Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 3 WEDNESDAY 24 MARCH, 2010 Vol. 90—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—
90 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2010 WAIRC 00089

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2010 WAIRC 00089
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 16 FEBRUARY 2010
DELIVERED	**:**	26 FEBRUARY 2010
FILE NO.	**:**	FBA 7 OF 2009
BETWEEN	**:**	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH Appellant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner J L Harrison
Citation	**:**	2009 WAIRC 01232
File No	**:**	C 35 of 2009

CatchWords	**:**	Courts and judges – Apprehended bias – Disqualification of President – Spouse of acting President appeared as counsel at first instance – Whether doctrine of necessity applies – Principles considered – Power of Full Bench to depart from previous decisions – Power to appoint acting President to hear an appeal where holder of the office of President is unable to act.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 11(1), s 15(1), s 17, s 17(1), s 17(1a), s 23(1), s 44, s 49, s 95(2) *Interpretation Act 1984* (WA) s 10(c), s 18

Result	:	Order made.

Representation:

Counsel:

Appellant	:	Mr R L Hooker (of counsel)
Respondent	:	Mr R L Bathurst (of counsel)

Reasons for Decision

SMITH AP:

1 Through my Associate on 28 January 2010, I wrote to the parties to raise the issue whether I should hear this appeal as my spouse had appeared as counsel on behalf of the Union in the matter before the Commission at first instance. I invited the parties to make submissions about this matter in open court before the Full Bench on Tuesday, 16 February 2010.

2 The parties agree that no issue of actual bias arises and that this is a matter where apparent or ostensible bias is raised which arises solely because of the fact that I am related by marriage to counsel who appeared on behalf of the Union at first instance. In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, Gleeson CJ, McHugh, Gummow and Hayne JJ observed:

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide (*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488). That principle gives effect to the requirement that justice should both be done and be seen to be done (*R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ), a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
>
> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror [6] - [7].

3 *Guide to Judicial Conduct* (2nd ed, 2007) published for The Council of Chief Justices of Australia by The Australasian Institute of Judicial Administration Incorporated, provides that a judge or a member of a tribunal should not sit to hear a case where a party to a matter is represented by a close relative. Such a circumstance in my view directly raises a situation where a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case. The Guide classifies the relationship of judge and spouse to be a first degree relationship and provides the following guidance about the conduct of matters in para 3.3.4(b) where such a relationship exists:

> Where a judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.
>
> In most of these situations, Bar Rules in each jurisdiction require a barrister to return a brief to appear in a contested hearing, so the occasion for a judge to disqualify himself or herself should arise infrequently.
>
> There may be a justifiable exception:
>
> - By reference to the principle of necessity (see par 2.1);
> - Where the solicitor-relative is a partner or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case;
> - Where, notwithstanding the relationship, the parties to the case consent to the judge sitting but that may depend upon the nature of the relationship, which should be disclosed to the parties before the judge decides whether to sit or not to sit.

4 Whether a judge should disqualify himself or herself where apparent or ostensible bias is raised is a matter for the judge to decide as an individual: *Kartinyeri v The Commonwealth* [1998] HCA 52; (1998) 72 ALJR 1334. The respondent says I should disqualify myself, the appellant does not agree. The appellant does, however, concede that if there is a factual dispute about what occurred at the conference before Commissioner Harrison when the orders the subject of this appeal were made, it may be difficult to say that the independent observer referred to in *Ebner* would not have an apprehension that I might not be able to bring an impartial mind to the resolution of this appeal.

5 As the decision of the Commission at first instance was made at the conclusion of a compulsory conference convened by the Commission under s 44 of the *Industrial Relations Act 1979* (WA) (the Act), no transcript of the proceedings was made. Affidavits made by Jessica Foster and Brett Owen are contained in the appeal book which purport to set out a record of who attended the conference and what was said during the course of the conference by the parties' representatives and Commissioner Harrison who convened the conference. Mr Bathurst has informed the Full Bench that the affidavits have yet to be analysed but there are some factual matters which will be in dispute between the parties.

6 It is clear to me that the grounds of appeal and the matters stated in the affidavits that the determination of this appeal will require members of the Full Bench to make findings of fact and draw inferences of fact from those affidavits and the other materials set out in the appeal book. This will include making findings of fact about the matters raised by my spouse on behalf of the appellant at first instance. In those circumstances it is also clear that a fair-minded observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the grounds of appeal. Where counsel for a party to a matter is related by marriage to the judge it is elementary that the judge should not sit as there is a real danger of actual bias and certainly the appearance of bias in such situations: The Hon James Thomas, *Judicial Ethics in Australia* (3rd ed, 2009) [5.6]. For this reason I am of the opinion that unless the principle of necessity applies I should not sit to hear and determine this appeal.

7 One of the justifiable exceptions which enables a judge or a member of a tribunal in a relationship to counsel in the first degree to sit on a matter is where the principle of necessity applies. The common law principle of necessity allows an otherwise disqualified decision maker to hear and decide a case where no other person is able to act to hear a matter. The application of the doctrine of necessity is raised because pursuant to s 15(1) of the Act each Full Bench must be constituted by no less than three members of the Commission one of whom shall be the President.

8 President Sharkey decided in 1992 that the doctrine of necessity prevents the President of the Commission from disqualifying himself or herself for bias unless the application of the doctrine of necessity would involve 'positive and substantial injustice': *Carter v Drake* (1992) 72 WAIG 736 at 744 - 746.

9 In *Carter v Drake*, Sharkey P found on the facts of the matter before him that although no apparent or ostensible bias applied, if the claims of bias had been upheld the doctrine of necessity excluded bias by the statutory constitution of the Commission when the Commission is constituted by the President. Sharkey P found at 744 - 745 that an acting President could not be appointed under s 17(1) of the Act unless the President was unable to attend to all of his or her duties on account of illness or otherwise and this would not arise if the President was to disqualify himself or herself from one matter. President Sharkey also found that he would be bound to disqualify himself if submissions persuaded him in a particular matter that the application of the doctrine of necessity would involve positive and substantial injustice (746).

10 The reasoning of Sharkey P in *Carter v Drake* was subsequently applied by the Full Bench in *Commissioner of Police v Civil Service Association of Western Australia Inc* (2001) 81 WAIG 3026 at [26], *Volkofsky v Clough Engineering Ltd* (2004) 84 WAIG 723 at 724 and *CFMEU v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 1924 at 1927. The decision of Sharkey P in *Carter v Drake* was also applied by Sharkey P in *J & R Sacca Poultry v Pearson* (1998) 78 WAIG 819 in an application for a stay of an order pending an appeal to the Full Bench. It is of some importance that in each of these decisions the principles considered in *Carter v Drake* were not the subject of any argument. Further it is apparent from the facts set out in each of those cases that no real arguable case of bias was raised.

11 Both parties in this appeal agree that the reasoning of Sharkey P in *Carter v Drake* is in error and should not be followed. They also agree that it is open to the Governor to exercise the power to appoint a person to act in the position of President to hear and determine this appeal. Both counsel put forward a submission that the proper interpretation of s 17(1) of the Act is that if the President is required to disqualify herself or himself under normal principles of judicial conduct, an acting President may be appointed by the Governor to hear the case in question. It is common ground that it is not unusual for Governments in Australia to appoint an acting judge or judges where there are no members of a court who can hear a matter because of the application of the principles of bias or conflict of interest.

12 Consequently, the Full Bench in this matter must turn its mind to whether the reasoning of Sharkey P in *Carter v Drake* should not be followed. In *Nguyen v Nguyen* (1990) 169 CLR 245 Dawson, Toohey and McHugh JJ observed in relation to the ability of a State Supreme Court to overturn an earlier decision that:

> Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predicability [sic]of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 at 620 per Aickin J.
>
> This Court has never regarded itself as bound by its own decisions, which is all the more appropriate now that it is a court of last resort for all purposes. There is a point of view that different considerations should govern the situation of an intermediate court of appeal: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; *Davis v Johnson* [1979] AC 264; *Miliangos v Frank (Textiles) Ltd* [1976] AC 443. But even if that view were correct, now that appeals to the High Court

> are by special leave only, the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes. There is no equivalent of s 12 of the Administration of Justice Act 1969 (UK) to authorize 'leap-frog' appeals which would by-pass those courts as the Court of Appeal may be by-passed in the United Kingdom. See, however, *Sanofi v Parke Davis Pty Ltd* [No 1] (1982) 149 CLR 147. In these circumstances, it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to this Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty (269 - 270).

This reasoning was applied by the Full Bench in *Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch)* [2004] WAIRC 10828; (2003-2004) 84 WAIG 694.

13 Unlike other courts of appeal, the High Court has power to review and depart from its previous decisions. However, such a course is not lightly undertaken. In *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 Stephen J (59) with whom Aickin J agreed (66) specified the following four matters that will justify departure by the High Court from earlier decisions. These are:

(a) The earlier decisions do not rest on a principle carefully worked out in a significant succession of cases;

(b) There was a difference between the reasons of the justices constituting the majority in one of the earlier decisions;

(c) The earlier decisions have achieved no useful result but to the contrary have led to considerable inconvenience;

(d) The earlier decisions have not been independently acted on in a manner which militates against reconsideration.

This criteria was applied in *John v Commissioner of Taxation of the Commonwealth of Australia* (1989) 166 CLR 417, by Mason CJ, Wilson, Dawson Toohey and Gaudron JJ (438 - 439). Whilst it is the case that the Full Bench can overrule its own decisions it is my view that it should only do so when an earlier decision is patently wrong in law and when at least one of criteria set out by Stephen J in *Hospital Contribution Fund* is made out.

14 As counsel for the respondent points out, the observations in *Carter v Drake* that the power to appoint an acting President to hear a case when the President is 'unable to attend to his duties … whether on account of illness or otherwise' can only be exercised in cases where illness or something else prevents the President being present to attend work is obiter (as Sharkey P had already decided he would not disqualify himself for bias). Therefore, in the absence of being applied in subsequent Full Bench decisions the reasoning in *Carter v Drake* could not be considered binding.

15 In my opinion, with respect, the reasoning of Sharkey P in *Carter v Drake* is plainly wrong in law. Firstly, in reasoning that the reference to 'duties' excludes the operation of s 17 in a single duty where the President should not sit, ignores the operation of s 10(c) of the *Interpretation Act 1984* (WA) which provides that words in the plural include the singular. When regard is had to s 10(c) of the *Interpretation Act*, it is clear as Mr Hooker points out that an inability to attend to duties within the meaning of s 17(1) of the Act must mean more than whether the person who holds the office of President is able to come to work or not. As Mr Bathurst properly points out one of the purposes of the Act is to set up a Commission that is able to decide matters impartially. This duty is expressly reflected in s 11(1) of the Act, which requires each member of the Commission to make an oath before a judge that he: 'will faithfully and impartially perform the duties of his office'.

16 Secondly, the reasoning is based on an incorrect, or incomplete, view of the contemporary rules of statutory interpretation: *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 297; *Mills v Meeking* (1990) 169 CLR 214. In particular, not only does the reasoning in *Carter v Drake* not have regard to the express intention of the Act that all members of the Commission are to act impartially, the reasoning takes no account of the difference in wording between s 17(1) and s 95(2) of the Act. As Ritter AP observed in *Kenji Auto Parts Pty Ltd t/as SSS Auto Parts (WA) v Fisk* (2007) 87 WAIG 328 [38] statutory construction involves a consideration and analysis of the meaning of the words used in a section in the context of the legislation and legislative scheme as a whole, to try to discern the intention of the legislature: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (381) (McHugh, Gummow, Kirby and Hayne JJ); and *Wilson v Anderson* [2002] HCA 29; (2002) 213 CLR 401 [8] (Gleeson CJ). Courts must seek to ascertain the statutory purpose and legislative intention from the words used in the statute (and can use other aids as are legitimately available). Where the will of Parliament is clear, a court or tribunal must give effect to that clearly expressed will.

17 Section 17(1) and s 17(1a) of the Act provide:

(1) Where a member of the Commission is, or is expected to be, unable to attend to his duties under this Act, whether on account of illness or otherwise, the Governor may appoint a person to be acting President, acting Chief Commissioner, acting Senior Commissioner or an acting commissioner, as the case may require, for such period as the Governor determines.

(1a) Where the office of President is vacant, or is expected to become vacant, the Governor may appoint a person to be acting President.

18 Section 95(2) of the Act provides:

> During the illness, temporary incapacity, or temporary absence from office of the Registrar, the designated deputy registrar shall have and may exercise the powers and authorities and shall discharge the duties of the Registrar under this Act.

The ability of a deputy registrar to act as Registrar in the absence of the Registrar is by the language used in s 95(2) of the Act confined to a temporary incapacity or temporary absence. The language used in s 95(2) is much narrower than the language used in s 17(1) of the Act. Section s 95(2) contemplates that the Registrar must be unable to be present to attend to his or her duties of the office of Registrar. Section 17(1) does not raise a similar requirement. The term 'otherwise' in s 17(1) is broad and unconstrained by any other terms in the provision. When s 17(1) is interpreted by having regard to its context, particularly the requirement to take an oath in s 11(1) to act impartially and to the fact that the legislature did not expressly confine the power to appoint an acting President to a temporary absence from office as opposed to being unable to attend to duties, it is plain that the legislature did not intend that s 17(1) could not operate when the President accepts that an issue of bias properly raised and accepted also raises a duty on the President to disqualify himself or herself.

19 I do not agree that s 17(1) is open to more than one construction. If I am wrong on this point, as Mr Bathurst points out, where an ambiguity arises, a court or tribunal should prefer the construction that appears to achieve the legislative purpose rather than one that appears to defeat or frustrate: *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307 (CA), Kirby P (319). This approach is enshrined in statute in s 18 of the *Interpretation Act*. The application of the reasoning of Sharkey P in *Carter v Drake* to matters where an issue of apparent or ostensible bias on behalf of the President is made out would result in matters such as this appeal not being able to proceed to hearing and determination if no appointment can be made under s 17 of the Act. Such a result is unjust. If there is no appeal at all it is possible that this would involve positive and substantive injustice which is inconsistent with the purpose of the Act to provide an independent arbitral body to resolve disputes which includes and preserves rights of appeal. In addition, if the doctrine of necessity applies this would, at least in this matter, result in positive and substantial injustice, in that a party or parties must be judged by a President who, according to required community standards, should not be sitting.

20 I am of the opinion that the reasoning in *Carter v Drake* should no longer be considered good law. In my opinion two of the criteria considered by Stephen J in *Hospital Contribution Fund* as reasons for departing from an earlier decision are satisfied. These are:

(a) The reasoning does not rest on a principle carefully worked out in a significant succession of cases;

(b) Because the decision has not been the subject of argument in any matter before a Full Bench it cannot be said that the decision has been independently acted on in a manner which militates against reconsideration.

Conclusion

21 I am of the opinion that the doctrine of necessity does not apply to the powers, functions and duties of the President under the Act. I am also of the opinion that if the person appointed as President or acting President of the Commission is unable to act to hear and determine a matter because an issue of actual bias, or apparent or ostensible bias, has been raised which makes it clear to the person holding the office of President that it would be improper for that person to sit as President, s 17(1) of the Act can be invoked to appoint a qualified person to act as President to hear and determine the matter in which the issue of bias has been raised. As set out above I am of the opinion that I should disqualify myself from hearing and determining this appeal. It follows therefore that this appeal cannot proceed until an appointment has been made under s 17(1) of the Act to appoint a qualified person to act as President to hear and determine this appeal.

22 For these reasons I am of the opinion that an order should be made that this appeal be adjourned sine die. I would anticipate that once an appointment is made a date can be fixed for the hearing of the appeal and the matter can promptly proceed.

BEECH CC:

23 I have had the advantage of reading in draft form the reasons for decisions of her Honour the Acting President. The decision of the Hon Acting President that she should disqualify herself from hearing and determining this appeal is a matter for her Honour. The Guide to Judicial Conduct (2nd edition), March 2007, Australasian Institute of Judicial Administration at 3.5(a) shows that if a judge considers disqualification is required, the judge should so decide. I respect the decision of the Acting President.

24 I am of the view that the reasons expressed by Sharkey P in *Carter v. Drake* (1992) 72 WAIG 736 must be seen in the context of its own circumstances. Subsequent cases in the Commission, *Commissioner of Police v. Civil Service Association of WA Inc.* (2001) 81 WAIG 3026; [2001] WAIRC 04107; *Volkofsky v. Clough Engineering Limited* (2004) 84 WAIG 723; [2004] WAIRC 10949; and *CFMEU v. BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 1924; [2005] WAIRC 01797, were not circumstances where *Carter v. Drake* was re-examined and these cases do not take the issue any further.

25 In *Carter v. Drake*, Sharkey P was asked to disqualify himself for ostensible or apparent bias arising from:

(a) a number of dicta in reasons for decision;

(b) by remarks in discussion with counsel;

(c) for having given the appearance for pre-determination of an issue by touching upon, and appearing to publish, a point of view which went to the very subject matter of the proceedings; and

(d) having made interim orders on the basis of no evidence.

26 The matters complained of before Sharkey P had arisen only in interim orders and directions hearings both before and after the final hearing and determination of some of the matters. Those circumstances are distinguishable from the facts in this matter.

27 Sharkey P concluded that there was no real possibility either that his participation might lead to a reasonable apprehension of pre-judgment or bias and declined to disqualify himself for bias on that ground. That conclusion, with respect, appears consistent with the observation in the Guide to Judicial Conduct at page 15 that:

> "What a judge may have said in other cases by way of expression of legal opinion whether as *obiter dicta* or in dissent can seldom, if ever, be a ground for disqualification."

28 To that extent, the comments made by Sharkey P subsequent to that conclusion regarding the application of the doctrine of necessity to the office of President are, with respect, obiter. Nevertheless, in my view, with respect, the conclusion reached by Sharkey P at 745 that the words "illness or otherwise" in s 17 of the *Industrial Relations Act, 1979* ("the Act") have to be interpreted to mean illness or something else which prevents the President to be present to attend his work appears to be too narrow an interpretation. Sharkey P states that at 745 that if the President were to disqualify himself for bias then for the reasons he gives, an Acting President could not be appointed merely because the President disqualifies himself from hearing one matter. It appears to follow from Sharkey P's reasoning at p 746 that although he would be bound to disqualify himself if the submissions made to him persuaded him that the application of the doctrine of necessity would involve positive and substantial injustice, if that disqualification was for one matter no Acting President could be able to be appointed because the President was not ill or otherwise not able to attend to his work. This would, in my view, mean that the matter would not be able to be heard which would be contrary to the purpose of the Act.

29 Where personal relationships do arise in a matter as discussed in the Guide to Judicial Conduct at 3.3.4, whether of the first, second or third degree, and it is appropriate that the judicial officer disqualify himself or herself, s 17 should not be read to require that judicial officer to continue to deal with the matter. This matter is not a case where the Acting President is unable to attend to her duties under the Act on account of illness; nor is there something else which prevents the Acting President being present to attend to her duties under the Act. Therefore, I agree with the conclusions of the Acting President and in particular, I agree with the Acting President that the legislature did not intend that s 17(1) could not operate when the President accepts that an issue of bias properly raised and accepted also raises the duty on the President to disqualify him or herself.

30 In the circumstances, the appropriate order to be made is that the appeal be adjourned *sine die* and I agree with the order to issue.

KENNER C:

31 To the extent that I am able to do so, I agree with the reasons to be published by the Acting President that she disqualifies herself on the grounds of ostensible bias.

32 I am also in general agreement that the decision of Sharkey P in *Carter v Drake* (1992) 72 WAIG 736 should now be regarded as wrongly decided. I add the following brief observations of my own.

33 The reasoning in *Carter* has been adopted in subsequent decisions of the Full Bench: *Commissioner of Police v Civil Service Association of Western Australia Inc* (2001) 81 WAIG 3026; *John Paul Volkofsky v Clough Engineering Limited* (2004) 84 WAIG 723. Whilst the Full Bench should be hesitant to overrule its previous decisions, it should not shrink from doing so where it considers its previous decisions to be wrong. This is particularly so in cases involving statutory interpretation, where an appellate court considers an earlier interpretation to be erroneous: *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

34 Whilst the rule of necessity can ground an exception to disqualification on the grounds of bias in certain circumstances, in my opinion, the doctrine has no application in this jurisdiction under s 17 of the Industrial Relations Act 1979 ("the Act").

35 With respect, in *Carter*, Sharkey P placed an overly restrictive construction on the ordinary and natural language of s 17(1) as to the meaning of "unable to attend to his duties under this Act, whether on account of illness *or otherwise* …." In my view, there is no warrant to read down the words "or otherwise" as a matter of plain construction, to apply only to the circumstance of the physical absence from work of the Commission Member, in that case, the President. Where a Member of the Commission, whether it be the President or any other Member, is unable to sit by reason of actual or ostensible bias, and no other Member is available to sit to deal with the matter, the Parliament has provided a mechanism in s 17(1) of the Act, to make an acting appointment to enable the Commission to function.

36 Such a construction is entirely consistent with the overall purposes and objects of the Act, which is to be taken into account in a contemporary approach to statutory interpretation: s 18 Interpretation Act 1984.

37 Where, as in this case, the President or an Acting President of the Commission is unable to sit to hear and determine a matter on the basis of ostensible bias, then plainly in my view, they are "unable to attend to their duties" in respect of the particular matter or matters in question. A disqualification on the grounds of bias, means that a Member of the Commission is unable to perform his or her statutory duty to "enquire into and deal with any industrial matter" for the purposes of s 23(1) of the Act, including exercising appellate jurisdiction under s 49 of the Act.

38 I agree with the order as proposed.

2010 WAIRC 00095

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPELLANT
	-and-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 3 MARCH 2010
FILE NO/S	FBA 7 OF 2009
CITATION NO.	2010 WAIRC 00095

Result	Order made
Appearances	
Appellant	Mr R L Hooker (of counsel)
Respondent	Mr R L Bathurst (of counsel)

Order

This matter having come on for hearing before the Full Bench on 16 February 2010, and having heard Mr Hooker (of counsel), on behalf of the appellant, and Mr Bathurst (of counsel), on behalf of the respondent, and reasons for decision having been delivered on 26 February 2010, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT this appeal be adjourned sine die.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Declarations made under Section 71—

2010 WAIRC 00101

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2010 WAIRC 00101
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 15 FEBRUARY 2010
DELIVERED	**:**	FRIDAY, 5 MARCH 2010
FILE NO.	**:**	APPL 75 OF 2009, FBM 8 OF 2009
BETWEEN	**:**	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES))
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	*Industrial Law (WA) – Application pursuant to s 62(2) of the Industrial Relations Act 1979 (WA) for the Full Bench to authorise alteration to registered rules as a matter referred to in s 71(5) – Application pursuant to s 71 for a declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices which exist with the Branch – Applications granted.*
Legislation	:	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 62, s 62(1), s 62(2), s 62(3), s 62(4), s 71, s 71(1), s 71(2), s 71(3), s 71(4), s 71(5).
		Industrial Relations Commission Regulations 2005 (WA) reg 72(b).
Result	:	Order made; Declaration issued.

Representation:

Counsel:

Applicant	:	Mr D H Schapper

Solicitors:

Applicant	:	Derek Schapper, Barrister & Solicitor

Reasons for Decision

THE FULL BENCH:

The Applications

1 The Full Bench has before it two applications made under the *Industrial Relations Act 1979* (WA) (the Act). The applicant seeks to obtain a s 71 certificate to enable the offices that exist in its rules to be held by persons holding corresponding offices in its counterpart Federal body. A certificate will also enable it to make an agreement with its Federal organisation relating to the management and control of funds.

