 (p 296) (Letter from ANF President to Mr Olson)
24	22.4.22	Council meeting where position of CEO is created and Olson is given appointment for 2 years effective from 1 May 2022. (Agenda Item 6)	Pontifex Affidavit, SP-7B (p 58-59) (ANF Council meeting minutes of 22 April 2022)

2024 WAIRC 00897

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

REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INTERVENOR**CORAM**

CHIEF COMMISSIONER S J KENNER

DATE

FRIDAY, 11 OCTOBER 2024

FILE NO/S

PRES 10 OF 2024

CITATION NO.

2024 WAIRC 00897

Result	Interim order issued
Representation Applicant	In person
First Respondent	Mr N Parkinson of counsel
Second Respondent	Mr M Clancy
Intervenor	Mr J Carroll of counsel

Order

HAVING heard Ms R Raschilla on her own behalf, Mr N Parkinson of counsel on behalf of the first respondent, Mr M Clancy 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 orders –

- (1) THAT Mr Mark Olson be removed from the office of Secretary of the Australian Nursing Federation, Industrial Union of Workers Perth until further order of this Commission.
- (2) THAT the Council of the Australian Nursing Federation, Industrial Union of Workers Perth is able to fill the casual vacancy in the office of Secretary created by order (1) above by appointing an eligible member, other

than Mr Mark Olson, to the casual vacancy under rule 24 of its registered rules, however, the term of any such appointment must be subject to any further order of this Commission.

- (3) THAT a copy of these reasons for decision and orders in the herein application be served by email on all members of the Council of the second respondent by no later than 4.00 pm Tuesday, 15 October 2024.
- (4) THAT a copy of these reasons for decision and orders in the herein application be served by email on all members of the second respondent by no later than 4.00 pm Tuesday, 15 October 2024.
- (5) THAT the President of the second respondent file an affidavit verifying the service of these reasons for decision and orders on members of the Council of the second respondent and members of the second respondent by no later than 4.00 pm Thursday, 17 October 2024.
- (6) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2024 WAIRC 00929

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TIM CLARKE

APPLICANT

-v-

MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER

DATE

TUESDAY, 29 OCTOBER 2024

FILE NO/S

PRES 8 OF 2024

CITATION NO.

2024 WAIRC 00929

Result Order issued

Appearances

Applicant Mr T Borgeest of counsel

Respondent No appearance

Order

WHEREAS on 28 May 2024, orders ([2024] WAIRC 00252) were made establishing an Interim Branch Executive of the respondent to enable the respondent to continue to operate while amendments to its Rules are being progressed, with such orders to operate until 30 October 2024 unless otherwise varied or revoked;

AND WHEREAS on 23 October 2024, the respondent sought a variation to the orders to extend their period of operation to 28 February 2025;

AND WHEREAS having considered the circumstances, I am satisfied that such an extension should be granted;

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the operation of the orders made on 28 May 2024 ([2024] WAIRC 00252) be and are hereby extended to 28 February 2025.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

CORRECTIONS—

2024 WAIRC 00905

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

MINISTER FOR AGRICULTURE, BOARD OF MANAGEMENT, ROYAL PERTH HOSPITAL, BOARD OF MANAGEMENT, PRINCESS MARGARET HOSPITAL, BOARD OF MANAGEMENT, SIR CHARLES GAIRDNER HOSPITAL, BOARD OF MANAGEMENT, KING EDWARD MEMORIAL HOSPITAL, BOARD OF MANAGEMENT, FREMANTLE HOSPITAL, GOLDEN EGGS, PUBLIC TRANSPORT AUTHORITY, ROTTNEST ISLAND AUTHORITY, AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, THE MINISTER FOR COMMERCE, THE MINISTER FOR EDUCATION, THE MINISTER FOR HEALTH, THE MINISTER FOR TRANSPORT, THE MINISTER FOR POLICE, THE MINISTER FOR HOUSING, THE MINISTER FOR THE ENVIRONMENT, COMMISSIONER OF MAIN ROADS

RESPONDENTS**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

THURSDAY, 17 OCTOBER 2024

FILE NO.

APPL 64 OF 2023

CITATION NO.

2024 WAIRC 00905

Result

Correction Order issued

Correction Order

WHEREAS a 'slip' error occurred in the Order ([2023] WAIRC 00767) that was deposited in the office of the Registrar on 19 September 2023; and

NOW THEREFORE the Commission, in order to correct this error, and pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT subclause (13) in relation to clause 17. – Special Rates and Provisions in the Schedule to the Order ([2023] WAIRC 00767) be amended to read:

'(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 25 cents per hour, with a minimum payment of \$2.05 per day.'

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2024 WAIRC 00935

SCHOOL EDUCATION ACT EMPLOYEES' (TEACHERS AND ADMINISTRATORS) GENERAL AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEPARTMENT OF EDUCATION

APPLICANT

-v-

STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA

FIRST RESPONDENT**and**

PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA

SECOND RESPONDENT**CORAM**

COMMISSIONER C TSANG

DATE

WEDNESDAY, 30 OCTOBER 2024

FILE NO.

AG 24 OF 2024

CITATION NO.

2024 WAIRC 00935

Result Order issued
Representation
Applicant Ms H Moir
First Respondent Mr M Jarman
Second Respondent Ms K Graves

Order

HAVING heard from Ms H Moir on behalf of the applicant, Mr M Jarman on behalf of the first respondent, and Ms K Graves on behalf of the second respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, and by consent, hereby orders –

1. THAT the name of the applicant to the application ‘Department of Education’ be deleted and substituted with ‘Director General, Department of Education’.
2. THAT the name of the first respondent to the application ‘State School Teachers’ Union of Western Australia’ be deleted and substituted with ‘The State School Teachers’ Union of W.A.’.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2024 WAIRC 00925

WESTERN AUSTRALIAN TAFE LECTURERS' GENERAL AGREEMENT 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DEPARTMENT OF TRAINING & WORKFORCE DEVELOPMENT

PARTIES

FIRST APPLICANT

and

THE STATE SCHOOL TEACHERS' UNION OF W.A.

SECOND APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE TUESDAY, 29 OCTOBER 2024
FILE NO. AG 25 OF 2024
CITATION NO. 2024 WAIRC 00925

Result Order issued
Representation
First Applicant Mr R Davenport
Second Applicant Ms R Mitussis

Order

HAVING heard from Mr R Davenport on behalf of the first applicant and Ms R Mitussis on behalf of the second applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, and by consent, hereby Orders –

THAT the name of the first applicant to the application ‘Department of Training & Workforce Development’ be deleted and substituted with ‘Governing Council of North Metropolitan TAFE, Governing Council of South Metropolitan TAFE, Governing Council of Central Regional TAFE, Governing Council of North Regional TAFE, Governing Council of South Regional TAFE and Director General, Department of Training and Workforce Development’.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2024 WAIRC 00971

COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF GREATER GERALDTON INDUSTRIAL AGREEMENT 2023 - 2026

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CITY OF GREATER GERALDTON, WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	APPLICANT
	-v- (NOT APPLICABLE)	
		RESPONDENT
CORAM	COMMISSIONER T KUCERA	
DATE	TUESDAY, 12 NOVEMBER 2024	
FILE NO/S	APPL 124 OF 2024	
CITATION NO.	2024 WAIRC 00971	

Result	Direction issued
Representation	
Applicants	Ms A Greenwood (of counsel) on behalf of the City of Greater Geraldton Mr Z Doherty (of counsel) on behalf of the Western Australian Municipal, Clerical and Services Union of Employees

Direction

UPON consent by Ms Greenwood on behalf of the City of Greater Geraldton and Mr Doherty on behalf of the Western Australian Municipal, Clerical and Services Union of Employees, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)* hereby directs that the Direction issued on 16 September 2024 [2024] WAIRC 00815 be varied as follows –

1. As to Direction 1 that the parties file an outline of the evidence of any witness whose evidence will be relied upon by 15 November 2024;
2. As to Direction 2, that the parties file written submissions and a list of any authorities relied upon by 22 November 2024;
3. As to Direction 3, that the parties file written submissions and a list of any authorities relied upon by 22 November 2024;
4. As to Direction 4, that the parties file and serve any written submissions responsive to those filed by the other party by 29 November 2024.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2024 WAIRC 00950

COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF SWAN PARKS, FACILITIES AND ENGINEERING INDUSTRIAL AGREEMENT 2023

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION 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	TUESDAY, 5 NOVEMBER 2024	
FILE NO.	APPL 125 OF 2024	
CITATION NO.	2024 WAIRC 00950	

Result Direction issued
Representation
First Applicant Ms J Flinn of counsel
Second Applicant Mr A Johnson
Third Applicant Mr R Knox

Direction

HAVING heard from Ms J Flinn of counsel on behalf of the first applicant, Mr A Johnson on behalf of the second applicant and Mr R Knox on behalf of the third applicant, the Commission, pursuant of the powers conferred under the *Industrial Relations Act 1976* (WA), hereby orders –

1. THAT the parties are to file and serve written closing submissions by 4:00pm on 19 November 2024.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2024 WAIRC 00909

**COMMISSION TO MAKE ORDERS AS TO TERMS OF THE CITY OF SWAN PARKS, FACILITIES AND
ENGINEERING 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 THURSDAY, 17 OCTOBER 2024
FILE NO/S APPL 125 OF 2024
CITATION NO. 2024 WAIRC 00909

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 Order 3 of the Directions made by Senior Commissioner Cosentino on 2 October 2024 ([2024] WAIRC 00858) be set aside.
2. THAT Order 4 of the Directions made by Senior Commissioner Cosentino on 9 August 2024 ([2024] WAIRC 00756) be set aside.
3. THAT the parties **file any signed witness statements** complying with Practice Note 9 of 2023 which it intends to rely upon by no later than Friday, 18 October 2024.
4. THAT the parties **file written submissions and a list of any authorities** relied upon by no later than Thursday, 24 October 2024.
5. THAT the parties have liberty to apply on short notice

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2024 WAIRC 00956

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** WEDNESDAY, 6 NOVEMBER 2024**FILE NO.** C 17 OF 2024**CITATION NO.** 2024 WAIRC 00956**Result** Recommendation issued**Representation****Applicant** Mr T Nolan**Respondent** Ms N Pyne

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 provides a response to the Award Commitment outlining which provisions, may be included in an update from the respondent's point of view on or before 5 November 2024;
2. THAT the parties are to meet and hold discussion in good faith and without prejudice regarding the 'Award Update' commitment within a fortnight of the respondent providing its positions outlined in paragraph 1 above;
3. THAT the respondent provides the applicant an updated 'International Deployment Conditions' document in response to the Unions latest position on or before 5 November 2024;
4. THAT the parties are to meet and hold discussion in good faith and without prejudice regarding the International Deployment Conditions commitment within a fortnight of the respondent's position outlined in paragraph 3 being provided;
5. THAT the respondent provides a response to the applicant's letter title 'EBA Clause 77 Accident and Medical Benefits Review' of 20 September 2024, on or before 5 November 2024;
6. THAT the respondent provides a response to the applicant's 'Rank Review' outline provided on 7 May 2024 and further outline its position in regards to fulfilling the requirements of Clause 13 of the *WA Fire Service Enterprise Bargaining Agreement 2023* on or before 15 November 2024;
7. THAT following the provision of the respondent's position in paragraph 6, the applicant and respondent hold weekly discussions in good faith and without prejudice;
8. THAT upon the conclusion of discussions on the rank review outlined in paragraph 6 the applicant and respondent are to hold discussions on a fortnightly basis, in good faith and without prejudice regarding clarifying the term '*(or equivalent) as agreed between the parties*', and specifically discuss the competencies for each rank;
9. THAT the parties schedule a meeting to hold discussions in good faith and without prejudice in relation to Fatigue Management, specifically on reducing excessive hours worked and prescribing mandated rest breaks on or before 12 November 2024; and
10. THAT the parties hold weekly meetings on the Fatigue Management commitment, with the intent of having finalised the commitment by 31 December 2024 to enable implementation to occur within the life of the agreement.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00891

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 65/2023 GIVEN
ON 5 APRIL 2024**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION COASTAL R.E. PTY LTD ATF COASTAL UNIT TRUST	APPELLANT
	-v- JASON JOWETT	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG COMMISSIONER T KUCERA	
DATE	THURSDAY, 10 OCTOBER 2024	
FILE NO/S	FBA 11 OF 2024 (CONSOLIDATED WITH FBA 18 OF 2024)	
CITATION NO.	2024 WAIRC 00891	

Result Order issued

Representation**Appellant** Mr J Dasey of counsel**Respondent** Mr S Farrell as agent

Order

HAVING heard from Mr J Dasey of counsel on behalf of the appellant and Mr S Farrell as agent on behalf of the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. The appellant has leave to file amended grounds of appeal in the consolidated appeal by 4:00pm on 31 October 2024.
2. The consolidated appeal be heard concurrently with the matter, FBA 12 of 2024.

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

[L.S.]

2024 WAIRC 00890

**APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 65/2023 GIVEN
ON 5 APRIL 2024**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JASON JOWETT	APPELLANT
	-v- COASTAL R.E. PTY LTD ATF COASTAL UNIT TRUST	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER C TSANG COMMISSIONER T KUCERA	
DATE	THURSDAY, 10 OCTOBER 2024	
FILE NO/S	FBA 12 OF 2024	
CITATION NO.	2024 WAIRC 00890	

Result Order issued
Representation
Appellant Mr S Farrell as agent
Respondent Mr J Dasey of counsel

Order

HAVING heard from Mr S Farrell as agent on behalf of the appellant and Mr J Dasey of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. The appellant has leave to amend the Notice of Appeal in relation to the relief sought by 4:00pm on 31 October 2024.
2. This appeal be heard concurrently with the consolidated appeals FBA 12 of 2024 and FBA 18 of 2024.

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

[L.S.]

2024 WAIRC 00920

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 91/2024 GIVEN ON 11 JUNE 2024

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MICHELLE SMITH	APPELLANT
	-v-	
	A TEAM CLEANING SERVICES PTY LTD	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON COMMISSIONER T KUCERA	
DATE	MONDAY, 28 OCTOBER 2024	
FILE NO/S	FBA 16 OF 2024	
CITATION NO.	2024 WAIRC 00920	

Result Order issued
Representation
Appellant In person
Respondent Mr T Magorwa

Order

HAVING heard Ms M Smith on her own behalf and Mr T Magorwa on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the time for the filing of the appeal book in the herein proceedings be and is hereby extended to 24 September 2024 and the appeal book is to be served on the respondent by 4 November 2024.

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

[L.S.]

2024 WAIRC 00957

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 16/2024 GIVEN ON 25 JULY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

A.S CAMPBELL & A.R STENT

APPLICANT

-v-

JASON MICHAEL CARLEO

RESPONDENT

CORAM

FULL BENCH
 SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T EMMANUEL
 COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 6 NOVEMBER 2024

FILE NO.

FBA 17 OF 2024

CITATION NO.

2024 WAIRC 00957

Result

Direction issued

Representation

Applicant

Mr A Stent

Respondent

Mr J Carleo

Direction

HAVING heard from Mr A Stent on behalf of the appellant and Mr J Carleo on his own behalf, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the appellant is to file an amended grounds of appeal and submissions in support of the amended grounds by 6 December 2024.
2. THAT the respondent is to file an outline of written submission in response to any amended grounds of appeal by 20 December 2024.
3. THAT the appeal be relisted for final hearing on a date to be fixed, not before 20 December 2024.

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

[L.S.]

2024 WAIRC 00946

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 20 MAY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JONATHAN BOSWELL

APPLICANT

-v-

COMMISSIONER, DEPARTMENT OF FIRE AND EMERGENCY SERVICES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON
 MS B CONWAY – BOARD MEMBER
 MS R SINTON – BOARD MEMBER

DATE

FRIDAY, 1 NOVEMBER 2024

FILE NO.

PSAB 15 OF 2024

CITATION NO.

2024 WAIRC 00946

Result	Direction issued
Representation Appellant	Ms G Murray (of counsel)
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT the parties file a statement of agreed facts and a bundle of agreed documents, by no later than 3 October 2024;
2. THAT the appellant file and serve any outlines of witness evidence and additional documents, upon which they intend to rely, by no later than 17 October 2024;
3. THAT the respondent file and serve any outlines of witness evidence and additional documents, upon which they intend to rely, by no later than 7 November 2024;
4. THAT the appellant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 21 November 2024;
5. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 5 December 2024; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2024 WAIRC 00966

APPEAL AGAINST THE DECISION TO DISMISS GIVEN ON 20 MAY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRENT CASS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
MR N CINQUINA - BOARD MEMBER
MR M FINNEGAN - BOARD MEMBER

DATE

MONDAY, 11 NOVEMBER 2024

FILE NO.

PSAB 17 OF 2024

CITATION NO.

2024 WAIRC 00966

Result	Direction issued
Representation Appellant	No appearance
Respondent	Mr M McIlwaine of counsel

Direction

HAVING had no appearance by the appellant and having heard from Mr M McIlwaine on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT any application by the appellant, Mr Cass, for an extension of time to comply with direction 3 of the Direction made by the Board on 25 July 2024:
 - a. be made no later than 2 December 2024; and
 - b. be accompanied by a copy of any outlines of witness evidence and documents that Mr Cass will seek to file if granted an extension of time to do so.

2. THAT if Mr Cass does not make an application complying with direction 1 above, Mr Cass's application for an extension of time to appeal be determined as a preliminary issue on the papers having regard to the evidence contained in the documents filed to the date of this direction.
3. THAT any submissions the respondent wishes to rely on in relation to Mr Cass's application for an extension of time to appeal be filed by 9 December 2024.
4. THAT the appeal otherwise be adjourned to a date to be fixed.

[L.S.]

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

2024 WAIRC 00954

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 1 JULY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CATHY KIRKUP

APPLICANT

-v-

DIRECTOR GENERAL DEPARTMENT OF JUSTICE

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

MR B HAWKINS – BOARD MEMBER

MS E HAMILTON – BOARD MEMBER

DATE

TUESDAY, 5 NOVEMBER 2024

FILE NO.

PSAB 19 OF 2024

CITATION NO.

2024 WAIRC 00954

Result Direction issued**Representation****Applicant** Mr W Claydon (as agent)**Respondent** Mr J Carroll (of counsel)*Direction*

HAVING heard from Mr Claydon on behalf of the applicant and Mr Carroll 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 discovery be informal between the parties;
2. THAT the parties are to file and serve any statement of agreed facts and an agreed bundle of documents by 29 November 2024;
3. THAT the appellant is to file and serve any outlines of evidence and any documents, not being agreed documents, upon which they intend to rely by 13 December 2024;
4. THAT the respondent is to file and serve any outlines of evidence and any documents, not being agreed documents, upon which they intend to rely by 17 January 2025;
5. THAT the appellant is to file and serve an outline of written submissions by 31 January 2025;
6. THAT the respondent is to file and serve an outline of written submissions by 14 February 2025;
7. THAT the matter be listed for a hearing of up to two-days on a date to be fixed not before 21 February 2025; and
8. THAT the parties have liberty to apply on short notice.

[L.S.]

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

2024 WAIRC 00902

DISPUTE RE UNDERPAYMENT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

APANUI TRANSPORT PTY LTD AND OTHERS

APPLICANT

-v-

BORAL RESOURCES (WA) LTD

RESPONDENT**CORAM**

COMMISSIONER T KUCERA

DATE

MONDAY, 14 OCTOBER 2024

FILE NO/S

RFT 1 OF 2021, RFT 2 OF 2021, RFT 3 OF 2021, RFT 4 OF 2021, RFT 5 OF 2021, RFT 6 OF 2021, RFT 7 OF 2021, RFT 8 OF 2021, RFT 9 OF 2021, RFT 10 OF 2021, RFT 11 OF 2021, RFT 12 OF 2021, RFT 13 OF 2021, RFT 14 OF 2021, RFT 15 OF 2021, RFT 16 OF 2021, RFT 17 OF 2021, RFT 18 OF 2021, RFT 19 OF 2021, RFT 20 OF 2021, RFT 21 OF 2021, RFT 22 OF 2021, RFT 23 OF 2021, RFT 24 OF 2021, RFT 25 OF 2021, RFT 26 OF 2021, RFT 27 OF 2021, RFT 28 OF 2021

CITATION NO.

2024 WAIRC 00902

Result

Order issued

Representation**Applicants**

Mr L Slaney

Respondent

Mr L Izzo (of counsel)

Order

HAVING heard from Mr L Slaney on behalf of the applicants and Mr L Izzo of counsel on behalf of the respondent, the Road Freight Transport Industry Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT the applicants file particulars of claim (**POC**) by 11 December 2024;
2. THAT the respondent makes any request for further and better particulars of the POC by 24 December 2024;
3. THAT the applicants file any response to a request for further and better particulars of the POC by 21 January 2025;
4. THAT the respondent files a response to the POC by 4 March 2025;
5. THAT this matter be relisted for a directions hearing on a date to be fixed after 4 March 2025;
6. THAT there be liberty to apply on short notice.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2024 WAIRC 00931

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WARREN ROBERT JOHNSTON

APPLICANT

-v-

LOOMA COMMUNITY INC

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 30 OCTOBER 2024

FILE NO.

U 16 OF 2023

CITATION NO.

2024 WAIRC 00931

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 29 October 2024;
3. THAT the parties file and serve any written submissions, by no later than 15 November 2024;
4. THAT the Commission list the matter on 4 and 5 February 2025; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00906

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WARREN ROBERT JOHNSTON

APPLICANT

-v-

LOOMA COMMUNITY INC

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 17 OCTOBER 2024
FILE NO. U 16 OF 2023
CITATION NO. 2024 WAIRC 00906

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 18 October 2024;
3. THAT the parties file and serve any written submissions, by no later than 8 November 2024;
4. THAT the Commission list the matter on 4 and 5 February 2025; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2024 WAIRC 00916

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

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	HANSSEN PTY LTD	APPLICANT
	-v-	
	WORKSAFE	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 23 OCTOBER 2024	
FILE NO/S	WHST 18 OF 2024	
CITATION NO.	2024 WAIRC 00916	

Result	Order issued
Representation	
Applicant	Mr L Swanson (of counsel)
Respondent	N/A

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) that has yet to be served;

AND WHEREAS on 23 October 2024 the applicant's representative informed the Tribunal by telephone that 'WorkSafe Commissioner' is the proper respondent to application WHST 18 of 2024;

AND WHEREAS the Tribunal considers that the name of the respondent should be amended to 'WorkSafe Commissioner';

NOW THEREFORE the Tribunal, pursuant to the powers conferred by 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.

2024 WAIRC 00974

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

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	DEPARTMENT OF JUSTICE	APPLICANT
	-v-	
	WORKSAFE WA	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 13 NOVEMBER 2024	
FILE NO/S	WHST 19 OF 2024	
CITATION NO.	2024 WAIRC 00974	

Result	Order issued
Representation	
Applicant	Mr T Bishop (of counsel)
Respondent	N/A

Order

WHEREAS this is an application to the Work Health and Safety Tribunal (**Tribunal**) under the *Work Health and Safety Act 2020* (WA) that has yet to be served;

AND WHEREAS on 12 November 2024 the applicant's representative informed the Tribunal by email that 'WorkSafe Commissioner' is the proper respondent to application WHST 19 of 2024;

AND WHEREAS the Tribunal considers that the name of the respondent should be amended to 'WorkSafe Commissioner';

NOW THEREFORE the Tribunal, pursuant to the powers conferred by 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'.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Cemetery Boards (Western Australia) Cemetery Employees Agreement 2024 AG 36/2024	06/11/2024	Department of Energy, Mines, Industry Regulation and Safety, Albany Cemetery Board, Bunbury Cemetery Board, Geraldton Cemetery Board, Kalgoorlie-Boulder Cemetery Board, Metropolitan Cemeteries Board	The Local Government, Racing and Cemeteries Employees Union (WA)	Senior Commissioner R Cosentino	Agreement registered
City of Perth Outside Workforce Agreement 2023 AG 27/2024	14/10/2024	City of Perth	Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Local Government, Racing and Cemeteries Employee Union (WA), The Construction, Forestry, Mining and Energy Union of Workers	Senior Commissioner R Cosentino	Agreement registered
City of Rockingham Industrial Agreement 2024 AG 26/2024	10/10/2024	City of Rockingham	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of South Perth Industrial Agreement 2024 AG 29/2024	21/10/2024	City of South Perth	The Local Government, Racing and Cemeteries Union Western Australia, Western Australian Municipal Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of Swan Waste and Recycling Services Industrial Agreement 2023 AG 32/2024	29/10/2024	City of Swan	Local Government, Racing and Cemeteries Employees Union (WA), Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
School Education Act Employees' (Teachers and Administrators) General Agreement 2023 AG 24/2024	04/11/2024	Director General, Department of Education	The State School Teachers' Union of W.A., Principals' Federation of Western Australia	Commissioner C Tsang	Agreement registered
Shire of Jerramungup Works and Services Industrial Agreement 2024 AG 35/2024	01/11/2024	Shire of Jerramungup, Western Australian Municipal, Administrative, Clerical and Services Union of Employees	(Not Applicable)	Senior Commissioner R Cosentino	Agreement registered
VenuesWest General Agreement 2024 AG 31/2024	11/11/2024	Western Australia Sports Centre Trust	Media Entertainment and Arts Alliance of Western Australia (Union of Employees), United Workers Union	Commissioner T Kucera	Agreement registered
WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2024 AG 33/2024	08/11/2024	Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services, North Metropolitan Health Service, PathWest Laboratory Medicine WA, Quadriplegic Centre and Others	United Workers Union (WA)	Commissioner T Emmanuel	Agreement registered
Western Australian TAFE Lecturers General Agreement 2023 AG 25/2024	30/10/2024	Governing Council of North Metropolitan TAFE, Governing Council of South Metropolitan TAFE, Governing Council of Central Regional TAFE and Others	The State School Teachers' Union of W.A	Commissioner C Tsang	Agreement registered

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2024 WAIRC 00961

NOTICE

APPL 155 of 2024

Commercial Travellers and Sales Representatives' Award 1978

NOTICE is given of application APPL 155 of 2024 by the Commission's Own Motion pursuant to section 47(2) of the *Industrial Relations Act 1979 (IR Act)*. The Commission intends to make an order to strike out the named employer parties to the *Commercial Travellers and Sales Representatives' Award 1978* set out in the **Schedule** to this Notice, being of the opinion that the named parties are no longer carrying on business as an employer in an industry to which the Award applies or are, for other reasons, not bound by the Award.