2 Prior to the issuance of a certificate, the applicant's rules must be altered and the Full Bench must issue a declaration pursuant to s 71 of the Act. In APPL 75 of 2009, the applicant seeks to ensure that its rules comply with the requirements of s 71 and the application for the declaration is the subject of FBM 8 of 2009.

3 In APPL 75 of 2009, pursuant to s 62(2) of the Act the applicant as a registered organisation seeks the authorisation of the Full Bench to register an alteration to its rules to provide as required by s 71(5) of the Act that each office in the State organisation may from time to time as the Committee of Management of the State organisation may determine be held by the person who in accordance with the rules of the State organisation's counterpart Federal body holds the corresponding office in that body. Pursuant to s 62(2) an alteration of an organisation's rules of this kind can only be authorised by a Full Bench.

4 The application to authorise the alteration to the rules is part of APPL 75 of 2009. APPL 75 of 2009 was an application under s 62 of the Act to alter a number of rules of the applicant. Except for the alteration sought to add a new r 18 – Offices which raises a matter referred to in s 71(5) of the Act, the other alterations sought by the applicant were registered by the Registrar on 18 February 2010 pursuant to s 62(1) and s 62(3) of the Act.

5 In the part of APPL 75 of 2009 that is before the Full Bench, the applicant seeks to add a new r 18 – Offices as follows:

> Each office in the Association may, from such time as the Council may determine, be held by the person who, in accordance with the rules of the Association's Counterpart Federal Body namely the Media, Entertainment and Arts Alliance – Western Australian Branch, holds the corresponding office in that body.

6 Section 62(1) and s 62(2) of the Act provides:

> (1) Upon and after the registration of rules in accordance with section 58(1), an alteration to those rules by the organisation concerned shall not be or become effective until the Registrar has given to the organisation a certificate that the alteration has been registered.
>
> (2) The Registrar shall not register any alteration to the rules of an organisation that relates to its name, qualifications of persons for membership, or a matter referred to in section 71(2) or (5) unless so authorised by the Full Bench.

7 In FBM 8 of 2009, the Full Bench has before it an application made pursuant to s 71 of the Act for a declaration by the Full Bench that:

> (a) The Media, Entertainment and Arts Alliance – Western Australian Branch is the counterpart Federal body of the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees);
>
> (b) The offices which exist with the counterpart Federal body are, or are deemed to be the same as the offices that exist in the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees).

8 Some of the alterations registered by the Registrar on 18 February 2010 are material to the application to make the declaration sought under s 71 of the Act. These are as follows:

> 4. Amend paragraph (b) of Rule 19 – Council by deleting the underlined words
>
> (b) The Council shall consist of the President, three Vice-Presidents, the Secretary, ~~Assistant Secretary (where Council has approved the creation of an Assistant Secretary)~~ and no more than 25 delegates from the sections of the Association. The numbers of delegates shall be determined by the Council.

5. Amend Rule 20 – Powers and Duties of Council by deleting the whole of paragraph (q).

Paragraph (q) reads "The right to create the office of Assistant Secretary".

6. Delete the whole of Rule 28 – Duties of Assistant Secretary.

…

8. Delete the words "Assistant Secretary (where determined by Council)" from paragraph (b)(i) of rule 53 – Elections.

9 Both applications before the Full Bench are unopposed.

APPL 75 of 2009

(a) The Applicant's Rules about Alteration

10 Pursuant to s 62(4) of the Act, the requirements of s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application. Section 55(4) of the Act provides that the Full Bench shall refuse an application by the organisation under this section unless it is satisfied that –

(a) the application has been authorised in accordance with the rules of the organisation;

(b) reasonable steps have been taken to adequately inform the members —

(i) of the intention of the organisation to apply for registration;

(ii) of the proposed rules of the organisation; and

(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,

and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;

(c) in relation to the members of the organisation —

(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or

(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;

(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and

(e) rules of the organisation relating to elections for office —

(i) provide that the election shall be by secret ballot; and

(ii) conform with the requirements of section 56(1),

and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

(b) Statutory Requirements Met

11 Pursuant to s 55(4)(a) of the Act, the Full Bench shall refuse the rule alteration unless it has been authorised by the organisation in accordance with its rules. The authority to alter the rules of the applicant is found in r 49 – New Rules and Alterations of Rules. Rule 49 provides:

(a) No new rules shall be made nor shall any of the rules of the Association for the time being be altered, added to, amended or rescinded except by the Council.

Any proposal to alter, amend, add to or rescind the Rules shall be submitted to the Secretary to enable it to be circulated to all members of the Union at least 28 days before the date on which the meeting or the postal ballot of Council to consider the proposal is scheduled to begin. A member wishing to object to a proposed amendment shall notify the Secretary in writing of his or her objection and the reasons for it not less than 14 days before the meeting of Council which will consider the amendment. The Secretary shall circulate the objection to members of Council at least 7 days before the meeting of Council.

(c) Any proposal to alter, amend, add to or rescind the rules may be proposed by any Sectional Committee at any time between meetings of the Council. Such proposed rules and/or amendments shall be submitted to the Secretary and shall be circulated in accordance with (b) hereof.

(d) No new rule (or amendment, addition or rescission) shall be made which alters any sectional professional rights without the section first approving any such change in accordance with the rules governing those sections.

12 The application to authorise the addition of a new r 18 – Offices is brought pursuant to r 49(a). The facts supporting the applicant's application that it has complied with r 49 and the statutory requirements of the Act are set out in an affidavit by the Secretary of the applicant, Mr Michael Sinclair-Jones, sworn on 9 February 2010.

13 The evidence of Mr Sinclair-Jones in his affidavit and documents attached to his affidavit establishes the following relevant matters:

(a) A notice was sent to members on 16 November 2009 setting out the proposed amendments, the reasons for the amendments and informed members that they could object to the proposal by forwarding a written objection to the Registrar of the Commission no later than 21 days after the date of the Council meeting. In addition as required by r 49(a), members were also advised that they could object by written notice to the Secretary not less than 14 days before the meeting of Council (annexure 1 of the affidavit).

(b) The notice informed members that a Council meeting at which the proposed alterations would be considered was scheduled for 15 December 2009 (annexure 1 of the affidavit). Consequently I am satisfied that the requirement of r 49 to circulate any proposal to amend the rules to all members of the Union at least 28 days before the date of the proposed meeting of Council to consider proposals was met.

(c) The Secretary received no objections or comments from any members in response to the notice of 16 November 2009.

(d) The notice was sent by email to all members. For those members with no email address, members were contacted to confirm a current postal address and notices were sent to those addresses. Those members that refused to give personal address details were sent a notice at their work address or post office box address. As the rules of the applicant do not prescribe or specify the means by which members must be given notice, I am satisfied that the members of the organisation were served with the notice.

(e) Minutes of the applicant's Council meeting of 15 December 2009 record that the proposed alterations were considered. Rule 21 – Meetings of the Council provides that a quorum shall be no less than a third of the members of the Council. The minutes of the meeting record that four of the five members of Council were present at the meeting and that those members unanimously agreed to the proposal to amend r 18 amongst other proposals to amend the rules which were registered by the Registrar on 18 February 2010 but not the subject of this part of Appl 75 of 2009 which is before the Full Bench. The Council also unanimously agreed to authorise an application to be made to the Commission to register the amendments (annexure 2 of the affidavit).

14 Having regard to the matters stated in the affidavit of Mr Sinclair-Jones and the attached documents, we are satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act have been complied with as it is clear that adequate notice of the proposed change to the rules was given to members and that they had a reasonable opportunity to make an objection to the change. It is notable that no objection has been forthcoming.

15 For these reasons we are of the opinion that an order should be made that the Registrar be authorised to register an alteration to the rules of the applicant by registering r 18 – Offices.

FBM 8 of 2009 – Application for s 71 Certificate

16 The counterpart Federal body of the applicant is the Media, Entertainment and Arts Alliance Western Australian (the Branch). The applicant seeks a declaration that pursuant to s 71(2) of the Act the Full Bench is of the opinion that the rules of the counterpart Federal Body prescribing the offices which exist in the Branch are deemed to be the same as the rules prescribing the offices which exist in the State organisation in accordance with s 71(1) and s 71(4) of the Act.

(a) Qualifications of Persons for Membership

17 Pursuant to s 71(1) of the Act, a counterpart Federal body, in relation to a State organisation, means a Western Australian Branch of an organisation of employees registered under the Commonwealth Act the rules of which:

(a) relating to the qualifications of persons for membership; and

(b) prescribing the offices which shall exist within the Branch,

are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter;

18 By operation of s 71(2) of the Act 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 Full Bench, they are substantially the same.

19 Further s 71(3) provides:

The Full Bench may form the opinion that the rules referred to in subsection (2) are substantially the same notwithstanding that a person who is —

(a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or

(b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.

20 In an affidavit sworn by Mr Sinclair-Jones dated 15 February 2010 he attests that the annexures to the application are true and correct in relation to each statement of fact made in each of the annexures. In an annexure to the application made pursuant to reg 72(b) of the *Industrial Relations Commission Regulations 2005*, r 4 of the applicant's rules and r 4 of the Media, Entertainment and Arts Alliance (the Federal Union) rules relating to qualifications of persons for membership are compared. The applicant says in this annexure that:

Part A of the Applicant's rule is not materially different from Part A of the Counterpart Federal Body's rule.

Part B of the Applicant's rule is not materially different from Part B of the Counterpart Federal Body's rule. [Rule B(h) has no counterpart in the Applicant's rule]

Part C of the Applicant's rule is not materially different from Part C of the Counterpart Federal Body's rule. [Rule Part C(a)7 has no equivalent in the Applicant's rules but those persons (Federal and State public servants) are probably eligible for membership of the applicant in any event]

Part D of the Applicant's rule is not materially different from Part D of the Counterpart Federal Body's rule.

Part E of the Applicant's rules has Part G of the Counterpart Federal Body's rules as its counterpart which, though differently expressed, covers much of the same classes of employees.

Parts E and H of the Counterpart Federal Body's rules have no counterpart in the Applicant's rules.

21 In an annexure headed "Regulation 72(d)" the applicant states that:

(a) there are 1,246 members of the applicant and its counterpart Federal body;

(b) all members of the applicant are also members of the counterpart Federal body; and

(c) all members of the counterpart Federal body are members of the applicant.

22 An examination of r 4 of the rules of the applicant and r 4 of the Federal Union's rules reveals that all persons who are to be eligible to be members of the applicant are eligible to be members of the Branch. However, there is one category of membership of persons who are eligible to be members of the Branch who are ineligible to be members of the applicant. These are persons set out in Part E of r 4 of the Federal Union's rules. Part E of r 4 of the Federal Union's rules establishes a category of persons eligible to be members who are independent contractors who, if they were employed performing work of the kind which they usually perform as independent contractors, would be employees and eligible for membership of the Branch. Historically Federal industrial legislation has enabled federally registered organisations to enrol subcontractors as members whereas such categories of persons in Western Australia have been unable to be registered under the provisions of the Act. It is also notable that Part H provides a category of persons ineligible for membership of the Union who are employed by named organisations in Queensland. It is our view that this category of ineligibility for membership is immaterial as this rule simply excludes persons from membership who are employed by a number of organisations in Queensland and it is not relevant to qualifications for membership of the Branch.

23 For these reasons we are of the opinion the qualifications of persons for membership set out in the rules of the applicant and rules that apply to the Branch are substantially the same.

(b) Offices

24 When determining whether the offices that exist in the Branch are the same as the offices of the applicant, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: *Jones v Civil Service Association Inc* (2003) 84 WAIG 4 (Pullin J) [35].

25 In an annexure to the application titled "Regulation 72(c)" the applicant compares the offices that exist within its organisation and the offices that exist within the Branch. The document states as follows:

Applicant's rule/office	**Counterpart Federal Body rule/office**
Rule 25- President	Rule 19(c) – Branch President
Rule 25A – 3 Vice-presidents	Rule 19(c) – 3 Vice-Presidents
Rule 26 – Secretary	Rule 19(c) - Secretary
Rule 19(b) – such number of Section Delegates as determined by Council and Rule 54	Rule 19(c) – such number of Section Delegates as determined by Council and Rule 80

In both the Applicant and the Counterpart Federal Body, the number of section delegates has long been determined to be 0.

Rule 19(b) and 28 – Assistant Branch Secretary – not created.	Not applicable

26 When the application was filed on 21 December 2009 the office of Assistant Branch Secretary was still in existence although historically this position had never been filled. However, this office was deleted by the variations to the rules set out in paragraph [8] of these reasons when those variations were registered by the Registrar on 18 February 2010.

27 The supreme governing body of the applicant is the Council (r 19(a)). The supreme governing body of the Branch is the Branch Council (r 19(a) of the Federal Union rules). Prima facie the offices of both the State organisation and the Branch pursuant to r 19(b) of the applicant's rules and r 19(c) of the Federal Union's rules are the same. The applicant's Council consists of the President, three Vice-Presidents, the Secretary and no more than 25 delegates from the sections of the applicant (r 19(b)). Under r 19(c) of the Federal Union's rules the Branch Council consists of the Branch President, three Branch Vice-Presidents, the Branch Secretary and delegates from the sections of the Association as determined by r 80 (other than in those

branches where Federal Council has determined that the number of delegates shall be zero). As set out in the applicant's annexure titled "Regulation 72(c)" in both the applicant's organisation and in the Branch, the number of section delegates has long been determined to be zero. In any event, the applicant's rules and the Federal Union's rules provide a very similar formula for the selection of sectional delegates. Rule 54 – Formula for Election of Sectional Delegates to Council of the applicant's rules, sets the number of section delegates by applying the annual income of each section from entrance fees and membership subscriptions for the aggregate dues paid to the applicant and its Branch for the previous financial year and ascertains the notional number of members of each section by dividing the amount of income for each section by $200 (or another amount as determined by Council). The same formula is contained in r 80 of the Federal Union's rules. However, the proportional formula to be obtained of national sections under r 80 is to be applied is 50, whereas the proportional formula to be obtained in respect of sections under the applicant's rules is 25. Further pursuant to r 54(vi) of the applicant's rules, where sections are entitled to three or more delegates or three or more Vice-President positions are to be filled, one of each three positions filled shall be a woman according to a formula that follows. There is no equivalent of r 54(vi) in the rules of the Federal Union. However, there is no requirement in s 71(4) of the Act that the offices be identical only that there be a corresponding office for each office in the State organisation.

28 In relation to each of the duties of the President, Branch President, the Vice-Presidents, the Secretary and the Branch Secretary it is clear that the rules of the applicant and of the Branch are not identical. However, when the powers and duties of each of those positions in the rules are examined, it is apparent that all of the powers and duties of each of the Branch offices are also found in the powers and duties of the offices that exist pursuant to the applicant's rules. There are, however, some additional duties which are required of the holders of the offices of the applicant which, in our view, are not material to the determination of this application. These matters relate to the keeping of books of account as required by the Act and other statutory duties under the Act. It is also notable that the terms of office for each of the offices are the same. Pursuant to r 52 – Terms of Office of the applicant's rules, the terms of office for the Secretary is four years and for Honorary officers two years. Under r 78 – Terms of Office of the Federal Union's rules, full-time Branch officers hold office for a term of four years and Honorary branch officers two years. For these reasons we are of the opinion that in each of the offices of the applicant's State organisation there is a corresponding office in the Branch.

29 For the reasons set out above, we are satisfied that the Media, Entertainment and Arts Alliance – Western Australian Branch is the counterpart Federal body in relation to the applicant. Accordingly, it is appropriate to make the declaration in the form provided for in s 71(1), s 71(2) and s 71(4) of the Act.

30 Once the order authorising the Registrar to register the alteration to the rules of the applicant by adding a new r 18 is made and the s 71 declaration is made, s 71(5) issues a mandatory command to the Registrar to issue a certificate in the form prescribed by that sub-section.

2010 WAIRC 00106

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	MONDAY, 8 MARCH 2010
FILE NO/S	APPL 75 OF 2009
CITATION NO.	2010 WAIRC 00106

Result	Order made
Appearances	
Applicant	Mr D H Schapper (of counsel)

Order

This matter having come on for hearing before the Full Bench on 15 February 2010, and having heard Mr D H Schapper, of counsel, on behalf of the applicant, the Full Bench orders that:—

The Registrar is hereby authorised to register an alteration to the rules of the applicant by adding a new rule 18 – Offices.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

2010 WAIRC 00105

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	MONDAY, 8 MARCH 2010
FILE NO/S	FBM 8 OF 2009
CITATION NO.	2010 WAIRC 00105

Result	Declaration issued
Appearances	
Applicant	Mr D H Schapper (of counsel)

Declaration

This matter having come on for hearing before the Full Bench on 15 February 2010, and having heard Mr D H Schapper, of counsel, on behalf of the applicant, the Full Bench pursuant to its powers in s 71 of the *Industrial Relations Act 1979* (the Act), hereby declares that:—

(a) The Media, Entertainment and Arts Alliance – Western Australian Branch is the counterpart Federal body of the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees);

(b) The rules of the applicant and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the Act.

(c) The rules of the counterpart Federal body prescribing the offices which exist in the Branch are hereby deemed to be the same as the rules of the applicant, prescribing the offices which exist in the applicant, in accordance with s 71(4) of the Act.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

COMMISSION IN COURT SESSION—Matters dealt with—

2010 WAIRC 00059

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT, 2010 EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH
	APPLICANT
	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION AND THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION DEPARTMENT OF COMMERCE
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 8 FEBRUARY 2010
DELIVERED	THURSDAY, 11 FEBRUARY 2010
FILE NO.	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00059

CatchWords	Practice and procedure - Further and better particulars - Discovery and inspection of documents - Relevant principles - Orders made - Industrial Relations Act, 1979 s 27(1)(o)
Result	Order issued
Representation	
Applicant	Mr B Owen
Respondent	Mr R Bathurst of counsel

Reasons for Decision

COMMISSION IN COURT SESSION:

1 The substantive proceedings in these matters are applications pursuant to s 42G of the *Industrial Relations Act 1979* ("the Act") for the registration of two agreements, they being the Education Assistants' (Government) General Agreement 2010 and the Government Services (Miscellaneous) General Agreement 2010 ("the Agreements"). The Commission in Court Session is requested to determine, for the purposes of s 42G (2) of the Act, the rates of pay to apply under the Agreements.

2 In accordance with the joint request of the Liquor Hospitality and Miscellaneous Union (WA Branch) ("LHMU") and the respondents, the substantive applications have been listed for hearing for six days commencing on 10 March 2010.

Interlocutory Applications

3 By application filed on 4 February 2010 the LHMU seeks an order pursuant to s 27(1)(o) of the Act in the following terms:

> "(1) particulars of the grounds upon which the Government denies that the LHMU is entitled to the pay increase it seeks (the LHMU Wages Claim) and maintains that the wage increases should, instead, the 2.5%, 2.5% and 3% over the next three years; and
>
> (2) discovery on oath of all documentation in the possession, custody or power of the Government relating to any matter and issue in the proceedings for the arbitration of the LHMU Wages Claim and without limiting the generality of the discovery that is fair and just to be provided by the Government (in accordance with regulation 20(7)) to enable the LHMU to properly and fairly present its case and understand the case against it, the LHMU seeks, in particular, discovery on oath of documentation concerning the following:
>
> (a) consideration by or on behalf of the Government of the LHMU Wages Claim;
>
> (b) advice (not including legal advice) about the LHMU Wages Claim;
>
> (c) economic analyses of or concerning the LHMU Wages Claim;
>
> (d) the application of the Government's Public Sector State Wages Policy to the LHMU Wages Claim."

4 Given the impending dates of hearing of the substantive claims, the Commission in Court Session heard the interlocutory application on 8 February 2010. At the hearing of the application, the LHMU, after making only limited submissions in support of the application, was granted leave by the Commission in Court Session to file and serve written submissions in reply by 9 February 2010, which it has done through its counsel, Mr Hooker.

5 For the purposes of dealing with this application, we will also refer to the written outline of submissions and annexures provided by Mr Bathurst, counsel appearing on behalf of the various State Government entities who are the respondents to which these proceedings relate.

6 Additionally, we should also observe that during the course of the hearing on 8 February, the State Government made an oral application for particulars and discovery, in relation to the LHMU's wages claim. This application was previously expressed in a letter from the State Solicitor's Office to the LHMU dated 4 February 2010 which relevantly provides as follows:

> **"Particulars and Discovery by the LHMU**
>
> Would you please provide, within five days of the date of this letter, particulars of the grounds upon which the LHMU claims that it is entitled to the pay increases it seeks. If it is alleged that there has been work value changes for any classification of employee in question, would you please specify the exact nature of that alleged change, when it allegedly occurred and how the LHMU claims it is to be valued. Further, if it is alleged that any amount of the pay rise sought is justifiable on the basis of gender discrimination or inequality, please specify the exact nature of that alleged discrimination or inequality and why it is said to justify a wage increase.
>
> Would you please also provide, within five days of the date of this letter, discovery of all documentation in the LHMU's possession, custody or power concerning any alleged:
>
> (a) change in work value for any classification of employee in question; and
>
> (b) gender discrimination or inequality which is said to justify a wage increase."

7 We will deal with both applications in these reasons.

Particulars

8 The Commission is empowered by s 27(1)(o) of the Act to make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, including delivery of particulars of claims of all parties, discovery, inspection or production of documents. As a matter of general principle, a party to proceedings before the Commission is entitled to reasonably know the case brought against it. The relevant provisions of the *Industrial Relations Commission Regulations 2005* ("the Regulations") require applicants and respondents to particularise their claims or answers respectively.

9 Furthermore, as in the present proceedings, by r 22 of the Regulations, it is open to a party to any matter before the Commission to apply to the Commission in Chambers for an order that any other party to the matter furnish further and better particulars of any claim, answer, counter-proposal or other matters stated in or in relation to the matter.

10 In the present context, the circumstances of the claims are somewhat unusual. This is the first application pursuant to s 42G of the Act, whereby the Commission in Court Session is being asked to determine the rates of pay to have application in the Agreements upon their registration by the Commission in Court Session. The only "claims" before the Commission in Court Session, as such, are set out in the "Agreement For Arbitration" annexed to the applications. The relevant part of this for present purposes is as follows:

> "The LHMU will argue for wage increases of 7%, 6.5%, 6.5% and the Government respondents will argue for wage increases of 2.5%, 2.5% and 3%".

11 As to the LHMU application for particulars, counsel for the respondents submitted that in their letter of 4 February 2010 to the LHMU, the respondents have set out particulars of their position. The particulars are as follows:

> "The Government's proposed pay increase of 8% over 3 years:
>
> (a) in accordance with the Public Sector Wages Policy 2009, maintains the real value of wages for the employees in question;
>
> (b) reflects the fact that the LHMU has not agreed to any efficiencies or work practice reform initiatives being included in the relevant industrial agreements;
>
> (c) reflects the fact that there has not been any changes, or alternatively, material changes, in work value for the employees in question;
>
> (d) is appropriate given the budgetary constraints facing the State and the difficult economic circumstances;
>
> (e) is appropriate taking into account the size of the Western Australian Public Sector and the adverse budgetary consequences if inappropriately large pay increases were to flow on to other employee groups;
>
> (f) is fair in all the circumstances."

12 In our view, the above sets out with reasonable particularity the basis for the respondents' position in relation to the wage increases to apply in the Agreements. We are not persuaded that any further particularity is necessary in order to enable the LHMU to adequately understand the case it has to meet. Accordingly, the LHMU application for further particulars is refused.

13 In terms of the the respondents' request for particulars of the LHMU claim, in our opinion, the the respondents, consistent with the principles to which we have just referred, are entitled to know the general basis of the claim they will be required to meet at the hearing of the applications. We note that no issue was taken with this in paragraph [9] of the written submissions filed by the LHMU. Indeed it has undertaken to provide particulars and discovery in a "reasonable time". Nonetheless, given the impending dates of hearing of the substantive claims we consider that the LHMU should be required to provide particulars of its claim within a defined timetable, which we deal with in the order to issue.

Discovery

14 It is fair to say that the primary focus of the oral and written submissions of the parties was in relation to the matter of discovery of documents in relation to the claims.

Relevant Principles Regarding Discovery

15 It is trite to observe that in this jurisdiction, discovery is not available as of right. Rather it is for a party making an application for an order under s 27(1)(o) of the Act to establish that it would be just for such an order to be made: *ALHMWU and Others v. Burswood Resort Management (Ltd) and Others* (1995) 75 WAIG 1801.

16 Relevantly, in *Burswood*, the Full Bench considered the approach to be taken in this jurisdiction in relation to applications for discovery and said at 1805:

> "The Commission may therefore only make an order if such an order is just (see Springdale Comfort Pty Ltd t/a Dalfield Homes v. BTA (*op cit*) (IAC).
>
> S.26(1)(a) of the Act would not seem to be excluded from operation by the words of s 27(1)(o) but we do not think that it alters the question to be asked and answered under s.27(1)(o).
>
> It is for the applicant for an order under s.27(1)(o), to establish that it is just for such an order to be made. The expression "just" means "right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right". (see Loxton v. Ryan (1921) State Reports (Qld) 79 at 84, 88 per Lukin J). Perhaps more appositely in Smith's Weekly Publishing Co Ltd v. Sunday Times Newspaper Co Ltd (*op cit*), which was a case relating to discovery of documents Isaacs and Rich JJ at page 562 held that "just" means "just according to law".

17 Generally speaking, if an order for discovery is made, it may be made requiring the parties to the proceedings to furnish a list to one another, setting out a list of documents which are or have been in the party's possession or power, relating to any matter in question in the proceedings. This will include documents which may advance a party's case or damage the case of its opponent, or otherwise which may fairly lead to a train of inquiry in connection with the subject matter of the proceedings: *Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* (1882) 11 QBD 55 per Brett LJ at 63.

Contentions of Parties

18 The LHMU submitted that a number of issues will be contested in these proceedings such that its general request for discovery should not be regarded as oppressive. It submitted that these issues will include:

(a) An erosion of the value of LHMU members' salaries compared to other public sector employees in particular nurses, teachers, and police;

(b) State Government expenditure in areas of policy and reform taking precedence over and above fair and reasonable remuneration for LHMU members proposed to be covered by the Agreements; and

(c) The general operation and effect of the State Government's Wages Policy particularly as to how and to what extent the Wages Policy applies to the claims.

19 There were also general submissions made by the LHMU that the position adopted by the State Government that the LHMU's request is oppressive is dubious, given the resources of the State and the LHMU's assertion that the State Government had previously advised that no such documents were in its possession, custody or power.

20 Counsel for the respondents submitted that the general request for discovery of all documents in its possession, custody or power relating to any matter in issue in the proceedings for the arbitration of the LHMU Wages Claim is of such a width as to make it oppressive. Additionally, a further submission was made by counsel to the effect that there has been an accepted practice in Australia for many years that in proceedings of this kind, internal working documents of parties are, other than in exceptional circumstances, not discoverable: *Re Federated Clerks Union of Australia* Print H2892*; Construction, Forestry, Mining and Energy Union v. A Aarons Waterbed Centre and Others* Print N4704*; The Amalgamated Metal Workers' and Shipwrights Union and Electricity Trust of South Australia and Others* Print E3438.

21 These decisions relied upon by counsel for the respondents were decisions of the Australian Industrial Relations Commission and its predecessors in relation to summonses for production of documents in the absence of any general power for the provision of discovery and inspection of documents under the relevant Commonwealth legislation. Having considered the

authorities to which counsel referred, with respect, we do not agree with the approach taken in those decisions. We do not consider they have application in this jurisdiction, where no such general principle has been endorsed. In our opinion, the approach to be taken is that as set out in *Burswood*, that being for the Commission in Court Session to consider whether an application for an order under s 27(1)(o) of the Act is just in all of the circumstances of the case.

Consideration

22 One of the respondents' claim for an order is that the LHMU provide discovery of all documentation in its possession, custody or power concerning any alleged change in work value for any change in work value for any classification of employee in question and gender, discrimination or inequality which is said to justify a wage increase. In relation to this, we note the preparedness of the LHMU in paragraph [9] of its written submissions to comply with the respondents' request.

23 Additionally, we observe that discovery is confined to what is in issue on the pleadings (*Burswood* supra at 1805). In this case we are not prepared to require the LHMU to give discovery in advance of the provision by it of its particulars. We are prepared to accept that the LHMU will provide discovery in accordance with its position in paragraph [9] of the written submissions and a liberty to apply may be exercised by the respondents if it is needed.

24 In relation to the LHMU claim for an order for discovery on oath of all documentation in the possession, custody or power of the Government relating to any matter and issue in the proceedings for the arbitration of the LHMU wages claim, we observe firstly that an order can only issue against the respondents and not the State Government. Even so, we consider the wording "any matter in issue" to be too broad in the absence of the LHMU's particulars. We also consider such an order would be oppressive for that reason.

25 We do not think an order should specifically include consideration by or on behalf of the Government of the LHMU wages claim. In our view, the relevant position of the respondents is the respondents' final position and in any event we consider an order in such terms would be too broad. We are also of the view that any advice to the Government about the LHMU wages claim is not relevant.

26 However, given the respondents' particulars outlined above, and paragraph 5(c) of the LHMU's written submissions, we do consider it is just that an order should issue in the terms of subparagraphs (2)(c) and (d) of the schedule to the LHMU's application, namely:

> "(c) economic analyses of or concerning the LHMU wages claim;
>
> (d) the application of the Government Public Sector State Wages Policy to the LHMU wages claim."

27 We propose to order accordingly.

Mode of Taking Evidence

28 The parties have informed us that evidence that will be adduced from approximately 24 witnesses in total. Some 20 witnesses are to be called by the LHMU and four by the respondents. In this connection, the respondents have requested that the Commission in Court Session make orders for the filing and service of witness statements to stand as the evidence in chief of the maker. The LHMU appears not to oppose the provision of witness statements as such, however, it wishes to call six witnesses to give their evidence in chief orally.

29 The Commission has the power under s 27(1)(hb) of the Act to require evidence or argument to be presented in writing. Additionally, modern case management principles, in particular where a large number of witnesses are to be called in proceedings, contemplate the making of orders for the use of witness statements in appropriate cases. We consider that such an order should be made in this case given the parties agreed position that the matter be listed for or hearing for six days. This will assist in enabling the matter to be completed within the agreed time.

30 However, we also acknowledge the request by the LHMU to call evidence in chief orally from some of its witnesses. In paragraph 10 of its written submissions the LHMU says that at this stage it does not intend to call more than six witnesses for this purpose. Subject to what follows, the orders to issue in relation to the filing and service of witness statements will make provision for this and, as a matter of balance, it will also extend to the respondents.

Case Management Generally

31 The proceedings have been listed for hearing for six days commencing on 10 March 2010. The requested length of hearing and the commencement date arise from an agreement between the parties which the Commission in Court Session has accommodated. In these circumstances, the Commission in Court Session wishes to observe that the parties should tailor the presentation of their cases in order that the matter can be completed within the agreed time. The Commission in Court Session also refers to the case management powers that it has under s 27(1)(ha) of the Act, which include the power to determine periods reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceedings and require the cases to be presented within the respective periods. The Commission in Court Session foreshadows that it will consider the use of these powers if it becomes necessary in the circumstances of this case. Despite the foregoing, if for whatever reason, the matters require further listing dates, we wish to state that while every consideration will be given to the availability of counsel, the Commission has an obligation to act with as much speed as the requirements of the Act and a proper consideration of the matter before it permit and the availability of counsel will not be determinative of that obligation.

32 A minute of proposed order now issues.

2010 WAIRC 00063

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT, 2010 EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH)
	APPLICANT
	-v-
	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION AND THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION, DEPARTMENT OF COMMERCE
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 12 FEBRUARY 2010
FILE NO/S	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00063

Result	Order made regarding provision of particulars, discovery and witness statements
Representation	
Applicant	Mr B. Owen
Respondents	Mr R. Bathurst (of counsel)

Order

HAVING HEARD Mr B. Owen on behalf of the applicant and Mr R. Bathurst (of counsel) on behalf of the respondents, the Commission in Court Session acting pursuant to s 27(1)(o) of the *Industrial Relations Act, 1979* hereby makes the following orders:

1. THAT the application by the Liquor, Hospitality and Miscellaneous Union ("LHMU") for particulars of the grounds upon which the Government denies that the LHMU is entitled to the pay increase it seeks is dismissed.
2. THAT by 15 February 2010 the LHMU file and serve upon the respondents particulars of the grounds upon which it claims that it is entitled to the pay increases it seeks.
3. THAT liberty is reserved to the respondents to seek an order for discovery following the provision of particulars by the LHMU.
4. THAT by 26 February 2010 the respondents give to the LHMU informal discovery and inspection of all documents which are in their respective custody, possession, power or control and which relate to:
    (a) the economic analyses of or concerning the LHMU Wages Claim;
    (b) the application of the Public Sector Wages Policy 2009 to the LHMU wages claim in this matter.
5. THAT other than as provided elsewhere in this order, evidence in chief be given by way of signed witness statements which will stand as the evidence in chief of the maker.
6. THAT by 3 March 2010 the parties file and serve upon one another any signed witness statements upon which they intend to rely.
7. THAT the LHMU and the respondents respectively may adduce oral evidence from no more than 6 witnesses.
8. THAT by 8 March 2010 the LHMU and the respondents file and serve an outline of submissions and any authorities upon which they intend to rely.
9. THAT the parties or any of them have liberty to apply at short notice to vary this order.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] Commission In Court Session.

2010 WAIRC 00067

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT, 2010 EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH)
	APPLICANT
	-v-
	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION AND THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION, DEPARTMENT OF COMMERCE
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 16 FEBRUARY 2010
FILE NO.	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00067

Catchwords	Speaking to the minutes – Industrial Relations Act, 1979 s 35(1)
Result	Order issued

Supplementary Reasons for Decision

1 This is our unanimous decision. The parties were given an opportunity to speak to the Minutes by way of written submissions. The LHMU submitted that the Minutes of Proposed Orders accurately reflect the reasons for decision and opposed any change to the Minutes in response to the respondents' submissions. The respondents raised three issues.

2 The first matter raised by the respondents is that to ensure there can be no misapprehension as to what is required by way of particulars to be provided by the LHMU, Order 2 of the Minutes should be amended so that the particulars should include, without limitation:

> "(a) the percentage increase that the LHMU alleges each classification of employee in question is entitled to;
>
> (b) if it is alleged that there has been any work value changes for any classification of an employee in question, the exact nature of that alleged change, when it allegedly occurred and how the LHMU states it is to be valued; and
>
> (c) if it is alleged that any amount of the pay rise sought is justifiable on the basis of gender discrimination or inequality, the exact nature of that alleged discrimination or inequality and why it is said to justify a wage increase."

3 We are of the view that the Minutes which issued reflect the decision reached by the Commission in Court Session. We considered the respondents are entitled to know the general basis of the claim they will be required to meet at the hearing of the applications and we noted the response of the LHMU in paragraph [9] of its written submissions which undertakes to provide the particulars. We do not propose to anticipate what those particulars might be. In the event that the respondents consider that insufficient particularity has been provided, the liberty to apply reserved to the parties is exercisable at short notice.

4 The respondents next point out that in Order 2 the date of 27 February 2010 is a Saturday. It had been the intention of the Commission in Court Session to refer to the preceding Friday which is 26 February 2010 and this change will be made.

5 Finally, the respondents foreshadow that it is likely they will need to lead evidence in rebuttal to the evidence provided by the LHMU. They request that the Minutes clarify that at the hearing either party may lead evidence in rebuttal to the witness statements filed and served by the other party.

6 We note that the reasons which were issued did not deal with evidence in rebuttal (or perhaps statements in reply). We are of the view that whether statements in reply are needed is an issue which will only be known once all witness statements are available, and accordingly we believe this issue is one that is better dealt with at the commencement of the hearing. No change will be made to the Minutes in this regard.

7 Therefore, the Order will issue in the terms of the Minutes other than for the correction of the date of 26 February 2010.

2010 WAIRC 00084

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT, 2010 EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION;
	THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION, DEPARTMENT OF COMMERCE
	APPLICANTS
	-v-
	THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DELIVERED	WEDNESDAY, 24 FEBRUARY 2010
FILE NO.	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00084

Catchwords	Practice and procedure - Further and better particulars - Discovery and inspection of documents - Orders made - Industrial Relations Act, 1979 s 27(1)(o)
Result	Order to issue
Representation	
Applicant	Mr R. Bathurst (of counsel)
Respondent	Mr B. Owen

Further Reasons for Decision

1 This is our unanimous decision. We announced at the conclusion of the proceedings that we intended to issue our decision as soon as possible with brief written reasons to follow. A minute of proposed order has issued and these are the reasons for that order.

2 The respondents filed an application for further and better particulars on 18 February 2010 in response to the particulars of the LHMU's wages position filed on 15 February 2010. We listed the application urgently and what follows are our reasons for the order we have made. Necessarily, these Reasons will be brief and follow on from and adopt our earlier Reasons ([2010] WAIRC 00059).

3 We commence by noting a significant deficiency in the particulars provided by the LHMU on 16 February 2010 when compared with the undertakings given by it in its earlier written submissions of 9 February 2010. We refer to:

(a) the LHMU statement at [5](b) in its written submission that numerous examples of government effecting spending on areas of policy and reform will be particularised; and

(b) the undertaking at [9] to provide the particulars requested by the respondents in the letter from the State Solicitor's Office of 4 February 2010 which, for ease of reference, were:

- particulars of the grounds upon which the LHMU claims that it is entitled to the pay increases it seeks. If it is alleged that there has been work value changes for any classification of employee in question, would you please specify the exact nature of that alleged change, when it allegedly occurred and how the LHMU claims it is to be valued. Further, if it is alleged that any amount of the pay rise sought is justifiable on the basis of gender discrimination or inequality, please specify the exact nature of that alleged discrimination or inequality and why it is said to justify a wage increase.

4 The Commission in Court Session accepted this latter undertaking in its Reasons for Decision [2010] WAIRC 00059 at [23] and especially in the Supplementary Reasons [2010] WAIRC 00067 at [3] as the basis for not ordering the particulars to be provided. We express our extreme disappointment that the LHMU has not done so.

5 We have previously stated in our Reasons for Decision at [13] that the respondents are entitled to know the general basis of the claim they will be required to meet. We consider, given the previous undertaking by the LHMU to provide greater detail of at least some of the issues now requested and also the submissions of the respondents, that it is appropriate for the LHMU to provide greater detail of its position. We consider that it will assist in the proper preparation for the hearing for the respondents to know in greater detail the case it has to meet.

6 We acknowledge the relatively tight timeframe the parties have imposed upon themselves for the hearing of this matter and that the resources of the LHMU may be limited compared to the resources available to the respondents. In turn, the scope we have to give practical recognition of any limitation is itself limited to the parties' own timeframe.

7 As to paragraph 1 of the particulars, we consider it is not apparent on what basis the LHMU is saying that its members are treated unfairly and that the respondents are entitled to know the basis. Similarly in relation to paragraph 2, we consider the respondents are entitled to know the basis for arguing that the Government Wages Policy does not maintain the real wages of the LHMU's members.

8 As to paragraph 3(c) of the particulars, we consider the reference to "State Government utilities" is sufficiently descriptive of what is being referred to. In relation to paragraph 3(d) we refer to the undertaking of the LHMU in its written submission to give these particulars and we shall require them to do so. Similarly in relation to 3(e) the LHMU has already undertaken to supply these particulars in the context of the letter from the SSO of 4 February 2010. We will require this to be done. In relation to the valuation of any change in work roles and work value, we consider the wording in the letter from the SSO of 4 February 2010 to be preferable to the currently proposed wording because the LHMU's valuation may not necessarily be by way of dollar value.

9 We consider the request for particulars relating to non-adherence to Government Wages Policy should be clarified as requested given the LHMU's written submissions at [5](a).

10 We are also of the view that discovery should be ordered as requested. We note the preparedness of the LHMU to do so in its written submission at [9].

11 The final matter is the respective dates of operation. We consider the particulars to be provided ought be able to be provided by the end of this week, that being 26 February 2010. We do take into account the LHMU's submissions as to its limited resources and we are prepared to given the LHMU to the midday of an additional working day to provide discovery. That is the Tuesday after the long weekend, being Tuesday 2 March 2010. According to Order 4 of 12 February 2010 ([2010] WAIRC 00063) the respondents are to give discovery to the LHMU by 26 February and we consider in fairness to both parties, the dates of discovery should be aligned. The order to issue will therefore also vary that earlier order accordingly. This was not a matter raised by either party nor by the Commission in Court Session during the proceedings and accordingly we will extend an opportunity to be heard in writing on this issue prior to finalising the order to issue from these proceedings.

12 In all other respects, we have requested any submissions by way of speaking to the minutes to be made in writing to us.

2010 WAIRC 00087

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT, 2010 EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION ;
	THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION, DEPARTMENT OF COMMERCE
	APPLICANTS
	-v-
	THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 24 FEBRUARY 2010
FILE NO/S	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00087

Result	Order made regarding provision of particulars and discovery; Previous Order varied
Representation	
Applicant	Mr R. Bathurst (of counsel)
Respondent	Mr B. Owen

Order

HAVING HEARD Mr R. Bathurst (of counsel) on behalf of the applicants and Mr B. Owen on behalf of the respondent, the Commission in Court Session acting pursuant to s 27(1)(o) of the *Industrial Relations Act, 1979* hereby makes the following orders:

PARTICULARS

THAT by 26 February 2010:

1. The LHMU state precisely each fact or circumstance relied upon to support the allegation that the timing and implementation of the Government Wages Policy treats the members of the LHMU unfairly and inequitably.
2. The LHMU state precisely each fact or circumstance relied upon to support the allegation that the Government Wages Policy does not maintain the real wages of LHMU members.
3. The LHMU provide full particulars of the "current trends in WA Government spending".
4. As to paragraph 3(e) of the Particulars, provide particulars of the alleged changes in work roles and work value performed by LHMU's members, including, but not limited to, particulars of:
   (a) The exact nature of the alleged changes in work roles and work value;
   (b) When the alleged changes occurred; and
   (c) How the LHMU claims the changes are to be valued.
5. As to paragraph 4 of the Particulars, state precisely each fact or circumstance relied upon to support the allegation that the Government Wages Policy has not been adhered to including, but not limited to, particulars of:
   (a) When it is alleged the Government Wages Policy came into force; and
   (b) Which other groups of employees have allegedly received wage increases which were not in adherence with the Government Wages Policy and when those increases were granted.

DISCOVERY

THAT the LHMU serve on the Applicants by midday 2 March 2010, by way of informal discovery, any documents in its possession, custody or power concerning:

1. The LHMU's claim at paragraph 1 of the Particulars that the Government Wages Policy, both in timing and implementation, treats the members of the LHMU unfairly and inequitably;
2. The LHMU's claim at paragraph 2 of the Particulars that the Government Wages Policy does not maintain the real wages of LHMU members;
3. The LHMU's claim at paragraph 3(e) of the Particulars that there have been changes in the work roles and work value performed by LHMU's members concerned; and
4. The LHMU's claim at paragraph 4 of the Particulars that the Government Wages Policy has not been adhered to for other groups of employees whose workforce is predominately male, and that it is unfair to strictly adhere to the wages policy in respect of the members the subject of this claim, who are predominately female.

AND the Commission in Court Session hereby further orders:

THAT the date of 26 February 2010 in Order 4 of the Order of 12 February 2010 ([2010] WAIRC 00063) be deleted and replaced with the date of midday 2 March 2010.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] Commission In Court Session.

INDUSTRIAL MAGISTRATE—Claims before—

2010 WAIRC 00110

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES TRANSPORT WORKERS' UNION OF AUSTRALIA

CLAIMANT

-v-

TWENTIETH SUPERPACE NOMINEES PTY LTD T/AS SCT LOGISTICS

RESPONDENT

CORAM INDUSTRIAL MAGISTRATE G. CICCHINI

HEARD MONDAY, 7 DECEMBER 2009, TUESDAY, 8 DECEMBER 2009, WEDNESDAY, 9 DECEMBER 2009, THURSDAY, 10 DECEMBER 2009

DELIVERED WEDNESDAY, 3 MARCH 2010

CLAIM NO. M 8 OF 2009, M 9 OF 2009, M 10 OF 2009

CITATION NO. 2010 WAIRC 00110

CatchWords	Alleged breach of clause 19.4.2 of the SCT, Forrestfield WA Agreement 1999, clause 19.4.2 of the SCT Logistics Perth WA Agreement 2003; and clause 19.4.2 of the SCT Logistics Perth WA Agreement 2006; Allegation that three of the Claimant's members employed by the Respondent were unable to take lunchbreaks; Claim for overtime payments for working through lunchbreaks.
Legislation	
	Workplace Relations Act 1996
Industrial Instruments	
	Transport Workers Award 1998
	SCT Forrestfield WA Agreement 1999
	SCT Logistics, Perth WA Agreement 2003
	SCT Logistics Perth WA Agreement 2006
Cases Cited	
	Metropolitan Health Services Board v Australian Nursing Federation (2000) 98 IR 390
	Briginshaw v Briginshaw [1938] 60 CLR 336
	Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
	Pacific Carriers Ltd v BNP Paribas [2004] HCA 35
	Kucks v CSR Ltd (1996) 66 IR 102
	AMIEU v Coles Supermarkets Australia Pty Ltd (1998) 80 IR 208
Cases Referred to in Judgement	
	Project Blue Sky Inc and Others v Australian Broadcasting Authority [1998] 194 CLR 355
	City of Wanneroo v Holmes (1987) 30 IR 362
	BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch) [2006] WASCA 124
Result	Claims Proven
Representation	
Claimant	Mr S. Millman instructed by *Messrs Slater and Gordon Lawyers* appeared for the Claimant.
Respondent	Mr M. Rinaldi with Mr C Broadbent instructed by *Marsh and Maher* appeared for the Respondent.

REASONS FOR DECISION

Background

1 The Respondent is a national transport and logistics company with its main office in Victoria. It undertakes rail and road bulk transport operations in Australia, primarily providing rail transport across the continent, and road transport along the north-south transport corridors of eastern Australia. It owns and operates locomotives and rolling stock systems on the east-west rail network. These are connected through modal facilities in New South Wales, Victoria, South Australia and Western Australia.

2 In Western Australia it operates a localised distribution network centred at its Forrestfield depot where rail freight is received. From that place it distributes stock by road transport within the Perth metropolitan and outer metropolitan areas and to Bunbury. From time to time it also services more distant locations such as Albany and Geraldton; however most of its long distance road transport is carried out by a third party carrier. It also conducts a third party logistics operation on behalf of the Fosters Group from premises adjacent to its Forrestfield depot.