Pursuant to section 47(4) of the IR Act, any person may, within 30 days of the day on which this notice is first published, object to the Commission making the order referred to in the notice. Pursuant to regulation 15(2) of the *Industrial Relations Commission Regulations 2005*, a notice of objection must clearly state the grounds of the objection and must specify with particularity the manner in which the objector is, or is likely to be, affected by the application.

The approved form, a *Form 1A – Multipurpose Form*, is available on the Western Australian Industrial Relations Commission website at www.wairc.wa.gov.au under 'Resources' and then 'Applications & Forms' and can be filed with the Registry at registry@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

7 NOVEMBER 2024

SCHEDULE

1. 3M Australia Pty Ltd
2. A & M Steel Fabrications Pty Ltd
3. A.A.I. Glass & Aluminium
4. A.C.I. Fibre Packages Co
5. A.N.I. Perkins
6. A.P.D. Snack Foods Pty Ltd
7. A.R.C. Engineering Pty Ltd
8. ABC Coin Machines Sales (WA) Pty Ltd
9. Abel Lemon & Co Pty Ltd
10. Able Staples Pty Ltd
11. Acme Engineering Co Pty Ltd
12. Acro Ceiling Industries Pty Ltd
13. Adams William Engineering Ltd
14. Addis Australia Pty Ltd
15. Addressograph Multigraph of Aust. Pty Ltd
16. Adelle Manufacturing Co Pty Ltd
17. Agfa-Gavert Ltd
18. Agnew-Go Western Pty Ltd
19. Airefrig Supplies Pty Ltd
20. Airex-Rigid PVC Foam Plastics Ltd
21. Albany Woollen Mills
22. Aldus Packaging & Converting Equipment
23. Alfa-Laval Pty Ltd
24. Allied Petrochemicals Pty Ltd
25. Allis Chalmers Australia Ltd
26. Allmark & Associates Pty Ltd
27. Allsport Distributors Pty Ltd
28. Alsco Linen Service Pty Ltd
29. Aluminium & Steel Corp (WA) Pty Ltd
30. Amalgamated Wireless (A/Asia) Ltd
31. Amprac Pty Ltd
32. Anax Pty Ltd
33. Anaz Pty Ltd
34. Anchor Engineering Co Pty Ltd
35. Anti-Friction Bearings Pty Ltd
36. Apeco of Australia Pty Ltd
37. Apex Belting Pty Ltd
38. Apex Glass Service Pty Ltd
39. APT Enterprises (1974) Pty Ltd
40. Ardmona Fruit Products Co-Op Pty Ltd
41. Armstrong-Nylex Pty Ltd
42. Arnott Mills & Ware Pty Ltd
43. Artic Foods Pty Ltd
44. Associated Baking Corp. (WA)
45. Associated Instrumentation Pty Ltd
46. Atkins Carlyle Ltd
47. Atlas Copco Australia Pty Ltd
48. Atlas Plastics Pty Ltd

49. Austral Bronze Crane Copper Ltd
50. Austral Engineering Supplies Pty Ltd
51. Australian Adhesive Industries Pty Ltd
52. Australian Packaging Industries Pty Ltd
53. Australian Posters Pty Ltd
54. Australian Timken Pty Ltd
55. Australian Women's Weekly
56. Avery Australia Ltd
57. Babcock-Moxey (Aust) Pty Ltd
58. Baker Perkins Pty Ltd
59. Ball B.J. Ltd
60. Barclay & SHARLAND Pty Ltd
61. Barnett Bros Pty Ltd
62. Baron Boats Pty Ltd
63. Bateman M.J. Pty Ltd
64. Bates Saddlery Pty Ltd
65. Beasley David Pty Ltd
66. Bell & Howell Australia Pty Ltd
67. Bell Reg A. Pty Ltd
68. Belmont Radiator Service Pty Ltd
69. Bendix Consolidated Industries Ltd
70. Berger Paints W.A. Pty Ltd
71. Berri Fruit Juices Co-Op Ltd
72. Besser Vibrapak Masonry, (WA) Ltd
73. Bestobel Engineering Products
74. Beta Pet Meats Pty Ltd
75. Birko Electric (Sales) Pty Ltd
76. Blackwood Hodge (Aust) Pty Ltd
77. Bladon Marketing Services Pty Ltd
78. Blue Cross Products Pty Ltd
79. Borden Chemicals (Aust) Pty Ltd
80. Borg Warner (Australia) Ltd
81. Boustead Pty Ltd
82. Bowater-Scott Ltd
83. Bradford Kendall Foundries Pty Ltd
84. Brik-Clad Pty Ltd
85. Brintons Pty Ltd
86. Brisbane H.L. & Wunderlich Ltd
87. Bromain Cork Distributors
88. Brookeades Pty Ltd
89. Brownbuilt Metalux Industries Ltd
90. Brownes Dairy Pty Ltd
91. Bullivants (WA) Pty Ltd
92. Bullock-Scott Pty Ltd
93. Bunning Bros. Pty Ltd
94. Burmac Enterprises Pty Ltd
95. Burns Philp & Co Ltd
96. Burr ridge & Warren Pty Ltd
97. Burroughs Wellcome & Co (Aust) Ltd

98. Bushell Charles & Co Pty Ltd
99. Bushells Pty Ltd
100. Business Aids Pty Ltd
101. Cable Makers Aust. (WA) Pty Ltd
102. Cadbury Schweppes Pty Ltd
103. Calsil Ltd
104. Campbell Furniture Pty Ltd
105. Carba Aust. Ltd
106. Carbonrib Co Pty Ltd
107. Carborundum Pty Ltd
108. Cartwright - Taylor Engineering Pty Ltd
109. Casa Furnishers Pty Ltd
110. Castrol Aust. Pty Ltd
111. Catoleum Pty Ltd
112. Cement Aids (WA) Pty Ltd
113. Chalk Distributors
114. Chamberlain John Deere Pty Ltd
115. Chloride Batteries Australia Ltd
116. Chrysler Marine Aust Pty Ltd
117. Chubb's Australia Co Ltd
118. Chuggs S & Co Pty Ltd
119. Clarevale Isaia Pty Ltd
120. Clark Equipment Australia Ltd
121. Claude Neon Ltd
122. Cli-Matic Airconditioning (WA) Pty Ltd
123. Coastal Agencies (1977) Pty Ltd
124. Coates Stationery Pty Ltd
125. Coca-Cola Bottlers Perth
126. Cockburn Cement Ltd
127. Collie R. & Co Pty Ltd
128. Cologne Perfumery Pty Ltd
129. Comalco Products Pty Ltd
130. Commercial Cleaning Supplies Pty Ltd
131. Commonwealth Industrial Gases Ltd
132. Communication Systems Australia Pty Ltd
133. Companion Pty Ltd
134. Computer Microfilming of Australia Pty Ltd
135. Consolidated Bearing Co (WA) Pty Ltd
136. Consolidated Steam Pty Ltd
137. Con-Stan Industries of Aust. Pty Ltd
138. Conveyancer Pty Ltd
139. Copolymer Industries Pty Ltd
140. Corium Chemical Division
141. Cottee's General Foods Ltd
142. Cotton Traders of Australia Pty Ltd
143. Courtland C.R. Pty Ltd
144. Coventry Motor Replacements
145. Crane Enfield Metals Pty Ltd
146. Crompton Parkinson (Aust) Pty Ltd

147. Crown Corning Ltd
148. Cruickshank Bros.
149. Cummins Diesel Sales & Service (Aust) Pty Ltd
150. Curtain Makers (WA) Pty Ltd
151. Custom Net Works
152. Cyclone Forgings Pty Ltd
153. Cyclone K-M Products Pty Ltd
154. Cygnus Metallurgical Co Pty Ltd
155. Cyril Cornish Advertising Pty Ltd
156. D. & J. Fowler (Aust) Ltd
157. Dataprint Business Equipment Pty Ltd
158. Datodi Ray Electronics & Hobby Supplies
159. David Beasley Pty Ltd
160. Davmar Pty Ltd
161. Davro Foster Furniture Manufacturers Pty Ltd
162. De Moeller Trading Co
163. Dental Houses of Australia Pty Ltd
164. Derben Marine Pty Ltd
165. Detroit Engine & Turbine Co (WA)
166. Deutscher W.A. Pty Ltd
167. Dexion (Aust) Pty Ltd
168. Diamonaire Pty Ltd
169. Diamond Poultry Services
170. Directories (Aust) Pty Ltd
171. Distillers Agency Ltd
172. Distillers Co (WA) Pty Ltd
173. Dobbie Dico Meter Co (WA) Pty Ltd
174. Docket Book Co (Aust)
175. Domestic Applicants & Co
176. Donhad Forgings Pty Ltd
177. Dorf Industries Pty Ltd
178. Douglas Floor Coverings Pty Ltd
179. Doulton Potteries Pty Ltd
180. Doulton Tableware Pty Ltd
181. Dowd Associates Pty Ltd
182. Drabbles Ltd
183. Dreske-Somoff Pty Ltd
184. Dresser Products Australia Pty Ltd
185. Dulux Australia Ltd
186. Dunlop Tyre Service (WA) Pty Ltd
187. Dunlop-Slazenger Australia Pty Ltd
188. Dynamic Graphics Pty Ltd
189. Dyson Jack Pty Ltd
190. Dysons Paper Bags Pty Ltd
191. E.F. Hodge & Co
192. E.M.I. Records
193. E.S. Wigg & Son Pty Ltd
194. E.T. Evans Pty Ltd
195. Eagle & Globe Steel, Ltd

196. Eclipse Tools (Sheffield) Pty Ltd
197. Edboards Pty Ltd
198. Educational Art Supplies Co
199. Edwards Business Machines Pty Ltd
200. Edwards Dunlop & Co Ltd
201. Elder Kreglinger Pty Ltd
202. Elder Smith Goldsborough Mort Ltd
203. Eliza Tinsley (VIC) Pty Ltd
204. Elna Australia Pty Ltd
205. Email Ltd
206. Embleton G.P. & Co Pty Ltd
207. Ensign Services (WA) Pty Ltd
208. Eutectic (Aust) Pty Ltd
209. Evans Deakin Industries Ltd
210. Fabco Pty Ltd
211. Faber-Castell A.W. (Aust) Pty Ltd
212. Faberge Aust. Pty Ltd
213. Fallshaw Pty Ltd
214. Fashion Furniture Pty Ltd
215. Faulding F.H. & Co Ltd
216. Federal Agencies Pty Ltd
217. Felt Products of W.A.
218. Fenner Dodge (Australia) Pty Ltd
219. Fischer Fire Protection Pty Ltd
220. Fischer Hugo Pty Ltd
221. Fleetwood Pty Ltd
222. Flextool (WA) Pty Ltd
223. Flower Davies WEMCO Pty Ltd
224. Foodland Associated Ltd
225. Fordigraph (WA) Pty Ltd
226. Formica Plastics Pty Ltd
227. Fremantle Bag Co
228. Fremantle Foundry & Engineering Co Pty Ltd
229. Frigopol (Australia) Pty Ltd
230. Gadsden J. Pty Ltd
231. Galvin Roy & Co Pty Ltd
232. GEC-AEI Aust. Pty Ltd
233. General Binding Corp (Aust) Pty Ltd
234. General Electric Co of Aust. Ltd
235. George Moss Pty Ltd
236. Gestetner Pty Ltd
237. Gibson Benness Industries Pty Ltd
238. Gilbert Lodge & Co Ltd
239. Gilbeys Aust. Pty Ltd
240. Gillete (Aust) Pty Ltd
241. Gliddon & Co Pty Ltd
242. Golden Crumpets Co (WA)
243. Golden Press Pty Ltd
244. Gollin & Co Ltd

245. Goyen Controls Co Pty Ltd
246. Great Southern Flour Mills Ltd
247. H.H. Webb & Co Ltd
248. H.U. Kendall & Co
249. Habitat Pty Ltd
250. Haco Distributing Agencies Pty Ltd
251. Hanimex Pty Ltd
252. Harbig P. & M. & Co Pty Ltd
253. Harper's Pty Ltd
254. Heatley Industrial Supplies (1976)
255. Hecht Distributors Pty Ltd
256. Heiman Leib Pty Ltd
257. Henderson Instrument Co Pty Ltd
258. Herbert Alfred (A/Asia) Pty Ltd
259. Hertz Walpole Advertising Pty Ltd
260. Heuga Australia Pty Ltd
261. High Nickel Alloys Pty Ltd
262. Hills Hoist Pty Ltd
263. Hobart Manufacturing Co Pty Ltd
264. Holland H.F. Pty Ltd
265. Honda Australia Pty Ltd
266. Hoover (Aust) Pty Ltd
267. Hotel & Cafe Supplies Pty Ltd
268. Hunter Distributors Pty Ltd
269. Hyams Wholesalers Pty Ltd
270. Hydraulic & Pump Service Co Pty Ltd
271. ICI Australia Ltd
272. Ideal Toy Corporation of Australia Pty Ltd
273. International Combustion Australia Ltd
274. International Optical Corp Ltd
275. Irwell Taps Pty Ltd
276. J. & J. Cash Pty Ltd
277. J.L. Burley Pty Ltd
278. Jacksons Ceramic Crafts Pty Ltd
279. Jacksons Drawing Supplies Pty Ltd
280. Jalco Products (WA) Pty Ltd
281. James Hardie & Co Pty Ltd
282. Jewel Fashions Pty Ltd
283. Jimmel Bolts Pty Ltd
284. John Leonard Pty Ltd
285. John Sands Pty Ltd
286. John Venables Pty Ltd
287. Johnson & Johnson Pty Ltd
288. Johnson Harper Pty Ltd
289. Johnsons Laundries Pty Ltd
290. Johnvalves Pty Ltd
291. Jute Manufacturers (WA) Pty Ltd
292. Kailis Timber & Trading Pty Ltd
293. Kalamazoo (Aust) Pty Ltd

294. Kande Kitchenware Pty Ltd
295. Kelvin Industries Pty Ltd
296. Ken George (Wholesale) Pty Ltd
297. Kenwood Peerless Pty Ltd
298. Kimberley-Clark of Australia Pty Ltd
299. King Gee Clothing Co Pty Ltd
300. Kirkby Industries Ltd
301. Klinger Richard Pty Ltd
302. Kodak (A/Asia) Pty Ltd
303. Kraft Foods Ltd
304. Kriesler Distribution Services Pty Ltd
305. L.H.P. Sales Pty Ltd
306. Landis & Gyr - Billman (Aust) Pty Ltd
307. Lane Ltd
308. Leigh-Mardon Pty Ltd
309. Leonard Industries Pty Ltd
310. Leonard John Pty Ltd
311. Letraset Aust. Pty Ltd
312. Lightburn & Co Ltd
313. Ludowici J.C. & Son Ltd
314. Lysaght John (Australia) Ltd
315. M. Athol Hill Pty Ltd
316. M.B.P. (WA) Ltd
317. M.J. Bateman Pty Ltd
318. Mack Ron Machinery Sales Pty Ltd
319. Magna Alloys & Research Pty Ltd
320. Marigny (A/Asia) Pty Ltd
321. Marquise Knitwear Pty Ltd
322. Marrickville Holdings Ltd
323. Mary Martin Bookshop Pty Ltd
324. Massey-Ferguson (Aust) Ltd
325. Massey-Ferguson (Aust) Pty Ltd
326. MBP (WA) Pty Ltd
327. Meadow-Lea Margarine (WA) Co Pty Ltd
328. Medical Teletronics Pty Ltd
329. Melwire (WA) Pty Ltd
330. Metal Perforators Ltd
331. Meyers Taylor Sales Pty Ltd
332. Mica & Insulating Supplies Co Pty Ltd
333. Michaelis Bayley Plastics
334. Midge Distributors
335. Midland Brick Co Pty Ltd
336. Millars (WA) Pty Ltd
337. Mining Supplies (Kalgoorlie) Pty Ltd
338. Mitchell Cotts Engineering (Aust) Pty Ltd
339. Mitchell-Lane Pty Ltd
340. Modern Ceilings Pty Ltd
341. Modulex Systems Pty Ltd
342. Mono Pumps (Aust) Pty Ltd

343. Mooney R.N. Pty Ltd
344. Mullins Wheels (WA) Pty Ltd
345. Napoli Pasta Products Pty Ltd
346. National Can (WA) Pty Ltd
347. National Iron & Steel Pty Ltd
348. NCR Australia Pty Ltd
349. Nightingale Chemicals W.A. Branch
350. Nilsen Sintered Products (Aust) Pty Ltd
351. Nolan Shannon (WA) Pty Ltd
352. Nonferral (WA) Pty Ltd
353. Nonporite (WA) Pty Ltd
354. Noritake (Australia) Pty Ltd
355. Norton Pty Ltd
356. Nova Laboratories
357. Noyes Bros Pty Ltd
358. Nuroof (WA) Pty Ltd
359. Nylex Corp Ltd
360. Olex Cables W.A. Pty.Ltd
361. Omega Manufacturing Co Pty Ltd
362. Opal Exploration Co
363. Osborne Metal Industries Pty Ltd
364. Oswald-Sealy (WA) Ltd, Wholesales
365. Otis Elevator Co Pty Ltd
366. Ozapaper Ltd
367. Paradar Pty Ltd
368. Parsons Charles (WA) Pty Ltd
369. Particle Board & Plywood Pty Ltd
370. Pederick Engineering Pty Ltd
371. Peerless Industrial Systems (WA) Pty Ltd
372. Perth Giftware
373. Perth Photographics Pty Ltd
374. Perth Surgical Supply Co Pty Ltd
375. Peters Foods (WA) Pty Ltd
376. Pics (WA) Photographic & Motion Picture Supplies
377. Pine Valley Flowers (WA) Pty Ltd
378. Pirelli Cables Aust. Ltd
379. Planned Music W.A. Pty Ltd
380. Plessey Communication Systems Pty Ltd
381. Poland Aquatics Wholesale Pet Division
382. Polaroid Australia Pty Ltd
383. Polylined Pipe (WA) Pty Ltd
384. Porter H.K. Australia Pty Ltd
385. Pre-Stressed Concrete (Aust) Pty Ltd
386. Prochelle Trading Co Pty Ltd
387. Protector Safety Products Pty Ltd
388. Purvisonic Sound Pty Ltd
389. Pyneboard Pty Ltd
390. Quikstik International Pty Ltd
391. Rank Industries Aust. Pty Ltd

392. Ready Lime Putty Pty Ltd
393. Red Tulip Distribution Services (WA) Pty Ltd
394. Redmond (Sales) Pty Ltd
395. Reiter & Associates Pty Ltd
396. Reliance MacBean Pty Ltd
397. Reliance Trading Corp. Pty Ltd
398. Remac Business Systems Pty Ltd
399. Repco Auto Parts (WA) Pty Ltd
400. Rheem Australia Ltd
401. Rheem Australia Ltd - Container Division
402. Richardson D. & Sons Ltd
403. Rigby Ltd
404. Rinnai Australia Pty Ltd
405. Rinnai Western Australia Pty Ltd
406. Rizla Cigarette Papers (Aust) Pty Ltd
407. Roche Products Pty Ltd
408. Roland Smith & Co Pty Ltd
409. Rosher E. & M.J. Pty Ltd
410. Rothmans of Pall Mall (Aust) Ltd
411. Rudolf Gunz & Co Pty Ltd
412. Rudolph Gunz & Co Ltd
413. Sabco Ltd
414. Salisons Marketing
415. Sanitarium Health Food Co
416. Sara & Cook Pty Ltd
417. Savage S.W. & Co Pty Ltd
418. Schwarzkopf Pty Ltd
419. Scott Bonnar Sales Pty Ltd
420. Selbys Scientific Ltd
421. Selleys Chemical Co
422. Sellotape (Australia) Ltd
423. Seppelt Wines Pty Ltd
424. Service Printing Co Pty Ltd
425. Sheridan's Engraving & Metal Stamping Co
426. Siemens Industries Ltd
427. Simplex Transfers Aust. Pty Ltd
428. Sims Products Pty Ltd
429. Slumberland (Australia) Pty Ltd
430. Smith Copeland (WA) Pty Ltd
431. Spicers Paper Industries Ltd
432. Spurway Industries Pty Ltd
433. St Regis - A.C.I. Pty Ltd
434. Standard Telephones & Cables Pty Ltd
435. Steel Supplies (Aust) Pty Ltd
436. Stegbar (WA) Pty Ltd
437. Stockfeeders Pty Ltd
438. Storage Systems (WA) Pty Ltd
439. Stott & Hoare Pty Ltd
440. Stramit Industries (WA) Pty Ltd

441. Supa Stik Labels Pty Ltd
442. Survey & Drawing Supplies Pty Ltd
443. Swan Brushware Ltd
444. Synthetic Resins Pty Ltd
445. T.W. Crommelin & Co Pty Ltd
446. Tasker Rolly Pty Ltd
447. Technicaids (Sales) Pty Ltd
448. Tecquip Sales Pty Ltd
449. Tequip Sales Pty Ltd
450. The Wrigley Company Pty Ltd
451. Therold Harper & Co Pty Ltd
452. Thomas Keith W. & Co Pty Ltd
453. Thomas W. & Co (WA) Pty Ltd
454. Thorn Sales AWA-Thorn Consumer Products Pty Ltd
455. Timms P.C. & Co Pty Ltd
456. Townson & Mercer (Distributors) Pty Ltd
457. Treloar Distributing (WA) Pty Ltd
458. Tronto Industries Pty Ltd
459. Tubemakers of Australia Ltd
460. United Packages (WA) Pty Ltd
461. V.S.L. Pre-Stressing (Aust) Pty Ltd
462. Valentine Publishing Co Pty Ltd
463. Voca Communications Pty Ltd
464. W. Schulstad Pty Ltd
465. W.A. Chain Saw Sales Pty Ltd
466. W.A. Honey Pool
467. W.A. Match Co Pty Ltd
468. W.A. Plaster Mills
469. W.H. Milne & Co Pty Ltd
470. W.K. Witt (WA) Pty Ltd
471. Wama Pty Ltd
472. Warburton Franki - Perth
473. Warner-Lambert Pty Ltd
474. Watson P.G. & Co Pty Ltd
475. Watsons Foods (WA) (Watsonia)
476. Wesbarrow Pty Ltd
477. Wesfeeds Pty Ltd
478. Wesply-Wesbord Industries
479. West Australian Industrial Rubber Pty Ltd
480. West Australian Media Services Pty Ltd
481. West Australian Rope & Twine Co Pty Ltd
482. Westate Electrical Industries (1972)
483. Western Case & Joinery Works Pty Ltd
484. Western Glass Works
485. Westinghouse Electric Western Australia Ltd
486. Westralian Wholesalers Pty Ltd
487. Westway International (Australia)
488. Whittakers Ltd
489. Wigg E.S. & Son Pty Ltd

- 490. Wilberforce Distributors Pty Ltd
- 491. William Adams Engineering Ltd
- 492. Wills G.R. Co Ltd
- 493. Wills W.D. & H.D. Aust Ltd
- 494. Wimble Machinery Sales Pty Ltd
- 495. Witt W.K. (WA) Pty Ltd
- 496. Wolf Power Tools Pty Ltd
- 497. Woodstock Leisure Products
- 498. Wormald International (Aust) Pty Ltd
- 499. Wormald Security Controls

2024 WAIRC 00938

NOTICE

APPL 150 of 2024

Metal Trades (General) Award

NOTICE is given of application APPL 150 of 2024 by the Commission's Own Motion pursuant to section 47(2) of the *Industrial Relations Act 1979 (IR Act)*. The Commission intends to make an order to strike out the following named employer parties to the *Metal Trades (General) Award*, being of the opinion that the named parties are no longer carrying on business as an employer in an industry to which the Award applies or are, for other reasons, not bound by the Award.