3 Timothy Falconer, Mitchell O'Brien and Bernie Williams, all members of the Transport Workers Union (TWU), work for the Respondent at its Forrestfield depot. They are longstanding employees of the Respondent. Mr Falconer and Mr O'Brien are engaged to drive trucks. They drive "B double" configured trucks and sometimes semi trailers in delivering stock to client distribution centres and other places. Mr Williams on the other hand is engaged to drive a forklift at the Forrestfield depot. His primary responsibility is to unload and back load trains. He sometimes is engaged in moving stock to and within warehouses. In each case their duties have remained unchanged for many years and were as described during the material period.

Industrial Instruments

4 The employment of Mr Williams, Mr O'Brien and Mr Falconer has, during the relevant period, been regulated by the *Transport Workers Award 1998* (the Award) and a number of enterprise bargaining agreements (EBAs). The EBA prevails over the Award, to the extent of any inconsistency. The first EBA namely *SCT Forrestfield WA Agreement 1999* (1999 Agreement) came into force in November 1999 and was replaced in August 2003 by the *SCT Logistics Perth WA Agreement 2003* (2003 Agreement). The 2003 Agreement was in turn replaced in 2006 by the *SCT Logistics Perth WA Agreement 2006* (2006 Agreement).

Claims and Response

5 The Claimant alleges that the Respondent is in breach of the 1999, 2003 and 2006 Agreements by not paying Mr Williams, Mr O'Brien and Mr Falconer their correct entitlements for having worked through their lunchbreaks in circumstances where they were unable to have a lunchbreak.

Truck Drivers

6 It is alleged that from March 2003 until December 2007 Mr O'Brien and Mr Falconer were unable to take a lunch or meal break because the system of work adopted by the Respondent was such that it made no provision for taking a lunch or meal break. Half an hour's pay at double time is claimed for each day worked.

7 The Respondent contends that truck drivers were at all relevant times able to take and did take paid lunchbreaks. They were never requested to defer their lunch. Indeed there was never an inability to have a lunchbreak. Most truck drivers with some exceptions preferred to not take an unpaid lunchbreak because it suited their purposes providing them with advantages such as earlier finishing times or more pay.

8 The Respondent asserts that the lunchbreaks issue has only arisen because of the changes made in February 2008, enforcing the taking of an unpaid half hour lunchbreak. Prior to then, there had never been any complaint by drivers or by the Respondent about the lunchbreak practice or any suggestion that truck drivers had been incorrectly paid.

Forklift Driver

9 The Claimant alleges that Mr Williams was, on occasions during the period April 2003 to December 2007, directed to work through his lunchbreak and although paid for having done so was not paid his correct entitlement that is at overtime rates.

10 The Respondent contends that Mr Williams' claim that he was directed to work through his lunchbreak on the material dates is both unsubstantiated and incorrect. The Respondent suggests that his claims are not credible and should not be accepted.

Relevant Employment Conditions

Hours

11 Each EBA required fulltime employees to work a 10 hour day, consisting of 8 hours at ordinary time and 2 hours of overtime four days per week. Employees could also choose to work a 5th day consisting of 7.6 hours payable at ordinary rates. If they chose to work a 5th day, they were not required to work the full day however they were required to work for at least 4 hours on that day. Any time worked in excess of 7.6 hours on 5th day was payable at overtime rates. That arrangement continues.

Meal break/Lunchbreak

12 The Award allowed employees to take a daily regular unpaid meal break of between 30 minutes and one hour during the ordinary hours of work except where unforseen extraordinary circumstances arose which made the taking of the regular meal break impracticable.

13 It provided and continues to provide:

> 36 Meal Times
>
> 36.1 Regular meal break
>
> 36.1.1 An employee shall be allowed a regular meal break during the ordinary hours of work except where unforseen extraordinary circumstances arise which make the allowance of the regular meal break impracticable.

14 The meal break shall:

> 36.1.1(a) be of a regular duration of not more that one hour or less than 30 minutes;
>
> 36.1.1(b) commence not earlier that three and one-half hours after an employee's fixed starting time of the ordinary hours of work; and
>
> 36.1.1(c) commence not later than five an one-half hours after an employee's fixed starting time of the ordinary hours of work.
>
> 36.1.2 Provide that in respect of 36.1.1(b) and 36.1.1(c), where it is reasonable and practicable the meal break shall be arranged to be in balance with the ordinary hours of work.
>
> 36.1.3 If the meal break is not allowed, all time worked after the commencement time of the regular meal break until a break without pay for a meal time is allowed shall be paid for at the rate of ordinary time, the payment to be in addition to any payment due in respect of a weekly or casual wage.

15 The applicable EBA provisions relating to lunchbreaks provided:

CLAUSE 19.4.2 Driver Employees ect

> Driver employees agree to defer lunchbreaks upon request and will continue at ordinary rate of pay until such time that a lunchbreak is available. If an employee is unable to have a lunchbreak, then that employee will be paid at an additional 30 minutes overtime. An employee may request a lunchbreak and approval may not be withheld. Lunchbreaks may be allocated by management to drivers on return to yard during each shift which if allocated must be taken.

16 Although only subclause 19.4.2 of the 2006 Agreement has been reproduced above the relevant clauses in the 1999, 2003 are the same as the 2006 Agreement except that the word "an" is missing before the words "additional 30 minutes overtime" in the 2003 Agreement.

17 The Award and the EBAs use different terms relating to the taking of a break for a meal or lunch. In my view, nothing turns on the use of different terminology. Clearly each provision is aimed at ensuring that an employee is able to take a timed, unpaid break in order to have a meal and/or do other things or to receive payment in lieu thereof in the event that it is unable to be taken.

18 The terms "lunchbreak" and "meal break" are not defined in the respective industrial instrument in which they are found. The common link with respect to each is that the word "break" is used. "Break" is defined in the Shorter Oxford Dictionary to mean;

"To rupture union or continuity; to disrupt; to stop for the time…"

19 It follows that in order to have a meal break or a lunchbreak there must a disruption to work and discontinuance of it. It must necessarily entail stopping for the time required by the applicable industrial instrument, primarily to facilitate the consumption of lunch or a meal.

Issues to be Determined

20 The pivotal issues to be determined in these matters are whether during the material period Mr O'Brien, Mr Falconer and Mr Williams were:

1. requested by the Respondent to defer their lunchbreak; and

2. unable to have a lunchbreak.

21 The Respondent submits that in order to prove its claim the Claimant must establish that on each relevant day the men were requested by the Respondent to defer or not to take their lunchbreak and they were unable to have a lunchbreak. On the other hand the Claimant seems to suggest that all that is required is establish that the men were unable to take a lunchbreak.

22 I accept the Respondent's submission. A proper construction of the subclause requires both elements to be satisfied.

Witnesses

23 The Claimant called Mr O'Brien, Mr Falconer, Mr Williams and its employee Mr Joshua Dalliston. Mr Dalliston prepared a number of spread sheets (exhibits 4.1, 4.2 and 4.3) using information contained on Mr O'Brien, Mr Falconer, and Mr Williams' time cards (Exhibit 5 volumes 1-3) in order to particularise the claims.

24 The Respondent called a number of its current and past employees. They were Mr Bradley Moore, its current State Manager, his predecessor Mr Neil Griffiths, who now works for another transport company, Mr Douglas James, its former Operations Manager who retired in 2008, Mr Mark Pitcher, its current Refrigeration Manager and former Operations Manger who before then was a truck driver working for the Respondent, Mr Andrew Gunn, Transport Manager at the Fosters warehouse, Mr Edward Davies, its Operations Manager for Rail and Mr Stephen Walker, its current Transit Operations Manager.

Assessment of Witnesses

25 Mr O'Brien, Mr Falconer and Mr Williams gave their evidence in an open, forthright, unequivocal and seemingly honest manner. Much of their evidence has not been contradicted and in any event is supported by the documentary evidence. They stood firm when challenged under cross-examination. There is no reason as to why their evidence should not be accepted. I prefer their evidence where there is direct conflict.

26 The evidence given by Mr Moore is of little assistance given that much of what is in issue predated his employment. Mr Gunn's evidence lacked relevance. Mr Pitcher's evidence was anecdotal and lacked detail with respect to Mr O'Brien and Mr Falconer. The evidence given by Mr Griffiths, Mr James, Mr Davies and Mr Walker lacked the specificity required to attract significant weight. Much of Mr Davies' evidence was predicated on assumptions rather than direct knowledge or observations. Mr Walker's evidence was somewhat limited. His concession that his memory is not all that good (see transcript - p314) also raises difficulty.

Findings of Fact - Truck Drivers

27 Mr O'Brien testified that about 15 years ago, when he began full time employment as a truck driver with the Respondent, it's then Fleet Controller Terry Tallowin told him that because of the need to meet customer requirements a dedicated lunchbreak would not be taken. He said that it was "common knowledge" that drivers were required to work though lunch. I accept his evidence in that regard. It has not been rebutted. Mr Douglas James' evidence supports the fact that prior to 1999 and subsequently there was a practice of not taking an unpaid half hour break. He testified that the practice not to take an unpaid lunchbreak was something not only well known to Mr Griffiths' predecessor Mr Warchomij but also to Claimant. He formed that view whilst involved in the 1999 EBA negotiations. The practice not to take lunchbreaks continued until 2008.

28 In 2008 Mr Griffiths made a decision to enforce the taking of an unpaid half hour lunchbreak. His decision upset many truck drivers and indeed drew a barrage of protests culminating in a dispute which required the intervention and assistance of the Australian Industrial Relations Commission. His decision to enforce the taking a lunchbreak was in part based on his view that drivers had been abusing the system. He had observed them to take what was in effect paid lunchbreaks. He put a stop to that. Further he was of the view that "a recorded lunchbreak" was desirable to demonstrate that the Respondent was complying with occupational safety and health requirements relating to fatigue management.

29 It is obvious that the practice of not taking of a dedicated lunchbreak would have suited the Respondent's operational requirements because it would have inevitably created efficiencies. The taking of a dedicated half hour lunchbreak would have made the Respondent's Fleet Controllers scheduling tasks more difficult and would have got in the way of customer requirements. Indeed the Respondent's primary objective was the need to meet customer requirements. Such was clear from Mr O'Brien and Mr Davies' evidence. The absence of an organised lunchbreak would have assisted the Respondent by enabling its processes to flow more rapidly and not to delay deliveries.

30 Mr O'Brien testified that Mr Tallowin's directive did not suit him. He much prefers the current system which enforces the taking of an unpaid half hour lunchbreak. Notwithstanding that, I accept that the former practice suited most truck drivers. Mr Pitcher's evidence, that of Mr Falconer and the documentary evidence (see Exhibit 9) establishes that the majority of truck drivers including Mr Falconer preferred not to take an unpaid half hour lunchbreak because it provided them with time and/or monetary advantages such as earlier finishing times or the earlier commencement of overtime. Both the Respondent and its truck drivers derived benefits from that practice.

31 There is no dispute about the fact that despite the practice of not having a lunchbreak Mr O'Brien and Mr Falconer were nevertheless able to have their lunch when ever they wanted. They do not suggest that they were not able to have lunch on any particular day nor is suggested that they forwent eating lunch. Their evidence is that they generally ate their lunch at or on their truck at convenient times, mainly whilst waiting for their truck to be loaded or unloaded. Occasionally lunch was eaten elsewhere or whilst driving. They did not expect to take an unpaid lunchbreak. It is not suggested by them that they were on each relevant day asked by the Respondent to defer and/or not take a lunchbreak. It appears also that they accepted that situation. They did not, except in the rarest of circumstances, ask their employer to allow them an unpaid lunchbreak. When such a request was made it was granted.

32 The Respondent argues, based on the observations of Mr Griffith and Mr James that despite there being no provision for the taking of an unpaid half hour lunchbreak, truck drivers nevertheless took a daily lunchbreak. Mr Griffith and Mr James testified that they had, on occasions, seen drivers sitting in lunch rooms and at other places having lunch. Mr Griffiths in particular asserts that truck drivers had multiple opportunities to take lunchbreaks and indeed did take lunchbreaks away from their trucks be it at the SCT depot, customer distribution centres or other places. He saw many of them including Mr Falconer taking lunchbreaks at such places. However Mr Griffiths' evidence and that of Mr James cannot and does not establish that truck drivers took a dedicated full half hour lunchbreak on each of those occasions. Their evidence which was based on limited observations lacked specificity. They made broad generalised allegations which were anecdotal in nature. At best such evidence can only establish that from time to time some drivers were seen to be stopped away from their trucks having their lunch. It cannot establish that on each day relevant to these claims that Mr O'Brien and Mr Falconer took a full half hour lunchbreak. The evidence does not establish that truck drivers discontinued work to have lunch. Rather the evidence is to the effect that there was no "break" in the truck drivers' obligations. They had to be ready to drive as soon as their truck was ready to be driven. Their duty was to be remaining at the ready and they did that. Time spent whilst waiting for their truck to be loaded or unloaded or waiting for paper work does not constitute a break.

33 I conclude that during the period of these claims and up to February 2008 neither Mr O'Brien nor Mr Falconer took an unpaid half hour lunch or meal break. There was no provision for it within the Respondent's operations. At that time both the Respondent and its truck drivers participated in a longstanding practice which had developed that lunch or meals would be eaten whilst on the job when convenient, having regard to the work at hand. Indeed the relevant time records kept by the Respondent with respect to Mr O'Brien and Mr Falconer clearly reflect that a dedicated unpaid half hour lunch or meal break was not taken except in the rarest of circumstances. Lorraine Pritchard who was the Respondent's Payroll Clerk during the material period said in her statement, received by consent, that unless otherwise indicated the default position was that truck drivers would work without taking a lunchbreak and be paid accordingly. The result was that they were paid for a 10.5 hour day (5.30am to 4 pm) consisting of 8 hours at ordinary time, 2 hours at time and a half, and 30 minutes at double time. The effect of truck drivers not taking lunch was that they were able to perform an extra 30 minutes work per day paid at double time. They were not paid overtime rates for having worked through their lunchbreak.

Findings of Fact - Forklift Driver

34 Mr Williams' position was somewhat different. Ms Pritchard in her statement said that the default position with respect to forklift drivers was that they would take a daily unpaid half hour lunchbreak. Typically forklift drivers would commence at 5.30am and finish at 4.00pm. They would be paid 8 hours at ordinary time (5.30am to 2.00pm) which spanned to across the lunchbreak period and thereafter 2 hours at time and a half (2.00pm to 4.00pm). If the forklift driver's time card signed off by a person with authority indicated that on a given day no lunchbreak had been taken then the half hour normally deducted to take account of the lunchbreak would not be made resulting in the forklift driver receiving an additional half hour of overtime at double time.

35 I accept that in each instance where Mr Williams' time cards indicate that he did not take a lunchbreak that a lunchbreak was not taken. Lunch was not taken because of a requirement made of him by of one of his dock supervisors. Not surprisingly he cannot, now many years after the event, specifically recall the name of the particular supervisor concerned in each instance. He can specifically remember Ron Marsh, Warren Osboine and Dave whose surname he could not recall, as being some of the dock supervisors who required him to work through lunch. However in more recent years he has had many different dock supervisors. It is of note that the bulk of the claim which relates to him covers the period August 2006 to December 2008. The Respondent's employment records (Exhibit 8) establish that Mr Ron Marsh's employment with the Respondent ceased on 18 August 2006 and that Mr Osboine's employment ceased on 30 April 2007. It follows therefore that most of the directives to

work through lunch would have come from other dock supervisors. The evidence of Mr Davies and Mr Walker enables a finding to be made that Mr Williams was supervised by many dock supervisors. It is probable therefore that Mr Williams was instructed to work through his lunchbreak not only by those he specifically remembers but also by others including Adrian Baines, Stuart Wells, Manuel Merredin, Brett Williams, Steve Wilfing, Jason Taylor and Adam Luscombe.

36 I accept that Mr Williams never worked through lunch without authority or directive. The increased requirements for him to work through lunch which started in about August 2006 coincided with him working at Warehouse 3 leading up to the busy Christmas period. I also accept that he did not make his own arrangements to work through lunch in order to leave early for medical appointments. His medical issues have only arisen in the last 12 to 14 months and post date the material period.

37 The Respondent contends also that Mr Williams worked through his lunch hour so that he could leave before the end of his shift. It provided a schedule attached to counsels' written submissions highlighting numerous examples gleaned from Exhibit 5 of when that is said to have occurred. Mr Williams denied that he worked through his lunchbreak so that he could leave early. I accept his evidence. The fact Mr Williams regularly left early on occasions when he worked through his lunchbreak is quite apparent but that does not necessarily lead to the conclusion that he worked through his lunchbreak, in order to finish early. The earlier finish is also consistent with Mr Williams' evidence that he was instructed to work through his lunchbreak. It follows that on those occasions he could have finished earlier because he worked through his lunchbreak.

38 Except for the odd instance the 'N/L" (no lunch) notation on Mr Williams' job card was made by one of his dock supervisors. An examination of his time cards (Exhibit 5) reveals that many of the N/L entries noted thereon have not been initialled by either his manager or his supervisor but despite that at the end of the relevant week a manager or supervisor has authorised payment to him for having worked through a lunchbreak as recorded on his time card. The entries on his time cards which were initially accepted by the Respondent to be accurate clearly corroborate Mr Williams' assertions. It is difficult in those circumstances to rationalise how the Respondent can now take issue with the correctness of Mr Williams' time cards.

39 I accept Mr Davies' and Mr Walker's evidence that they did not at any stage ask Mr Williams or anyone else for that matter not to take lunch. It seems that they only asked rail forklift drivers unloading trains to defer their lunchbreaks when the Respondent was under time pressure to meet customer demands. On such occasions they asked them to delay taking their lunchbreak by about half an hour in order to finish unloading a train. However I do not accept their contention that all forklift drivers always had lunch and if they did not it was so they could get away early. It is obvious that that Mr Davies did not directly supervise Mr Williams and that Mr Walker only did so occasionally. In fact Mr Williams was supervised by any number of dock supervisors under Mr Davies' control. Both Mr Davies and Mr Walker accepted under cross-examination that they cannot know whether any of the dock supervisors instructed Mr Williams to work through lunch. Mr Davies said that if that had happened he would have expected to be told but was not. Any of a number of supervisors had authority to adjust time cards and authorise payments and accordingly the instruction given to work through lunch may not have been brought to Davies' attention. There appears to have been no protocols for the reporting of such eventuality. I find that dock supervisors have, without Mr Davies' knowledge or consent, instructed Mr Williams to work through his lunch hour. Mr Walker's evidence (transcript pp 334-5) suggests a degree of autonomy given to dock supervisors. Just because Mr Davies and Mr Walker were unaware that Mr Williams had been instructed to work through lunch does not mean it did not happen.

40 The Respondent has over many years not taken issue with the correctness of the entries made on Mr Williams' time cards. It has accepted those entries as being legitimate and accordingly where claimed paid him at the ordinary rate of pay for having worked through his lunchbreak. In those circumstances it will be difficult, without significant evidence of weight to the contrary, for the Respondent to displace Mr Williams' credible evidence about his time card entries being correct.

Determination

41 The determination of these claims necessarily requires the construction of subclause 19.4.2 of the Agreements. The contemporary approach to construction which stems from Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 is that factors such as purpose, general policy and context have to be taken into account rather than just the literal meaning of a provision so as to create consistency and fairness. The interpretation of the relevant industrial instruments in these matters begins with a consideration of the words used and their natural meaning but they cannot be interpreted in a vacuum divorced from industrial realities. (See City of Wanneroo v Holmes (1987) 30 IR 362 per French J at 378 and BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch) [2006] WASCA 124 per Pullin J at [19] - [23]).

42 The proper construction of the subclause will necessarily require a consideration of the objectives of the Agreements. The broad objectives of each Agreement are the same. Clause 2 of the 2006 Agreement states that it is "built on a concentrated focus aimed at delivering the best possible service to the customer." It recognises that the customer provides the Respondent and its employees with work, revenue, profit, viability and growth. Subclause 2.3 makes it clear that "the customer is the cornerstone" of the Respondent and its employees' future. Clause 5 further refines the Agreement's objectives. It states that the Agreement is aimed at developing and maintaining a culture of common purpose, trust, and co-operation that will improve the Respondent's profitability. It also goes on to specify the following further objectives:

> 5.1 Operate within flexible, responsive parameters to meet dynamic customer market requirements.
>
> 5.2 Develop a highly motivated, multi skilled. Flexible and adaptable workforce.
>
> 5.3 Continue to foster co-operation between all staff in a climate of consultation not confrontation through the recognition of the needs and concerns of all employees.

> 5.4 Remove inefficient work practices and processes in all areas of operation to ensure flexibility and quality, timeliness and reliability of services.
>
> 5.5 All employees will conduct themselves in a professional manner that will enhance the Company image.
>
> 5.6 To provide wage increases in line with Clause 24 of this Agreement.

43 The objectives of efficiency, timeliness flexibility and co-operation are reflected in individual clauses of the Agreements. Those clauses recognise the existence of practices aimed at meeting the objectives of the Agreement so as to increase the Respondent's profitability. Clause 20 is one such clause. It provides:

> CLAUSE 20. FLEXIBILITY DURING HOURS OF WORK
>
> CLAUSE 20.1 Breaks
>
> The flexibility which currently exists in the depot in the staggering of meal and rest breaks to enable continuous loading/unloading will continue. Additionally this practice will be reviewed as required by the Consultative Committee to ensure continuous operation, high service levels and the flexibility to meet customer's requirements. It is intended that lunch breaks be taken during shunting activities where possible.

44 Subclause 19.4.2 of the Agreements fits comfortably with objectives of the Agreements and is consistent with other provisions within them. It too recognises existing practices. It appears to have been concluded on the basis that truck drivers did not, as a matter of routine, take lunchbreaks but would be afforded one upon their request. That pre-existing practice was not only contemplated by the Agreements but also formed part of the Respondent's operation. The documentary evidence (Exhibit 5) supports that. For example Mr Falconer's time cards demonstrate that he routinely did not take lunchbreaks however on 5 July 2006 he took a one hour lunchbreak. The inference to be drawn is that he sought an extended lunchbreak for some special purpose and was granted it (see page 961, volume 3 of Exhibit 5).

45 There can be no suggestion that subclause 19.4.2 of the Agreement somehow fetters or removes the Award entitlement to a lunchbreak. To the contrary the subclause appears to reaffirm the entitlement to a lunchbreak and makes specific provision for its taking. The third and fourth sentences of the subclause provide:

> "An employee may request a lunch break and approval may not be withheld. Lunch breaks may be allocated by Management to drivers on return to the yard during each shift which if allocated must be taken."

Truck Drivers

46 One of the critical issues to be decided in the matters relating to Mr O'Brien and Mr Falconer is whether they took a lunchbreak.

47 The taking of a lunchbreak, as opposed to merely eating lunch at a convenient time involves a disruption to the continuity of work. It creates a hiatus in the continuum of work. The taking of a lunchbreak will inevitably require the cessation of work responsibilities and obligations in order to consume a meal (if desired) and/or to do anything else not connected with work that the employee wants to do in his or her own time.

48 Accounting for some rare exceptions, it is clear that during the material period neither Mr O'Brien nor Mr Falconer took lunchbreaks. That was because the Respondent's system of work which was customer focused did not facilitate the taking of lunchbreaks. It is the case that each of Mr O'Brien and Mr Falconer were able to eat their lunch at convenient times. However when doing so they were still on duty with all the attendant responsibilities that such entails. They were required to maintain governance over their truck and could not leave their trucks other than for short periods. In essence they were tied to their truck and could not get away to do other things. The fact that on very odd occasions they may have been able to leave their trucks for short periods and even have a meal away from them does not change the character of what was happening. What was happening was that they were having lunch whilst working and not during a dedicated lunchbreak. It follows that they had lunch but not a lunchbreak.

49 Subclause 19.4.2 recognises the need to service customers. It was created against that background and to give efficacy to the objectives of the Agreements. Consistent with objectives of the Agreements, truck drivers agreed to defer their lunchbreaks. The first sentence of the subclause reflects that. It provides:

> "Driver employees agree to defer lunch breaks upon request and will continue at ordinary rate of payment until such time that a lunchbreak is available."

50 The first sentence of the subclause is an affirmation, expressed as an agreement, of the existing practice and willingness of drivers to defer their lunchbreak in order to achieve the Respondent's objectives with which they agreed. In those circumstances the words "upon request" therein can be construed to mean a standing request that truck drivers defer their lunchbreaks until such time as the Respondent allowed one. That standing request originated prior to the commencement of the 1999 Agreement. It was recognised, adopted and continued in the 1999 and subsequent Agreements until it was ceased by directive in February 2008. The existence of the standing request is apparent from the conduct of the parties. The industrial

reality was that truck drivers worked in accordance with the practice which they and the Respondent had developed that they not take a lunchbreak. The drivers were prepared to do so to meet the Respondent's objectives. It is obvious that neither Mr O'Brien nor Mr Falconer were on each day specifically instructed to defer their lunchbreak. It did not happen that way. The meaning of "upon request" in the first sentence of subclause 19.4.2 must, so as to achieve consistency and fairness, be construed to include standing request having regard to the existent industrial reality.

51 The second sentence of subclause 19.4.2 provides:

> "If an employee is unable to have a lunch break, then that employee will be paid an additional 30 minutes overtime."

52 Mr O'Brien and Mr Falconer were, almost invariably, unable to take a lunchbreak. They were not afforded the opportunity to do so because the Respondent's work practices failed to facilitate the taking of a lunchbreak. The Respondent's position throughout was that the ability to consume a meal during an interlude in work was sufficient. The facilitation of time during which lunch can be consumed is however an entirely different concept to the taking of a lunchbreak.

53 In order for the claims relating to Mr O'Brien and Mr Falconer to succeed, the Claimant must prove on the balance of probabilities that for each day claimed, the Respondent requested Mr O'Brien and Mr Falconer to defer taking their lunchbreak and that they in each instance were unable to take a lunchbreak on the day. I am satisfied that has occurred. There has been a breach of the Agreements and each of Mr O'Brien and Mr Falconer are entitled to payment of an additional 30 minutes overtime for the days worked during the period of the claim with the exception of the claim relating to Mr Falconer for the week ending 9 July 2006. In that regard it is obvious that on 5 July 2006 Mr Falconer took a one hour unpaid lunchbreak and accordingly the claim for that day cannot succeed. An adjustment will have to be made to the calculations in Exhibit 4.3.

Forklift Driver

54 The claim relating to Mr Falconer is to be determined on the facts. As indicated earlier I accept his evidence that he was, with respect to the days claimed, instructed to work through his lunchbreaks and that he was thereafter unable to have a lunchbreak. It follows that there has been a breach of the Agreements and that Mr Williams is entitled to be paid an additional thirty minutes over time for each day he worked through his lunchbreak.

Rate of Pay

55 Clause 19.4.2 provides that if an employee is unable to have a lunchbreak, then that employee will be paid at "an additional 30 minutes overtime".

56 The Respondent contends that the penalty payment referred to in the clause is extra time above that which is payable. Therefore the 30 minute penalty payment is to be paid at the ordinary rate of pay. It is not a prescribed penalty such as 1.5 times or double time which appears elsewhere in the Agreements. Such prescribed penalty rates could have been easily stipulated in subclause 19.4.2 but are not. The only reference to the rate is that of "continuing at the ordinary rate of pay" which appears not only in subclause 19.4.2 but also in subclause 36.1.3 which refers to an additional payment at the rate of ordinary time where a meal break is not allowed.

57 I do not accept the Respondent's contention. Subclause 19.4.2 expressly provides for the payment of 30 minutes "overtime" when a lunchbreak is unable to be taken. If it was intended that the 30 minutes be paid at ordinary time then it would have said so. It could have provided something similar to that contained in subclause 36.1.3 of the Award which stipulates the payment of ordinary time when a meal break is unable to be taken. It appears rather that the word "overtime" has been deliberately used. The word "overtime" means working beyond ordinary hours. When work is done beyond ordinary hours it attracts a penalty rate. The rate at which the penalty will be applied will be dependant upon the prevailing circumstances. In these instances the correct rate was double time.

58 I accept that the Claims as reflected in Exhibits 4.1, 4.2 and 4.3 have been calculated using the correct rates of pay.

Conclusion

59 The claim made in relation to Mr Williams is made out in its entirety.

60 The claims relating to Mr O'Brien and Mr Falconer are not made out in their entirety. Parts of those claims fall outside the six year limitation period. Given that such claims were lodged on 18 March 2009 the allegations with respect to the pay period ending 16 March 2003 cannot succeed. Furthermore there needs to be an adjustment made with respect Mr Falconer given the error in Exhibit 4.3. He took an unpaid lunchbreak on 5 July 2006 and therefore the Claimant cannot be successful with respect to that day. Otherwise the claims are proved.

61 As a consequence of the breaches of subclause 19.4.2 of the 1999, 2003 and 2006 Agreements the Respondent has underpaid Mr Williams $2,119.15, Mr O'Brien $13,859.79 and Mr Falconer $17,771.26.

G. Cicchini

Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2010 WAIRC 00079

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM GIDDENS
	APPLICANT
	-v-
	LHMU
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 22 FEBRUARY 2010
FILE NO/S	U 193 OF 2009
CITATION NO.	2010 WAIRC 00079

Result	Application discontinued
Representation	
Applicant	Ms K Giddens
Respondent	Mr N Whitehead

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS this application was the subject of conciliation conferences before Commissioner Wood on 18 November 2009 and 9 December 2009;

AND WHEREAS at the conclusion of the conference held on 9 December 2009 no agreement was reached between the parties;

AND WHEREAS the matter was re-allocated to Commissioner Mayman;

AND WHEREAS agreement was reached between the parties;

AND WHEREAS on 11 February 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00078

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRY HALES
	APPLICANT
	-v-
	ROGER SECA & DEREK SIMPSON
	AUTO ONE - MARGARET RIVER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 22 FEBRUARY 2010
FILE NO/S	U 240 OF 2009
CITATION NO.	2010 WAIRC 00078

Result	Application discontinued
Representation	
Applicant	Mr B Hales
Respondent	Mr R Seca and Mr D Simpson

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 22 December 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 11 February 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00066

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MIGUEL LOBATO
	APPLICANT
	-v-
	GORDON HULL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 15 FEBRUARY 2010
FILE NO	B 228 OF 2009
CITATION NO.	2010 WAIRC 00066

Result	Application discontinued
Representation	
Applicant	Mr M Lobato
Respondent	Mr G Hull

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*;

AND WHEREAS on 1 February 2010 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 4 February 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00100

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK DOUGLAS MCKINNON
	APPLICANT
	-v-
	JOHN HOLLAND GROUP PTY LIMITED
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 4 MARCH 2010
FILE NO/S	B 221 OF 2009
CITATION NO.	2010 WAIRC 00100

Result	Application dismissed for want of jurisdiction

Order

HAVING heard the applicant on his own behalf and there being no appearance for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2010 WAIRC 00099

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK DOUGLAS MCKINNON
	APPLICANT
	-v-
	JOHN HOLLAND GROUP PTY LIMITED
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 4 MARCH 2010
FILE NO/S	U 221 OF 2009
CITATION NO.	2010 WAIRC 00099

Result	Application dismissed for want of jurisdiction

Order

HAVING heard the applicant on his own behalf and there being no appearance for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2010 WAIRC 00077

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS BARBARA WYLIE
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 22 FEBRUARY 2010
FILE NO/S	U 261 OF 2009
CITATION NO.	2010 WAIRC 00077

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS by a letter dated the 22nd day of January 2010 the Commission directed the applicant to advise of whether or not she was a government officer, and if so, whether the appropriate jurisdiction was the Public Service Appeal Board; and

WHEREAS on the 16th day of February 2010 the applicant filed a Notice of Discontinuance in relation to the application; and

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this application be and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2010 WAIRC 00092

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MONIQUE O'GARR
	APPLICANT
	-v-
	WESTCOAST AUTOMOTIVE SUPPLIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 MARCH 2010
FILE NO/S	U 238 OF 2009
CITATION NO.	2010 WAIRC 00092

Result Application discontinued

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 19 February 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00074

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK THOMAS PARKER
	APPLICANT
	-v-
	BLOODWOOD TREE ASSOC. INC.
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	WEDNESDAY, 20 JANUARY 2010
DELIVERED	THURSDAY, 18 FEBRUARY 2010
FILE NO.	U 187 OF 2009
CITATION NO.	2010 WAIRC 00074

CatchWords	Whether agreement made to compromise claim – applicant claims agreement made under duress – respondent claims applicant breached agreement - uncertainty in reaching agreement considered - *Industrial Relations Act 1979* (WA)
Result	Application referred for further conciliation
Representation	
Applicant	Mr F T Parker
Respondent	Mr B Neville

Reasons for Decision

1 Frank Thomas Parker (the applicant) was employed by Bloodwood Tree Association Inc. (the respondent) as a workcoach from 5 May 2008 to 14 September 2009. The applicant asserts he was constructively dismissed by the respondent when he was forced to resign. The applicant now seeks relief by way of an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act), alleging that he was harshly, oppressively and unfairly dismissed by the respondent. The applicant seeks compensation for the unfairness of the dismissal.

2 A conference was held between the parties on 3 November 2009 pursuant to s 32 of the Act and an agreement was reached and reflected in correspondence dated 5 November 2009 from the Western Australian Industrial Relations Commission (the Commission) to the parties.

3 The supposed agreement was reflected in correspondence from my Associate to the parties dated 5 November 2009:

1. The respondent will pay to the applicant the sum of $9,000. The payment will be made by close of business on Friday 6 November 2009.
2. Neither party will make any adverse comments with respect to the other party.
3. The agreement is in full and final settlement of all matters relating to the applicant's employment with the respondent.
4. The terms of the agreement are to remain confidential.

4 Following the conference there was contact between the applicant and the Commission regarding various aspects of the settlement. The applicant was requested to submit a Form 14, Notice of withdrawal or discontinuance. None was forthcoming. The matter was then listed for the applicant to show cause why the application ought not be dismissed.

Preliminary issue

5 A preliminary issue has now arisen in this matter, that being the question of whether an agreement was ever reached between the parties in conciliation.

6 This matter was listed for hearing on 20 January 2010 by video link-up for the applicant to show cause as to why an order ought not issue dismissing the application. Subsequent to the proceedings, the Commission wrote to the parties asking for written submissions by 31 January 2010 on their views as to what ought to occur in the event the application is not dismissed with respect to the payment of $9,000 each party acknowledges has been made and received. Further, the applicant was to advise what it is he now seeks.

Respondent's submissions

7 It is suggested by the respondent the terms of the agreement as reached in conciliation are being breached by the applicant.

8 With respect to the preliminary issue the respondent says that it was agreed to settle the applicant's claim in certain terms and in return the applicant would discontinue the application. The respondent submits he has honoured the agreement and paid to the applicant the sum of $9,000, an aspect conceded by the applicant.

9 It was further agreed no adverse comments would be made by either party of each other. The respondent submitted he was currently seeking legal advice given he believed adverse comments were continuing to be made by the applicant. Further, the respondent considers adverse comments were subsequently made by the applicant in correspondence between the applicant and the local Member of Parliament. The respondent submitted the latter matters had been referred to solicitors regarding the issue of defamation. The respondent submitted:

> It's just I've had a legal opinion on statements he's made to the Member of Parliament Mr Haas, and they are defamatory and there is a letter going out to Mr Parker to state such.
>
> ts 3

10 The respondent understood the matter had been settled by way of the agreement reached at conciliation. It is the respondent's view the Commission ought issue an order dismissing the application. In his written submissions the respondent emphasised the agreement reached at conciliation amounted to full and final settlement of the claim by the applicant against the respondent. The respondent asserted the applicant had breached that agreement and advised in his submissions of 25 January 2010:

> that unless the applicant makes good this verbal agreement by way of filing a completed Notice of Discontinuance in due course, then the sum of $9,000 should be returned to Bloodwood Tree Association Inc. forthwith.

Applicant's submissions

11 The applicant submitted the terms of the agreement were reached while he was under significant pressure. The applicant submitted he was in a state of anxiety in relation to a number of issues and did not realise what he was doing at the conciliation conference. The applicant was nervous about the Commission proceedings. Further the applicant's father had recently died in Sydney and at the time of the conciliation proceedings the applicant was attempting to have his father's body returned to Western Australia for burial. The applicant submitted he had great concerns about the terms of the proposed agreement. These added to his overall anxiety in relation to the matter.

12 In his written submissions of 22 January 2010 the applicant submitted:

> I have been experiencing severe financial hardship due to my "unfair dismissal", in that, I have been deprived of my livelihood and my social standing. In respect to the $9,000 paid to me, and received, I can only say that I will abide by the rulings of your court.

13 The applicant further submitted he was seeking from the respondent:

(a) a written agreement the applicant had been unfairly dismissed;

(b) an apology;

(c) compensation based on the previous Driver Trainer's income (based on the 2008/2009 year); and

(d) compensation for at least 12 months.

14 The applicant raised concerns regarding threatening tactics demonstrated by the respondent in regard to court action, tactics the applicant suggested were causing increased anxiety.

Findings

15 I have listened carefully to each of the parties and closely observed them during the presentation of their submissions by way of video. In my view the applicant, on occasion, presented his submissions honestly and to the best of his recollection. I adopt a similar view about the submissions made Mr Neville for the respondent. Mr Neville appeared angered when detailing exchanges that had allegedly occurred.

16 I find it passing strange that the respondent had a copy of personal correspondence written by the applicant to his local Member of Parliament outlining the nature of this dispute.

17 It is the Commission's view that at the time the agreement was reached the applicant was under significant pressure created in part by his father's recent death and a lack of certainty surrounding the conciliation proceedings.

18 It is common ground the applicant received $9,000 from the respondent, an aspect of the terms of settlement.

19 Further, the Commission finds that several of the terms have been breached by the applicant and the respondent namely:

(a) the requirement for each party to refrain from making adverse comment about the other party; and

(b) the requirement for the terms of the agreement to remain confidential.

Legal Issues

20 Where parties to proceedings settle or compromise the proceedings prior to or during the hearing of the claim or matter, the settlement is a new agreement between the parties and may be enforced like any other contract*: Halsbury's Laws of England* (4th ed) [391].

21 Further, it is undoubtedly the case, that given the nature of the Commission's jurisdiction, where agreements are reached in conciliation proceedings, parties should not be able to go back on the terms of that settlement. Given that one of the fundamental objects of the Act is resolution of disputes by conciliation, parties should be held to their bargain arising out of conciliation proceedings: *Foley v G & J Reely School of Dancing Pty Ltd trading as Arthur Murray School of Dancing* (1996) 76 WAIG 4342; *MacLeod v Paulownia Trees Pty Ltd* (1997) 78 WAIG 1057.

22 Pressure in a less obvious form may arise where the influence exercised to the extent that the applicant's ability to make decisions is reduced and the subsequent decision reached cannot be regarded as having been freely made. In such circumstances it may be determined that the agreement reached cannot be allowed to stand: Sappideen C, O'Grady P and Warburton G, *Mackens Law of Employment* (6th ed, 2009) [4.135].

Was an Agreement Concluded?

23 In these proceedings, the applicant and the respondent have each observed there was an agreement reached. It is the Commission's view that what has been blurred is whether the agreement was achieved under duress. For an agreement to be properly concluded, the parties must have a true understanding of the agreement's terms. The terms of the agreement must be sufficiently definite and absolute to allow the agreement reached to be enforced at law: Lindgren K E, Carter J W and Harland D J, *Contract Law in Australia* (1986) [258].

24 In this matter the issue is whether there was an agreement. In the absence of clear evidence from which it can be held that such was the case, then it is not open in my opinion, to conclude that there was the necessary understanding on the part of the applicant to bring the matter to an end.

25 As far as the respondent was concerned, a proposal was put and was taken by the applicant on the face of it, to be fair for the purposes of settling the matter. However, the circumstances surrounding the applicant's acceptance, were far from definite or decisive. During the proceedings the applicant submitted:

> In relation to the supposed agreement that we did come to, as I was saying, I was under emotional duress, I was panicking, I had never said anything before … had anything to do with this.
>
> ts 4

26 The Commission accepts that during the conference the applicant was under duress and did not fully appreciate the terms of the proposed compromise agreement. Therefore the agreement reached cannot be allowed to stand.

Conclusion

27 In my view, for the aforementioned reasons, it cannot be said that there has been a final agreement reached in this matter and accordingly a declaration will issue to this effect.

28 In light of this, it is necessary to relist further conciliation proceedings as soon as practicable, which will proceed in Port Hedland. A critical issue for the applicant to consider will be the standing of the $9,000 payment already made by the respondent.

2010 WAIRC 00073

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK THOMAS PARKER
	APPLICANT
	-v-
	BLOODWOOD TREE ASSOC. INC.
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 18 FEBRUARY 2010
FILE NO/S	U 187 OF 2009
CITATION NO.	2010 WAIRC 00073

Result	Declaration issued
Representation	
Applicant	Mr F T Parker
Respondent	Mr B Neville

Declaration

HAVING heard Mr Parker as the applicant and Mr Neville on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

> DECLARES that to date there has been no final agreement conciliated in the aforementioned matter between the applicant and the respondent.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2010 WAIRC 00075

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHAYNE OLD
	APPLICANT
	-v-
	MANDURAH TOYOTA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 22 FEBRUARY 2010
FILE NO/S	U 199 OF 2009
CITATION NO.	2010 WAIRC 00075

Result	Application discontinued
Representation	
Applicant	Mr S Old
Respondent	Mr G Fisher

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 9 November 2009 and 29 January 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 29 January 2010 agreement was reached between the parties;

AND WHEREAS on 12 February 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2010 WAIRC 00103

DISPUTE RE EMPLOYMENT STATUS OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	MONDAY, 2 NOVEMBER 2009, TUESDAY, 3 NOVEMBER 2009, WEDNESDAY, 4 NOVEMBER 2009
DELIVERED	FRIDAY, 5 MARCH 2010
FILE NO.	CR 40 OF 2008
CITATION NO.	2010 WAIRC 00103

Catchwords	Industrial Relations (WA) – Claim that respondent has incorrectly determined an employee's salary level and wrongly capped employee's salary – Claim that employee should be paid the rate of a trained teacher - Application for an order that outcome applies to all other employees in similar circumstances - Whether employee is an untrained/unqualified teacher for the purposes of the relevant industrial instruments – Employee classified as an untrained/unqualified teacher - Application dismissed - *Industrial Relations Act 1979* s 44(9); *School Education Act 1999* s 235; *Western Australian College of Teaching Act 2004; Public Sector Management Act 1994; Vocational Education and Training Act 1996*
Result	Dismissed
Representation	
Applicant	Ms E J Carbone (of Counsel)
Respondent	Mr J Misso (of Counsel)

Reasons for Decision

1 On 5 December 2008, the State School Teachers' Union of W.A. (Incorporated) ("the applicant") ("the union") lodged an application in the Commission pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") with respect to a dispute over the permanent status of one of its members, Mr Stephen Adams who is employed by the Director General of the Department of Education and Training ("the respondent").

2 As conciliation proceedings did not resolve the dispute the matter was referred for hearing and determination pursuant to s 44(9) of the Act. During conciliation proceedings it became apparent that the parties were also in dispute over Mr Adams' salary level and the salary paid to other teachers who were employed in similar positions to Mr Adams and this matter was also referred for hearing. The Schedule of the memorandum of matters referred for hearing and determination is as follows:

"1. The applicant claims that the respondent has incorrectly determined Mr Stephen Adams' salary level and as a result the respondent has wrongly capped his salary. The applicant also claims that the respondent has refused to provide Mr Adams with permanent status. The applicant is seeking the following orders:

(a) That Mr Adams be confirmed as a permanent employee pursuant to Clause 92.1 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the Agreement").

(b) That Mr Adams has a right to incremental progression with respect to his salary.

(c) That Mr Adams' salary and entitlements be adjusted accordingly and any payment and entitlements due to Mr Adams be paid to him.

(d) That the respondent provide a letter to Mr Adams advising him that he is a permanent employee and withdrawing previous contrary advice.

(e) That all personnel records pertaining to Mr Adams be adjusted accordingly.

(f) That the abovementioned outcomes apply to all other employees who have been historically paid in accordance with the teacher salary scale in similar circumstances as Mr Adams.

2. The respondent denies the claim and opposes the orders being sought.

Applicant's contentions

3. The applicant's contentions are as follows:

(a) the applicant disputes that Mr Adams is not eligible for permanency as there are no exceptions of the nature alleged that exist to granting permanency under Clause 92.1(a) of the Agreement;

(b) it has never been the intention of the applicant, a party to the Agreement, to agree to inferior conditions of employment for Limited Authority to Teach ("LAT") holders who undertake teaching duties (as defined) in schools, simply because they hold a LAT;

(b) Clause 92.1(a) of the Agreement refers to 'employees' who are a broader class of the applicant's membership encompassing administrators and school psychologists as well as all those who teach;

(c) the applicant disputes that it is lawful to follow a policy that is:

- inconsistent with sound industrial principles of fairness;
- disputed by the applicant union who has not been engaged in any consultation concerning the formulation of an alleged policy concerning an important employment condition;
- a subordinate legal authority to the Agreement which does not provide exceptions to permanency of the nature the respondent is constructing;
- not clear and transparent for current employees and potential employees; and
- appears arbitrary in nature;

(d) the *Western Australian College of Teaching Act 2004* operates to protect the standards of the teaching profession by its regulation of LATs, in that the Act confines LATs to those instances where suitably qualified teachers are not available;

(e) in the event that a more suitably qualified teacher is available at a future time and a LAT holder (such as Mr Adams) is unable to have their LAT renewed, the respondent is empowered by virtue of s 236 of the *School Education Act 1999* (WA) to transfer the employee.

Respondent's contentions

4. The respondent's contentions are as follows:

(a) Mr Adams is an employee of the respondent at the WA College of Agriculture in Morawa;

(b) the payment of Mr Adams' salary is and has been made in accordance with the terms and conditions provided in the *Teachers (Public Sector Primary and Secondary Education) Award 1993*, the Agreement and the replacement *School Education Act Employees' (Teachers and Administrators) General Agreement 2008* as applied at the relevant times;

(c) the respondent agreed to grant permanency to Mr Adams on 14 April 2009, therefore there is no need for hearing and determination of this issue."

3 The following facts were agreed between the parties at the outset of the hearing:

1. The applicant is an organisation of employees registered under the Act.

2. Mr Stephen Adams was initially employed by the respondent under the *Government School Teachers' and School Administrators' Certified Agreement 2004* ("the 2004 Agreement") and the *Teachers (Public Sector Primary and Secondary Education) Award 1993* ("the Award").

3. The respondent is the Chief Executive Officer of the Department of Education and Training and with respect to Mr Adams is an "employing authority" for the purposes of Division 3, Part 5 of the *Public Sector Management Act 1994*.