1. A.E. Smith-Westair
2. ABB Industries Pty Ltd
3. ABB Transmission & Distribution
4. ABC Bearings
5. Abel Appliance Service Co
6. Aero Flour Co
7. Air Liquide WA Pty Ltd
8. Albany City Council
9. Allmark & Associates Pty Ltd
10. Alltype Engineering Services
11. Alsthom Australia Ltd (Power Plant Division)
12. Alucast
13. Alumacraft Pty Ltd
14. Alumimum Products (1964) Pty Ltd
15. Ampol Northlands
16. ANI Bradken WA
17. Anodisers WA
18. Applied Micro Systems (Australia) Pty Ltd
19. Arch Engineering
20. Architectural Ceiling Systems Pty Ltd
21. Arcus Australia Pty Ltd
22. Arnotts Biscuits Ltd
23. Asko Appliances (Aust) Pty Ltd
24. Astra Metal Products Pty Ltd
25. Atlas Cement
26. Austal Ships Pty Ltd
27. Austral Wright Metals
28. Australian Glass Manufacturers Co
29. Australian Pacific Air Conditioning Manufacturing
30. Auto Masters
31. Automotive Instrument Control

32. Baguley Engineering
33. Baguley F & Co
34. Bains Harding Industries Pty Ltd
35. Baitz Confectionery
36. Baker A.J. & Sons Pty Ltd
37. Baker, AJ & Sons
38. Bassendean Town Council
39. Bayswater Powder Coaters Pty Ltd
40. Bells Thermalag & Industrial Services Pty Ltd
41. Belmont City Dairy Supplies
42. Benny's Gelati Pty Ltd A Division of D'Orsogna Ltd
43. Bernina Sewing Machines of Australia
44. Black & White Taxis
45. Bob Jane T-Mart
46. BOC Gases
47. Boomerang Engineering Pty Ltd
48. Bosich Motor Body Works
49. Bradford Insulation
50. Bradford Insulation (WA) Ltd
51. Bradys Building Products
52. Bridgestone Australia Ltd
53. Brine A T & Sons Pty Ltd
54. Bristile Ltd
55. Brother Industries Pty Ltd
56. Brother International (Aust) Pty Ltd
57. Bunnings Forest Products Pty Ltd
58. C.J.D. Equipment Pty Ltd
59. Can-Calc Pty Ltd
60. Cape Modern Joint Venture
61. Carrier Airconditioning Pty Ltd
62. Casa Cheeses
63. Chubb Safe
64. City Plating Co
65. Clelands Cold Stores Pty Ltd
66. Coca Cola Bottlers (Perth) Pty Ltd
67. Cockburn Cement Pty Ltd
68. Coles Myer Ltd
69. Colli & Sons
70. COM-AL Windows Pty Ltd
71. Comalco Aluminium (Western Australia) Ltd
72. Cospak (WA) Pty Ltd
73. Crane Aluminium Systems
74. Crane Copper Tube
75. CRC Humes Ltd
76. Crystal Printing Pty Ltd
77. CSBP & Farmers Ltd
78. CSR Building Products
79. CSR Monier Wunderlich
80. Cully's Motor Cycle Centre

81. Cummins Diesel Sales & Service
82. D & F Engineering
83. Dardanup Butchering Company
84. David Gray & Co Ltd
85. David Jones
86. De Cassan Industries Pty Ltd
87. Detroit Diesel Allison Australia Pty Ltd
88. Diesel Engine Services & Spares Pty Ltd
89. Diesel Motors Pty Ltd
90. Direct Engineering Services Pty Ltd
91. Donaghy Downs Pty Ltd
92. Donhad Armco Pty Ltd
93. Dunlop and Olympic Tyres Pty Ltd
94. Eilbeck Cranes Pty Ltd
95. Elna WA
96. Engineering Equipment Sales
97. Fennessy's Motors Pty Ltd
98. Finline Print & Copy Service Pty Ltd
99. Floreat Iron Works
100. Ford Motor Company (Australia) Pty Ltd
101. Forward Engineers Pty Ltd
102. Fremantle Foundry & Engineering Co Pty Ltd
103. Fremantle Steel Fabrication Co (1979)
104. Galvin Engineering Pty Ltd
105. General Motors Holden's Automotive Ltd
106. General Motors Holden's Automotive Ltd
107. Geraldton Building Co Pty Ltd
108. Globe Meats
109. Goldfields Contractors WA
110. Goodman Fielder Mills Ltd
111. Goodyear Tyre & Rubber
112. Gordon Brothers Industries Pty Ltd
113. Green E.G. & Sons Pty Ltd
114. Greenbushes Tin
115. Harvey Meat Exports (E.G. Green & Sons)
116. Hawke Measurements Systems Pty Ltd
117. Heat Exchangers International Ltd
118. Henry Walker Eltin Contracting Pty Ltd
119. Hinc Instruments Pty Ltd
120. Hitachi Construction Machinery (Australia) Pty Ltd
121. Howard Porter Pty Ltd
122. Husqvarna Viking
123. HVAC Construction Ltd
124. Ian Diffen Tyres
125. Industrial Storage Batteries Pty Ltd
126. Inghams Enterprises Pty Ltd
127. Inhouse Laundries
128. Jambro Pty Ltd
129. James Hardie

130. James Hardie & Co Ltd
131. Janome Sewing Machine Co. (Aust) Pty Ltd
132. Jason Windows
133. Jenkins Springs Pty Ltd
134. Jiffy Instant Printing
135. John Holland Constructions & Engineering Pty Ltd
136. Kailis and France Pty Ltd
137. Kalamunda Ice Works
138. Karrakatta Monumental Works
139. Kilpatrick Green Pty Ltd
140. Lidco Alumimium Windows Pty Ltd
141. Lombardi Bros
142. Lube Mobile
143. Lyons & Pierce
144. Madco Engineering
145. Makutz, B
146. Malvern Star Bicycle Co
147. Matilda Bay Brewing Co Ltd
148. Mauri Closures Pty Ltd
149. Maytag Commercial
150. McAlpine Hussmann
151. McIntosh & Son
152. Mechatronics Pty Ltd
153. Metal Corp Recyclers
154. Metro Baldock Spring Works Pty Ltd
155. Metro Baldocks Springs
156. Metro Brick
157. Mettler Toledo Ltd
158. Midland Brick
159. Mills & Wares
160. Mills and Hassall
161. Monadelphous Engineering Associates Pty Ltd
162. N.S. Komatsu Pty Ltd
163. NCR Australia
164. Nix Machinery Design
165. Notley & Co
166. NS Komatsu Pty Ltd
167. O'Donnell Griffin
168. O'Donnell Griffin Pty Ltd
169. Orbital Engine Company (Aust) Pty Ltd
170. Osborne Park Brass Co
171. Osborne Patternmakers
172. P B Foods Ltd
173. Park Engineers Pty Ltd
174. Pattern Making Services
175. Pepsi Cola Bottlers Australia
176. Perth City Council
177. Perth Ice Works
178. Perth Monumental Works

179. Perth Wrought Iron
180. Pinakis Refrigeration Works Pty Ltd
181. Pioneer Concrete (WA) Pty Ltd
182. Plastics Ltd
183. Plumbers (WA) & Co
184. Precision Brass
185. Premier Plating Co
186. Press and Die Company
187. Q A L Refrigeration WA Pty Ltd
188. Quality Rewinds
189. QVR Pty Ltd
190. Radix Pty Ltd
191. RCR Tomlinson
192. Readymix Group (The)
193. Regina Footwear 1957
194. Rick Gill Motorcycles
195. Roche Mining
196. Ron Mack Machinery Sales WA
197. Sheridan's for Badge
198. Simsmetal Ltd
199. Southcorp Packaging
200. Southern Cross Electrical Engineering Pty Ltd
201. Specialised Welding (WA) Pty Ltd
202. Stanley-Bostitch Pty Ltd
203. Stegbar
204. Sun Industries
205. Supreme Scale Service Pty Ltd
206. Suzuki North
207. Swan Brewery Co Ltd
208. Swan Taxis Co-Op Ltd
209. T L Engineering
210. Tenix Shipbuilding WA
211. Tibbett & Coote
212. Timcast Pty Ltd
213. Touch Instrument Service Co
214. Unifab (W.A.)
215. United Construction Pty Ltd
216. Van Leer Australia Pty Ltd
217. Vaughan Castings
218. Vax Appliances (Australia) Pty Ltd
219. Veem Engineering Group Pty Ltd
220. Vesta Vatter Company Ltd
221. Volgren Australia
222. Wallace Engineering Co
223. Watsonia
224. Watsonia Pty Ltd
225. Westrac Equipment Pty Ltd
226. Westralian Engineering Works
227. Wilroof Australia

- 228. Wilson's Engraving Works
- 229. Wintern International Pty Ltd
- 230. Woolworths (WA) Pty Ltd

Pursuant to section 47(4) of the IR Act, any person may, within 30 days of the day on which this notice is first published, object to the Commission making the order referred to in the notice. Pursuant to regulation 15(2) of the *Industrial Relations Commission Regulations 2005*, a notice of objection must clearly state the grounds of the objection and must specify with particularity the manner in which the objector is, or is likely to be, affected by the application.

The approved form, a *Form 1A – Multipurpose Form*, is available on the Western Australian Industrial Relations Commission website at www.wairc.wa.gov.au under 'Resources' and then 'Applications & Forms' and can be filed with the Registry at registry@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

30 OCTOBER 2024

2024 WAIRC 00962

NOTICE

APPL 156 of 2024

Shop and Warehouse (Wholesale and Retail Establishments) State Award

NOTICE is given of application APPL 156 of 2024 by the Commission's Own Motion pursuant to section 47(2) of the *Industrial Relations Act 1979 (IR Act)*. The Commission intends to make an order to strike out the named employer parties to the *Shop and Warehouse (Wholesale and Retail Establishments) State Award* set out in the **Schedule** to this Notice, being of the opinion that the named parties are no longer carrying on business as an employer in an industry to which the Award applies or are, for other reasons, not bound by the Award.

Pursuant to section 47(4) of the IR Act, any person may, within 30 days of the day on which this notice is first published, object to the Commission making the order referred to in the notice. Pursuant to regulation 15(2) of the *Industrial Relations Commission Regulations 2005*, a notice of objection must clearly state the grounds of the objection and must specify with particularity the manner in which the objector is, or is likely to be, affected by the application.

The approved form, a *Form 1A – Multipurpose Form*, is available on the Western Australian Industrial Relations Commission website at www.wairc.wa.gov.au under 'Resources' and then 'Applications & Forms' and can be filed with the Registry at registry@wairc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

7 NOVEMBER 2024

SCHEDULE

1. ACI Fibreglass
2. Acme Group Pty Ltd
3. Addressograph Multigraph of Aust. Pty Ltd
4. AFA Airfreight Pty Ltd
5. Aherns Pty Ltd
6. Airport Retail Enterprises
7. Alco
8. Allmark and Associates Pty Ltd
9. Alaska Investments Pty Ltd Trading for Hugal and Hoile Unit Trust T/A Hugal and Hoile (WA)
10. Alsco Linen Service Pty Ltd
11. Angliss and Co (Aust) Pty Ltd
12. Angus and Coote Audioclinic
13. ANI Products
14. Arcus Commercial Refrigeration Pty Ltd
15. Arnotts Biscuits Ltd
16. Atkins Carlyle Ltd
17. AT and T Global Information Solutions (Aust) Pty Ltd
18. 3M Australia Pty Ltd
19. Australian Abrasives Pty Ltd
20. Australian Consolidated Investments Ltd

21. Australian Glass Manufacturers Co
22. Australian Shipbuilding Industries (WA) Pty Ltd
23. Avion Australia
24. AWA Ltd
25. Baily CH & Son
26. Bank of New South Wales
27. Baroid (Aust) Pty Ltd
28. Bayer Aust Ltd
29. Bearing Service Pty Ltd
30. Bell, Reg A Ltd
31. Bell Bros Pty Ltd
32. Belmont Forum Food Centre
33. Beta Pet Meals Pty Ltd
34. Boart Longyear Pty Ltd Boral Windows Pty Ltd
35. Bradford Insulation (WA) Ltd
36. Bradmill Industries Ltd
37. Brown & Dureau Pty Ltd
38. BTR Engineering (Aust) Ltd
39. BTS Pty Ltd
40. Buildex Industries
41. Bunning Bros
42. Burns Philip Food Properties Pty Ltd
43. Cable Makers Aust (WA) Pty Ltd
44. CAI Fences
45. Candle Light Co Pty Ltd
46. Canning Engineers Pty Ltd
47. Cargill's Pty Ltd
48. Cement Aid (WA) Pty Ltd
49. Cereal Foods Pty Ltd
50. Chandon Pty Ltd
51. Channel 7
52. Charlie Carters Pty Ltd
53. Churchill Gallery
54. City Milling Pty Ltd
55. Coates Hire Service
56. Coles & Co Ltd GJ
57. Commonwealth Industrial Gases Ltd
58. Coolbellup Deli
59. Cottees Foods
60. Coventrys
61. CSR Building Material
62. Dalgety Holdings Pty Ltd
63. Davro Interiors Pty Ltd
64. De Wolf N and Associates Pty Ltd
65. Diamond and Boart Pty Ltd
66. Doogue G. Esq Lucky Lottery Agency
67. D'Orsogna Bros Pty Ltd
68. Dreske-Someff Pty Ltd
69. Dulux Australia

70. Dunlop and Olympic Tyres
71. Dunlopillo Pty Ltd
72. ED Oates Brushware Pty Ltd
73. Edwards Dunlop and Co
74. Eilbeck Wire Industries Pty Ltd
75. Elder Smith Goldsbrough Mort
76. Electrolux Pty Ltd
77. Email Ltd
78. EMI Music (Aust) Pty Ltd
79. Engineering Supplies (WA) Pty Ltd
80. Evans Deakin Industries Ltd
81. Faulding & Co Ltd FH
82. Federal Loan Office
83. Felt Products of WA
84. Fern Investment
85. Flexascreen Pty Ltd
86. Flower Davies-Wemco Pty Ltd
87. Ford Motor Co (Aust) Ltd
88. Fosroc Expandite
89. Fremantle Bond Store Pty Ltd
90. Fremantle Fisherman's Co-op Soc Ltd
91. Fuji Xerox Aust Pty Ltd
92. Gadsden Pty Ltd J
93. Galvin Roy & Co Pty Ltd
94. Gamemaster Billiard Tables
95. Garlock Pty Ltd
96. GEASF Nominees Pty Ltd
97. GEC-AGI (Aust)
98. Gibbs Bright & Co
99. Gibson Benness Industries Pty Ltd
100. Globe Meats
101. Golden Sheaf Macaroni (WA) Pty Ltd
102. Gordon and Gotch (A/Asia) Ltd
103. Gray and Co Ltd D
104. H F Holland Pty Ltd
105. Hanimex Pty Ltd
106. Hardie & Co James
107. Hart & Co SW
108. Hawker Noyes Investments Pty Ltd
109. Hayman and Sons Pty Ltd
110. Heidelberg Harris Aust Pty Ltd
111. Hills Industries Ltd
112. Hoover (Aust) Pty Ltd
113. Hotel and Cafe Supplies Pty Ltd
114. Hunts Canning Co Pty Ltd
115. IBM Ltd
116. IBM Aust Ltd
117. ICI Australia Ltd
118. Ilford (Aust) Pty Ltd

119. Ingot Metal WA
120. International Floral Boutique
121. IPE Packaging Pty Ltd
122. Jackson's Drawing Supplies Pty Ltd
123. Jason Industries Ltd
124. John Sands Pty Ltd
125. Jones Blind and Awning Co
126. Joyce Bros (WA) Pty Ltd
127. Jute Manufacturer's (WA) Pty Ltd
128. Kodak (A/Asia) Pty Ltd
129. Kolotex Australia Pty Ltd
130. Kraft Foods Ltd
131. Lever Rexona
132. Lockyer Simpson Pty Ltd
133. London Court Florist
134. Lysaght (Aust) Ltd John
135. McDougall Pty Ltd
136. McPhersons Ltd
137. Marigny (A/Asia) Pty Ltd
138. Marshall Flower Manufacturer's Agencies
139. Massey Ferguson Iseki Australia Ltd
140. Medical Teletronics Pty Ltd
141. Mettler Toledo Ltd
142. Meuleman's Sport Supply
143. Millars (WA) Pty Ltd
144. Milne and Co Pty Ltd WH
145. Mine Safety Appliances (AUST) Pty Ltd
146. Minster Carpets Pty Ltd
147. Moss Pty Ltd George
148. Morley Delicatessen
149. Myer Stores Ltd (incorporated in Victoria)
150. Myer (WA) Stores Ltd
151. National Can (WA) Pty Ltd
152. Nestles Aust Ltd
153. Newcastle Shop Fitters
154. Nolan Shannon (WA) Pty Ltd
155. Norcross Australia Greeting Cards
156. Nylex Corporation Ltd
157. Moulden Products (WA) Pty Ltd
158. Oakwood Finance Pty Ltd
159. Ocean Pools Pty Ltd
160. Olympic Tyre and Rubber Co Pty Ltd
161. Pak Pacific Corp. Pty Ltd
162. Pellegrini & Co (W.A.) Pty Ltd
163. Perrott, Vance and Sons
164. Perth Jukebox Hire Services
165. Pine Valley Flowers (WA) Pty Ltd
166. Plunkett Baby Furniture Pty Ltd
167. Poon Bros (W.A.) Pty Ltd

168. Poultry Growers of W.A. Co-op Society Ltd
169. Rapid Metal Development Aust Pty Ltd
170. Ready Lime Putty Pty Ltd
171. Repco Auto Parts
172. Rheem Aust Ltd
173. Rowntree Hoadley Ltd Sadleir & Co. Pty Ltd R.C.
174. St. REGIS-ACI Pty Ltd
175. Sands & McDougall (Aust) Pty Ltd Sanitarium Health Food Co. Sara and Cook Pty Ltd
176. Scott Bonnar Sales Pty Ltd
177. Sealane Supplies
178. Sellys Chemical Co. Pty Ltd
179. Sew-Knit Enterprises Pty Ltd Sheridan's Engraving & Metal Stamping Co.
180. Shimenson's Surplus Stores
181. Siemens Industries Ltd
182. Simplex International Time Equipment Pty Ltd
183. Simpson and Kelvinator Sales Pty Ltd
184. Simsmetal Ltd
185. Sirs for Men Pty Ltd
186. Smith Copeland (WA) Pty Ltd Smith & Co. W.H.
187. Smits, Wim Esq, Philatelists
188. Spicers (Aust) P/L, Spicer Cowan
189. S.S. Enterprises Westralia Pty Ltd
190. Streeter & Male Pty Ltd
191. Sunshine General Industries Pty Ltd
192. Swan Motor Wreckers Ltd
193. Swan Settlers Co-op Assn Tony Sadler Pty Ltd Tough Instrument Co.
194. Ullrich Noyes Bros Pty Ltd
195. Unilever Australia Pty Ltd
196. United Welders Pty Ltd
197. Venables Pty Ltd L & T
198. V.S. Supplies W.A. Salvage Co. Watsons Food Holdings Pty Ltd Wells & Son, H.E.
199. Wesfarmers Kleenheat Gas Pty Ltd
200. Western Glass Works Pty Ltd
201. Westralian Drug Co. Pty Ltd
202. Westralian Farmers Co-Op Ltd Wigg E.S. & Son Pty Ltd Wills (Aust) Ltd W.D. & H.O.
203. Woolworths (W.A.) Ltd

2024 WAIRC 00963

NOTICE

APPL 157 of 2024

Transport Workers (General) Award No. 10 of 1961

NOTICE is given of application APPL 157 of 2024 by the Commission's Own Motion pursuant to section 47(2) of the *Industrial Relations Act 1979 (IR Act)*. The Commission intends to make an order to strike out the named employer parties to the *Transport Workers (General) Award No. 10 of 1961* set out in the **Schedule** to this Notice, being of the opinion that the named parties are no longer carrying on business as an employer in an industry to which the Award applies or are, for other reasons, not bound by the Award.

Pursuant to section 47(4) of the IR Act, any person may, within 30 days of the day on which this notice is first published, object to the Commission making the order referred to in the notice. Pursuant to regulation 15(2) of the *Industrial Relations Commission Regulations 2005*, a notice of objection must clearly state the grounds of the objection and must specify with particularity the manner in which the objector is, or is likely to be, affected by the application.

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(Sgd.) S BASTIAN,
Registrar.

[L.S.]

7 NOVEMBER 2024

SCHEDULE

Agents - General:

William Barker & Co., Kalgoorlie
Barrett & Radley Pty Ltd., Moora
Ted Britten, Collie
Gascoyne Trading Co. Pty Ltd., Carnarvon
L. Jessop & Co., Kalgoorlie
W.D. Moore & Co.
George Wills & Co. Ltd

Agents - Stock and/or Wool and/or General:

Dalgety & Co. Ltd., Perth
Westralian Farmers Co-operative Ltd New Section's Body
Agents - Newspaper and Periodicals Dealing and/or Selling:
Gordon & Gotch (Australasia)

Agents - Indent and/or Manufacturers:

E.S. Lazarus & Co. (W.A.) Ltd

Aerates Waters, Cordials, Manufacturing, Dealing and/or Selling

(outside a radius of twenty-five miles from the G.P.O., Perth):

Apiarists:

A.J. Markey, Toodyay
Armoured Car Service
Armoured Escort Ltd

Asbestos Goods Manufacturing and/or Dealing:

James Hardie & Co. Pty Ltd

Auctioneering - Fruit, Produce, Meat, Eggs and Poultry:

Berryman & Langley Ltd

Auctioneering:

T.W. Newbold

Artificial Manure Manufacturing and/or Dealing:

Cuming Smith and Mount Lyell Farmers Fertilisers Limited

Bag, Sack and/or Textile Manufacturing and/or Dealing:

J. Gadsden Pty Ltd
Joyce Bros. (W.A.) Pty Ltd
Western Australian Worsted and Woollen Mills Ltd., Albany

Bitumen Products:

Colfix Emulsified Bitumen Products
Boot Manufacturing and/or Dealing:
Goode Durrant & Murray Ltd

Bottle Merchants:

Kalgoorlie Bottle Exchange

Box and Case Making and/or Dealing:

City Case Factory Pty Ltd

Bread, Cake, Biscuit and Pastry Manufacturing and/or Selling:

Mills & Ware Biscuits Pty Ltd

Stanbridges

Tippetts Ltd

Brick Making and/or Dealing:

Metropolitan Brick Co. Ltd

Midland Brick Co. Pty Ltd

Hawker Siddeley Building Supplies Pty Ltd

H.L. Brisbane & Wunderlich Ltd

Building and/or Demolition Contractors:

J.G. Hough & Son Pty Ltd., Bunbury

Wrights Salvage Pty Ltd

T.D. Scott, Kalgoorlie

Butter and/or Cheese Making and/or Cream Manufacturing and/or Dealing:

Sunny West Cooperative Dairies Ltd

Watsons Foods Pty Ltd

Cartage Contractors:

W.J. Bawden, Geraldton

Bell Bros. Pty Ltd

W. Cleasby, Toodyay

Harvey Transport Co., Harvey

Smith Allan & Co.

R.J. Possett & Co., Northam

Cement and/or Lime Manufacturing and/or Dealing:

Cockburn Cement Pty Ltd

Cement Brick Manufacturing:

Dunbrick (W.A.) Pty Ltd

Cereal Foods Manufacturing:

Nabisco Pty Ltd

Clothing Manufacturing and/or Dealing:

Goode Durrant & Murray Ltd

Morris & Co.

Concrete and/or Cement Products Manufacturing:

Humes Ltd

Peter Pan Tiles Pty Ltd

Swan Block Co. Pty Ltd

Confectionery Manufacturing and/or Dealing:

Calthop Bros. (W.A.) Pty Ltd

MacRobertson (W.A.) Pty Ltd

The Nestle Co. (Aust.) Ltd

Plaistowe & Co. Ltd

Cotton and Wool Waste Merchants:

Cotton Traders of Australia

Customs, Shipping and/or Forwarding Agents:

E.J. Armstrong, Manjimup

Barnards Pty Ltd

Frank Cadd Co. (1959) Pty Ltd

F.W. Churcher & Co.