4 At the outset of the hearing it was put to the parties that as Mr Adams had been offered permanent status by the respondent Order 1(a) being sought by the applicant was therefore redundant. However, the applicant maintained that as this offer was conditional on Mr Adams retaining a Limited Authority to Teach ("LAT") from the Western Australian College of Teaching ("WACOT") and was contingent upon the applicant withdrawing his application this offer was rejected. On this basis the applicant continued to pursue Order 1(a). During the respondent's final submissions it confirmed that the offer of permanency to Mr Adams was still available, subject to Mr Adams retaining a LAT, and the applicant therefore agreed to accept this offer on behalf of Mr Adams. In the circumstances the evidence given during the proceedings with respect to the employment status of Mr Adams has been excluded and Order 1(a) was no longer being sought by the applicant.

Applicant's evidence

5 Mr Adams gave evidence by way of a witness statement which was updated at the hearing by the inclusion of an additional pay slip (Exhibit A4).

6 Mr Adams is currently employed on a full-time basis as the Design and Technology Automotive Teacher and Program Co-ordinator at the Western Australian College of Agriculture in Morawa ("the College") and he has been in this position since May 2006. Mr Adams has not been subject to any disciplinary proceedings nor has he been the subject of any performance related issues.

7 Mr Adams is responsible for running the College's automotive program. In this role he teaches the Certificate II Automotive course to year 11 and 12 students and an Automotive Transport course to year 10 students. He has also taught Vocational Mathematics at the College. Mr Adams reviewed and developed the College's Certificate II Automotive Program, he redesigned the College's automotive workshop facilities and he is responsible for the automotive section's budget and expenditure. Mr Adams has been a member of the College's finance committee since 2007.

8 Mr Adams gained a Certificate IV in Assessment and Workplace Training in 2004. Mr Adams stated that he is a qualified Automotive Mechanic and he has worked in the automotive industry for over 30 years. Mr Adams holds a Trade Certificate in Automotive Engineering and has the following current automotive certificates and licences:

- Motor Vehicle Industry Board Repairer's Certificate – No. MR 407;
- Energy Safety Gas fitting Permit – Installing and Servicing – No. GF003564;
- Refrigerant Handling Licence – AUTO – No. L043374; and
- Institute of Automotive Mechanical Engineers (IAME) – No. 00926121.

9 Mr Adams worked on a full-time basis as an Automotive Lecturer within the TAFE system from April 2003 through to April 2006. During this period Mr Adams taught Automotive Certificates II and III as well as a number of high school automotive introductory courses. Prior to becoming a TAFE lecturer Mr Adams was employed as a service technician and between 1983 and 1998 he ran Crown Auto Repairs, an automotive repair and servicing business, which involved managing annual budgets, hiring and training staff, purchasing, sales, customer relations, marketing and overseeing financial processes.

10 Mr Adams undertook the following professional development courses between 2003 and 2006:

Adult and Adolescent Learning Strategies;

Powerpoint – Adding sound and music;

SCDL – Word – Mail Merge;

SCDL – Excel – Foundations;

SCDL – Excel 2 – Formulas and Functions;

SCDL – Excel 3 – Charts and Graphs;

SCDL – Word – Foundations;

Job Application and Interview Skills;

Ethical Behaviour and Corruption Prevention;

ESS – Employee Self Service workshop;

SCDL – Excel 1 – Foundations;

SCDL – Powerpoint – Charts and Graphs;

TAA – Skills Recognition Workshop;

SCDL – Word 2 – Tables, Images and Objects;

SCDL – Powerpoint 1;

Swan TAFE – 50 Lecturers Program;

Professional Development for Lecturers – Midland;

Induction Orientation Program;

Flexible Learning Showcase;

Learning and Assessment Strategies Workshop;

Disability Awareness; and

Delivery Strategies Workshop.

11 Whilst working as an automotive technician, Mr Adams completed the following industry training courses:

CFC Awareness Course for Service Personal (sic) – Motor Trade Association of WA;

NR21 Automotive Air conditioning 86723 – Automotive Training Services, South Metropolitan;

Automotive LP Gas Servicing "A" Pass – Department of Education WA;

Automotive LP Gas Installations "A" Pass – Department of Education WA;

Bosch Electronic Ignition Systems – Petro Ject Training Centre;

Advance EFI Stage One – Petro Ject Training Centre;

Bosch Jectronic Fuel Injection Systems "L" and "LE" - Petro Ject Training Centre;

Electronic Fuel Injection – Repco Auto-tech Clinic;

Engine Management Systems – Repco Auto-tech Clinic;

Braking Systems – Repco Auto-tech Clinic;

Clutch Designs - Repco Auto-tech Clinic; and

Engine Electronic – Department of Education WA.

12 Mr Adams holds a current St John Ambulance Senior First Aid Certificate.

13 Mr Adams gave evidence about how he became employed at the College. Mr Adams stated that in early 2006 the College's Principal Mr Craig Chadwick asked him to apply for the position of Design and Technology teacher at the College and Mr Chadwick initially offered him a salary significantly less then what he was being paid at TAFE. After Mr Adams decided not to apply for this position Mr Chadwick then offered him a salary of approximately $53,000 per annum which Mr Adams accepted. At the time Mr Adams was not told that he would not be receiving ongoing wage increases and Mr Adams gave evidence that he only found out after he commenced with the respondent that his salary was to be capped.

14 Mr Adams gave evidence that WACOT gave him a LAT on 11 April 2006 which was valid until 31 December 2006 and this was later extended by WACOT to 31 December 2007. Mr Adams has since been given two more LATs, one from 12 February 2008 to 31 December 2009 and another from 17 December 2009 to 31 December 2010.

15 Mr Adams stated that his first payslip from the respondent described his job as that of teacher and his grade was as a "TCH/UT/2" which Mr Adams did not understand (Exhibit A4 attachment SA 14). Mr Adams' second payslip for the period 5 May 2006 to 18 May 2006 increased his pay rate to be comparable to what he was paid at TAFE and states that his grade was a "TCH/TT/8". Another payslip for the period 26 January 2007 to 8 February 2007 specifies that his grade is a "TCH/UT/6" and as this rate of pay was less than what he should have been paid Mr Chadwick took steps to rectify this (see Exhibit A4 attachments SA 15 to 17). When Mr Adams was being paid at the salary level of TCH/L1/8 he asked Mr Chadwick to request that the respondent review his salary level to reflect the remuneration package paid to TAFE teachers taking into account his trade qualifications and the teaching duties that he was undertaking at the College. As a result on 30 November 2007 Mr Adams and a colleague at the College, Mr Stuart Wilkinson, who was also a design and technology teacher, both

progressed to salary level TCH/L2/1. Mr Adams gave evidence that Mr Chadwick told Mr Adams at the time that his salary would progress through to Level 2.4. In January 2008 Mr Adams found out that his pay grade had been reduced to TCH/L1/8 and this omission was again rectified with his pay returning to TCH/L2/1 in early 2008 (Exhibit A4 attachments SA 20 and 21). On 18 April 2008 Mr Adams progressed to level TCH/L2/2 (Exhibit A4 attachment SA 22). When Mr Adams was due to receive his next salary increment in May 2009, taking his salary to TCH/L2/3 his grade was changed to that of Teacher/UT/8 on his payslips and his payslips also referred to him receiving salary maintenance (Exhibit A4 attachment SA 24). In May 2009 Mr Chadwick told Mr Adams that he would not be receiving an increase to Level 2.3 and his salary was to be capped at Level 2.2. In response Mr Adams told him that he believed that he had an assurance from him that he would proceed through to Level 2.4 and it was on that basis that he had agreed to another two year contract to work at the College. As at the date of the hearing Mr Adams remains being paid at a level TCH/UT/1/8 employee, although he is in receipt of salary maintenance at Level 2.2.

16 Under cross examination Mr Adams stated that all negotiations about what he was to be paid was with his Principal, Mr Chadwick and he confirmed that he had no discussions with Mr Chadwick about progressing up the salary scale. Mr Adams agreed that he had received an email from Mr Iain Dennis, which was sent prior to him commencing employment with the respondent, that refers to him being employed as an unqualified teacher however he could not recall reading the email until recently seeing a copy of it. Mr Adams agreed that he does not hold a teaching qualification but he stated that when he was employed by the respondent he did not understand that he was classified as an untrained teacher. Mr Adams is aware that a LAT lasts for a maximum of two years.

17 Mr Adams stated that when he was advised by the respondent that his salary level was 1.8, even though he was paid at a Level 2.2 at the end of 2008, he contacted the respondent's head office and in response Mr Chadwick confirmed that even though his salary level was stated as 1.8 he would not be paid any less than a level 2.2 salary. Mr Adams agreed that even though his salary level was 1.8 his salary continued to be paid at Level 2.2 through salary maintenance.

18 Mr Adams stated that the nature of the students he teaches is no different at TAFE or at the College however classroom management is different.

19 Under re-examination Mr Adams again stated that he was unaware that he was employed as an untrained teacher and "didn't even know the term 'untrained teacher'" (T51) and Mr Adams could not recall receiving the email from Mr Dennis in April 2006 confirming that this was the case. Mr Adams stated that the issue of him being on salary maintenance did not arise until May 2009. Mr Adams maintained that he was a qualified teacher as he holds a Certificate IV in Training and Assessment and he has the requisite skills and experience to be a teacher. Mr Adams confirmed that he was performance managed by the Deputy Principal at the College.

20 Dr Margaret Henderson gave evidence by way of witness statement (Exhibit A5). As her evidence in the main went to the issue of Mr Adams' permanent status, it is unnecessary to include her evidence.

21 Ms Anne Gisborne gave evidence by way of a witness statement (Exhibit A7). Ms Gisborne is the union's President and she has held this position since January 2008. Prior to this she was the applicant's Senior Vice President from 2002 through to 2007. Ms Gisborne has taught for over 20 years and has been actively involved in the applicant's activities for over 16 years.

22 Ms Gisborne stated that as the applicant's President and in her role as Senior Vice President she has been the lead negotiator when finalising successive collective enterprise agreements. Ms Gisborne co-ordinated the applicant's position in the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the 2006 Agreement") and the *School Education Act Employees' (Teachers and Administrators) General Agreement 2008* ("the 2008 Agreement") and she also co-ordinated negotiations on behalf of the applicant in recent award variations to and the consolidation of the *Teachers (Public Sector Primary and Secondary Education) Award 1993* ("the Award"), which was registered in December 2008.

23 Ms Gisborne gave evidence that provisions in the 2006 Agreement and the 2008 Agreement provide a forum and mechanism for ongoing consultation about VET issues. Ms Gisborne gave evidence that after the introduction of the *Western Australian College of Teaching Act 2004* ("the WACOT Act"), during joint committees and working party discussions between the applicant and the respondent and during consultations at the VET forum, no issue was raised by the respondent with respect to the status of Mr Adams and other teachers in a similar situation with respect to their LAT status and entitlements. Ms Gisborne stated that since the WACOT Act came into effect in 2004 the first time discussions took place about teachers employed holding a LAT were at the most recent meeting of Employee Relations Executive Committee ("EREC") on 23 September 2009.

24 Ms Gisborne stated that at the EREC meeting held on 20 October 2009 the applicant disputed Mr Adams being described as an untrained teacher and the parties remained in disagreement about this issue. Ms Gisborne stated that the 2006 Agreement and the 2008 Agreement and the recent variation and consolidation of the Award makes no mention of the WACOT Act nor do they provide for differential entitlements for teachers holding a LAT. Furthermore, during negotiations for the 2006 Agreement and the 2008 Agreement no discussion took place with respect to LAT teachers being treated separately to other teachers. Ms Gisborne maintains that WACOT accepts holders of LAT to be teachers who undertake a specific role and they perform the same functions as other teachers, they undertake the same roles and responsibilities and are subject to the same accountability requirements.

25 Ms Gisborne gave evidence that during negotiations for the 2008 Agreement the parties agreed to rename and divide some of the salary scales and she stated that one of the outcomes was that the new teachers scale better reflected the fact that the first time appointment of a graduate teacher was at a Level 1.6 and Ms Gisborne stated that Level 1.6 was to be renamed Level 2.1 in February 2010 under the 2008 Agreement. Ms Gisborne stated that Clause 22(4) of the Award contemplates teachers who may not have graduated being appointed in accordance with the teachers scale and she stated that the applicant's intention in

accepting the salary scales being retitled was that no person appointed as a teacher would be paid below the current Level 1.6 of the teachers scale and the parties also intended to continue to explore a career path for "assistant teachers". Ms Gisborne gave evidence that during these discussions the respondent did not raise the prospect of employing persons in designated teacher positions on any other scale but the teachers scale nor was there any discussion about restricting the progression of a teacher holding a LAT to a particular salary scale. Ms Gisborne stated that the parties agreed to put a new table titled 'untrained teachers' scale in the 2008 Agreement and no mention was made by the respondent at the time of any intention to employ LAT holders in accordance with this scale. The applicant understands that teachers holding a LAT have been progressing in accordance with the teachers salary scale and she was unaware that a teacher in this category had a cap on their salary. Ms Gisborne gave evidence that the applicant did not intend that the untrained teachers scale apply to employees responsible for performing all of the usual functions of a teacher as well as the usual duties of a teacher and that the applicable scale in these circumstances is the teachers scale. Ms Gisborne stated that the increments contained in Table 1 of the untrained teacher scale were taken from Level 1.1 to 1.4 of the previous teachers scale in the 2006 Agreement and they were put into the new untrained teacher scale in the 2008 Agreement to make it clear that teachers who were undertaking the usual functions and duties of a teacher did not start on those incremental scales.

26 Ms Gisborne maintained that the classifications existing in the untrained teacher scale in the 2008 Agreement predate the introduction of WACOT (see Clause 37 of the *Government School Teachers' and School Administrators' Certified Agreement 2000*) and Ms Gisborne stated that the purpose of having the untrained teachers scale, which was discussed during negotiations for the 2006 Agreement and the 2008 Agreement was to develop a position of teacher assistant which could sit below the teachers salaries scale and she stated that Clause 30 of the 2006 Agreement reflects this discussion, specifically Clauses 30.6 and 30.7. Ms Gisborne stated that even though there is no specific reference to "assistant teacher" in the 2008 Agreement, Clauses 47 and 57 considers this issue.

27 Ms Gisborne gave evidence that during negotiations for the 2008 Agreement the respondent never raised its intention that teachers holding a LAT would be provided with inferior conditions with respect to their salary and access to permanency. Ms Gisborne stated that during negotiations for the 2006 Agreement there was some discussion about "unqualified teachers" and the applicant made it clear to the respondent that a person holding a LAT and who undertook the full range of duties and responsibilities as a teacher was entitled to be paid as a trained teacher. Ms Gisborne maintained that the applicant did not consider that a person in this situation who lacks teacher training qualifications should have their entitlement or income as a teacher affected. Furthermore, there is no reference in the 2006 Agreement, the 2008 Agreement and the Award variation and consolidation to the WACOT Act nor is there any provision for differential entitlements for teachers employed who hold a LAT.

28 Ms Gisborne stated that the capping of Mr Adams' salary was never agreed to by the applicant and it is her view that the respondent's unilateral action in this regard is arbitrary and not in the public interest as this action results in teachers in this situation being paid an uncompetitive salary.

29 Under cross-examination Ms Gisborne stated that she understood the untrained teacher scale to apply to graduates who were not qualified teachers and was a career path for students prior to fully qualifying as a teacher and she gave evidence that this issue was raised during discussions about alleviating the work load for teachers and administrators. Ms Gisborne stated that she was not aware that anyone was currently employed under this scale.

30 Under re-examination Ms Gisborne stated that she has been directly involved in agreement negotiations with the respondent since 2004 and Ms Gisborne re-iterated that during the negotiations for the 2008 Agreement there were no discussions about the untrained teacher category.

31 Mr Kris Weinert was summonsed to give evidence. Mr Weinert teaches Automotive Mechanical Certificate II courses at the Western Australian College of Agriculture at Denmark ("Denmark College") and he has undertaken this role since 16 October 2006. Mr Weinert gave evidence that Denmark College is a Registered Training Organisation ("RTO") and its students are in Year 11 and 12, it is a residential school and the courses are Vocational Education and Training ("VET") subjects. Mr Weinert said that in total there were five agricultural colleges in Western Australia and courses run at these colleges are accredited under the Australian Quality Training Framework ("AQTF") training regime. Denmark College also runs *School Education Act 1999* (SE Act) courses. Mr Weinert stated that in order to teach a VET course, he is required to hold a Certificate IV in Workplace Training, which he has and he is required to be competent to deliver the courses which he undertakes and to moderate these courses and he assesses student outcomes against AQTF national competencies. Mr Weinert has a LAT which expires in September 2010. Mr Weinert stated that he is required to have a LAT because he is classified as not having a teaching degree and he is required to have a LAT to work in a high school. Mr Weinert stated that he is not required to have a teaching qualification from a tertiary institution to teach and assess students in the VET area. Prior to teaching at Denmark College Mr Weinert taught at TAFE for three and a half years.

32 Mr Weinert gave evidence that the respondent paid for him to upgrade and retain his qualifications.

33 Mr Weinert confirmed that as a teacher he facilitates student learning, he believes that he competently runs classes, he works in accordance with Denmark College's plan, he assesses students and writes reports with respect to their achievements, he answers to Denmark College's Principal and the relevant Head of Teaching, he supervises students, maintains order and discipline and he undertakes administrative duties including writing references and photocopying duties. Mr Weinert also undertakes other duties as required such as driving Denmark College's bus, he takes students on excursions, he undertakes yard duty, he supervises students and is involved in their behaviour management and he also undertakes counselling of students as well as pastoral care.

34 Mr Weinert gave evidence that details about the level contained in his payslips recently changed. Up until mid May 2009 his payslip reflected him as being a Teacher Level 2.2 and from that point onwards his payslip stated that he was an Untrained Teacher Level 8 and salary maintenance at Level 2.2 was then applied to his pay. Mr Weinert stated that in October 2009 his salary maintenance amount was increased to incorporate an increase equivalent to the Teacher Level 2.3 pay rate under salary maintenance (see Exhibits A2 and A3). Mr Weinert gave evidence that he started on the Level 1.8 pay rate when he commenced employment with the respondent and his salary increased on an annual basis and Mr Weinert gave evidence that he understood from discussions with colleagues that Level 2.4 was the highest salary level that he could be paid. Mr Weinert stated that he had no discussions with the respondent about the change in his classification on his payslip in May 2009 nor was any documentation reflecting this changed provided to him at the time.

35 Mr Weinert stated that he has had extensive experience in the automotive industry both as an employee and a business owner and he has also supervised numerous apprentices and Mr Weinert considers himself more than qualified to teach in the automotive area given his qualifications and his experience.

36 Mr Weinert stated that he enjoys teaching, his students were keen to attend his classes and student participation in the courses he taught was growing.

37 Mr Weinert took umbrage at being classified as an untrained teacher on the basis that he is highly trained and skilled in his area of expertise, he has undertaken a four year apprenticeship and has had extensive experience in the automotive area subsequent to completing this qualification. Mr Weinert has also been a TAFE teacher, he has assisted with teacher training at Denmark College, he has undertaken a range of courses outside of his area of expertise and he has also undertaken moderation and assessment with other teachers.

38 Mr Weinert stated that it would be difficult for him to gain formal teaching qualifications as he would be on a reduced salary and once he qualified he could be sent anywhere in the State which would create issues for his family.

39 Under cross examination Mr Weinert stated that he was aware of the classification of untrained teacher when he applied for the position at Denmark College and he agreed that when he commenced employment with the respondent there was no undertaking given to him that he would receive on-going salary increments. When it was put to Mr Weinert that obtaining a Certificate IV qualification was not demanding, he stated that this qualification was not difficult for him to achieve given his relevant skills and experience and he stated that if a person undertaking this course did not have his background then it would be challenging for them. Mr Weinert stated that in order to run his courses he had to determine the competencies to be assessed, design the learning process, work out the assessment instruments and prepare a training package for each competency. These courses were then evaluated and validated through a moderation process.

40 Mr Weinert confirmed that he was assessed under a performance management process at Denmark College by his Head of Teaching and he stated that feedback was given to him that his is going well in his role.

41 Mr Geoffrey Moyle was summonsed to give evidence. Mr Moyle is employed by the respondent as the Director of Agricultural Education and in this role he manages the respondent's five residential agricultural colleges. Mr Moyle has been in this position since July 2008. Mr Moyle commenced employment with the respondent in 1977 and has had a range of teaching and administrative positions during that period. Mr Moyle confirmed that each of the five residential agricultural colleges has RTO status and he confirmed that he generated a discussion paper which he presented to Principals of the respondent's agricultural colleges at one of their regular meetings (see Exhibit A7, attachment AG 4).

42 Mr Moyle stated that students at agricultural colleges completed secondary graduation if they successfully completed requirements to do so and Mr Moyle confirmed that the colleges are subject to the AQTF standards with which they must comply or they will lose their registration. Mr Moyle stated that under AQTF standards teachers at the respondent's agricultural colleges must have a Certificate IV in Workplace Training and Assessment in order to deliver VET courses.

Respondent's evidence

43 Mr Chadwick gave evidence by way of a witness statement (Exhibit R1). Mr Chadwick has been employed by the respondent as the Principal of the College since 2003. In this role Mr Chadwick oversees the daily operations of the College as well as its farm and residence, he manages the physical and financial operations, its human resources and he oversees and directs the curriculum delivery for the College's educational and training programs.

44 Mr Chadwick gave evidence that Mr Adams was appointed to the College as an unqualified teacher and he was required to obtain a LAT from WACOT before he could commence employment. Mr Chadwick gave evidence that when Mr Adams started working at the College he was assigned the salary grade of 1.8 and he stated that this level was negotiated by Mr Adams with Mr Dennis and Mr Neil Wilson on behalf of the respondent as Mr Adams was not prepared to work at the College if he was to be paid at the untrained teacher salary of Level 1.6. Mr Chadwick gave evidence that he told Mr Adams at the time that his salary would not progress beyond Level 1.8.

45 Mr Chadwick was told by Mr Adams in December 2007 that the salary level of an unqualified teacher holding a LAT at Denmark College had progressed past Level 1.8 and this teacher was being paid at salary Level 2.1. After Mr Adams informed him of this, Mr Chadwick contacted the respondent's staffing section to obtain wage parity for his staff at the College. Mr Chadwick confirmed that since that time both Mr Adams and the other unqualified teacher at the College were given salary increments up to Level 2.2 but he was advised in early 2009 by the respondent's payroll section that Mr Adams and the other teacher had been moved back to Level 1.8 and their salary was being maintained at Level 2.2 by salary maintenance allowance.

46 Under cross-examination Mr Chadwick stated that he was aware that an untrained teacher could be paid up to Level 1.8 and he stated he informed Mr Adams that he would not receive any further increments past this level. Mr Chadwick gave evidence that when he was told in early 2009 that Mr Adams' salary had been capped at Level 2.2 he was advised by the respondent that

it was a mistake to allow Mr Adams to progress past the salary Level of 1.8. Mr Chadwick confirmed that Mr Adams facilitates learning, he delivers competency based assessment modes aligned to the requirements in the *Vocational Education and Training Act 1996*, he works under the College's plans, he regularly reports on students within the context of this plan, he is answerable to him, he supervises students and provides discipline to them to the highest standard and he undertakes other duties as directed.

47 Under re-examination Mr Chadwick stated that to the best of his knowledge a Certificate IV qualification is for delivering competency based units from training packages and possibly up to 300 to 400 hours of tuition was involved in completing this qualification and it was his understanding that to obtain a teaching qualification required a much greater number of hours of study. Mr Chadwick confirmed that Mr Adams was subject to the same performance management processes as other teachers at the College.

48 Ms Petra Cameron gave evidence by way of witness statements (Exhibits R2 and R2[2]). Ms Cameron is employed by the respondent as the Acting Senior Labour Relations Advisor in the Labour Relations Directorate. In this role she:

- provides high level advice, support and information on employment and industrial relations issues relevant to the respondent including the interpretation and application of awards, agreements, legislation and policy;
- mentors and provides information and professional advice to the respondent's managers and members of the labour relations team;
- promotes, protects and negotiates the intentions and interests of the respondent at a senior level in relevant industrial relations forums;
- develops and improves client relations; and
- participates in the business and planning activities of the Directorate and provides significant input into the development, implementation and review of the respondent's labour relations policy and procedures.

49 Ms Cameron has been employed in industrial relations in the Western Australian Public Sector since March 2005 and she has been in her current position since April 2008. Ms Cameron gave evidence that she has a comprehensive understanding of the respondent's industrial instruments and she stated that she was involved in the preparation and negotiation of the 2008 Agreement.

50 Ms Cameron stated that a person seeking employment as a teacher must be a member of WACOT before they can teach. Ms Cameron stated that membership of WACOT in the LAT category is granted where the person applying for membership has specialist skills or a completed teaching qualification that does not meet the requirements for registration as a teacher but who has nevertheless been offered employment as a teacher. Ms Cameron stated that all other WACOT membership categories require the person applying for membership to hold a teaching qualification approved by WACOT and the minimum approved qualification requirement is four years of completed higher education study with at least one year of this study consisting of a pre-service teacher education program in early childhood, primary, middle or secondary education.

51 Ms Cameron stated that under s 235 of the SE Act and consistent with the requirements for WACOT membership, teachers employed by the respondent are required to hold an appropriate qualification. These teachers fall into two groups:

a. teachers with teaching qualifications – the minimum qualification being successful completion of four years of tertiary education which includes at least one year of full-time teacher education; or

b. teachers without teaching qualifications who are employed on the basis of their specialist knowledge, training, skills or qualifications in a particular field to teach in specialist programs such as the languages, arts, sports, business, maths, science and technology when suitably qualified teachers cannot be found.

52 Ms Cameron stated that when the WACOT Act came into effect in 2004 teachers without a teaching qualification were required to have a LAT and if a teacher failed to obtain a LAT the WACOT Act prohibited them from teaching in any school. A teacher who is not a member of WACOT therefore cannot perform any teaching duties for the respondent.

53 Ms Cameron stated that the change in terminology from "unqualified teacher" to "untrained teacher" in the 2008 Agreement occurred as a consequence of the Award modernisation process undertaken as part of the last round of bargaining between the applicant and the respondent. Ms Cameron gave evidence that three classifications of teacher were identified by the respondent – "four-year-trained", "five-year-trained" or "unqualified" teachers and the term "unqualified teacher" was regarded by representatives of the respondent to be incorrect terminology because s 235 of the SE Act states that all teachers are required to have a qualification in order to be employed. Ms Cameron stated that in June 2008 the respondent decided that the term "untrained" was the best terminology to describe unqualified teachers and as a result this was incorporated into the draft replacement 2008 agreement. Ms Cameron stated that in late 2008 the respondent's Teacher Establishment System, which is an electronic database for the management of teacher placements in Government schools, was upgraded to incorporate the untrained teacher status and this assisted the respondent to ensure that the appropriate documentation was sent to both trained and untrained teachers.

54 Ms Cameron stated that under the Award, the 2006 Agreement and the 2008 Agreement the only provisions where separate entitlements apply based on whether a teacher is trained or untrained is the incremental range for salary, internal relief and casual rates of pay. This distinction is based on the Award provision specifying that untrained teachers cannot progress to a salary level higher than 1.8.

55 Ms Cameron stated that salary rates for teachers are inserted into the respondent's Human Resource Management Information System ("HRMIS") using a scale for untrained teachers ("UT") ranging from salary levels 1.1 to 1.6 and a scale for trained teachers ("TT") ranging from salary levels 1.6 to 2.4. Incremental progression within each scale is automatic however

progression from the UT scale to the TT scale is not. Ms Cameron stated that the salary rates for trained and untrained teachers overlap on Level 1.6 to Level 1.8 and as the UT scale only goes up to Level 1.6, untrained teachers at Level 1.7 or Level 1.8 are therefore placed on the TT scale in HRMIS. As HRMIS cannot distinguish between trained and untrained teachers who are on the TT scale errors occurred enabling some untrained teachers who under the Award cannot progress to salary levels higher than 1.8 being overpaid. Where such overpayments occur the respondent is obliged to recovers these overpaid monies.

56 Ms Cameron stated that Schedule B – Salaries in the 2008 Agreement contains separate salary tables for untrained teachers and teachers. Ms Cameron stated that the applicant and respondent agreed to set out the salaries in Schedule B in this way to take into consideration the limitations of the HRMIS as well as the Award provision which requires progression from Level 1 to Level 2 of the salary scale being subject to the attainment of a four year teaching qualification. Ms Cameron stated that during negotiations for amendments to the Award and the final terms of the 2008 Agreement Ms Gisborne was advised that changing the term "unqualified teacher" to "untrained teacher" was necessary as the respondent can only employ qualified teachers or in certain circumstances people who have a specialist knowledge or skills who hold a LAT including music teachers, language teachers and other specialist or trade based positions. Ms Cameron stated that during these negotiations she explained to the applicant's representatives that whilst these teachers do not hold a qualification in teaching they are qualified in their trade, language or area of expertise hence the term "unqualified teacher" was deemed inappropriate. Ms Cameron stated that she specifically advised Ms Gisborne that not many teachers were paid on the "untrained teacher" salary scales and these scales are used for teachers who were not qualified as teachers. Ms Cameron stated that these changed provisions were endorsed by the applicant's executive.

57 Ms Cameron stated that "Industrial Relations Advice No 1 of 2009" confirms that where employees are being paid at rates higher than their applicable salary level these affected employees will have their salary maintained until such time as the correct salary rate exceeds their current rate (see Exhibit R2 attachment PC6). As a result where untrained teachers have a salary level greater than 1.8 due to errors created by the HRMIS system the respondent maintains their salary levels rather than recover any overpayment of these salaries.

58 Ms Cameron stated that before the enactment of the WACOT Act and the registration of the 2006 Agreement the respondent employed teachers without teaching qualifications to be in control of and supervise classes in the same way as a teacher with a teaching qualification. Such teachers were employed in specialist subject areas such as music, drama and languages and they were paid on the "unqualified teachers" salary scales of Level 1.1 to 1.6 and up to 1.8 at the discretion of the respondent. Ms Cameron disagreed that teachers holding a LAT commenced on the same pay scale as a graduate and are paid the same as a fully qualified teacher with a teaching qualification. Ms Cameron stated that the introduction of the WACOT Act from 2004 had no impact on the way the respondent remunerated its teachers.

59 Ms Cameron stated that the respondent has consistently paid teachers without a teaching qualification in accordance with the Award and by 2008 these practices had been in place for almost 14 years without any issues arising. Ms Cameron concedes that there is no difference between the functions, roles and responsibilities and accountabilities of teachers fully registered by WACOT and those holding a LAT. However, LAT teachers do not have a teaching qualification and are only given a LAT when suitably qualified teachers cannot be found and the LAT restricts the teacher so that they can only teach in a specific subject area, location and for a finite period.

60 Ms Cameron stated that during the negotiations for the 2008 Agreement there were no discussions between the parties regarding the need to make it clear that teachers were not paid salaries below Level 1.6 nor was there a discussion about the need to provide a salary scale for "assistant teachers". Documentation was also provided to Ms Gisborne clearly showing that approximately 700 full time equivalent teachers were paid on salary levels below 1.6 (see Exhibit R2[2] attachment PCR9. Ms Cameron stated that the separation of the salary scales in the 2008 Agreement was at the respondent's initiative because of the limited capabilities of the HRMIS, the need to provide a single reference point for all rates of pay according to classifications and to implement the new salary structure and present it in a readable format. Ms Cameron concedes that from time to time there have been instances where untrained teachers have progressed beyond the maximum increment as prescribed in the Award through administrative error and when this has occurred employees have had their salary maintained so as not to financially disadvantage them.

61 Ms Cameron maintains that as successive agreements and the Award applied to untrained teachers there was therefore no necessity to hold any discussions with the applicant about this issue and she stated there has been no change in the entitlements of untrained teachers since 1993. Ms Cameron stated that it was the respondent's intention and obligation to fill all teaching positions by suitably qualified teachers and the employment of LAT teachers was therefore kept to a minimum. However during times of teacher shortage this has resulted in the employment of untrained teachers becoming more prevalent.

62 Under cross examination Ms Cameron conceded that there had been errors in the way in which the respondent had handled Mr Adams' employment and she stated that she was unaware if Mr Adams had been given written advice that he had been overpaid. Ms Cameron confirmed that during discussions for the 2008 Agreement there was no discussion about LAT teachers specifically being placed on the untrained teachers scale as this was not the terminology used by the respondent as it used the term untrained teachers.

63 Ms Cameron confirmed that untrained teachers were paid pursuant to Clause 22(2) of the Award and she conceded that the duties of an untrained teacher were the same as those of trained teachers who have as a minimum, a four year teaching qualification.

64 Mr Wilson gave evidence by way of a witness statement (Exhibit R3). Mr Wilson is employed by the respondent as the Manager of Teacher Staffing in the Staffing Directorate and in this role he facilitates the staffing of public schools throughout Western Australia and the appointment and transfer of teachers across Western Australia. Mr Wilson has worked with the respondent since 1977. Mr Wilson has been in his current role since January 2005. Mr Wilson is familiar with the appointment processes for both teachers and school administrators.

65 Mr Wilson stated that untrained teachers working for the respondent are paid on a salary scale that, in May 2006, ranged from Level 1.1 to Level 1.6 in accordance with Clause 47.6 of the *Government School Teachers' and School Administrator's Certified Agreement 2004* ("the 2004 Agreement") and movement through this salary scale was by annual increment based on a specified number of service days and calculated automatically by the HRMIS. In order to attract and retain teachers in areas of need, such as design and technology, the respondent may increase the salary of untrained teachers up to a maximum of Level 1.8 and the procedure adopted by the Staffing Directorate in a case of this nature was to request substantiating documentation from the teacher who sought to be paid at a higher salary level. This documentation was then considered by staff in the Staffing Directorate and one salary increment was applied to the teacher's salary for every three years of related work experience. Mr Wilson stated that this was a long standing business rule used by the respondent. Mr Wilson stated that moving an untrained teacher to a higher salary level than 1.6 required the untrained teacher to be placed on the trained teacher salary scale within HRMIS and because increments were automatically applied by HRMIS the salary of untrained teachers placed on the teachers scale had to be monitored manually to ensure that they did not progress above Level 1.8.

66 Mr Wilson stated that given Mr Adams' work experience Mr Wilson authorised that Mr Adams be paid at commencement at a Level 1.8 and Mr Wilson stated that the respondent's payroll section were asked to ensure that his salary did not progress above this level however this request was not followed.

67 Mr Wilson stated that under the 2008 Agreement the salary for untrained teachers can progress to Level 1.8 whereas under previous agreements the salary of an untrained teacher could only progress above Level 1.6 upon a consideration of substantiating document and the HRMIS system was altered at the time to reflect this.

68 Mr Wilson stated that the community expects and demands that qualified teachers teach students and this is one of the cornerstones of the national teacher registration requirements. Mr Wilson maintained that to allow untrained teachers to progress to the top of the salary scale would be inappropriate because it would fail to recognise the additional study and higher education fees incurred by teachers who undertake teacher training and appropriately reflect this additional training in the salaries structure and teachers would not undertake such training which may have a significant impact on public confidence in the education system.

69 Mr Salvatore Mastrolembo gave evidence by way of a witness statement (Exhibit R4). Mr Mastrolembo is employed by the respondent as the Payroll Operations Manager within the respondent's Shared Services Centre. In this role he manages the respondent's payroll operations. Mr Mastrolembo is familiar with the respondent's payroll procedures and processes.

70 Mr Mastrolembo stated that Mr Adams was employed as a Level 1.8 employee from 1 May 2006 and this level was approved by Mr Dennis, Mr Wilson and Kim Ward the respondent's Director of Staffing. Mr Mastrolembo understood that this salary level was to remain at Level 1.8 because the Award precludes untrained teachers from rising about this level. Mr Mastrolembo stated that as HRMIS was programmed so that untrained teachers could not be paid a salary above Level 1.6, Mr Adams' salary level was recorded on the trained teacher salary level in HRMIS.

71 Mr Mastrolembo stated that in January 2008 Mr Adams' salary was increased to Level 2.1 at the request of one of the respondent's staffing consultants and on 1 May 2008 HRMIS automatically increased his salary to Level 2.2 as this was the increment applied to all teachers on salary Level 2.1. This error was corrected on 1 May 2009 when Mr Adams' status was changed in HRMIS to "untrained teacher Level 1.8" with no increment date inserted. Mr Mastrolembo stated that since that time Mr Adams' salary has remained at Level 2.2 on a salary maintenance basis until such time as the salary payable at Level 1.8 exceeds his current salary rate, in accordance with advice from the respondent's Acting Executive Director–Workforce.

72 Mr Mastrolembo stated that he understands that the respondent employs 177 untrained teachers, that is teachers who have not undertaken teacher training and he has ascertained that of these five have progressed above Level 1.8.

73 Mr Dennis gave evidence by way of a witness statement (Exhibit R5). Mr Dennis is currently employed by the respondent as the Manager Operations for the West Coast Education District and between August 2003 and May 2008 he was a staffing consultant for the respondent in the area of art, design and technology and home economics.

74 Mr Dennis gave evidence that he discussed the process for appointing Mr Adams as an untrained teacher in early 2006 with Mr Chadwick and at the time he explained to Mr Chadwick the process of obtaining an ID number and discussed the salary level for untrained teachers. On 10 April 2006, Mr Dennis sent a memo to WACOT requesting that Mr Adams' application for a LAT be endorsed (Exhibit R5 attachment ID2).

75 Mr Dennis stated that he was aware that under the Award the highest salary level payable to an untrained teacher was Level 1.6 and the respondent had discretion to increase this to Level 1.8. Mr Dennis stated that from 2004 onwards there was pressure on the respondent to staff classes in the design and technology area due to a shortage of trained teachers in this area and there was an increased demand from employers and students in this area. After Mr Adams requested a salary level higher than Level 1.6 and after he supplied documentation with reasons for supporting an increase salary the respondent used its discretion to appoint Mr Adams above Level 1.6 up to a cap of Level 1.8. In doing so Mr Dennis intended that Mr Adams would not receive any annual increments to this salary on the basis of the limitation provided for in the Award (see Exhibit R5 attachment ID4).

Submissions

Applicant's submissions

76 The applicant submits that as Mr Adams fulfils the same roles and duties of a tertiary trained teacher under the SE Act, then he should be paid the rate of pay of a trained teacher and even though Mr Adams holds a LAT this should not impact on the salary he should be paid.

77 The applicant argues that Mr Adams is not an untrained teacher for the purposes of the WACOT Act and the 2008 Agreement, even though he is regarded by the respondent as being an untrained teacher. Additionally, Mr Adams holds appropriate qualifications to teach in his current role. The applicant concedes that holding a Certificate IV qualification does not equate to that of a tertiary teaching qualification however, the skills held and exercised by Mr Adams as well as the role undertaken by him entitles him to be paid as a Level 2.4 teacher. The applicant also maintains that teachers in a similar situation to Mr Adams should be able to access the teachers salary scale up to Level 2.4 on the basis that they are entitled to equal pay for undertaking equal work and they undertake the full range of duties expected of a teacher.

Respondent's submissions

78 The respondent maintains that when determining Mr Adams' salary the provisions of the 2008 Agreement as well as the Award must be taken into account. The respondent argues that when interpreting industrial agreements the ordinary meaning of the text is paramount (see *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union* of Western Australia [1987] 67 WAIG 1097). When determining the true interpretation of the 2008 Agreement and the meaning of relevant clauses the Commission is to refer to the presumed mutual intentions of the parties and if the terms of the industrial agreement are clear and unambiguous, which the respondent submits they are in this case it is not permissible to look at extrinsic material to qualify the meaning (see *Codelfa Construction Pty Ltd v State Rail Authority [NSW]* [1982] 149 CLR 337).

79 The respondent does not dispute that Mr Adams fulfils the duties normally undertaken by a teacher however the trained teacher salary scale does not apply to him as he does not have a teaching qualification from a higher education institution and Mr Adams is not a trained teacher under the relevant agreements and the Award, specifically Clause 22(2) of the Award.

80 The respondent submits that the term 'untrained teacher', as defined in Clause 7 of the 2008 Agreement, means a teacher who does not have tertiary teacher training. As Mr Adams holds a LAT on the basis that he does not have a tertiary teaching qualification, this also confirms that Mr Adams should not be entitled to be paid the salary level of a trained teacher. Additionally, holding a LAT limits where an employee can teach and that employee is restricted to teaching certain subjects which is different to that which applies to a tertiary trained teacher. The untrained teacher scale must therefore apply to Mr Adams and other teachers who do not hold a relevant tertiary teaching qualification.

81 The respondent argues that there was never any agreement between the parties nor did the parties intend that an untrained teacher would progress beyond salary Level 1.8 and no documentation exists confirming otherwise. It is also a relevant consideration that since 1993 the Award provides that Level 1.8 is the maximum salary that an untrained teacher can be paid. As the teacher salary scale incorporates the placement of three, four and five year trained teachers it follows that an untrained teacher is an employee whose qualifications do not meet those requirements. The respondent also argues that gaining a Certificate IV qualification does not mean that a person is a trained teacher as this certificate is not an equivalent qualification to that of a tertiary trained teacher. The respondent maintains that even though there is a shortage of design and technology teachers and that the salary scales of an untrained teacher may not be competitive with other careers this issue is not the subject of arbitration with respect to this application.

82 The respondent submits that the fact that Mr Adams' current salary is above Level 1.8 is as a result of administrative errors and Mr Adams has therefore been placed on salary maintenance.

83 The respondent objects to the issuance of the order being sought by the applicant that all employees in a similar category to Mr Adams be paid as a fully trained teacher because the evidence given in the proceedings only related to Mr Adams.

Findings and Conclusions

Credibility

84 I listened carefully to the evidence given by each witness and closely observed each witness. In my view each witness gave their evidence honestly and to the best of their recollection and I find that the evidence give by each witness was given in a considered and forthright manner. Given my confidence in the evidence of all of the witnesses who gave evidence in these proceedings I have no hesitation in accepting the evidence they gave.

85 The applicant is seeking the issuance of orders contained in points 1 (b) to (f) of the Schedule of the memorandum of matters referred for hearing and determination (see paragraph 2). Order 1(b) being sought by the applicant is that Mr Adams be classified and paid at a salary level higher than Level 1.8 of the Untrained Teacher scale in the 2008 Agreement and that he be entitled to be paid the rates of pay of a trained teacher and progress up the teacher scale in the same manner as a three, four or five year trained teacher. The respondent argues that as Mr Adams is an untrained teacher for the purposes of the relevant industrial instruments and given the salary restrictions placed on an untrained teacher in these instruments the appropriate salary level for Mr Adams can be no higher than Level 1.8 notwithstanding the fact that he is currently being paid as a Level 2.2 employee under a salary maintenance arrangement.

86 What it is necessary to determine is the salary level to which Mr Adams is entitled and whether or not he is an untrained or unqualified teacher for the purposes of the Award and the 2004, 2006 and 2008 agreements. It is also necessary to consider the applicant's claim that even though Mr Adams does not hold a tertiary teaching qualification, he has teaching qualifications, he fulfils the role of a teacher and as he holds an authority to teach (LAT) this should enable him to progress up the salary scale beyond Level 1.8.

87 As Mr Adams' terms and conditions of employment since the commencement of his employment with the respondent were and are now regulated by a range of industrial instruments it is appropriate to review and interpret these relevant provisions to determine his correct salary level.

88 The interpretation of an award is a matter of law. When interpreting an award one must read the terms of the award, give the words in the clause or clauses in question their ordinary commonsense meaning and ascertain whether the words used have an unambiguous meaning. If the terms of the award are clear and unambiguous it is not permissible to look at extrinsic material to qualify the meaning of the clause or clauses in issue (see *Norwest Beef Industries Limited and Another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers* [1984] 64 WAIG 2124).

89 In *Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board* (2001) 81 WAIG 665 at 671 Smith, C, as she was then, also observed the following:

> "In interpreting industrial instruments tribunals usually do not apply a literal approach, as awards and enterprise agreements may have been drafted by industrial rather than skilled draftsmen (*Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union* per Kennedy J at 1100). This approach to interpretation was explained by Street J in *Geo A Bond and Co Ltd (in liq) v McKenzie* (1929) 28 AR 499 at 503-504—
>
> > 'Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relation as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.'"

90 There was no dispute and I find that Mr Adams' employment was governed by the 2004, 2006 and 2008 agreements and the Award, as varied from time to time. There are a number of clauses in these industrial instruments which are relevant to the salary scale of untrained/unqualified and trained teachers and definitions relevant to these classifications.

91 When Mr Adams commenced employment at the College in May 2006 the Award did not contain a definition for untrained teacher but instead contained a definition of an unqualified teacher. This definition reads as follows:

> ""Unqualified teacher" shall mean a teacher who does not hold an approved teacher's qualification."

At this time the Award also contained the following definition:

> ""Teacher" shall mean as defined in the Education Act 1928 and shall include –
>
> (a) any person engaged in teaching in a government school;
>
> (b) any person employed by the Minister and engaged in teaching in a pre-school centre; and
>
> (c) any person holding or acting in a position in the Ministry for which a teaching academic qualification is required,
>
> but does not include any public servant, whether or not he or she holds, or acts in a position in respect of which a teaching academic qualification is required;"

92 As at May 2006, the Award contained the following provisions at Clause 8. – Salaries:

> "(1) For the purpose of this clause -
>
> …
>
> "Unqualified teacher" shall mean a teacher who does not hold an approved teacher's qualification.
>
> …
>
> (3) (a) Teachers who possess an approved qualification shall be placed on the salary scale prescribed in Schedule B, Table I of this award as follows –
>
> (i) Three-year trained teacher - Level 1, Point 4;
>
> (ii) Four-year trained teacher - Level 1, Point 5;
>
> (iii) Five-year trained teacher – Level 1, Point 6;
>
> provided that teachers who possess approved qualifications in excess of those specified above may be placed on the salary scale at the discretion of the employer.
>
> (b) Teachers who do not possess an approved qualification may be placed on salary points lower than those specified in paragraph (a) of this subclause at the discretion of the employer.

(c) On first appointment to the Ministry, other than directly from a teacher training institution, teachers may be placed on the appropriate salary scale in Level 1 or 2 as determined by the employer having regard for their qualifications and experience.

(4) Progression from Level 1 to Level 2 of Schedule B, Table I, will be subject to attainment of a four year trained qualification, except that the employer may allow a three-year trained teacher to progress to Level 2 subject to subclause (10) of this clause.