James Kiernan Pty Ltd

Frank Manford Pty Ltd

Prevost & Co. Pty Ltd

Dairy Produce Dealing:

Watsons Foods Pty Ltd

Departmental Stores:

Aherns Pty Ltd

John Allan Ltd

Bairds Pty Ltd

Boans Ltd

Thos. haywood Pty Ltd., Bunbury

J.A. Hicks & Co. Pty Ltd., Kalgoorlie

Drug and/or Chemical Manufacturing and/or Dealing:

F.H. Faulding & Co. Ltd

David Gray & co Ltd

Rumbles Ltd

Electrical Appliances Manufacturing and/or Dealing:

Lightburn & Co. Ltd

S.W. Hart & co

Metters Ltd

Electroplating:

Industrial Plating Co. Pty Ltd

Earthenware Manufacturing and/or Dealing:

H.L. Brisbane & Wunderlich Ltd

Electrical Goods & Appliances Dealing:

Beavis Bros., Northam

R. Bell & Co., Albany

Rowleys Pty Ltd

Electrical Supplies and/or Equipment Dealing and/or Selling:

Atkins (W.A.) Ltd

British General Electric Co. Pty Ltd

Nicholsons Ltd

Engineers and/or Brass and/or iron or Steel Founders:

Atlas Engineering Co. Pty Ltd

Bradford Kendall Ltd

Structural Engineering Co. of W.A. Pty Ltd

Engineering Supplies and Equipment:

Hodgson & Cranston Pty Ltd., Kalgoorlie

Farm Implement Manufacturing and/or Dealing:

Chamberlain Industries Ltd

International Harvester Co. of Aust. Pty Ltd

H.V. McKay, Massey Harris Pty Ltd

Fibrous Plaster Goods Manufacturing and/or Dealing:

H.B. Brady & Co.

Fish Dealing and Processing:

Fremantle Fishermen's Co-operative Society Ltd

Golden Gleam Fish Processing Co. Pty Ltd., Geraldton

National Fisheries (1947) Pty Ltd

Florists and/or Nurserymen:

Dawson Harrison Pty Ltd

Flour Milling and/or Dealing:

Great Southern Roller Flour Mills Ltd

Thomas & Co. (W.A.) Ltd

Fruit Extract and/or Essences Manufacturing and/or Dealing:

Plaimar Ltd

Fruit and Vegetable Merchants and/or Agents:

Ah Sam & Co.

Gardner Bros.

Premier Markets, Kalgoorlie

Fruit and Vegetable Processing and Canning:

Great West Processed Foods Pty Ltd

Fruit Trading:

Tropical Traders Ltd

Furniture Manufacturing and/or Dealing:

Craiks (1933) Pty Ltd

Hearn Bros. & Stead

Jason Metal Furniture Ltd

Furniture Removalists:

A. Blowes & Son

R.P. North Co. Pty Ltd

Firewood and/or Coal Dealing:

Bryant & Waters

Perth Jarrah Mills Pty Ltd

Collie Coal and Woodyard

General Carriers:

Allen & Brimage, Kalgoorlie

Bingley Bros., Boulder

George Brand & Co., Kalgoorlie

Bullochs Transport

Daly Bros.

General Storekeeping:

Armadale-Kelmscott Co-operative Society Ltd., Armadale

Australian Flag Store, Kalgoorlie

Boyup Brook Co-operative Company, Boyup Brook

Central Provisions Stores Pty Ltd

Sydney Fong & Co., Geraldton

Glass Manufacturing:

Australian Glass Manufacturers Co. Pty Ltd

Glass Merchants and/or Shop Fitters:

Arcus Pty Ltd

Grocery Manufacturing and/or Dealing:

J. & W. Bateman Ltd

Henry Berry & Co. (Australasia) Ltd

Bushells Ltd

Co-operative Wholesale Services Ltd

H.W. Davidson, Kalgoorlie

W.A. Honey Pool

Sanitarium Health Food Co.

Sara & Cook Pty Ltd

D. & J. Fowler Ltd

Grocery Dealing (Retail):

Charlie Carter Ltd

Greengrocers and/or Fruiterers:

Litis Bros. Super Market

Hardware and/or Ironmongery Dealing:

Barnett Bros. Pty Ltd

B.K.W. Co-operative Co. Ltd., Katanning

Harris Scarfe & Sandovers Ltd

J.A. Kirby, Bridgetown

McLean Bros. & Rigg Ltd

J. Krasnostein & Co. Pty Ltd

Hawker Siddeley Building Supplies Pty Ltd

Ice Cream Manufacturing and/or Selling:

Peters Ice Cream (W.A.) Ltd

Sunny West Co-op Dairies Ltd

Ice Manufacturing and/or Selling and/or Cold Storage:

P.H. Clarke

Diamond Ice & Cool Storage Co. Ltd

Great Southern Ice Works, Narrogin

Western Ice Co.

Industrial Gases:

Commonwealth Industrial Gases Ltd

Insulation Manufacturing and/or Installation:

Bradford Insulation (W.A.) Ltd

Laundries and/or Dry Cleaners:

Fremantle Steam Laundry Co.

Home of the Good Shepherd Laundry

Johnson's Bag Wash Laundry Pty Ltd

Economic Dry Cleaners

Leather and/or Leather Goods Manufacturing and/or Dealing:

Rosenstamm Pty Ltd

Locksmiths and/or Gunsmiths:

Harry Armstrong Pty Ltd

Machinery Manufacturing and/or Dealing:

Malloch Bros. Ltd

Wigmores Ltd

Macaroni Manufacturing:

Sorrento Macaroni Products

Marine Dealers and/or Metal Merchants:

J. Krasnostein & Co. Pty Ltd

Albert G. Sims Ltd

Metal Ware Manufacturers and/or Agents:

Jason Industries Ltd

Milk Processors:

Brownes Dairy Ltd

Masters Dairy Ltd

Milk Vendors:

W.A. Retail Dairymen Industrial Union of Employers

Mail Contracting:

H.J. Stevens, Kalgoorlie

Meat Canning:

Watsons Foods Pty Ltd

Monumental Masons:

Wilson Gray & Co. Pty Ltd

Motor Accessories Dealing:

Raphaels Pty Ltd

Replacement Parts Ltd

Motor Body Building and Panel Beating:

Boltons Ltd

Motor Vehicle Assembling and/or Dealing:

Sydney Atkinson Motors Ltd

Ford Motor Co. (Aust.) Pty Ltd

Motor Garages and Service Stations:

Dorsett Motors Pty Ltd., Bunbury

Musical Instrument Dealing:

Nicholsons Ltd

Newspaper Delivery:

Bays Transport Service Ltd

Oil Exploration:

Western Australian Petroleum Pty Ltd

Paint and/or Varnish Manufacturing and/or Dealing:

Balm Paints Pty Ltd

Lewis Berger & Sons (W.A.) Pty Ltd

Clarksons (W.A.) Pty Ltd

Plumbing:

F. Instone & Co.

H. Rance & Son Pty Ltd

Potato Chip and Nut Food Products Manufacturing:

Food Products of Aust. Pty Ltd

Produce Merchants and/or Agents:

Barrow Linton Pty Ltd

Burridge & Warren Ltd

Harris Bros.

Pauley Bros., Boulder

R. Piercy & Co. Pty Ltd

Ready Mixed Concrete:

Ready Mixed Concrete (W.A.) Pty Ltd

Rope and Twine Manufacturing:

W.A. Rope and Twine Co. Pty Ltd

Sand Lime Brick Manufacturing:

Calsil Bricks Pty Ltd

Sandalwood Merchants:

Australian Sandalwood Co. Ltd

Seed Merchants:

E. Symonds

Sheet Metal Goods and/or Cannister Manufacturing:

Federal Tinware Manufacturing Pty Ltd

S.W. Hart & Co.

Rheem Australia Pty Ltd

Ships Chandlers and/or Providores:

Fremantle Providoring Co. Pty Ltd

H.A.W. Jones Pty Ltd

Soap and Candle Manufacturing and/or Dealing:

Unilever Aust. Pty Ltd

Westralian Soaps Pty Ltd

Stationery Manufacturing and/or Selling:

Spicers (Aust.) Pty Ltd

Steel Fencing Manufacturing:

Cyclone Co. of Aust. Ltd

Steel and Iron Products Distributors:

Stewart and Lloyds (Distributors) Pty Ltd

Sand and/or Stone and/or Brick and/or Gravel Supplying:

Dixon Bros. Pty Ltd

Snashall Bros. Pty Ltd

Australian Blue Metal Limited

Stone Quarrying and/or Lime Production:

Standard Lime & Stone Co.

Australian Blue Metal Limited

Stove and/or Bathroom Fittings Manufacturing:

Metters Ltd

Timber Merchants (Outside of the South West Land Division):

Adelaide Timber Co. Pty Ltd., Kalgoorlie

Tobacco and/or Cigarette Dealing:

W.D. & H.O. Wills (Aust.) Ltd

Towel Supplying:

City Towel Supply Co.

Tyre Repairing and/or Dealing:

Nu-Tred (W.A.) Pty Ltd

Well Sinking and/or Boring Contractors:

W. Robinson & Sons

Vehicle Hiring:

Ryan & Ryan Hire Cars

Wine and/or Spirit Manufacturing and/or Dealing:

G. Gramp & Sons Ltd

Penfolds Wines Pty Ltd

Lionel Samson & Son Pty Ltd

Wire Netting Manufacturing:

W.A. Netting & Wire Co. Ltd

Wood Extracts:

Industrial Extracts Ltd

Wool, Skin and Hide Merchants:

Prevost & Co. Pty Ltd

Wool Scourers and Fellmongers:

Jandakot Wool Scouring Co. Ltd

PUBLIC SERVICE APPEAL BOARD—

2024 WAIRC 00917

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 15 MARCH 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DANIEL RYAN CLEMENT

APPELLANT

-v-

DEPARTMENT OF FIRE & EMERGENCY SERVICES

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD

COMMISSIONER T B WALKINGTON - CHAIRPERSON

MS R SINTON - BOARD MEMBER

MR G LEE - BOARD MEMBER

DATE

FRIDAY, 25 OCTOBER 2024

FILE NO

PSAB 22 OF 2024

CITATION NO.

2024 WAIRC 00917

Result Appeal Discontinued by Leave**Representation****Appellant** Mr D Clement**Respondent** Mr J Carroll (of counsel)*Order*

WHEREAS on 24 October 2024, the appellant sought leave to discontinue this appeal;

AND WHEREAS on 24 October 2024, the respondent advised it had no objection to the appellant discontinuing this appeal;

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

THAT the appeal be and by this order is discontinued by leave.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2024 WAIRC 00959

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 NOVEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00959**CORAM** : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MS R ANDERSON – BOARD MEMBER
MS J SYMONS – BOARD MEMBER**HEARD** : TUESDAY, 24 SEPTEMBER 2024,
WEDNESDAY, 25 SEPTEMBER 2024**DELIVERED** : THURSDAY, 7 NOVEMBER 2024**FILE NO.** : PSAB 25 OF 2023**BETWEEN** : KAREN AUZINS

Appellant

AND

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

Respondent

CatchWords	:	Public Service Appeal Board – appeal of dismissal for breach of discipline – misconduct in accessing colleague’s Departmental emails without authorisation – whether appellant guilty of misconduct to the <i>Briginshaw</i> standard – whether CCTV footage reliable in substantiating allegations – whether personal circumstances and employment history render dismissal disproportionate
Legislation	:	<i>Industrial Relations Act 1979</i> (WA), ss 80C(1), 80I(1)(d) <i>Public Sector Management Act 1994</i> (WA), ss 64(1)(a), 78(1)(b)(iv), 82A(3)(b)
Result	:	Appeal dismissed
Representation:		
Appellant	:	Ms G Murray with Ms J Moore (of counsel)
Respondent	:	Ms S Power (of counsel)

Cases referred to in reasons:

Briginshaw v Briginshaw (1938) 60 CLR 336

Byrne v Australian Airlines Limited (1995) 185 CLR 410

G v H (1994) 181 CLR 387

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

Minister for Health v Drake-Brockman [2012] WAIRC 00150

Reasons for Decision

Background

- 1 The appellant (**Ms Auzins**) was employed by the respondent as a Level 3 School Based Network Support Officer at Kelmscott Senior High School (**KSHS**).
- 2 On 27 November 2023, the respondent dismissed Ms Auzins for her conduct on 22 May 2023, for accessing, without proper authorisation, her subordinate Ms Kamalanathan’s departmental emails on Ms Kamalanathan’s work mobile phone (**work-phone**) and forwarding one of Ms Kamalanathan’s confidential emails to her own Departmental email address.
- 3 On 19 December 2023, Ms Auzins filed a *Form 8B – Notice of Appeal - Government Officers, Public Service Officers*, contesting the dismissal (**Form 8B**).

The Board’s jurisdiction

- 4 There is no dispute that:
 - (a) Ms Auzins was a public officer appointed under s 64(1)(a) of the *Public Sector Management Act 1994* (WA) (**PSM Act**);
 - (b) The respondent dismissed Ms Auzins under s 82A(3)(b) of the PSM Act for committing a breach of discipline;
 - (c) Ms Auzins was a ‘government officer’ pursuant to s 80C(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**);
 - (d) By s 78(1)(b)(iv) of the PSM Act, Ms Auzins has standing to appeal her dismissal to the Public Service Appeal Board (**Board**); and
 - (e) By s 80I(1)(d) of the IR Act, the Board has jurisdiction to hear the appeal.

Legal principles and issues for determination

- 5 There is no dispute that:
 - (a) 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.
 - (b) As it is Ms Auzins’ appeal, she has the onus of satisfying the Board that it should interfere with and adjust the dismissal.
 - (c) The Board must be satisfied to the *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*) standard that Ms Auzins engaged in the alleged misconduct.
 - (d) The questions for determination, as outlined in Ms Auzins’ legal submissions, are:
 - (i) Where was Ms Kamalanathan’s work-phone on Monday 22 May 2023, 3:34pm when Agreed Document 1 (the **Email**) was sent?
 - (ii) Was the Email sent from Ms Kamalanathan’s work-phone?
 - (iii) Can the CCTV footage be relied upon to substantiate the allegation that Ms Auzins accessed Ms Kamalanathan’s work-phone when the Email was sent?

- (iv) Do Ms Auzins' personal circumstances and employment history render her dismissal disproportionate in the circumstances?
- 6 **Briginshaw** at [5(c)] above, was a High Court appeal of the decision of Martin J of the Supreme Court of Victoria, dismissing the appellant husband's petition for divorce on the ground of adultery under ss 80 and 86 of the *Marriage Act 1938* (VIC):
- 80 Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged.
- 86 Subject to the provisions of this Act the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage.
- 7 In dismissing the husband's petition for divorce, Martin J stated (**Briginshaw**, 337):
- I have done my best to decide, but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted.
- 8 There were four grounds of appeal before the High Court (**Briginshaw**, Latham CJ, 340–341):
- (1) That the learned judge wrongly decided that he could not hold that adultery was proved unless he was satisfied of the fact of adultery beyond reasonable doubt; that is, that it was wrongly held that the criminal standard of proof should be applied in divorce proceedings, at least in relation to a charge of adultery;
 - (2) that the reasons for judgment given by the learned judge showed that he was satisfied to the fact of adultery according to civil standards of proof, that is, upon a preponderance of probabilities, and that therefore the petition should have been granted;
 - (3) alternatively, that upon the evidence the learned judge should have been so satisfied;
 - (4) alternatively, a new trial is sought.
- 9 In the context of the background outlined at [6]–[8] above, Dixon J stated (**Briginshaw**, 361–363, 368–369) (footnotes omitted) (emphasis added):
- Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.
- ...
- When, in a civil proceeding a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues. But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.
- These illustrations show the good sense of Professor *Wigmore's* statement that, in civil cases, it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain.
- ...
- Upon an issue of adultery in a matrimonial cause **the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.**
- 10 Applying the principles at [9] above, the Board can be satisfied to the **Briginshaw** standard that on the balance of probabilities, Ms Auzins engaged in the misconduct alleged, if the Board scrutinises the evidence and is satisfied the evidence appears 'precise and not loose and inexact' and not 'susceptible of some other not improbable explanation'.

Filed documents

- 11 On 16 April 2024, the parties filed a Statement of Agreed Facts, stating (Agreed Document number references, other than Agreed Document 1, omitted):
- The Events of 22 May 2023**
3. An email written by [Ms Kamalanathan] was sent to Ms Kerry Date [(**Ms Date**)] on Thursday 18 May at 10:06pm. The email was to advise of Ms Kamalanathan's resignation due to her perceived poor treatment from [Ms Auzins] and described numerous negative incidents between herself and [Ms Auzins].
 4. The email was forwarded to [Ms Auzins'] DOE email address on 22 May 2023 at 3:34pm from Ms Kamalanathan's DOE email address. [This **Email** is **Agreed Document 1**].
 5. [Ms Auzins] entered the back area of the library which contains the printing room, staff kitchen and IT Storeroom (the **Area**) at KSHS at 3:28pm on 22 May 2023. She was accompanied by a tradesperson who exited the Area after 13 seconds, while [Ms Auzins] remained in the Area.

6. Another employee, Mr Bruce Walther, entered the Area at 3:30pm and exited the IT storeroom 25 seconds later. [Ms Auzins] remained in the Area until 3:37pm.
7. [Ms Auzins] approached Ms Date on Tuesday 23 May 2023 to discuss the contents of the Email. When Ms Date asked [Ms Auzins] how she knew about the Email, she said the Email had been forwarded to her DOE email address, from Ms Kamalanathan's DOE email address.

The Disciplinary Process

8. The respondent initiated the disciplinary process [via] a letter dated 15 August 2023 (the **Complaint Letter**) to [Ms Auzins] from [Ms McCallum-Van Lierop], A/Principal Investigator, setting out two complaints as follows:

Complaint 1

On 22 May 2023, you were employed as a Network Support Officer at [KSHS]. It is alleged that you accessed the Departmental emails of [Ms Kamalanathan], using a work mobile phone that had been issued to Ms Kamalanathan, without authorisation to do so.

Your alleged conduct is considered a breach of discipline pursuant to section 80(c) [PSM Act]. Additionally, this would be a breach of the Department's *Code of Conduct standards – Behave professionally and with integrity, behave honestly and use public resources responsibly*.

Complaint 2

On 22 May 2023, you were employed as a Network Support Officer at KSHS. It is alleged that you forwarded a confidential email written by Ms Kamalanathan to your own email address, using Ms Kamalanathan's work phone, without authorisation to do so.

Your alleged conduct is considered a breach of discipline pursuant to section 80(c) [PSM Act]. Additionally, this would be a breach of the Department's *Code of Conduct standards – Behave professionally and with integrity, behave honestly and use public resources responsibly*.

9. On 16 August 2023, [Ms Auzins] made a telephone call to SID in response to the Complaint Letter.
 10. [Ms Auzins] also provided a written response (the **Initial Response**) to the Complaint Letter on 17 August 2023.
 11. [Ms Auzins] provided a further written response (the **Second Response**) to the Complaint Letter by email dated 17 August 2023, to which she attached a time sheet which she claimed was proof that she was not at the school on 22 May 2023.
 12. [Ms Auzins] provided a further written response (the **Third Response**) to the Complaint Letter by email dated 18 August 2023.
 13. The DOE issued a findings and proposed outcomes letter (**Proposed Outcome Letter**) on 25 October 2023 from [the respondent].
 14. The Investigation Report (dated 4 September 2023) [(**Investigation Report**)] was also provided with the Proposed Outcome Letter on 25 October 2023.
 15. The CSA, on behalf of Ms Auzins, provided a response to the Proposed Outcome Letter on 17 November 2023 [(**CSA Letter**)].
 16. On 27 November 2023, Ms Auzins received a **Final Outcome letter** from the Respondent that advised her that she was dismissed from her employment effective immediately. Ms Auzins was paid in lieu of the notice period.
12. On 16 May 2024, Ms Auzins filed her amended outline of evidence.
 13. On 31 May 2024, the respondent filed outlines of evidence for:
 - (a) Ms Kamalanathan.
 - (b) Ms Date, Manager Corporate Services at KSHS, and previous manager of both Ms Auzins and Ms Kamalanathan.
 - (c) Daniel Whitney (**Mr Whitney**), Senior Investigator at the Department's Standards and Integrity Directorate, and investigator into the allegations of misconduct against Ms Auzins.
 14. The respondent's outlines of evidence attaches three documents:
 - (a) **Respondent's Document 1:** A hand drawn map of the Library, outlining the following areas:
 - (i) Room 1: IT Room.
 - (ii) Room 2: Librarian Office.
 - (iii) Room 3: Kitchenette area.
 - (iv) Area 4: Doorways for entering and exiting the Library.
 - (v) Room 5: Server Room.
 - (vi) Room 6: Tech Support Office.
 - (vii) Room 7: SIDE Room (for students to access distance education online).
 - (viii) Area 8: External security door to the IT Room.
 - (b) **Respondent's Document 2:** comprising:
 - (i) a School Quotation and Purchase Order Form, for an iPhone 12 Pro Max, signed by Ms Auzins on 11 June

- 2021; and
- (ii) a Tax Invoice, for an iPhone 12 Pro Max 128GB – Pacific Blue, signed by Ms Auzins in two of four signatory spaces on 14 June 2021.
- (c) **Respondent’s Document 3:** comprising:
- (i) a document labelled ‘Timesheet provided by Ms Auzins’; and
- (ii) a document labelled ‘Timesheet provided by [KSHS]’.
- 15 The Investigation Report did not form part of the parties’ Agreed Documents. After hearing the parties’ respective submissions on the admissibility of the Investigation Report, the Board determined that it would permit the Investigation Report to be tendered and for the respondent’s witnesses to be cross-examined on its contents. This decision was made because the Investigation Report was attached to the Form 8B, and the Board considered that certain attachments to the Investigation Report, specifically still photos of the Library and IT Room (Attachments 4 and 5), may be relevant to the issues for determination in the appeal. Specifically, the Board considered that these attachments could assist in determining questions regarding access to, and visibility of, the IT Room (Room 1) from the room Ms Auzins is captured on CCTV exiting at 3:37pm (Room 3).

The documentary evidence

- 16 The Statement of Agreed Facts [8] outlines the complaints in the Complaint Letter.
- 17 The Statement of Agreed Facts [10] notes that shortly after receiving the Complaint Letter, Ms Auzins provided the Initial Response, stating (emphasis added):
- On 22 May 2023 at 3.34 pm, I received an email from [Ms Kamalanathan] in my Education inbox titled ‘Fwd: Job Changing’. **I was dumbfounded that [Ms Kamalanathan] would forward me the email** as I had not yet been informed by our line manager, [Ms Date], that she was even leaving her position at KSHS at this stage **and that the context of the email was extremely defaming towards myself**, so I presumed that this was her way of letting me know how she felt. I approached my line manager the next day and asked if [Ms Kamalanathan] was leaving and that [Ms Kamalanathan] had sent me the email. I asked [Ms Date] did I need to take any action against the unfounded allegations that [Ms Kamalanathan] had made with regard to me and her reason for her resignation. [Ms Date] informed me that she too had not read the email as she had been under the pump and had not had time but had been told verbally that [Ms Kamalanathan] was leaving. [Ms Date] then read the email and said, ‘Let it go she will be out of here soon, stop stressing’. **In hindsight, I now wish I had gone with my gut feeling of up-and-coming backlash from [Ms Kamalanathan] that I had acted at the time.** I now find myself equally dumbfounded that this has been made a Standards and Integrity issue 5 months after **the email was originally sent to me by [Ms Kamalanathan] herself.**
- 18 In the Initial Response, Ms Auzins states (emphasis added):
- [Ms Kamalanathan] and I did not share a workspace together, so I really have no idea where she kept her things as the only time I went into her office was to get IT supplies, i.e. printer toner, HDMI cables etc, when requested by staff and [Ms Kamalanathan] was not at work to do so. ... The work area that [Ms Kamalanathan] had been assigned was also used as a storeroom when Admin was doing renovations. **This meant anyone could have gone in the room as it was not locked during the day** (either the cleaners or [Ms Kamalanathan] would lock it at the end of the day, I made sure that unless it was absolutely necessary I gave [Ms Kamalanathan] her own space and stayed away) and touched the phone. **The room was also unlocked and accessible from the library’s internal kitchen area, which all staff members, including teachers, had access to allowing them to make coffee, heat lunches etc, so again if her phone was left unattended it would have been open slather to anyone in that area.** Please note that the office [Ms Kamalanathan] occupied could also be accessed via an outside door so there were two access points for anyone to go in and out of.
- ...
- I hereby officially deny going onto her phone, I deny sending the email to myself and feel there is very little evidence to support the complaints made.
- Reasons being:
1. I had no idea what passcode/lock was set on her devices. ...
 2. **Access to her workspace, where she says her devices were kept, was freely accessible to anyone** (internal/external access). ...
- 19 From the Agreed Documents, it appears that Ms Auzins emailed the Initial Response to Mr Whitney on 17 August 2023, 3:49pm.
- 20 Thereafter, they exchanged the following emails:
- (a) 17 August 2023, 4:34pm: Email from Mr Whitney to Ms Auzins, stating:
- On the phone yesterday I do recall you saying that you had finished early on 22/05/2023 and that you weren’t even at school when the email was sent. Are you able to confirm this with a timesheet or something similar? That would assist a lot.
- (b) 17 August 2023, 5:29pm: Email from Ms Auzins to Mr Whitney, stating:
- With the time sheets this is where I confirm that something along the lines of being setup comes into play. My copy that I kept says I left at 1.30pm on that Monday but the copy held on Admin Shared drive at the school which again is open to anyone allowing sheets to be manipulated says 3.45pm. The strange thing is that I was

away the last week of term 2 sick and then first two weeks this term long service leave totalling 5 weeks in total that I was not at school. Yet my time sheet has been updated until the 10/8/23. I have been using, since returning from long service leave, the sign in cards that we use to login/logout via Compass kiosk so again endorsing my belief that I am being setup in some way. I am starting to think someone had my E-number and password which I have changed this week.

- (c) 18 August 2023, 7:46am: Email from Mr Whitney to Ms Auzins, stating:

Can you send me a copy of the timesheet you kept please?

Also, could you please send me a copy of [all] the discrepancies you can see in your timesheets? Just for my info, is it possible for any person to change the timesheet entry of another person or do you need that person's E number and password?

- (d) 18 August 2023, 10:08am: Email from Ms Auzins to Mr Whitney, stating (emphasis added):

Because I am not in my office, I don't have access to the document I saved, but I can say that all the time sheets are on the shared drive at work and can be accessed by anyone as they are not locked down. I am extremely concerned about losing my job and retaliation from fellow staff members with regard to someone falsely being accused of editing timesheets, and I don't want to be classified as a troublemaker. This would make working at the school extremely challenging and stressful. **Therefore, I will accept whatever is noted on the sheets as true.** In saying this, can we focus more on the accusations made and the fact that I believe [Ms Kamalanathan] has set me up to return to KSHS without me being there? Please ring the contacts I supplied to verify my statement, as they have seen first-hand the issues and accusations, I faced with [Ms Kamalanathan]. **Even if the timesheets say I was onsite, there are still too many variables i.e. mainly being the open access to the said workspace and phone from anyone within the school,** to prove that I have done what I am falsely accused of.

I hope you understand my position, but I am the one that needs to face these people each day and I know, as having the role of union delegate, that this is not right and you cannot be targeted for speaking up, but unfortunately, it happens every day. ...

- (e) 18 August 2023, 10:35am: Email from Mr Whitney to Ms Auzins, stating:

I may be confused about your worked hours on 22 May 2023.

You stated that you left work at 1.30pm and you have documentation to prove this. I really need a copy of that.

When you return to work next week, could you please send me the document you saved?

- (f) 18 August 2023, 10:51am: Email from Ms Auzins to Mr Whitney, stating:

I have gotten in touch with a co-worker who sent me the sheet I have so I have attached it for you.

- (g) 18 August 2023, 2:44pm: Email from Mr Whitney to Ms Auzins, stating:

Do you remember why you left at 1.30pm on 22 May?

Was there a Dr's appointment or something similar or is there anyone you may have visited that can verify you being there?

- (h) 18 August 2023, 2:56pm: Email from Ms Auzins to Mr Whitney, stating:

If my memory is correct I went to see my 90yr old father who lives in Pinjarra and who had fallen over in the garden and was shaken up but I doubt he will remember dates etc as his memory is not what it used to be.

21 The Proposed Outcome Letter states:

Proposed Action

I have now considered all of the information available to me and I propose to make the following findings.

Firstly, you committed a breach of discipline by using the work phone of your colleague, [Ms Kamalanathan], to access her emails without authorisation to do so.

Secondly, you used the phone to forward a confidential email written by Ms Kamalanathan to your own email address, without authorisation to do so. Ms Kamalanathan's phone was in the IT storeroom and there is evidence to show that you were also in the IT storeroom at the time the email was forwarded from her phone to your email address.

Based on the evidence gathered, I propose to dismiss you from your employment.

The Department has an expectation that all employees will behave in an exemplary manner and in a way that is consistent with the Code of Conduct. Your alleged conduct is wholly inconsistent with the Department's values and standards.

Additionally, I am concerned that you have been dishonest in the course of the discipline process. In particular, you provided a timesheet stating that you left work at 1:30pm on the afternoon in question. This was at odds with the school's timesheet. Also, CCTV footage from the school shows that not only were you at school on the afternoon in question, but that you were in the IT storeroom (which was used by Ms Kamalanathan as an office) at the time the email was sent from her phone (which was located in the IT storeroom that afternoon). This disproves your claim that you were not at school and suggests that you fabricated the timesheet that you produced in support of your claim.

Should I ultimately be satisfied that you were dishonest in that regard, in addition to the conduct referred to in the complaints, I would also hold concerns that your lack of honesty presents an obstacle to me having the necessary trust and

confidence for you to remain employed in the Department.

- 22 The Proposed Outcome Letter attaches the Investigation Report, which states:

Ms Auzins has been subject to the following complaints previously received by SID:

- in July 2019, it was alleged Ms Auzins used her Departmental email to forward inappropriate emails to a restaurant that gave her poor service. Ms Auzins also submitted her email on the restaurant's Facebook page. Ms Auzins was subject to Improvement Action for her conduct. (F21/0162022 refers)
- on 10 March 2023, Ms Auzins stated to a KSHS colleague that it was against policy for them to speak their 'native language' in the workplace. Whilst this was considered a breach of the Code of Conduct by Ms Auzins, it did not constitute minor or serious misconduct and so the matter was dealt with by local management. (REF0005329 refers)

- 23 The CSA Letter (Statement of Agreed Facts [15]) states (emphasis added):

Reliance on CCTV footage that does not contain a view of the room needed to form the conclusions

The CCTV footage does not include a view of the space where the alleged action took place. The investigation report provides stills of Ms Auzins entering and then exiting this area but no view of her in the room. The room itself contains the kitchenette area where staff often keep food or have breaks so Ms Auzins entry to this area is not unauthorized or unusual. In the provided CCTV stills Ms Auzins was chewing when exiting the room, the logical conclusion being that she entered the room to have something to eat.

The CCTV footage does not show Ms Auzins picking up a phone and using the phone for the time one would assume it would take a person to send an email on that phone. It simply shows an employee proceeding with usual activities.

Location of the work phone belonging to Ms Kamalanathan

There is no independent or corroborated evidence presented in the report that establishes that Ms Kamalanathan's phone was in the IT storeroom on that day and at that time. Furthermore, the alleged location is a thoroughfare to the kitchen for staff and for staff to access other IT rooms and amenities. **If the phone was in fact in the IT storeroom there any number of people who could have picked it up.** If the investigator cannot establish that the phone was actually in that location how can it be established on the balance of probabilities that Ms Auzins accessed the phone.

Reliance on recall of location over more than 3 months ago

...

In the investigation report it was provided that Ms Auzins stated that she was not at the workplace on the date and time in question. This is incorrect. Ms Auzins has provided to the investigator and to the CSA that she believed that she may have left early that day for a family emergency. However, on review of her timesheets, conversations with a coworker and her sister, she was able to recall that she had mixed up the days that week that she had left early, and furthermore, that the family emergency in question had happened in April, not May. These recall issues are not uncommon for individuals when asked to recall events from memory occurring more than a few days ago.

The investigator should have followed up any concerns or inconsistencies with Ms Auzins and given her the opportunity to refresh her memory before relying on her initial response, which was heavily influenced by the stress of the situation and the pressures of the deadline. I note that the investigator did request to speak with Ms Auzins to ask her more questions, but when the CSA responded asking for the questions to be in writing and a written response would be provided, there was no further communication from the investigator.

- 24 The Final Outcome letter states:

My Decision

In my previous letter, I outlined the factors that I considered in reaching the preliminary decision to dismiss you from employment. I continue to rely on those considerations.

As above, there has been no new relevant information received since my previous letter and as a result, I maintain my findings in relation to complaints 1 and 2. In my previous letter, I outlined why your conduct, as particularised in these complaints, was concerning to me. I maintain those views.

Your conduct in complaints 1 and 2 fell well below the standard that is expected of Department employees. I am satisfied that you were aware of the standard of conduct expected of you in your position as it has been brought to your attention previously.

Your failure to take responsibility for your actions and your attempts to fabricate certain details of the matter during the course of the investigation is of great concern. Therefore, I am not confident that imposing a reprimand, fine, demotion or disciplinary transfer, or a combination of these, would result in you sustaining a change of behaviour that would allow me to have the necessary trust and confidence in your ability to perform your duties appropriately.

Therefore, I am of the view that dismissal is the appropriate disciplinary action in the circumstances, and I dismiss you from your employment from the Department immediately.

The oral evidence

- 25 Ms Auzins gave the following evidence-in-chief:

- (a) As the Network Support Officer, her duties included purchasing technology resources under \$5,000, which included phones.

- (b) The process for purchasing staff phones involved the Manager of Corporate Services informing her to order a phone, and her purchasing the phone from a CUA supplier.
- (c) When the phone arrived, she would turn the phone on to ensure it was working and then deliver the phone to the Admin Officer 'to put it on their asset manager'.
- (d) It was policy that everybody should have a passcode on their phone.
- (e) Prior to Ms Kamalanathan, she was the only Network Officer that KSHS ever had.
- (f) Ms Kamalanathan was to be the first port of call for technical support (including troubleshooting, installing and reimaging machines, laptops, iPads, and helping if there was printer or printing issues), and she provided that training to Ms Kamalanathan.
- (g) After about five weeks, she was advised by Ms Date that 'all training will be taken off and it was just better if we had no verbal communication', and she was asked to set up a different work area for Ms Kamalanathan.
- (h) Room 1 is an IT room and also called the Rainbow Room, accessible for student councillors, the Aboriginal Indigenous Officer, and psychologist. 'It was basically open all day, every day, from the outside, because it was actually classed as a meeting room'.
- (i) Her office, since October–November 2022, was in Room 6, which she shared with the Media Support Officer (Kirsten Lindley).
- (j) Upon walking into Room 3, '**if you turn right**, down the bottom there, is all the library store cupboards, the, um, relief staff iPad lockbox, the kitchenette, the microwave, the fridge, um, and the doorway to the IT office'. The doorway is a four-panel barn door that is 'always locked'.
- (k) On 22 May 2023 around 3.30pm, she had a conversation with Hugh Lancaster (contractor, cabling technician), and as she had said to Bruce Walther (Library Officer) that she would clean up the kitchen, she attended to the following end of day tasks: cleaning up the kitchen area, ensuring staff iPads were on charge and locked away and taking out and turning on any laptops on loan for staff the next day.
- (l) The CCTV footage shows her entering and exiting Room 3. The only part of Room 1 that is visible on the CCTV footage are the glass windows above Room 2 and 3, from which you can see the windows into Room 1, which are 'completely black' and 'you can't see in there without putting lights on' so 'if anybody was in there, lights would've gone on' because 'you literally can't see in that room without it being lit up'.
- (m) She first became aware of the Email when she returned to her office, as her daily routine before leaving in the afternoon is to sit down, go through her emails and then shut down her computer. She was 'gobsmacked' because she did not know that Ms Kamalanathan had resigned from KSHS and was 'dumbfounded' because the Email was 'really quite demeaning' of her. She turned and asked the Media Officer whether she knew that Ms Kamalanathan had resigned, and she said that she did not know.
- (n) The only reason she did not speak with Ms Date about the Email was because Ms Date was in a senior staff meeting that afternoon. So she went home and spoke to her husband about the Email. She said to her husband that 'I don't believe this. Have a look at what I got'.
- (o) The next day, she went to see Ms Date and asked if she could have a conversation. She closed the door, sat down, and asked Ms Date if it was true that Ms Kamalanathan had resigned. Ms Date asked her how she knew and she said that Ms Kamalanathan had sent her an email and that 'it wasn't a nice email'. She asked if there was any reason she needed to be worried about the Email. Ms Date said she had not yet read the email but that Ms Kamalanathan had resigned. Ms Date then read the email and said 'Don't worry about it. She's out of here at the end of the week. Let her go'. That was the end of their conversation so she got up and left Ms Date's office.
- (p) On 16 August 2023, about 2:00pm–2:30pm, the Principal provided her with the Complaint Letter. She returned to her office and telephoned Mr Whitney. Mr Whitney told her to 'put down what had happened' and she was led to believe 'just put it all into writing and everything will be okay'. Mr Whitney only told her to contact PeopleSense. He did not advise her to seek union help 'or anything like that'.
- (q) After providing the Initial Response, she spoke with Mr Whitney 'once in person' and there were 'to and froing emails'.
- (r) She does not remember how they came to discuss her timesheet, but when she saw that her timesheet had been completed until 10 August yet they had stopped using them because they were using Compass login cards on the Compass desktop, and that she had been overseas for five weeks and seven days, she queried who had completed her timesheets. She looked at her timesheet for 22 May 2023, and saw that 'the time had been missing' and said 'Well, according to this here' 'I wasn't even at the school'.
- (s) When she settled down and had another look, she realised that she was at the school on 22 May 2023. The timesheet showed her 'signing back on from lunch. I wasn't signing off at 1.30. That's actually me signing back on'.

26 Under cross-examination, Ms Auzins gave the following evidence:

- (a) She has worked for the Department for approximately 17 years.
- (b) During that time, she has not adhered to the Department's policies and procedures on one occasion in 2019, when a friend used her iPad to send an email, and the email was sent from her Department email account because they had not realised that the 'Education email had been changed to default on my iPad'. She denies she was investigated by SID. She says, it 'just came back to the school to be dealt with'. She agrees she was subject to Improvement Action.

- (c) In relation to the March 2023 complaint at [22] above, she disagrees the conduct was found to not be serious enough misconduct to require the oversight of SID but that it was found to be a breach of the Department's Code of Conduct and the complaint was sent back to the Principal to address. She says she was not allowed to give evidence about the matter. She says, when she went to give evidence, the Principal and Ms Date said, 'Don't want to know about it', and that 'that was the exact words' they had used.
- (d) Ms Kamalanathan was under her management, and she communicated KSHS' policies regarding the use of work mobile phones to her. She cannot recall whether she communicated KSHS' policies regarding the use of work mobile phones to Ms Date when Ms Date commenced at KSHS.
- (e) KSHS' policies included that work mobile phones should always be left on school grounds if there was no need for the employee to be working at home.
- (f) She agrees that when she was Ms Kamalanathan's manager, she communicated to Ms Kamalanathan that she should keep the work-phone at work, and not take it home.
- (g) She agrees that Ms Kamalanathan was the first port of call for technology issues. She says, if Ms Kamalanathan was absent, then 'we didn't know what was – what was needed to be done'.
- (h) She denies entering Room 1 from Room 3 on 22 May 2023 at around 3:30pm, picking up Ms Kamalanathan's work-phone, using it to access Ms Kamalanathan's Departmental emails, and using it to forward the email to her own email address.
- (i) She says she approached Ms Date on 23 May 2023 to discuss the Email. She denies she approached Ms Date to discuss something else. She denies talking with Ms Date about another position in Support Services. She says that discussion occurred in April 2023 at her performance management meeting. She denies raising the idea of her moving to a position in Student Services as a solution to Ms Kamalanathan leaving KSHS.
- (j) When she said in evidence-in-chief that she asked Ms Date if there was anything she needed to do about the Email, she meant should she have gone and sought advice from the union because it was a 'very, very demeaning' email, and 'basically made me out to be a complete bully, which was not true'. She says she asked Ms Date 'Do I need to take any actions against this?', 'Do I need to cover myself ... from any actions from Ms Kamalanathan?'
- (k) She had thought for some time about whether to make a complaint to SID about Ms Kamalanathan. After reading the Email her thoughts about making a complaint 'became stronger'.
- (l) In response to a question about whether she said to Ms Date that Ms Kamalanathan had forwarded the Email to her and she 'wasn't too smart about it', she says all she said was that Ms Kamalanathan had forwarded the Email to her, because Ms Date had asked her how she got the Email.
- (m) She maintained that Ms Date told her not to worry and to just ignore the Email.
- (n) She denies that she was not expressing worry or concern during her conversation with Ms Date and denies that she came across as smug.
- (o) She agrees that she telephoned Mr Whitney on the same day that she received the Complaint Letter. She does not recall saying to Mr Whitney that she had a timesheet that could confirm that she was not at school on the afternoon of 22 May 2023. She denies Mr Whitney encouraged her to seek advice and support from her union to assist her in her response, and says Mr Whitney only encouraged her to seek support from PeopleSense.
- (p) Regarding Respondent's Document 3, the KSHS timesheets were on the S drive, which is KSHS' shared drive. Everything from the Department is on there. The timesheets were in the timesheet folder because up until the time they were using Compass sheets, they were using physical timesheets. She says the only time she kept a copy of her timesheet 'was to keep a track of TOIL'.
- (q) She says, she told Mr Whitney to 'take what is on S drive as to be true', because 'mine was actually really only for me to keep my TOIL'.
- (r) She says that when she sent the emails at [20] above, she believed that Ms Kamalanathan was setting her up so that she can return to KSHS. She says, since then, she has been seeing a psychologist and now realises she was thinking with her emotions and not with her head.
- (s) The timesheet she provided to Mr Whitney shows that across April, May and June 2023, other than on 27 April 2023 (when she left early to see her father):
- (i) She takes her lunchbreak between 12:45pm–1:15pm each day, except on 22 May 2023, when it records her taking her lunchbreak between 12:45pm–1:30pm. She says she cannot recall the reason for that. Nor can she recall any reason why she needed a longer lunchbreak on that one day.
- (ii) Her workday ends at 4:00pm each day, except on 22 May 2023, when there is no finish time recorded. She says she cannot think of any reason why the timesheet does not show a finishing time. Nor can she think of any reason why that might have been the case on that one day.
- (t) The timesheet kept and provided by KSHS, shows her taking her lunchbreak between 12:45pm–1:15pm and finishing at 4:00pm on 22 May 2023. She cannot think of any reason for the discrepancies between her timesheet and KSHS' timesheet.
- (u) She says that at some point after the emails at [19]–[20] above, and prior to the CSA Letter at [23] above, that she spoke with Mr Whitney on the phone and informed him that she had gotten the day she went to visit her father mixed up, and that it was not on 22 May 2023 as she initially stated to him.

- (v) She says that she returned the Departmental phone in 2020/2021 and from that time was using the Departmental SIM in her own dual-SIM iPhone. She denies the phone recorded in Respondent's Document 2 was allocated to her, and that she did not return it to KSHS when requested to return all KSHS property upon her dismissal. She says that when she went on long service leave, she took the Departmental SIM from her phone, inserted it into an old handset in the Media Officer's drawer, and left the handset there. She says she did not return the Departmental SIM to her own phone upon returning from long service leave because KSHS refused her TOIL so she refused to take the phone home after that. She says that Ms Date 'knew that I never had a phone. She knew that I had my own personal phone right from when she first started, because she actually asked me – we had to buy her a new phone. And she asked me what model mine was. And we had talked about it. And she knew I didn't have my own phone.'
- (w) On Respondent's Document 1, Room 1 is as long as Room 3, and the door from Room 3 to Room 1, is closer to the number 8. They are four barndoors. If entering Room 3 from Room 1, you have to push the doors out. The two doors at the top were always open. The two doors at the bottom were swinging doors. They were locked during the day, so that nobody can come in from Room 1 into Room 3.

27 In response to clarifying questions from the Board, Ms Auzins gave the following evidence:

- (a) On 22 May 2023, on returning to her office, which she shared with the Media Officer, and finding the Email in her Inbox, she said:
- I was dumbfounded. I just could not believe it. And I – and I – I – because I didn't know that she'd even resigned. So, you know, like, I had no idea. Um, and I was just absolutely dumbfounded what she'd – she'd actually written. Because, pretty much, what she'd written was complaints that I had already made to Ms Date about the treatment that I had received of Ms Kamalanathan. And I was – I was just dumbfounded that it had been turned around to make me look like the bad guy. And I was, like, ah – I – I couldn't believe it.
- (b) In response to a question about whether she thought about making a complaint about Ms Kamalanathan after receiving the Email, she said:
- I wanted to speak to Ms Date first, um, being my line manager. And I thought it was only, um, fair to try and keep it within school. You know, I didn't sort of want to have to bring on anything that wasn't necessary. And it was – after speaking to Ms Date, when she said, 'Just let it go', um, that – that's when I let it go. I just – 'Okay' which – 'She's – she's' – as she said, 'She's out of here at the end of the week. Let her go'. And I – I knew I had the Friday off. So it was only a couple of days that I actually had to, you know, see Ms Kamalanathan.
- (c) In response to a question about whether she wanted to speak with Ms Date on the same day as receiving the Email, she said:
- No. Because I knew – I knew that Ms Date was in the senior staff, ah, meeting, which is always held between 3 and 4 pm on a Monday. Um, and to be honest, I just wanted to get home. I was – I was just – I actually wanted to speak to my husband before I spoke to [Ms Date]. I was gobsmacked.

28 In re-examination, Ms Auzins gave the following evidence:

- (a) At the time of her dismissal, she did not have a Department-issued mobile phone. She had a Department-issued SIM, which was in the phone that she left at KSHS. Ms Lindley and her replacement, Christopher Horton, are aware that at the time of her dismissal she was using that phone and that it was left at KSHS.
- (b) She no longer believes that her timesheets were completed to set her up. She believes that her timesheets were completed because they were required to be completed to 'cross the Ts, dot the Is'.

29 Ms Date gave the following evidence-in-chief:

- (a) On 23 May 2023, Ms Auzins came to her office and said that she knew what Ms Kamalanathan had written about her, and:
- I just said, 'I don't know what you're talking about'. And she said, ah – ah, 'She's not that smart. She sent that email to me'. And I sort of started to panic a little bit inside, thinking how would she have received that email. Um, then she proceeded to tell me that, ah, 'It's okay', that she has a solution for me, that she would be happy to go and be an SSO, ah, in Student Services, because we had a job going. And she'd expressed interest in that role. Um, and she said, 'So if I went over there, then [Ms Kamalanathan] could take my role and everyone would be happy'. And that's when I just informed her I'd have to talk to the Principal and ended the conversation. And then I shut my door and had a bit of a, 'What was that about?' And I rung Ms Kamalanathan to ask her, um, if she had given – if she'd forwarded that email to Karen.
- (b) She recalls Ms Auzins' demeanour as very calm, and:
- In fact, I felt like she was – she wanted to tell me she'd read the letter and the email. And in her eyes, she had a solution for the whole thing. And it was, like, she was bragging about the letter – the – the email that – and I think she said something like, um, you know, 'She's not too smart, because she sent it to me'. And I thought, you know – I just – I just thought that was very out of character for [Ms Kamalanathan] to send that to her. Because she was very distressed about their relationship. She was, um, very emotionally unstable, ah, towards the last few months that she worked at [KSHS].
- (c) She says Ms Auzins did not mention any concern about the Email. Nor did she ask if she needed to take any action. 'She was pretty much giving me a solution, saying that she could go work as an SSO, because that's what she wanted to do'.

- (d) She denies telling Ms Auzins not to worry about the Email as Ms Kamalanathan will be out of KSHS soon.
- (e) She had read the email from Ms Kamalanathan before speaking with Ms Auzins. After speaking with Ms Auzins, she re-opened the email to check that it had only been sent to her. She shut her office door and telephoned Ms Kamalanathan, who 'immediately got very upset'. She told Ms Kamalanathan to be calm, and asked her to hang up the phone, go through her emails, and call back if she found anything.
- (f) Ms Kamalanathan returned her call about 10 minutes later and said she had found the Email in her deleted box, and that the Email had been forwarded on the day that she was not at KSHS and had left the phone in the IT office.
- (g) When Ms Auzins was dismissed, it was the Principal who was responsible for asking her to return any KSHS property in her possession. She was not satisfied that Ms Auzins did because:

[W]hen I started at the school, ah, [Ms Auzins] made a point of telling me that, um, she broke her phone in the past at school and the school agreed to buy her, um, an iPhone to use for work. And, um, that was the phone that she had in her possession. And then before she was dismissed, it was budget time. And she said to me that, um, her phone's a couple of years old and could she be considered for a – an – an upgrade. Um, and I just told her that, 'Yeah. Sure. Everything gets considered by the finance committee. It needs to be in your budget submission, so add that to your budget submission'. Um, but of course, we didn't get to that point. Um, so when I received the phone and the keys back from the Principal, I noticed that it wasn't the phone that she was issued by the school. Um, it looked like an iPhone 4 or, um, just a really – a – a really basic, um, iPhone. Not the one she was issued. But I thought, 'I better check this'. So I took it to IT and they scanned it and it was registered as Kirsten Lindley's, um, phone. So I showed her the phone and she confirmed that that was the phone she used, um, when she was the tech officer years and years ago. Six years ago. I don't know how – how many exactly. Um, so then I started to go, 'Well, where is Karen's phone?' So I pulled up the, um – the purchasing records of the phone that we'd – the school purchased for Karen and two other staff members.

- (h) Respondent's Document 2 are the documents that she retrieved when trying to determine what happened to Ms Auzins' phone and its serial number. She believes these documents refer to the phone allocated to Ms Auzins because:

Ah, so the details and description of the phone is the one that I've – I've viewed, that she's shown me. She's – it also the one that I've asked, um, various school officers that, ah, worked with [Ms Auzins], that confirmed that she had a blue iPhone 12 and that the school paid for it. I've also been told that, um, the previous employee, Sacha, wasn't happy about the purchase, because it didn't fulfil, um, the financial agreement that we have in schools, which I can see straightway, it's not. Um, so I'm not sure if you remember, Department of Communities got ripped off for millions, and this is because people were abusing purchase orders. So it was decided, um, that a school of our size would need four signatures – four separate signatures, to approve any purchases from purchase orders. Um, so you have to have one person to, ah, sign the order book. And that has to be an authorised person. Any person can agree that it was received. So that's the second person. The third person has to incur it. And a fourth person then certifies it.

- (i) When a new phone is purchased by KSHS, IT are responsible for recording the serial number into Hardcat (the resourcing software used to record phones, laptops, desktops, cameras, etc). At the time, that was Ms Auzins. Ms Auzins recorded the serial number for Ms Date's phone, so Ms Auzins knew the process. However, and despite the iPhone referenced in Respondent's Document 2 being purchased with government funds, there is no record of the phone in Hardcat. Further, the iPhone referenced in Respondent's Document 2 has not been returned to KSHS and is not in KSHS' possession.
- (j) In relation to the Ms Kamalanathan's work-phone, she said:

[Ms Auzins] was very particular that [Ms Kamalanathan], um, should leave hers at work at all time and unlocked and in a certain place, so that, um – because it was deemed the IT helpdesk phone, that it could be retrieved and used to answer, um, IT help that any teachers had, because they had that number as the call number for when – when they were at work. So look, I felt that was a little bit controlling, but I could see [Ms Auzins'] point of view. And she's got way more experience in IT than myself, so I trusted that that was a system that worked at the school. Ah, and – and that's how we – we treated that – that IT helpdesk phone.

- (k) In relation to the March 2023 complaint at [22] above, she said:

I'd had various staff come to me with this complaint. Some quite distressed. Ah, so I spoke to the Principal and that's when he actioned the SIDs, um – the – the SIDs inquiry. When it came back, [the Principal and I] met with [Ms Auzins] and verbally explained that it wasn't acceptable to – 'It – it just is deemed that you're – you're intimidating someone when they're using their own, you know, language, and that we feel that we're quite welcoming and if it's not upsetting anyone, we don't see the big deal. And perhaps to come to us next time'. Ah, and she didn't take it too well, um, and denied it happened. But I have three witnesses that said it happened.

- (l) When asked if Ms Auzins might have something to say to defend herself, whether she would have told her that she did not want to know about it, she said:

No. We sat and talked for quite a while about it. And we just explained that we're a multi-racial – national, um, country and, you know, Olga speaks in her language on the phone. People – people should be able to speak however they want to speak. Um, and we just said it's just – we don't want that environment at our school. We want everyone to feel welcome, um, and not intimidated.

30 Under cross-examination, Ms Date gave the following evidence:

- (a) She addressed the working relationship between Ms Auzins and Ms Kamalanathan by working with both on them on it. She spoke with Ms Auzins about being less dominating and more empowering of Ms Kamalanathan.
- (b) Ms Auzins told her that she was only going to interact with Ms Kamalanathan via email unless there was a witness in the room. She said it was not ideal but she did not want either of them to be under too much stress, so that ended up being how their communication was undertaken.
- (c) The relationship between Ms Auzins and Ms Kamalanathan was clearly fractured. She knew Ms Kamalanathan was applying for other jobs, and that they should start looking for someone to replace her to assist Ms Auzins because it is a big job in a school to be in charge of all the IT. But Ms Auzins did not mention that she was going to make a complaint about Ms Kamalanathan.
- (d) The phone recorded in Respondent's Document 2 would have been issued to Ms Auzins by her predecessor. She is not sure if Ms Auzins had a dual-purpose SIM on her personal phone.
- (e) In relation to the March 2023 complaint at [22] above, the Principal handled the complaint and arranged the meeting, which she attended. At the meeting, the Principal said that 'it's informal but it's serious' and 'to think about how you treat others in the workplace and it needs to be a safe environment for everyone'.
- (f) In relation to the 23 May 2023 discussion, she says that she was working and Ms Auzins came and stood in her doorway and was having idle chit-chat and then said that she had read the email that Ms Kamalanathan had sent her.
- (g) When asked about the SSO position and whether Ms Auzins was concerned about the Email, she said:

And so when you're talking about the SSO position, was this a conversation that also occurred on 23 May 2023, or was this a conversation that was had during her performance review in April?---No – no. I knew that – we'd – we'd already talked about it before. But, um, she – she'd come out with that idea, that, um, [Ms Kamalanathan] could move into her role and she can move into a new SSO role. Because we had quite a lot of movement there. We hired three in one year.

And so Ms Auzins, to your account, did not seem concerned with the content of the email, which was, of course, quite disparaging towards her?---Yeah. No. She wasn't. She said, um, 'I know what she thinks of me and I know that she can come back and take my job', um, 'And I'll do the SSO job'. Um, she had talked to me about she was getting a bit bored and stale in her role, which I understood. It happens. And, um, we did talk about the SSO role. So, um, in her mind, she thought that was a great solution.

- (h) She became aware that Ms Kamalanathan had found the Email in an archived deleted folder, when Ms Kamalanathan returned her call 10 or 20 minutes later. She had told Ms Kamalanathan to calm down and look through her inbox, deleted, spam, and sent folders and to return her call if she saw anything.
- (i) The CCTV footage shows Ms Auzins entering Room 3, which goes through to Room 1. The CCTV footage does not show Ms Auzins entering Room 1, or that Room 1 is viewable on the CCTV footage.

31 In response to some clarifying questions from the Board, Ms Date gave the following evidence:

- (a) The idea for Ms Auzins and Ms Kamalanathan to interact in writing, was Ms Auzins' idea. She recalls the arrangement commenced when she returned from leave in early May 2023.
- (b) The CCTV footage shows the entry to Room 3. Room 3 is used as a room but it is also a thoroughfare for Room 1. Room 3 contains the kitchen and storage area. The IT staff go straight forward, from Room 3 into Room 1. The Board understands Ms Date to be saying that the door to Room 1 is directly opposite the entryway into Room 3.
- (c) 'Barn doors' are an accurate description of the four doors to enter Room 1 from Room 3.
- (d) There is a door between Rooms 2 and 3, but there is a heavy bookshelf against it. So the only way to get to Room 1 is via Room 3, or via the external door, which is numbered 8 on Respondent's Document 1. Room 1 runs the length of Room 3.
- (e) She accessed the CCTV footage for 22 May 2023. She downloaded and reviewed the CCTV footage of the external door (numbered 8) for the whole day, and she saw an IT contractor exiting through the door at around 3:00pm but nobody else entering via the external door the entire day. She accessed the CCTV footage for the doorway to Room 3, and witnessed Ms Auzins enter the area where Ms Kamalanathan was working and 'she came back out within minutes of the email being sent to herself. So I felt like, um, that was fairly evident that she'd accessed that phone and – and forwarded it to herself. I don't understand why anyone else would want to do that'.
- (f) When Ms Kamalanathan returned her call, 'she had figured out in her head that it had been sent via her phone' because she said it had 'Outlook Mobile', and said that the Email had been sent from her phone, and her phone is at work, and she was not at work that day, she was at Jandakot Primary.
- (g) When Ms Kamalanathan said her phone was at work, she understood that to mean that the phone was in Room 1, because 'if something happened, or it started ringing, [Ms Auzins] could check it and deal with the IT issue in [Ms Kamalanathan's] absence'.
- (h) She holds the belief that the phone was in Room 1, because:

Ah, [Ms Auzins] was very clear that it had to stay at work at all times, um, because, um, it was a – it – it was for IT, ah, help. So you know, the – the – the teachers, if they needed help in a classroom, they could ring that mobile number. And also, if [Ms Auzins] needed to locate her, she'd take the phone with her. So it needed to stay at – at work. That – that was the reasoning I got given. Um, and that [Ms Auzins] needed to know where

it was. So it was always held in the same spot in the same room, so that, um, if she was sick or absent, we could still operate.

- (i) She said that Ms Auzins told her the reason why Ms Kamalanathan's phone was supposed to be left in Room 1, and that Ms Auzins gave her that reason at the time when she signed the paperwork to issue the phone to Ms Kamalanathan. Ms Auzins' reason sounded reasonable to her because Ms Auzins was an experienced IT person who has had people work for her before. She did not vary this direction.
 - (j) As Ms Kamalanathan was absent from KSHS on 22 May 2023, Ms Auzins would have been checking Ms Kamalanathan's phone throughout the day, if there was a teacher that had an issue, 'that's the agreement'.
- 32 In re-examination, Ms Date gave the following evidence:
- (a) She reviewed the CCTV footage for both the external and internal doors, and is confident that except for Ms Auzins, nobody was in Rooms 1 and 3 as a combined area, at the time the Email was sent.
 - (b) Students do not have independent access to Room 1. The arrangement was that students were required to be supervised at all times.
 - (c) She did not witness Ms Kamalanathan domineering or yelling at Ms Auzins as they worked in a different building. However, she finds it hard to believe. She saw their relationship as one of Ms Auzins having difficulty and being frustrated with Ms Kamalanathan, because she was new, there were language barriers, and she made mistakes.
- 33 Mr Whitney gave the following evidence-in-chief:
- (a) The Principal provided the Complaint Letter to Ms Auzins, and she called him later the same day. He was surprised that she called so soon. She said straightaway that she was not at the school that day. He describes her demeanour as straight onto the defensive, saying that it was not her and she did not do it. He says that she was not uncertain in her responses during this call.
 - (b) He already had possession of the CCTV footage so he knew she was at school that day, so he instantly became a little bit suspicious, and told her that she needed to 'speak to a union representative to get some legal advice'.
 - (c) He did not say to Ms Auzins that everything would be okay if she sent her reply in. As outlined in the Complaint Letter, he would have said what she can do in order to provide a response. This is because often employees do not respond. So, he would not say that everything would be fine if she sent a response. Essentially, it was her choice whether or not to respond.
 - (d) He does not recall a subsequent telephone discussion with Ms Auzins. He thinks it was mainly email exchanges at that point. He does not think that Ms Auzins subsequently telephoned him to say that her reason for not being at the school on that day was false. He thinks 'everything was on email, back and forth'.
 - (e) The first time Ms Auzins corrected her story was via the CSA Letter.
- 34 Under cross-examination, Mr Whitney gave the following evidence:
- (a) From the second still photo of Attachment 4 to the Investigation Report (which depicts Ms Auzins exiting Room 3), you cannot see the entrance to Room 1.
 - (b) Whilst he had only been in Room 3 once, he believes that upon entering Room 3, you enter Room 1 'slightly to the right'.
 - (c) From the CCTV footage, you cannot see Ms Auzins enter Room 1, but you can see her going to the right.
 - (d) He took the third still photo of Attachment 4 to the Investigation Report (which depicts Room 1). In the background of this photo is a door. He cannot remember if the door depicted is the external door, but he does remember seeing a door, and he does know there was an external door where CCTV is pointing, and he was informed that the external door was locked at all times.
 - (e) He did not take any photos from inside the Library because there were people present. The stills from inside the Library attached to the Investigation Report are enlarged stills from the CCTV footage. From these, the inside of Room 1 is not visible at all.
 - (f) Ms Date informed him as part of the investigation that the external entry door to Room 1 was locked, so the only entry to Room 1 is the entry via Room 3 that is depicted in the CCTV footage. Therefore, he reviewed the CCTV footage for anyone entering Room 3, and no one else, other than Ms Auzins, entered Room 3 at the time the Email was sent.
 - (g) Ms Auzins called him on the same day that she was served the Complaint Letter. He does not recall the time she called, nor how long the call lasted. During the call, he gave her the specific advice to speak to a trusted person:

Because I thought there was a chance she was going to say something that she probably may need some advice before saying. Because I knew I already had the CCTV. Um, and then she'd explained that, you know, she wasn't even at the school. So I thought, 'Oh, maybe you need to get some advice'. Um, she also spoke about, um, it being quite stressful. And, um – and part of the – the letter, it says, um – um, further support, you know, for - - - um, for whatnot - - - for that sort of stuff - - - PeopleSense.
 - (h) Whenever he has a telephone call, he makes a note of the call and the contents of the call on a running sheet. He does not recall having a subsequent telephone call with Ms Auzins in which anything was said that 'stands out'. If a phone call provided evidence, it would be in the Investigation Report. The running sheet contains a lot of information that is irrelevant to the Investigation Report so it is not separately attached or identified.

- 35 In re-examination, Mr Whitney gave the following evidence:
- (a) During Ms Auzins' call, she said it was a stressful situation. He cannot say that she sounded stressed or upset as people handle stress in different ways.
 - (b) He records all telephone contact in a matter in his running sheet.
 - (c) He would describe Ms Auzins, in her telephone call to him, as certain. It was 'I was not there and I've got proof'.
- 36 In response to a clarifying question from the Board, Mr Whitney gave the following evidence:
- (a) All telephone contact is recorded in his running sheet. If the contents of a call provided any evidence it would feature in the Investigation Report.
 - (b) If something was said during a call that was relevant or pertinent to the investigation, it would feature in the Investigation Report.
- 37 Ms Kamalanathan gave the following evidence-in-chief:
- (a) When she was working at KSHS, her personal phone was an iPhone 13 Pro. She did not use this inside KSHS. Inside KSHS, she used the work-phone issued to her by Ms Date, a Samsung A30.
 - (b) Ms Date said she could use the work-phone for both personal and work purposes as it was a dual SIM phone. However, Ms Auzins, the head of ICT who she worked under, told her that she could not put a password on the work-phone, she could not take it home, and she needed to store it in Room 1.
 - (c) Ms Auzins told her she could not put any password on the work-phone so it was not password protected.
 - (d) She provided the work-phone's number to her husband so he could call her if there was an emergency. Other than that, the work-phone was only used for KSHS purposes: for teachers to call if they were having ICT related issues – 'that's the only purpose of the phone'. 'Other than that', she did not use the work-phone for anything else.
 - (e) When she was on school grounds, she kept the work-phone with her. When she left school grounds, she kept the work-phone in Room 1.
 - (f) The only email inbox on the work-phone was her Departmental emails. Access to this was not password protected.
 - (g) She also accessed her Departmental emails on her personal mobile and from her laptop.
 - (h) For access to her Departmental emails, she would need to enter her Department credentials (her Department email) and her password. No one else was privy to her password in Term 2, 2023 (24 April 2023–30 June 2023).
 - (i) On 22 May 2023, she was at Jandakot Primary School, undertaking a handover for the Network Support Officer role. She was there the whole day. The work-phone was in Room 1.
 - (j) She sent the Agreed Document 1 email to Ms Date on 18 May 2023. She did not send it to anyone else. She did not intend for Ms Auzins to see it. There is no circumstance in which she would have been okay with Ms Auzins seeing it.
 - (k) She became aware that her email to Ms Date had been forwarded to Ms Auzins when Ms Date called her to ask if she sent the email to Ms Auzins. She does not remember the date of this call, but says she received the call at a time after she had commenced working at another school after leaving KSHS. During this call, Ms Date asked her to 'dig a little bit deeper' to look for the Email.
 - (l) She moved her email to Ms Date to the Archive folder because she was nervous that Ms Auzins could view it if left in the Sent folder. After the call from Ms Date, she located the Email in the Archive folder.
 - (m) She knows the Email was forwarded from the work-phone because it states on the bottom, 'Sent from Outlook Mobile'.
 - (n) Emails forwarded from her laptop would show her Departmental signature and emails forwarded from her personal phone would show 'Get Outlook for IOS'.
- 38 Under cross-examination, Ms Kamalanathan gave the following evidence:
- (a) She never took the work-phone home.
 - (b) Even though Ms Date had informed her that she could use the work-phone for personal use, she did not use it for personal use.
 - (c) When Ms Date issued her with the work-phone, she showed it to Ms Auzins as the head in ICT under whom she technically works under and who needs to know what she is doing as the supervisor. Ms Auzins told her that she could not put any passwords on the work-phone, she could not take it home, and it has to stay in the school.
 - (d) Ms Auzins told her to keep the phone at the school. She denies that when this conversation took place it was because she had taken the phone away from the school. She says that she showed the work-phone to Ms Auzins after being issued it by Ms Date, and it was at this time that the conversation about not having a password on the work-phone took place.
 - (e) She never had a password on the work-phone.
 - (f) In her last month at KSHS, her ordinary workspace was either the Service Desk or she spent most of her time in Room 1.
 - (g) During the day, the Service Desk is accessible to students. She may have left her laptop and work-phone at the Service Desk for a minute or so if she was working on something, but most of the time she would not leave them

- unattended at the Service Desk. If she wanted to secure the laptop or work-phone, she would put it in Room 1.
- (h) The work-phone was not accessible to students. This is because, if she was storing it, she would keep it in Room 1. 99% of the time, only her and Ms Auzins accessed Room 1.
 - (i) On 22 May 2023, she was at Jandakot Primary School, and was using her personal phone. 22 May 2023 was a Monday. On the preceding Friday, she left the work-phone on one of the two desks in Room 1. Specifically, on the big desk near the entrance. There were no lockable cabinets in Room 1, but they used to lock Room 1 itself.
 - (j) She does not recall where she was on 23 May 2023. She says that Ms Date did not call her on 23 May 2023. Ms Date called her after she had left KSHS. She thinks she was at Campbell Primary School at the time.
 - (k) Ms Date called and asked her to let her know if she could find the Email. When she found the Email she let Ms Date know via email. She did not call Ms Date. She found the Email using a computer.
 - (l) The Email says, 'Sent from Outlook Mobile' so she knows it was not sent from an IOS device. It was also not sent from her laptop, otherwise it would contain her Departmental signature.
 - (m) From the Library, she would walk into a 'tea and other preparation area', namely a 'first room', before getting access to Room 1.
 - (n) During the day, the door to Room 1 (from Room 3) was kept open, to allow the retrieval of relief devices and other items.
 - (o) She moved the email she sent to Ms Date to the Archive folder. There are two ways someone could find it. Accessing the Archive folder. Or conducting a search of the contents of the email, such as a search for 'Kerry Date', which would return all emails sent to and received from Ms Date.
- 39 In re-examination, Ms Kamalanathan gave the following evidence:
- (a) She never took the work-phone home.
 - (b) She did not move the Email.
 - (c) She found the Email in the Archive folder.
 - (d) She moved the email she sent to Ms Date to the Archive folder. The email is visible in the Archive folder and can be forwarded from the Archive folder.
- 40 In response to some clarifying questions from the Board, Ms Kamalanathan gave the following evidence:
- (a) On Friday 19 May 2023, she left her work-phone on one of the two desks in Room 1. Both desks are next to the wall. The desk that she left her work-phone on was the one 'in the entrance side of the room'.
 - (b) The three main devices she used at KSHS were the laptop (which she used every day for resolving IT issues), the work-phone, and her personal mobile (which she used if she wanted to notify of taking leave, or other application, remotely).
 - (c) To access her emails on the laptop, she is required to enter a password. However, on the work-phone and her personal mobile, she had her password entered in the Outlook app and therefore did not have to enter a password to open Outlook.
 - (d) She did not create the Archive folder; it is a default Outlook folder, like Inbox, Drafts, Sent Items, Deleted Items. At KSHS, she did not have any Outlook sub-folders; she just had the Outlook default folders.

Question 1: Where was Ms Kamalanathan's work-phone on Monday 22 May 2023, 3:34pm when the Email was sent?

- 41 Ms Auzins gave evidence that it was KSHS policy for work phones to be left on school grounds if the employee was not working from home ([26(e)] above), and there is no suggestion that Ms Kamalanathan was required to, or ever did, work from home.
- 42 There is no dispute that Ms Auzins told Ms Kamalanathan that she was to keep her work-phone at work and not take it home: [26(f)], [29(j)], and [37(b)] above.
- 43 Ms Kamalanathan gave evidence that Ms Auzins told her she could not password protect the work-phone, it could not be taken home and should be stored in Room 1; and that she adhered to this instruction at all times, including on 22 May 2023: [37(b)-(e), (i)] and [39(a)] above.
- 44 Ms Kamalanathan's evidence at [43] above, was not disturbed under cross-examination: [38(a)-(e), (g)-(i)] above.
- 45 Ms Kamalanathan's evidence at [43] above, is consistent with:
- (a) Ms Date's evidence that during her telephone discussion with Ms Kamalanathan on 23 May 2023 Ms Kamalanathan told her the work-phone had been left in Room 1 on 22 May 2023 ([29(f)] and [31(f)] above); and
 - (b) Ms Kamalanathan's email to Ms Date sent on 31 May 2023, 1:27pm (Attachment 2 of the Investigation Report), stating (emphasis added):

On 22nd [May] I was not in Kelmscott School; I was in Jandakot School. ... It is definitely sent to Karen through **my work phone which I kept in back room by Karen. Usually, I don't take my work mobile to home.**
- 46 Ms Auzins gave evidence that Ms Kamalanathan was the first port of call for IT issues: [26(g)] above. This is supported by:
- (a) Ms Date's evidence that Ms Kamalanathan's work-phone was the IT helpdesk phone, and therefore, Ms Auzins had insisted that it was to be left at work, unlocked, and in Room 1: [29(j)] and [31(g)-(i)] above.

- (b) Ms Date's evidence that as Ms Kamalanathan was absent on 22 May 2023, Ms Auzins would have been checking Ms Kamalanathan's work-phone throughout the day pursuant to 'the agreement' that it was the IT helpdesk phone: [31(j)] above.
- (c) Ms Kamalanathan's evidence that the purpose of the work-phone was for teachers to call if they were having ICT related issues: [37(d)] above.

- 47 Ms Auzins denied the rationale for requiring Ms Kamalanathan to keep her work-phone at work was to allow it to be accessed if necessary, such as if Ms Kamalanathan was absent on sick leave, and someone had sent an email to Ms Kamalanathan as the first port of call for IT issues. Ms Auzins said that if Ms Kamalanathan was absent that she would not know 'what was needed to be done': [26(g)] above.
- 48 The Board finds Ms Auzins' evidence at [47] above is implausible and inconsistent with the phone being used as the helpdesk phone. It is also inconsistent with the evidence at [41]–[46] above.
- 49 Considering the consistency of the evidence at [41]–[46] above, and the implausibility of the evidence at [47] above, the Board finds that Ms Kamalanathan left her work-phone in Room 1 on Friday 19 May 2023. Accordingly, the Board finds that on 22 May 2023, 3:34pm, Ms Kamalanathan's work-phone was in or near Room 1.

Question 2: Was the Email sent from Ms Kamalanathan's work-phone?

- 50 In the Initial Response, Ms Auzins says that she was dumbfounded 'that [Ms Kamalanathan] would forward me the email' and the Email 'was originally sent to me by [Ms Kamalanathan] herself': [17] above.
- 51 There is no dispute that during their discussion on 23 May 2023, Ms Date asked Ms Auzins how she knew about Ms Kamalanathan's email of 18 May 2023, 10:06pm and Ms Auzins said that Ms Kamalanathan had sent it to her: [25(o)], [26(l)], [29(a)–(b)] above.
- 52 As outlined at [50]–[51] above, it is agreed that Ms Kamalanathan's email of 18 May 2023, 10:06pm was forwarded to Ms Auzins' Departmental email on 22 May 2023, 3:34pm. It is also agreed that the Email was forwarded from Ms Kamalanathan's Departmental email account to Ms Auzins' Departmental email account. The only issue for determination under Question 2 is whether the Email was forwarded from Ms Kamalanathan's Departmental email account using her work-phone. The issue of **who** forwarded the Email will be addressed in the section addressing Question 3.
- 53 Ms Kamalanathan gave evidence that she mainly used three devices to access her Departmental emails: her laptop, personal mobile, and the work-phone: [37(f)–(g)] and [40(b)] above.
- 54 Ms Kamalanathan testified that if an email was forwarded from her laptop, it would contain her Departmental signature block, and if an email was forwarded from her personal mobile, it would display 'Get Outlook for IOS'. As the Email states, 'Sent from Outlook Mobile', she knows it was sent from her work-phone: [37(m)–(n)] above. Her evidence on this point was not disturbed on cross-examination: [38(l)] above.
- 55 Ms Kamalanathan's evidence at [54] above, that the Email was sent from her work-phone was further corroborated by Ms Date's testimony, that when Ms Kamalanathan returned the call on 23 May 2023, Ms Kamalanathan mentioned that the Email had been sent from her work-phone because it displayed 'Outlook Mobile' on it: [31(f)] above.
- 56 In light of the consistency of the evidence presented in [54]–[55] above, the Board finds that the Email was sent from Ms Kamalanathan's work-phone.

Question 3: Can the CCTV footage be relied upon to substantiate the allegation that Ms Auzins accessed Ms Kamalanathan's work-phone when the Email was sent?

- 57 As outlined at [49] and [56] above, the Board has found that the Email was sent from Ms Kamalanathan's work-phone, which was in or near Room 1 on 22 May 2023, 3:34pm.
- 58 There is no dispute that Room 1 can be accessed via an external door (Door 8) and via Room 3: Respondent's Document 1.
- 59 Ms Date's evidence, which was not challenged, was that she had downloaded and reviewed the CCTV footage of Door 8 for 22 May 2023, and while she observed a contractor exit via Door 8 around 3:00pm, she did not see anyone enter via Door 8 on that day: [31(e)] and [32(a)] above.
- 60 Consequently, this only leaves open the possibility of access to Room 1 via Room 3.
- 61 Ms Date's evidence was that she had accessed the CCTV footage for the entrance to Room 3, reviewed it for the relevant period, and was satisfied that no one other than Ms Auzins was in Room 1 and Room 3 as a combined area when the Email was sent: [31(e)] and [32(a)] above.

Access to Room 1 from Room 3

- 62 The CCTV footage is consistent in showing Ms Auzins entering Room 3 at 3:28pm and exiting at 3:37pm, as recorded in the Statement of Agreed Facts [5]–[6].
- 63 There is no dispute that Room 1 is not visible from the CCTV footage: [30(i)] and [34(a)] above.
- 64 Ms Date stated that entry to Room 1 is straight ahead of the entry to Room 3: [31(b)] above. However, this contradicts the evidence of Ms Auzins, Mr Whitney, the still photos, and the CCTV footage.
- 65 Ms Auzins stated that upon entering Room 3, she had to 'turn right' to lead to the 'doorway to the IT office': [25(j)] above. This is consistent with Mr Whitney's evidence that upon entering Room 3, the doorway to Room 1 is 'slightly to the right': [34(b)] above.

- 66 The Board notes that the still photos and CCTV footage appear to indicate that directly opposite the doorway to Room 3 is a redbrick wall, not a doorway.
- 67 The Board notes Ms Date's evidence that she works in a different building to the Library, where Ms Auzins and Ms Kamalanathan worked. Therefore, the Board prefers the evidence of Ms Auzins, which is consistent with Mr Whitney's evidence and with the still photos and CCTV footage, concerning the position of the door to Room 1 from Room 3.
- 68 Consequently, given the consistency of the evidence at [65]–[66] above, the Board finds that after entering Room 3, the entry to Room 1 involves a slight turn to the right.
- 69 It is not disputed that an apt description of the door between Room 3 and Room 1 are a four-panel barndoor: [25(j)] and [31(c)] above.
- 70 At the hearing, Ms Auzins stated that the doors leading to and from Room 3 are 'always locked': [25(j)] and [26(w)] above.
- 71 However, the statement that the doors are 'always locked' is inconsistent with Ms Auzins' earlier evidence, which included:
- (a) The Initial Response, stating that Room 1 'was not locked during the day' and was 'unlocked and accessible from the library's internal kitchen area' 'so again if her phone was left unattended it would have been open slather to anyone in that area' and 'Access to her workspace where she says her devices were kept, was freely accessible to anyone (internal/external access)': [18] above.
 - (b) An email to Mr Whitney, at [20(d)] above, where Ms Auzins stated that there was 'open access to the said workspace and phone from anyone within the school'.
 - (c) The CSA Letter stating that Room 3 is a 'thoroughfare to the kitchen for staff and for staff to access other IT rooms and amenities. If the phone was in fact in the IT storeroom there any number of people who could have picked it up': [23] above.
- 72 The doors being locked is also inconsistent with Ms Kamalanathan's evidence that the door between Room 3 and Room 1 are kept open during the day: [38(n)] above.
- 73 In light of the consistency of the evidence presented in [71]–[72] above, the Board finds that the door between Room 3 and Room 1 was kept open during the day.

Could Ms Auzins have accessed Ms Kamalanathan's work-phone?

- 74 As outlined at [68] and [73] above, the Board has found that after entering Room 3, one must turn slightly to the right to enter Room 1, passing directly through an open doorway.
- 75 There is no dispute that the CCTV footage shows:
- (a) Ms Auzins entering Room 3 and then turning to the right: [34(c)] above.
 - (b) Ms Auzins exiting via the Room 3 doorway nine minutes after entering: Statement of Agreed Facts [5]–[6].
 - (c) A contractor entering Room 3 at the same time as Ms Auzins and exiting 13 seconds after entering: Statement of Agreed Facts [5].
 - (d) Mr Walther entering Room 3 at 3:30pm and exiting 25 seconds after entering: Statement of Agreed Facts [6].
 - (e) Ms Auzins was the sole individual present in the area encompassing Room 3 and Room 1 at 3:34pm, the time when the Email was sent.
- 76 Ms Kamalanathan's evidence was that her work-phone was not password protected: [37(c)] above. Her evidence on this point was not disturbed during cross-examination: [38(e)] above.
- 77 Ms Kamalanathan's evidence was that the Outlook app on her work-phone was not password protected: [37(f)] and [40(c)] above.
- 78 Ms Kamalanathan testified that she moved her email to Ms Date to the Archive folder. She only had the default Outlook folders, comprising Inbox, Drafts, Sent Items, Deleted Items, Archive, etc. She explained that there were two ways the email could be found, either by accessing the Archive folder itself, or by using a search function to find an email containing a key term, such as the addressee's name: [37(l)], [38(o)], [39(d)] and [40(d)] above.
- 79 Ms Date testified that since Ms Kamalanathan was absent on 22 May 2023, Ms Auzins would monitor Ms Kamalanathan's work-phone throughout the day: [31(j)] above. Given this agreement, it is not improbable that Ms Auzins may have come across the email during her monitoring of Ms Kamalanathan's work-phone, and the Board accepts that this is a plausible explanation.
- 80 In light of the evidence at [76]–[79] above, that:
- (a) Ms Auzins was authorised to check Ms Kamalanathan's work-phone;
 - (b) the Outlook app on Ms Kamalanathan's work-phone was not password protected; and
 - (c) Ms Auzins was inside the area comprising Room 3 and Room 1 for a sufficient period of time (nine minutes), the Board considers that it is not improbable that Ms Auzins accessed and sent the Email.
- 81 Ms Auzins has consistently denied sending the Email. In her Initial Response, she explicitly stated that she did not send the Email, and instead claimed that it was sent to her by Ms Kamalanathan: [17]–[18] above.
- 82 Ms Kamalanathan's evidence indicated that she had not forwarded her email to anyone else, and did not intend for Ms Auzins to see it. In fact, Ms Kamalanathan claimed that there were no circumstances under which she would have wanted Ms Auzins to be aware of the email: [37(j)] above. This is consistent with Ms Date's evidence that Ms Kamalanathan became

‘immediately ... very upset’ when she called to ask if she had sent the email to Ms Auzins: [29(e)] above. Furthermore, the sentiments expressed in Ms Kamalanathan’s email to Ms Date, dated 31 May 2023, 1:27pm (Attachment 2 of the Investigation Report), support her account of not intending for Ms Auzins to see the email:

When I heard this, [it] was so frustrating for me. How could I like that someone look into my personal email. Definitely it is privacy breach. I feel like I want to cry loudly because I cannot work peacefully even though I left the school and stay away from her. It is so stressful.

83 In *G v H* (1994) 181 CLR 387 (*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) (emphasis added)

84 Ms Auzins gave evidence that she first became aware of the Email upon returning from Room 3 to her office (Room 6) which she shared with the Media Officer. She said she discussed the contents of the Email with the Media Officer:

And what did you do when you became aware of the email?---I was actually gobsmacked, because I didn’t even know that Ms Kamalanathan had resigned. Um, and I turned and asked the media officer, did she know if Ms Kamalanathan had resigned. Um, and she said, ‘No’. So I was basically – I was just absolutely gobsmacked, um, because we just – we had no idea that – that she was even leaving. So, um, we’d basically closed up, um, shut down the computers, went home ...

85 After receiving the Email, Ms Auzins stated that she went home and spoke with her husband about the matter: [25(n)] above. According to her account, she did not speak with Ms Date about the Email that afternoon because Ms Date was scheduled to attend a regular Monday afternoon meeting, and in any case, Ms Auzins was feeling ‘gobsmacked’, and therefore wanted to go home and speak with her husband first: [27(c)] above.

86 The Board notes that, despite the onus of proof being on Ms Auzins at [5(b)] above, she did not call the Media Officer or her husband to corroborate her account of the matters at [84]–[85] above. In light of this, the Board considers that it is entitled to infer that their evidence would not have assisted Ms Auzins’ case, in accordance with the principles set out in *G v H*, 402 at [83] above.

87 Ms Auzins claims that she did not enter Room 1 at 3:34pm, because, according to her, it would be necessary to turn on the lights to see inside the room, and that if she had entered the room, the CCTV footage would have shown the room to be illuminated through the windows above Rooms 2 and 3: [25(l)] above.

88 The Board makes the following observations regarding the CCTV footage. Firstly, the footage captures the Room 3 doorway for the period 3:25:18pm–3:39:57pm. While the Board cannot discern a change in the windows above Rooms 2 and 3 on the CCTV footage in this period of time, there are several possible reasons for this.

89 One possible explanation is that, given it was undisputed that Room 1 was not visible in the CCTV footage, whether the lights in Room 1 are turned on is not something that is visible from outside of Room 1 including from the windows above Rooms 2 and 3.

90 Another possible explanation is that, contrary to Ms Auzins’ claim that the lights in Room 1 were not turned on, the lack of a change in the windows about Rooms 2 and 3 does not necessarily mean that the lights in Room 1 were not turned on.

91 Another possible explanation is that the lights in Room 1 do not need to be turned on for Ms Auzins to access Ms Kamalanathan’s work-phone, particularly given Ms Kamalanathan’s evidence about the desk that she left her work-phone on top of on Friday 19 May 2023, which was described as being ‘in the entrance side of the room’: [38(i)] and [40(a)] above. The Board interprets this to mean that Ms Kamalanathan was referring to a desk located at the ‘entrance’ to Room 1 from Room 3, for the following reasons:

- (a) There is no dispute that Room 1 runs the length of Room 3: [26(w)] and [31(d)] above.
- (b) Attachments 4–5 to the Investigation Report are photos taken of the inside of Room 1: [34(d)] above. Attachments 4–5 are length-wise photos of Room 1, both taken facing Door 8.
- (c) Given the finding at [68] above that the doorway to Room 1 is slightly to the right as you enter from the Room 3 doorway, and that Attachments 4–5 are length-wise photos of Room 1, it is likely that both photos are taken near the doorway to Room 1 from Room 3.
- (d) During the hearing, Ms Kamalanathan was taken to the Attachments 4–5 photos. Her evidence was that the desk depicted in the photos, that is against the wall, is the second desk she referred to as being in Room 1, but not the desk on which she left her work-phone on 19 May 2023: [38(i)] and [40(a)] above.
- (e) Ms Kamalanathan’s evidence was that the desk she left her work-phone on is not captured in either of the Attachments 4–5 photos.
- (f) Attachment 5 is a wider-shot of Room 1 than Attachment 4. While both Attachments 4 and 5 face Door 8, Attachment 4 only partially captures the right-half of Door 8. Conversely, Attachment 5 captures what appears the whole inside wall of Room 1, including the whole of Door 8 and the wall immediately to the left of Door 8.
- (g) There is no desk against the wall that is to the left of Door 8.

- 92 In any event, given the Board's finding at [49] above, that Ms Kamalanathan's work-phone **was in or near** Room 1 on 22 May 2023, 3:34pm, the Board does not consider it is necessary to make any findings about the lighting in Room 1 at that time.

Credibility issues

- 93 The respondent submits that Ms Auzins' dishonesty during the investigation and during these proceedings should be taken into account when assessing the Board's acceptance of her testimony. Specifically, the respondent argues that Ms Auzins was dishonest in submitting a false timesheet to Mr Whitney to support her claim that she could not have sent the Email as she was not at KSHS at the time, and also in making representations to the Board that she had an unblemished work record.
- 94 The Board will address the alleged dishonesty concerning the submitted timesheet in this section, and the alleged dishonesty concerning Ms Auzins' work record when addressing Question 4.
- 95 Ms Auzins says that after the Principal handed her the Complaint Letter on 16 August 2023 at about 2:00pm–2:30pm, she returned to her office and made a phone call to Mr Whitney: [25(p)] above. Under cross-examination, Mr Whitney's evidence was that although he could not specify the exact time the Complaint Letter was served, he testified that he received a call from Ms Auzins 'pretty soon afterwards': (ts 80). Based on this consistent evidence, the Board finds that Ms Auzins was at KSHS when she telephoned Mr Whitney on 16 August 2023.
- 96 The finding at [95] above has significant consequences. It establishes that on 16 August 2023, when Ms Auzins telephoned Mr Whitney, she would have had access to her timesheet for 22 May 2023 saved on the S drive, as well as a separate copy of her timesheet which she had claimed was to track her TOIL: [26(p)] above. This means that Ms Auzins would have had the opportunity to readily verify her whereabouts on 22 May 2023, prior to her phone call to Mr Whitney, in which she denied being at KSHS, and prior to submitting a timesheet to support her claimed absence.
- 97 An examination of the timesheet provided by Ms Auzins reveals an internal inconsistency. Specifically, the timesheet spans a 5-week period during which, apart from 27 April 2023 when she left work early to visit her father, Ms Auzins consistently took her lunchbreak at the same time every day, namely 12:45pm–1:15pm. However, on 22 May 2023, the timesheet she submitted recorded her lunchbreak as occurring at a different time, specifically 12:45pm–1:30pm. Under cross-examination, Ms Auzins was unable to provide a satisfactory explanation for this anomaly: [26(s)(i)] above.
- 98 Notably, the timesheet provided by Ms Auzins is identical to the KSHS timesheet in all respects, apart from a single entry for 22 May 2023, which records her lunchbreak at a different time and records her finishing work at 4:00pm. Under cross-examination, Ms Auzins was unable to provide a satisfactory explanation for this anomaly: [26(t)] above.
- 99 Ms Auzins claims that she kept a personal copy of the KSHS timesheet to keep track of her TOIL: [26(p)] above. However, this claim does not provide any plausible explanation for the discrepancy in the entry for 22 May 2023, as there is no record of her accruing or taking TOIL on that day.
- 100 In the Initial Response, Ms Auzins says she was 'dumbfounded' by the Email, and that the 'the context of the email was extremely defaming towards myself': [17] above. She says the only reason she did not speak with Ms Date on 22 May 2023 was because Ms Date was in a senior staff meeting: [25(n)] above. She says she was 'gobsmacked' by the Email, and that while she had contemplated making a complaint about Ms Kamalanathan to SID for some time, that thought became stronger after receiving the Email: [26(k)] above. Further, it was only after speaking with Ms Date on 23 May 2023, who advised her not to worry about the Email, that she 'let go' of the idea of making a complaint against Ms Kamalanathan to SID: [27(b)] above.
- 101 Ms Auzins' evidence contradicts her own assertions. She claimed that the Email had a profound impact on her, leading her to speak with the Media Officer and her husband about it on the day she received the Email, and with Ms Date about it the following day. Furthermore, she stated that she had intended to lodge a formal complaint against Ms Kamalanathan with SID, but later decided not to pursue the matter after speaking with Ms Date. In light of this, it is inexplicable that Ms Auzins would later claim to Mr Whitney that she was not at work on the day she received the Email, given that on her own assertions she had discussed the Email with the Media Officer near the time of its receipt while they were both in Room 6 and had discussed the Email with her husband upon returning home from work on the day of receiving the Email, and had discussed the matter with Ms Date the following day.
- 102 The matters at [96]–[101] above:
- (a) Call into question the veracity of Ms Auzins' statement to Mr Whitney on 16 August 2023 that she was not at work on 22 May 2023 and could prove it. Mr Whitney describes Ms Auzins as being certain in her call to him; that she was clearly communicating that she was not at KSHS on 20 May 2023 and had proof: [35(c)] above.
 - (b) Lends weight to the respondent's submission that Ms Auzins fabricated a timesheet to demonstrate her absence on 22 May 2023.
- 103 The respondent says that Ms Auzins only resiled from her reliance on the timesheet submitted to Mr Whitney on 17 August 2023 as proof of her absence on 22 May 2023, through the CSA Letter sent 17 November 2023.
- 104 Ms Auzins says she clarified the timesheet issue with Mr Whitney during a subsequent telephone call, prior to the CSA Letter: [25(q)] and [26(u)] above. However, there is no record of this telephone call in either the CSA Letter or Ms Auzins' outline of evidence filed on 16 May 2024. To the contrary, the outline of evidence states that Ms Auzins will provide the following evidence at the hearing (emphasis added):
- g. Description of her responses provided in the disciplinary process.
 - ...
 - vii. **That she did not seek to correct the discrepancy within the timesheets nor why she initially believed she**

may have been absent on the afternoon of 22 May 2023.

- viii. That this information was corrected on 17 November 2023 in the response to proposed outcomes letter which was issued on her behalf by the Civil Service Association.
- ix. That she had not acted with an intent to deceive at any point.
- x. That her initial responses were influenced by significant stress the complaints letter had caused her and a genuine attempt to provide all relevant information as quickly as possible, leading to an oversight in this occurrence.

105 Mr Whitney does not recall a second telephone call. He believes all contact with Ms Auzins after their first call was via email, until he received the CSA Letter: [33(d)–(e)] and [34(h)] above. Mr Whitney says that all telephone calls are recorded by him, and if the contents of the call are relevant to the investigation, it would end up in the Investigation Report: [34(h)], [35(b)] and [36(a)–(b)] above. The Board notes that Mr Whitney’s evidence on relevant telephone calls being referenced in the Investigation Report is supported by the following statement in the Investigation Report (emphasis added):

On 16 Augst 2023, Ms Auzins was issued with a Complaint Letter and **responded immediately by phone** to SID and subsequently via email. (Attachments 7 and 8).

106 Applying the principles established in *Briginshaw* at [9] above, the Board has carefully considered the evidence presented at [95]–[105] above, and finds, after a detailed examination, that the more probable explanation of all the evidence is that Ms Auzins ‘did not seek to correct the discrepancy within the timesheets nor why she initially believed she may have been absent on the afternoon of 22 May 2023’ ([104] above) until the CSA Letter, and was dishonest when she told Mr Whitney that she could not have sent the Email because she was not at work on 22 May 2023 and could prove it with a timesheet. The Board also finds that the more probable explanation of the unexplained differences in the timesheets is that Ms Auzins fabricated a timesheet to support her claim that she was not at work on 22 May 2023.

Conflicting witness accounts

107 Ms Auzins says when she mentioned the Email to Ms Date on 23 May 2023 that Ms Date said she had not read Ms Kamalanathan’s email. She says she asked Ms Date if there was anything in the Email that she needed to be worried about and Ms Date said no: [25(o)] above. She denies that she mentioned the Support Services position during this discussion: [26(i)] above.

108 Ms Date says that during the discussion on 23 May 2023, that Ms Auzins mentioned the Email and the Support Services role as a solution that would make everyone happy: [29(a)] above. According to Ms Date, Ms Auzins displayed a calm demeanour and did not express any concerns or worry about the Email, nor did she ask about taking any action in relation to the Email: [29(b)–(c)] above. Notably, Ms Date denied ever advising Ms Auzins not to worry about the Email, contrary to Ms Auzins’ claim, because Ms Kamalanathan was leaving KSHS: [29(d)] above. Ms Date explained that, having previously read Ms Kamalanathan’s email to her, after Ms Auzins left her office she remained in her office, opened it again to verify, and then made a phone call to Ms Kamalanathan to confirm whether Ms Kamalanathan had forwarded the email to Ms Auzins: [29(e)] above.

109 Ms Date’s evidence remained undisturbed under cross-examination: [30(f)–(g)] above.

110 The Board has given more weight to the evidence provided by Ms Date at [108] above. Ms Date’s evidence was presented in a straightforward and consistent manner, providing a clear and credible account of the events surrounding the Email and her discussion with Ms Auzins’ about it.

111 Ms Auzins maintains that Mr Whitney did not tell her to contact her union for advice: [25(p)] and [26(o)] above.

112 Mr Whitney says when Ms Auzins called and said she could prove she was not at school on the day the Email was sent, he became instantly suspicious because he had already obtained the CCTV footage, which showed that she was, in fact, at school that day. In response, he advised her to seek advice from the union: [33(a)–(b)] above.

113 Mr Whitney’s evidence was not disturbed under cross-examination: [34(g)] above.

114 As outlined at [5(a)] above, the appeal is a de novo hearing. Given this, the Board is unclear of the import of Ms Auzins’ assertions that Mr Whitney did not tell her to seek advice from the union. Nevertheless, the Board notes that Ms Auzins’ email to Mr Whitney at [20(d)] above mentions that she was serving as a union delegate. Therefore, the Board considers it highly improbable that Ms Auzins would be unaware of her rights to contact her union for advice.

115 In light of these circumstances, the Board has given more weight to the evidence provided by Mr Whitney at [112] above. The Board considers Mr Whitney’s account of the discussion to be the more probable account of events, and thus prefers his testimony over Ms Auzins’.

116 Taking into account the consistent evidence provided by Ms Date, Mr Whitney and Ms Kamalanathan, as well as the credibility findings at [106] above, the Board finds that Ms Auzins’ claim that Ms Kamalanathan sent the Email is highly improbable. The lack of corroboration for this assertion, combined with the credibility findings, means that Ms Auzins’ assertion cannot be accepted without additional supporting evidence.

Findings in relation to Question 3

117 In the circumstances, the Board finds Ms Auzins’ denial that she sent the Email to be highly improbable. Consequently, the Board draws the following conclusions:

- (a) On 22 May 2023, 3:34pm, Ms Kamalanathan’s work-phone was in or near Room 1: [49] above.
- (b) The Email was sent from Ms Kamalanathan’s work-phone: [56] above.

- (c) Neither Ms Kamalanathan's work-phone, nor her Departmental email account on the work-phone, were password protected: [76]–[77] above.
- (d) Given the agreement that Ms Kamalanathan's work-phone was to be used as the IT help-desk phone, it is not improbable for Ms Auzins to have found the email during the course of the day: [79] above.
- (e) In any event, given the door to Room 1 is slightly to the right of the Room 3 entry and the door to Room 1 is kept open during the day, and given the CCTV footage shows Ms Auzins entering Room 3 and heading towards the right and remaining inside that area for nine minutes, there was sufficient time for Ms Auzins to access and forward the email: [68], [74], [75(a)–(b)] and [80] above.

118 For the reasons at [117] above, the Board finds that Ms Auzins accessed Ms Kamalanathan's work-phone on 22 May 2023 and sent the Email.

119 This means Complaint 1 and Complaint 2 outlined in the Complaint Letter (Statement of Agreed Facts [8] at [11] above) are found to be substantiated.

Question 4: Do Ms Auzins' personal circumstances and employment history render her dismissal disproportionate in the circumstances?

Ms Auzins' work record

120 Ms Auzins asserts in the Form 8B that she 'has not previously been the subject of disciplinary or performance processes', and in her legal submissions that she 'has provided 17 years of good service to the Respondent, without any documented performance concerns.'

121 However, the Investigation Report refers to Ms Auzins' prior disciplinary matters: [22] above.

122 Under cross-examination, Ms Auzins agreed she was the subject of Improvement Action in relation to the first of the two prior disciplinary matters noted in the Investigation Report: [26(b)] above.

123 Under cross-examination, Ms Auzins suggested that the second of the two prior disciplinary matters noted in the Investigation Report was not treated as a disciplinary matter by the Principal and Ms Date: [26(c)] above.

124 In relation to the second of the two prior disciplinary matters noted in the Investigation Report, Ms Date says she received complaints from various staff members regarding Ms Auzins conduct. While Ms Auzins denied the conduct, Ms Date had three witnesses corroborating the conduct, and she and the Principal relayed to Ms Auzins their expectations of not intimidating colleagues: [29(k)–(l)] above. Ms Date's evidence was not disturbed under cross-examination: [30(e)] above.

125 The Board finds Ms Date's account of the second of the two prior disciplinary matters to be more probable than Ms Auzins' account.

126 In the circumstances of the matters at [121]–[125] above, the Board agrees with the respondent's submission that it cannot place any weight on Ms Auzins' claims at [120] above that she has no prior disciplinary record and therefore her conduct on 22 May 2023 does not justify her dismissal. Furthermore, the Board considers that the two prior disciplinary matters, when assessed alongside the issues at [106] above, lead the Board to conclude that Ms Auzins' misconduct on 22 May 2023 justify her dismissal.

Other grounds of misconduct

127 In *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 (*Byrne*), Brennan CJ, Dawson and Toohey JJ, 430 said:

And facts which existed at the time of a dismissal, but which come to light only subsequently, might justify the dismissal when otherwise it would be harsh, unjust or unreasonable: see *Lane v Arrowcrest Group Pty Ltd* (1990) 27 FCR 427 at 456.

128 On 31 May 2024, the respondent filed their outlines of evidence, stating that Ms Date would give the following evidence at the hearing:

When Ms Auzins was asked to hand in her phone and keys at the time of her dismissal, she did not hand in the iPhone that the school had purchased, and instead handed in an old iPhone which the school's asset software shows is registered to another staff member. Ms Date will refer to the tax invoice and purchase order form (**Respondent's Document 2**) which shows that the phone's serial number does not match the serial number of the phone that was returned. Ms Date is not aware that Ms Auzins has otherwise handed the phone back.

129 Ms Auzins gave evidence that she returned the Department-issued phone in 2021, and since that time, was using the Department-issued SIM in her personal phone: [26(v)] above. She says that Ms Date knew she did not have a Department-issued phone and was using her own: [26(v)] above. She also gave evidence that Ms Lindley and Mr Horton could corroborate her account: [28(a)] above. Further, that she could corroborate her account that she did not have a Department-issued phone from her Telstra records: (ts 47).

130 Ms Date says she is satisfied from her discussions with Ms Auzins about her phone, and from her investigations resulting in the production of Respondent's Document 2 and enquiries of other staff members, that the phone referenced in Respondent's Document 2 was issued to Ms Auzins. Ms Date says that Ms Auzins was responsible for recording the serial number in KSHS' records, and that the phone is not recorded and is not in KSHS' possession: [29(g)–(i)] above.

131 By the respondent's outline of evidence at [128] above, Ms Auzins was put on notice that Ms Date intended to give evidence that Ms Auzins remained in possession of KSHS property. However, despite this, and in light of the documentary evidence and testimonial accounts Ms Auzins says she could call in support, she failed to present any corroborating evidence to support her account of having returned the Departmental phone and using her personal phone. Moreover, Ms Auzins had a reasonable opportunity to produce such evidence between receiving the respondent's outline of evidence and the commencement of the

hearing, yet she chose not to do so.

132 Applying the principle established in *G v H*, 402 at [83] above, the Board finds it is entitled to infer that the supposed corroborating evidence would not assist Ms Auzins in any way.

133 Furthermore, applying the principle established in *G v H*, 402 at [83] above, the Board finds a 'more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence'. As a result, the Board finds that Ms Auzins has failed to return the Department's iPhone 12 Pro Max.

134 The conduct attributed to Ms Auzins at [133] above came to light after her dismissal, and constitutes conduct that could have justified her dismissal, as noted in *Byrne* at [127] above.

Findings in relation to mitigating circumstances

135 Given the findings at [118]–[119], [126] and [134] above, the Board does not consider that the decision to dismiss Ms Auzins 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.

136 After considering Ms Auzins' misconduct in the context of her 17 years of service and employment history, the Board finds that there are no sufficient mitigating factors to justify adjusting the dismissal in light of all the circumstances.

Conclusion

137 For the preceding reasons, the Board concludes that Ms Auzins has failed to discharge the onus on her to demonstrate to the Board that the decision to dismiss her should be adjusted.

138 Accordingly, the Board will order that PSAB 25 of 2023 be dismissed.

2024 WAIRC 00958

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 27 NOVEMBER 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KAREN AUZINS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MS R ANDERSON – BOARD MEMBER
MS J SYMONS – BOARD MEMBER

DATE

THURSDAY, 7 NOVEMBER 2024

FILE NO.

PSAB 25 OF 2023

CITATION NO.

2024 WAIRC 00958

Result

Appeal dismissed

Representation

Appellant

Ms G Murray and Ms J Moore (of counsel)

Respondent

Ms S Power (of counsel)

Order

HAVING heard from Ms G Murray and Ms J Moore (of counsel) on behalf of the appellant, and Ms S Power (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,

On behalf of the Public Service Appeal Board.

[L.S.]

2024 WAIRC 00967

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 23 FEBRUARY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2024 WAIRC 00967

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MS B CONWAY - BOARD MEMBER
MR S DANE - BOARD MEMBER

HEARD : FRIDAY, 4 OCTOBER 2024, TUESDAY, 1 OCTOBER 2024

DELIVERED : TUESDAY, 12 NOVEMBER 2024

FILE NO. : PSAB 6 OF 2024

BETWEEN : SHARON LAWSON
Appellant
AND
DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
Respondent

CatchWords : Public Service Appeal Board – Whether the ending of an acting arrangement constitutes a dismissal – Appellant was not dismissed – No jurisdiction to hear appeal – Appeal dismissed

Legislation : *Industrial Relations Act 1979* (WA): s 80I(1), s 80I(1)(d)
Public Sector Management Act 1994 (WA): s 8(1), s 64, s 67(f), s 80A

Result : Appeal dismissed

Representation:

Appellant : On her own behalf

Respondent : Mr M McIlwaine (of counsel)

Cases referred to in reasons:

Bone Densitometry Australia Pty Ltd trading as Perth Bone Densitometry v Lenny [2005] WAIRC 02081; (2005) 85 WAIG 2981

Gallotti v Argyle Diamond Mines Pty Ltd t/a Argyle Diamonds [2002] WAIRC 06828, (2002) 82 WAIG 3011

Gallotti v Argyle Diamonds Pty Ltd [2003] WAIRC 07928; (2003) 83 WAIG 919

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525

Hudston v North Metropolitan Health Services [2019] WAIRC 0036; (2019) 99 WAIG 238

Metropolitan (Perth) Passenger Transport Trust v Gersdorf (1981) 61 WAIG 611

Mathew v East Metropolitan Health Service [2024] WAIRC 00277; (2024) 104 WAIG 675

Townes-Vigh v North Metropolitan Health Service [2020] WAIRC 00188; (2019) 99 WAIG 238

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Ms Sharon Lawson works for the Director General, Department of Justice (**Department**). Her substantive position is Assistant Superintendent Offender Services, which is a level 6 role. On 9 October 2023, Ms Lawson began an acting arrangement that meant she would work in a level 7 role, Manager Executive Support, until 7 October 2024 (**Acting Arrangement**). However, in February 2024, the Department informed Ms Lawson that the Acting Arrangement would end on 22 March 2024.
- 3 Ms Lawson characterises the end of the Acting Arrangement as a dismissal. She says this is because the Department sent her away from the position which was the subject of the Acting Arrangement. She says this decision was harsh, oppressive or unfair because the reason that she says was given to her for the decision (that she was ‘not a good fit’) is contrary to the Department’s obligations under public sector employment standards.
- 4 The Department says that the Board has no jurisdiction to hear Ms Lawson’s appeal. It argues that Ms Lawson was not dismissed or constructively dismissed. Her employment relationship with the Department is ongoing.

Questions the Board must decide

- 5 The Board must decide:
 1. Did the Department dismiss Ms Lawson by ending the Acting Arrangement; and if so
 2. Should the Board adjust that decision?

Background

- 6 The following background is not in dispute.

- 7 On 26 August 2019, the Department appointed Ms Lawson as a permanent full-time public service officer in the position of Assistant Superintendent Offender Services Level 6, Position Number 014493. Ms Lawson's substantive position is located at Wandoo Rehabilitation Prison in the Department's Corrective Services division.
- 8 On 9 October 2023, Ms Lawson started a 12-month acting opportunity in the position of Manager Executive Support, Level 7, Position Number 4232 to manage the Aboriginal Visitors Scheme (AVS) in the Department's Strategic Reform division. The end date of the Acting Arrangement was 7 October 2024.
- 9 As a result of the Acting Arrangement, Ms Lawson was entitled to a higher duties allowance (HDA) in accordance with cl 19 of the *Public Service Award 1992 (Award)*.

16 February Discussion

- 10 On 16 February 2024, Ms Lawson had a discussion with her line manager, Ms Emma Roebuck (**16 February Discussion**), during which Ms Lawson told Ms Roebuck about negative feedback from AVS clients about Ms Roebuck and Ms Gina Hill (Acting Deputy Director General, Strategic Reform). Ms Lawson told Ms Roebuck that people in the community thought she was the 'white c--- director telling the Aboriginal staff what to do' and that they did not have a high opinion of Ms Hill.
- 11 Ms Lakeisha Mongoo, a new employee at the Department, witnessed the 16 February Discussion.

20 February Meeting

- 12 On 20 February 2024, Ms Lawson met with Ms Roebuck and Mr Trent Davies (**20 February Meeting**). At the time, Mr Davies was acting in Ms Hill's position. They discussed the 16 February Discussion.

23 February Meeting

- 13 On 23 February 2024, Ms Lawson met with Ms Gina Hill, Ms Rhodessa Krakouer and Ms Louise Koyd (**23 February Meeting**).
- 14 At the meeting, Ms Hill told Ms Lawson that the Acting Arrangement would end on 22 March 2024 and that Ms Lawson would be given meaningful work to do from home from Monday 25 February 2024 until 22 March 2024.
- 15 Ms Lawson remains employed by the Department.

Witnesses

- 16 Ms Lawson, Ms Krakouer and Mr Dennis Hodges gave evidence for Ms Lawson.
- 17 Ms Roebuck and Mr Davies gave evidence for the Department. Neither party called Ms Mongoo to give evidence.
- 18 Generally the witnesses presented as credible and reliable. We make further observations about the evidence below.

The legal framework for this appeal

- 19 Ms Lawson appeals under s 80I(1)(d) of the *Industrial Relations Act 1979 (WA) (IR Act)* against what she says is the Department's decision to dismiss her.
- 20 Under s 80I(1) of the IR Act, the Board's remedial power is limited to 'adjusting' the decision Ms Lawson appeals.
- 21 This appeal is by way of hearing de novo and procedural defects can be cured by the de novo hearing before this Board: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525 at [65].

Did the Department dismiss Ms Lawson by ending the Acting Arrangement?

- 22 Essentially, we accept the Department's submissions. For the reasons that follow, we do not consider that the ending of the Acting Arrangement amounts to dismissal.
- 23 There are some differences in the witnesses' accounts about what happened on 16, 20 and 23 February 2024.
- 24 Ms Lawson had a very good recollection of events. She was a cooperative, forthcoming witness. Generally speaking Ms Lawson's evidence rang true to us and we consider her to be a reliable, credible witness.
- 25 Considerable time has passed since the events in question. In some respects, Ms Roebuck's recollection was not as good as Ms Lawson's, and there were some relatively minor inconsistencies in her evidence. Generally Ms Roebuck made concessions when they were due.
- 26 Ms Krakouer and Mr Hodges were credible witnesses but ultimately their evidence did not go to whether the Department dismissed Ms Lawson.
- 27 We are satisfied that Ms Lawson and Ms Roebuck both gave a truthful account of the 16 February Discussion to the best of their recollection. We attribute the differences in their evidence to their different perceptions of an interaction that was likely stressful for both of them.
- 28 Broadly Mr Davies' evidence about the 20 February Meeting was consistent with that of Ms Roebuck.
- 29 Ultimately we consider it unnecessary to make findings about exactly what happened during the 16 February Discussion or at the 20 February Meeting, because it would not change the outcome in this matter. We would not be able to find that Ms Lawson was dismissed on any witness' version of events.
- 30 It is clear that what happened at the 16 February Discussion and the 20 February Meeting led the Department to decide to end the Acting Arrangement early. But ending the Acting Arrangement early, in circumstances where Ms Lawson was still employed by the Department and had a permanent substantive position, does not amount to a dismissal.

- 31 It is not in dispute that in August 2019 Ms Lawson was appointed as a permanent full-time public service officer to the position of Assistant Superintendent Offender Services. In October 2023 Ms Lawson started the Acting Arrangement as Manager Executive Support. It is not in dispute that the Acting Arrangement was to be temporary. The evidence does not support a finding that Ms Lawson was appointed to the Manager Executive Support role under s 64 of the *Public Sector Management Act 1994* (WA) (**PSM Act**), thereby vacating her substantive position by operation of s 67(f) of the PSM Act.
- 32 Indeed Ms Lawson's evidence was that she understood it was 'an acting opportunity at a higher duties allowance' and that, if she were not 'placed permanently into that Manager AVS position', and no other position in the Strategic Reform division were created, then she would be 'going back' to her Assistant Superintendent role. Ms Lawson rightly conceded that she remains employed in her substantive position.
- 33 It is clear to us that no stage did the Department and Ms Lawson intend that Ms Lawson would relinquish her substantive position to take up the Acting Arrangement. On the oral and documentary evidence we must find that instead the parties intended that Ms Lawson would be entitled to a higher duties allowance under cl 19 of the Award while she performed the higher duties of the Manager Executive Support position.
- 34 We accept that in some circumstances a significant demotion can amount to a dismissal. But that simply is not what happened in this case. The submission that ending the Acting Arrangement amounts to a demotion and therefore a dismissal is misconceived. We agree with the Department's submission that demotion can be a dismissal, but for that, the parties would need to enter into a new employment contract, 'which is fundamentally different to the terms of the substantive contract or the previous employment contract. And that's not what happened here.'
- 35 The Commission and its constituent authorities have consistently held that a dismissal involves being sent away or removed from office, employment or position, citing *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611; *Gallotti v Argyle Diamond Mines Pty Ltd t/a Argyle Diamonds* [2002] WAIRC 06828, (2002) 82 WAIG 3011 at [55] – [62] and *Gallotti v Argyle Diamonds Pty Ltd* [2003] WAIRC 07928; (2003) 83 WAIG 919 at [47] – [50]. See for instance the Full Bench in *Bone Densitometry Australia Pty Ltd trading as Perth Bone Densitometry v Lenny* [2005] WAIRC 02081; (2005) 85 WAIG 2981 at [48] and the Public Service Appeal Board in *Hudston v North Metropolitan Health Services* [2019] WAIRC 0036; (2019) 99 WAIG 238 at [37], *Townes-Vigh v North Metropolitan Health Service* [2020] WAIRC 00188; (2019) 99 WAIG 238 at [25] and *Mathew v East Metropolitan Health Service* [2024] WAIRC 00277; (2024) 104 WAIG 675 at [20].
- 36 Neither party could refer us to (and we are not aware of) any authority that supports the proposition that ending an acting arrangement and returning an employee to their substantive position amounts to dismissal.
- 37 Ms Lawson says that being sent away from the Manager Executive Support position amounts to being 'sen[t] away or remove[d] from office, employment or position' in accordance with *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611 (**Gersdorf**). We do not agree. Where an employee continues to hold their substantive position, and merely ceases acting in a higher duties arrangement, that employee has not been sent away or removed from office, employment or position in the sense discussed in **Gersdorf**.
- 38 In effect, Ms Lawson says she was dismissed because she brought to Ms Roebuck and Ms Hill's attention the derogatory name that members of the Aboriginal community had called Ms Roebuck and their dislike of Ms Hill. We agree that what happened during the 16 February Discussion and at the 20 February Meeting is the reason the Department ended the Acting Arrangement, but that does not mean there was a dismissal.
- 39 We cannot accept the argument that Ms Lawson's conduct must have been dealt with as a disciplinary matter under Part 5 – Substandard performance and disciplinary matters of the PSM Act. While we agree that dismissal can be a form of disciplinary action taken under s 82A of the PSM Act, that a person is dismissed does not automatically mean that dismissal was by way of disciplinary action in disciplinary proceedings under s 82A. Further, here there was no dismissal.
- 40 Ms Lawson argues that if the Department did not dismiss her as a result of disciplinary action, 'then it must have arisen as a result of an arbitrary or capricious administrative act', which would be contrary to s 8(1) of the PSM Act. In our view, we can only consider arguments about arbitrary or capricious administrative behaviour in this matter if we find that Ms Lawson was dismissed. Further, the Board's jurisdiction does not extend to considering whether Ms Hill had authority to end the Acting Arrangement.
- 41 Even if there were 'a lacuna in the PSM Act (and, possibly, the Award) in respect of acting opportunities' as argued by Ms Lawson, that could not confer jurisdiction that the Board otherwise lacks.
- 42 Ms Lawson made a number of submissions relating to what she says is the effect of s 67 of the PSM Act. She says she was appointed to the temporary position of Manager Executive Support, in line with s 64 of the PSM Act and Public Sector Commissioner's Instruction 2: Filling a Public Sector Vacancy. Ms Lawson says that the effect of that appointment, together with s 67 of the PSM Act, means the 'only way the office in which [she] was acting became vacant is because [she] was dismissed because of a decision made by the respondent'. Section 67 of the PSM Act says:

67. Vacation of offices

The office of a public service officer (other than an executive officer) becomes vacant if —

- (a) that public service officer dies; or
- (b) in the case of a term officer, the term officer completes a term of office and is not reappointed; or
- (c) that public service officer is dismissed, or retires from office, under this Act; or
- (d) the employment of that public service officer in the Public Sector is terminated under section 79(3) or under regulations referred to in section 95A; or

- (e) that public service officer resigns his or her office in writing addressed to his or her employing authority and that employing authority accepts that resignation; or
- (f) that public service officer is appointed or transferred under this Part to another office, post or position (unless it is an appointment and the Commissioner authorises the offices, posts or positions being held concurrently by that public service officer).

[Section 67 amended: No. 39 of 2010 s. 52 and 70; No. 8 of 2014 s. 12.]

- 43 Ms Lawson says that (a), (b), (d), (e) and (f) did not apply, and in relation to (c), she did not retire.
- 44 There are many difficulties with Ms Lawson's submissions about this matter and we cannot accept them. Fundamentally, we agree with the Department's submission at hearing that the true characterisation of what happened in this case is that Ms Lawson was given an opportunity to perform the full duties of a higher role. When she accepted that opportunity and performed the full duties of the higher role, Ms Lawson was entitled under the Award to be paid a higher duties allowance for doing so. That arrangement did not create a new employment contract that amounted to an appointment under the PSM Act. Further, that the acting opportunity had an expiry date did not elevate it to be a fixed-term appointment under the PSM Act. As Ms Lawson was not appointed to the Manager Executive Support position, she could not be (and was not) dismissed from it. Accordingly the Board's jurisdiction is not enlivened.
- 45 For these reasons, we find that the Department did not dismiss Ms Lawson.
- 46 At its heart, Ms Lawson's appeal is about contesting the Department's decision to end the Acting Arrangement early. In circumstances where we have found that there was no dismissal, the appeal is outside of the Board's jurisdiction. We cannot consider the fairness or otherwise of the Department's decision and we do not have the power to adjust it.
- 47 We must dismiss application PSAB 6 of 2024.

2024 WAIRC 00968

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 23 FEBRUARY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SHARON LAWSON

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIRPERSON
 MS B CONWAY - BOARD MEMBER
 MR S DANE - BOARD MEMBER

DATE

TUESDAY, 12 NOVEMBER 2024

FILE NO

PSAB 6 OF 2024

CITATION NO.

2024 WAIRC 00968

Result

Appeal dismissed

Representation

Appellant

On her own behalf

Respondent

Mr M McIlwaine (of counsel)

Order

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

THAT application PSAB 6 of 2024 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
 Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2024 WAIRC 00933

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LOUISE BOWLER

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** WEDNESDAY, 30 OCTOBER 2024**FILE NO/S** APPL 131 OF 2024**CITATION NO.** 2024 WAIRC 00933**Result** Application Discontinued by Leave**Representation****Applicant** Ms L Bowler**Respondent** Mr J Carroll (of counsel)*Order*

WHEREAS on 13 October 2024, the applicant sought leave to discontinue this application;

AND WHEREAS on 30 October 2024, the respondent advised it has no objection to the applicant discontinuing this application;

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

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

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

WORK HEALTH AND SAFETY ACT—Matters dealt with

2024 WAIRC 00912

**APPLICATION TO EXTEND A DEADLINE FOR MAKING A DECISION PURSUANT TO SECTION 82A OF THE
WORK HEALTH AND SAFETY ACT 2020**

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES

WORKSAFE COMMISSIONER

APPLICANT

-v-

THE WA PRISON OFFICERS UNION (WAPOU)

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** MONDAY, 21 OCTOBER 2024**FILE NO/S** WHST 17 OF 2024**CITATION NO.** 2024 WAIRC 00912**Result** Order issued**Representation****Applicant** Ms H Wreford (of counsel)**Respondent** Mr B Hanlon (as agent)*Order*WHEREAS on 17 September 2024, the WA Prison Officers' Union (**Union**) asked the WorkSafe Commissioner (**Regulator**) to appoint an inspector under s 82(1) of the *Work Health and Safety Act 2020* (WA) (**WHS Act**) to resolve an issue relating to a lack of consultation regarding a system of smoke and fire response and whether personal protective equipment, in particular respiratory protective equipment, should be tagged out or remain in use. The Regulator said the issue may affect all public prisons in Western

Australia;

AND WHEREAS under s 82(3) of the WHS Act, an inspector must make a decision resolving the issue no later than two days after the day on which the request that an inspector be appointed is made;

AND WHEREAS on 19 September 2024, the Regulator applied to the Work Health and Safety Tribunal (**Tribunal**) under s 82A of the WHS Act to set a new deadline in application WHST 16 of 2024, and after hearing from all parties to the issue on 25 September 2024, the Tribunal set a new deadline of 18 October 2024;

AND WHEREAS on 16 October 2024, the Regulator applied to the Tribunal under s 82A of the WHS Act to set a new deadline in application WHST 17 of 2024, being in effect an extension of the deadline that the Tribunal set in application WHST 16 of 2024;

AND WHEREAS on 18 October 2024, application WHST 17 of 2024 was allocated to Commissioner Emmanuel (constituting the Tribunal) and was listed for hearing on 21 October 2024;

AND WHEREAS on 18 October 2024, the Tribunal sent the Union a document prepared by the Tribunal titled 'Information for workers affected by the issue and any person conducting a business or undertaking that is involved in the issue' (**Information Sheet**) and directed the Union to email the Information Sheet to its members who may be affected by the issue by 4pm on 18 October 2024, and at 3.30pm on 18 October 2024 the Union confirmed that it had done so;

AND WHEREAS on 18 October 2024, the Tribunal wrote to the Minister for Corrective Services and informed him of the application and opportunity to be heard in relation to the application at the hearing listed on 21 October 2024;

AND WHEREAS on 18 October 2024 the Tribunal sent the Information Sheet to the Department of Justice and asked the Department of Justice to display the Information Sheet by 5pm on 18 October 2024 in a suitable, prominent place in the affected workplaces (being prisons) where it will be seen by affected workers. At 4.01pm on 18 October 2024, the Department of Justice confirmed that it had complied with the Tribunal's request;

AND WHEREAS in those circumstances, the Tribunal is satisfied that all affected workers and parties to the issue were notified of the hearing and had an opportunity to be heard about the Regulator's application for a new deadline;

AND HAVING HEARD at the hearing on 21 October 2024 from Ms Wreford on behalf of the Regulator and Mr Hanlon on behalf of the Union;

AND WHEREAS the Regulator says that a new deadline is necessary because the inspector with the conduct of this matter needs more time to finalise his decision. In effect, the Regulator says the inspector is well underway with his decision-making process, and would have been able to make a decision to resolve this matter but for his young child becoming unwell with influenza. In the circumstances, the inspector's caring responsibilities mean that he cannot meet the existing deadline. Other suitably experienced inspectors are on leave or have very recently returned from leave such that it is not practicable for the inspector to hand over the matter to a colleague. The Regulator gave the Tribunal a redacted copy of the inspector's child's medical certificate and a copy of the Prohibition Notice that issued on 18 October 2024 in relation to this matter;

AND WHEREAS the inspector has explained this situation to relevant stakeholders and has said that he should be able to make his decision by 25 October 2024 as long as he remains well and does not become ill, and the Regulator seeks a new deadline of 1 November 2024 to be sure that the Regulator can comply with the deadline;

AND WHEREAS the Union considers that a deadline of 1 November 2024 is practicable in the circumstances and does not oppose the new deadline sought now that the Prohibition Notice has issued;

AND WHEREAS Mr Neal Paterson wrote to the Tribunal on 18 October 2024. He is a worker affected by the issue. Mr Paterson also represents other workers affected by the issue in his capacity as their Work Health and Safety Representative. Mr Paterson says that the issue must be resolved in a timely way, because Wooroloo Prison Farm has no breathing apparatus response capability and relies on the Department's 'Respiratory Protection Equipment'. Mr Paterson says he and other workers support the extension requested by the WorkSafe Commissioner, but may not support any further extension request;

AND WHEREAS no other party to the issue attended the hearing or wished to be heard;

AND WHEREAS in setting a new deadline that the Tribunal considers to be practicable, the Tribunal must evaluate the facts and circumstances of the case in question;

AND WHEREAS the Tribunal notes the Union's consent to the new deadline sought and the Tribunal accepts that:

- a) the unforeseen circumstance of the inspector's young child's illness has impacted on the inspector's ability to comply with the deadline set by the Tribunal in September 2024;
- b) the inspector has almost completed the decision-making process;
- c) the inspector may become unwell as a result of caring for his young child, who has a contagious illness; and
- d) given the Regulator's staffing resources, it would not be practicable to hand over this matter to one of the inspector's colleagues to deal with by the existing deadline;

AND WHEREAS in all the circumstances of this application before it, the Tribunal considers that a new deadline of 1 November 2024 is practicable;

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

THAT an inspector make a decision resolving the issue by 1 November 2024.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]