…

(6) An unqualified teacher may not proceed beyond Level 1, point 6, of Schedule B, Table I, except that the employer may at his/her discretion, and under such terms as he/she thinks fit, allow an unqualified teacher to progress to Level 1, point 8."

93 Clause 22. – Salaries of the Award, as at 16 December 2008, provides as follows:

"(1) (a) The salaries and pay rates for employees are contained in Schedule B. – Salaries of this Award.

(b) Employees covered by this award are to be paid as per the provisions comprising:

(i) Part 1 – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(ii) Part 2 – Expired Industrial Agreement Wages

whichever are the greater.

(2) Teachers who possess a qualification recognised by the Director General as being an appropriate qualification are placed on the salary scale prescribed in Schedule B. – Salaries of this Award, as follows:

(a) Three-year-trained Teacher - Level 1, Point 5.

(b) Four-year-trained Teacher - Level 1, Point 6.

(c) Five-year-trained Teacher - Level 1, Point 7.

Teachers who possess approved qualifications in excess of those specified above may be placed above Level 1 point 7 at the discretion of the Employer.

Untrained Teachers may be placed on salary points lower than those specified in clause 22(2) at the discretion of the Employer.

An Untrained Teacher can not proceed beyond Level 1, point 8.

(3) Level 1 and 2 Teachers who have added to their qualifications after appointment may be given accelerated progression subject to the following restrictions:

(a) An Untrained Teacher appointed from a teacher training institution who obtains approved teaching qualifications within a period of three (3) years after leaving the teacher training institution is placed on the same salary point as their contemporaries at the time of appointment who were appointed with qualifications.

(b) Untrained Teachers other than those referred to in clause 22(3)(a) advance one increment on gaining a qualification recognised by the Director General as being an appropriate qualification.

(c) A two (2)-year-trained Teacher who obtains the qualifications of a three (3)-year-trained Teacher is to advance one increment but can not proceed beyond the maximum of Level 1.

(d) A three (3)-year trained Teacher who obtains the qualifications of a four (4)-year-trained Teacher is to advance one increment.

(e) A four (4)-year-trained Teacher who completes a course of higher study, approved by the Employer, leading to an award such as Doctoral Degree, Master's Degree or approved Graduate Diploma, must advance one (1) increment but can not proceed beyond the maximum of Level 2, Schedule B – Salaries Table I of this Award. Only one (1) increment can be obtained under clause 22(3)(e).

(4) If a person, immediately before graduating as a qualified Teacher, is employed on a permanent or fixed-term contract basis to fill a teaching vacancy, they are entitled to receive the salary and entitlements as prescribed for Graduate Teachers."

94 Clause 5. – Definitions of the Award, as at 16 December 2008, provides the following definitions:

"'"Untrained Teacher" means a Teacher who does not have teacher training"

"'"Teacher" means a person as defined in the Act, and unless otherwise specified in this Award, the term is used to include the classifications identified in Clause 15 – Teacher Career/Classification Structure of this Award"

"'"Three-Year-Trained Teacher" means a Teacher who successfully completed an academic qualification requiring a sequence of the equivalent of three (3) years of full time, post-matriculation tertiary education which incorporates an approved course of initial teaching training, or obtained other qualifications approved as of equivalent standard;"

"'"Four-Year-Trained Teacher" means a Teacher who has successfully completed an academic qualification requiring a sequence of the equivalent of four (4) years of full time, post-matriculation tertiary education which incorporates an approved course of initial teacher training, or obtained other qualifications approved as of equivalent standard"

“"Five-Year-Trained Teacher" means a Teacher who has successfully completed an academic qualification requiring a sequence of the equivalent of five (5) years of full time, post-matriculation tertiary education which incorporates an approved course of initial teacher training, or obtained other qualifications approved as of equivalent standard”

“"Approved" means approved by the Employer”

95 Clause 46 – Compaction of Teachers Incremental Salary Scale in the 2004 Agreement contained the following table:

“46.5 Effective from 2005 the Teachers Salary Structure shall be as follows:

	Current Rate	February 2004	February 2005	February 2006
Teachers				
1.1	$30,985	$31,915	$33,872	$33,858
1.2	$32,595	$33,573	$34,580	$35,617
1.3	$34,474	$35,508	$36,573	$37,671
1.4	$35,961	$37,040	$38,151	$39,296
1.5	$38,288	$39,437	$40,620	$41,838
1.6	$40,543	$41,759	$43,012	$44,302
1.7	$43,486	$45,563	$46,930	$48,338
1.8	$48,640	$50,099	$51,602	$53,150
2.1	$50,135	$52,025	$53,586	$55,193
2.2	$52,211	$54,164	$55,789	$57,463
2.3	$56,126	$57,810	$59,544	$61,330
Senior Teacher 1	-	$59,310	$61,089	$62,922
Senior Teacher 2	-	$60,496	$62,311	$64,180
Level 3 Classroom Teacher	$62,972	$65,050	$67,197	$69,414

96 Clause 47 –Teacher Career Structure in the 2004 Agreement provided as follows:

“**47 TEACHER CAREER STRUCTURE**

47.1 The jointly agreed Teacher Competence and Standards Working Party will continue to monitor and make recommendations to the parties on further development and implementation of the Teacher Career Structure as initiated in the 1996 Teachers Agreement.

Level 1 & 2 Teachers

47.2 Teachers who possess an approved qualification shall be placed on the salary scale prescribed in clause 45 – Teacher Salary Increases of this Agreement as follows:

(a) Four-year trained teacher – Level 1, Point 5;

(b) Five-year trained teacher – Level 1, Point 6;

provided that teachers who possess approved qualifications in excess of those specified above may be placed on the salary scale at the discretion of the employer.

47.3 Teachers who do not possess an approved qualification may be placed on salary points lower than those specified in subclause 47.2 at the discretion of the employer.

47.4 On first appointment to the Department of Education and Training, other than directly from a teacher training institution, teachers may be placed on the appropriate salary scale in Level 1 or 2 as determined by the employer having regard for their qualifications and experience.

47.5 A teacher who has not had a satisfactory report may not advance further than three (3) annual increments from the salary point on appointment.

47.6 An unqualified teacher may not proceed beyond Level 1, point 6, of clause 45 – Teacher Salary Increases, except that the employer may at his/her discretion, and under such terms as he/she thinks fit, allow an unqualified teacher to progress to Level 1, point 8.

47.7 Teachers employed on Level 1 and 2 who have added to their qualifications after appointment may be given accelerated progression subject to the following restrictions –

(a) An unqualified teacher appointed from a teacher training institution who obtain approved teaching qualifications within a period of three (3) years after leaving the teacher training institution shall be placed on the same salary point as his/her contemporaries at the time of appointment who were appointed with qualifications.

(b) Unqualified teachers other than those referred to in paragraph (a) of this subclause shall advance one increment on gaining approved teaching qualifications.

(c) A four-year trained teacher who completed a course of higher study, approved by the employer, leading to an award such as Doctoral Degree, Master's Degree or approved Graduate Diploma, shall advance one increment but shall not proceed beyond the maximum of Level 2 outlined in clause 45 – Teacher Salary Increases (provided that only one increment can be obtained under this subclause)."

97 An approved qualification in the 2004 Agreement means approved by the employer.

98 Clause 5. - Relationship to Award and Previous Agreements in the 2004 Agreement provided as follows:

"5.1 This Agreement shall replace the *Government School Teachers' and School Administrators' Certified Agreement 2000*, *Government School Administrators' Workplace Agreement 2000* and all previous memoranda and agreements which had application to the parties to this Agreement prior to the registration of this Agreement.

5.2 The conditions prescribed in this Agreement shall, to the extent of any inconsistency, prevail over the terms prescribed in the Award. Otherwise the terms of the Award shall be read wholly in conjunction with this Agreement, and such terms are included in this Agreement."

99 Clause 50 – Teacher Salary Increases in the 2006 Agreement provided the following table:

"50.2 Salaries shall be paid in accordance with the following table:

	Current Rate	August 2006	February 2007	August 2007	February 2008
Teachers					
LEVEL 1.1	$33,858	$34,704	$35,399	$36,107	$37,009
LEVEL 1.2	$35,617	$36,507	$37,238	$37,982	$38,932
LEVEL 1.3	$37,671	$38,613	$39,385	$40,173	$41,177
LEVEL 1.4	$39,296	$40,278	$41,084	$41,906	$42,953
LEVEL 1.5	$41,838	$42,885	$43,743	$44,618	$45,733
LEVEL 1.6	$44,302	$45,410	$46,318	$47,244	$48,425
LEVEL 1.7	$48,338	$49,546	$50,537	$51,548	$52,837
LEVEL 1.8	$53,150	$54,479	$55,568	$56,680	$58,097
LEVEL 2.1	$55,193	$56,573	$57,704	$58,858	$60,330
LEVEL 2.2	$57,463	$58,900	$60,078	$61,279	$62,811
LEVEL 2.3	$61,330	$62,863	$64,121	$65,403	$67,038
LEVEL 2.4	-	-	-	$67,446	$69,132
Senior Teacher 1	$62,922	$64,495	$65,785	$69,140	$70,868
Senior Teacher 2	$64,180	$65,785	$67,100	$71,067	$72,844
Level 3.1 Classroom Teacher	$69,414	$71,149	$72,572	$74,275	$76,132
Level 3.2 Classroom Teacher	-	-	-	$75,848	$77,744

100 Clause 34 – Teacher Career Structure in the 2006 Agreement provided as follows:

"34.1 The teacher career structure consists of:

(a) Graduate Teacher, a teacher in his/her first two years of teaching,

(b) Teacher, a teacher who has taught for more than 2 years;

(c) Senior Teacher 1 and 2, a teacher who has successfully completed the Senior Teacher process as per Clause 36.

(d) Level Three Classroom Teacher, a teacher who has attained L3 Classroom Teacher status as per Clause 37.

34.2 In the event an unqualified person, before graduation, is required to fill a teaching vacancy, such an employee who is on fixed term or permanent employee shall be employed at a salary level of no less than 1.5 and will enjoy the entitlements as described for graduate teachers."

101 Clause 9 – Definitions of the 2006 Agreement contained the following definitions and also contained definitions of a "Four-year-trained teacher" and a "Five-year-trained teacher" in the same terms as the Award:

"'"Unqualified teacher" means a teacher who does not hold an approved teacher's qualification"

"Tertiary Education" means undertaking a course at an approved education institution for which the pre-requisite is a successful Year 12 of schooling or its approved equivalent"

102 Clause 5 – Relationship to Award and Previous Agreements of the 2006 Agreement reads as follows:

"5.1 This Agreement replaces the Government School Teachers' and School Administrators' Certified Agreement 2004 which had application to the Parties to this Agreement prior to the registration of this Agreement.

5.2 The conditions prescribed in this Agreement shall, to the extent of any inconsistency, prevail over the terms prescribed in the Award. Otherwise the terms of the Award shall be read in conjunction with this agreement."

103 Clause 7 – Definitions in the 2008 Agreement provides the following definitions and also contains definitions of a "Three-Year-Trained Teacher", a "Four-year-trained teacher" and a "Five-year-trained teacher" in the same terms as the Award:

"Teacher" means a person as defined in the Act, and unless otherwise specified in this Agreement, the term is used to include the classifications identified in Clause 15 – Teacher Career/Classification Structure of the Award"

"Untrained Teacher" means a Teacher who does not have teacher training"

"Approved" means approved by the Employer"

104 Schedule B – Salaries of the 2008 Agreement contains, among others, the following relevant tables:

"**UNTRAINED TEACHERS**

TABLE 1 - Salaries (Annual Rate)

Increment	From Feb-08	Sep-08	Oct-09	Feb-10	Oct-10
1.1	$37,009	$39,230	$41,192	$41,224	$42,873
1.2	$38,932	$41,268	$43,331	$43,504	$45,244
1.3	$41,177	$43,648	$45,830	$45,910	$47,747
1.4	$42,953	$45,530	$47,807	$48,448	$50,386
1.5	$45,733	$48,477	$50,901	$51,127	$53,172
1.6	$48,425	$51,331	$53,898	$53,954	$56,112
1.7	$52,837	$56,007	$58,807	$59,199	$61,567
1.8	$58,097	$61,583	$64,662	$64,788	$67,380

TEACHERS

TABLE 4 - Salaries (Annual Rate)

Increment	From Feb-08	Sep-08	Oct-09	Feb-10		Oct-10
1.6	$48,425	$51,331	$53,898	2.1	$53,954	$56,112
1.7	$52,837	$56,007	$58,807	2.2	$59,199	$61,567
1.8	$58,097	$61,583	$64,662	2.3	$64,788	$67,380
2.1	$60,330	$63,950	$67,148	2.4	$67,328	$70,021
2.2	$62,811	$66,580	$69,909	2.5	$69,967	$72,766
				2.6	$72,710	$75,618
2.3	$67,038	$71,060	$74,613	2.7	$75,559	$78,582
2.4	$69,132	$73,280	$76,944	2.8	$78,521	$81,662
				2.9	-	$84,863

TRANSITION ARRANGEMENTS FOR SALARY INCREMENTS - FEBRUARY 2010

TABLE 23

The following arrangements are effective from the beginning of the pay period ending 4 February 2010:

(a) The new Teacher salary scale commences at level 2.1 (2.1 is equivalent to 1.6) with increments up to level 2.8, and a new increment level 2.9 introduced from 4 February 2011.

(b) Permanent teachers in the employ of the Department at the date of registration of the Agreement and remunerated at levels 1.7, 1.8 and 2.1 respectively on the existing classification structure will transition to and progress up the new structure as follows:

(i) those on level 2.1 will progress to level 2.2 in accordance with current entitlements in 2009. At the date of transition, Teachers on level 2.2 will convert to the new level 2.5 and progress to level 2.7 on their next anniversary date;

(ii) those on levels 1.7 and 1.8 respectively will continue to progress up the existing classification structure in accordance with current entitlements and convert to the equivalent incremental point at the date of transition; then as the case may be progress automatically on their anniversary date from Level 2.3 to 2.4 to 2.5 to 2.7.

(c) Temporary fixed term Teachers in the employ of the Department at the date of registration of this Agreement at levels 1.7, 1.8 and 2.1 respectively and who at the transition date have either attained permanent status or maintained continuous service as a fixed term Teacher as provided for in Clause 38 – Long Service Leave of the Award will convert to and progress up the new classification structure in the manner referred to in subclauses (b)(i) and (ii) above.

(d) Teachers at level 2.4 (new level 2.8); their new increment date changes to February 2011 at which point they will advance to the next increment, i.e. 2.9.

(e) Teachers at ST1; their new increment date changes to February 2011 at which point they will advance to the new single ST rate.

(f) ST2 will convert to the new single ST salary point.

(g) The transition arrangements referred to above do not apply to casual employees.

105 Clause 2 – Relationship to Award of the 2008 Agreement reads as follows:

> "2.1 This Agreement replaces the School Education Act Employees' (Teachers and Administrators) General Agreement 2006 [AG 63 of 2006].
>
> 2.2 The conditions prescribed in this Agreement, to the extent of any inconsistency, prevail over the terms prescribed in the Award. Otherwise the terms of the Award will be read in conjunction with this Agreement."

106 I find that when determining the salary level to which Mr Adams is entitled the terms of the relevant clauses in 2004, 2006 and 2008 agreements, when read in conjunction with the Award, are clear and unambiguous and confirm that Mr Adams is an untrained/unqualified teacher and his salary therefore cannot progress beyond Level 1.8. Given this conclusion I also reject the applicant's claim that Mr Adams should be treated in the same manner as a three, four or five year trained teacher and should be able to progress through the teacher salary scales beyond Level 1.8 as he undertakes the full range of duties as a teacher with tertiary teaching qualifications as this would be contrary to the salary level to which Mr Adams is entitled under the relevant industrial instruments.

107 The facts are, to a large extent, not in dispute. There is no dispute and I find that Mr Adams holds a Certificate IV in Assessment and Workplace Training and this is not a tertiary teaching qualification. Notwithstanding this I accept that Mr Adams has sufficient qualifications and experience to adequately undertake his role as a Design and Technology Automotive teacher and Program Co-ordinator at the College. Furthermore, there was no dispute and I find that Mr Adam has successfully carried out his role as a teacher at the College since the commencement of his employment with the respondent in May 2006.

108 A teacher is defined in the Award and the 2004, 2006 and 2008 agreements as being a person who has successfully completed a minimum of three years of full-time, post matriculation tertiary education which incorporates teacher training and an untrained/unqualified teacher is defined as a teacher who does not have an approved teacher's qualification and an employee who does not have teacher training. When taking into account the definitions of a teacher and the definition of an untrained/unqualified teacher in the relevant industrial instruments and as it was not in dispute that Mr Adams has never completed an approved post secondary teaching qualification of at least three years full-time study I find that Mr Adams is not able to be classified as a teacher and is therefore an untrained/unqualified teacher for the purposes of the Award and the 2004, 2006 and 2008 agreements.

109 I find that the terms of Clause 8(3) and (6) of the Award and Clause 47.6 of the 2004 Agreement, which applied at the time Mr Adams commenced employment at the College and the terms of Clause 22 of the Award which replaced Clause 8 of the Award, make it clear that the respondent only has the discretion to pay Mr Adams no more than the salary attached to Level 1.8 given that he is classified as an untrained/unqualified teacher. Even though Mr Adams claims that he was unaware at the time of his appointment as a teacher at the College that Level 1.8 was the highest level he could be paid under the relevant salary scale, it is clear under the 2004 Agreement and subsequent agreements when read in conjunction with the relevant section of the Award that as an untrained/unqualified teacher he is not entitled to be paid a salary higher than Level 1.8. I find that when Mr Adams commenced employment with the respondent in May 2006, the respondent used the discretion given to it under Clause 8 and later Clause 22 of the Award to place Mr Adams at higher than the untrained/unqualified teacher salary of Level 1.6 to ensure that his salary was competitive with his qualifications and his previous salary as a TAFE teacher. I note that Mr Adams continued to receive salary increments up to Level 2.2 via annual increments however I find that this was as a result of the respondent's HRMIS system not being able to restrict an untrained teacher's annual salary progression to Level 1.8.

110 I accept that Mr Adams is currently paid at a higher level than 1.8 however this does not assist the applicant's claim that Mr Adams has the right to access the trained teacher remuneration scale on an ongoing basis. I find that due to the respondent's inability to adequately ensure that Mr Adams be paid in accordance with the relevant industrial instrument and due to administrative errors Mr Adams is currently paid a salary level of 2.2 which has now been capped by the respondent under salary maintenance and I accept that Mr Adams will continue to be paid this rate of pay until the Level 1.8 salary rate exceeds this amount.

111 I accept the applicant's argument that it never intended that teachers in Mr Adams' position who undertake the same duties as three, four or five year trained teachers and who are regarded as untrained/unqualified teachers for the purposes of the Award and the 2004, 2006 and 2008 agreements should not have their salaries capped at Level 1.8 and I accept Ms Gisborne's evidence that during negotiations for the 2006 and 2008 Agreements there was no discussion between the parties about the salary rates of LAT teachers who do not have a tertiary teaching qualification being treated differently to other teachers. I also find that there was no discussion between the parties during these negotiations about LAT teachers in Mr Adams' situation having their salary level capped at Level 1.8. However the relevant terms of the 2004, 2006 and 2008 agreements when read in conjunction with the Award with respect to the salary to be paid to an untrained/unqualified teacher cannot be ignored when determining an employee's terms and conditions of employment. It is clear that the combined effect of the definitions of a teacher when read in conjunction with Clause 8 and the current Clause 22 of the Award is that teachers in Mr Adams' situation who do not hold approved tertiary teaching qualifications are regarded as an untrained/unqualified teacher and are precluded from being paid a salary beyond Level 1.8. Whilst Mr Adams' salary is currently capped at Level 2.2 I have already stated that I accept that this level is under a salary maintenance arrangement which arose as a result of the respondent's loose administrative practices which unfortunately gave Mr Adams the impression that he may have had an automatic entitlement to progress up the respondent's teacher salary scale beyond Level 1.8.

112 The regime adopted by WACOT to register teachers who are eligible to teach in Western Australian schools in my view is consistent with the conclusion I have reached that as Mr Adams does not hold teaching qualifications necessary to be registered as a teacher he has a different status to that of a tertiary trained teacher.

113 The Membership Policy of WACOT ("the Policy") contains the following categories of membership:

> "**2. Categories of membership**
>
> A. Provisional registration as a teacher (PRT)
>
> A Provisionally Registered Teacher is a person who has met all requirements for registration, including the qualification requirements of the College, but who has not been employed as a teacher for at least one year in the past five years. The minimum qualification requirement is four years of completed higher education programs with at least one year being a completed initial teacher education program covering K-12 in early childhood, primary, middle or secondary education. In some circumstances, experienced teachers with three year teaching qualifications may be eligible for PRT.
>
> B. Registration as a teacher (RT)
>
> A Registered Teacher is a person who has met all requirements for registration, including the qualification requirements of the College, and has been employed as a teacher for at least one year in the past five years. The minimum qualification requirement is four years of completed higher education programs with at least one year being a completed initial teacher education program covering K-12 in early childhood, primary, middle or secondary education.
>
> During the transition to professional regulation, people who were teaching in Western Australia prior to September 2004 and who did not meet the qualification requirements above, or who had not taught in the last five years, were eligible to apply for membership under special arrangements provided for in Schedule 4 of the Act.
>
> C. Limited authority to teach (LAT) membership
>
> A person who has suitable specialist skills or holds a completed teaching qualification that does not meet the requirements for registration as a teacher, and who has been offered employment as a teacher where no suitable registered or provisionally registered teacher is available, may be granted in conjunction with a prospective employer, a Limited Authority to Teach (LAT). This does not allow the person to engage in any relief teaching or taking of any classes outside of the conditions of the LAT.
>
> A special category of LAT referred to as a "Relief LAT" may be granted to applicants that can demonstrate that they satisfy all requirements and have been awarded a recognised three year teaching qualification. This may allow them to be employed as a relief teacher in a maximum of six nominated schools.
>
> D. Associate membership
>
> An Associate Member is a teacher or educator who holds a qualification in teaching or who has made a significant contribution to education or teaching recognised by the College. An Associate Member is not eligible to teach in a Western Australian school."

114 Section 1 – Membership requirements of the Policy reads as follows:

> "All persons employed as teachers in Western Australian schools must be members of the Western Australian College of Teaching. To ensure that professional standards are maintained, a person applying for membership must meet the minimum prescribed requirements for membership outlined in the sections 33, 35, 37 and 39 of the *Western Australian College of Teaching Act 2004*. These requirements are described in this policy.
>
> A person may apply to the College for membership in one of four categories:
>
> 1. Provisional Registration as a Teacher;
> 2. Registration as a Teacher;
> 3. Limited Authority to Teach; or
> 4. Associate membership.

1. Provisional registration as a teacher

The requirements for provisional registration as a teacher are that the applicant:

(a) holds a qualification in teaching approved by the College for provisional registration;

(b) has not been convicted of an offence the nature of which renders the person unfit to be a teacher; and

(c) is proficient in the English language, both written and oral.

Provisional registration as a teacher expires after three years and may be renewed.

2. Registration as a teacher

The requirements for registration as a teacher are that the applicant:

(a) holds a qualification in teaching approved by the College for registration;

(b) has not been convicted of an offence the nature of which renders the person unfit to be a teacher;

(c) has successfully completed a prescribed police Criminal Record Check;

(d) has achieved standards of professional practice approved by the College;

(e) is proficient in the English language, both written and oral; and

(f) within the 5 years preceding the application –

i) has been teaching, whether or not on a full-time basis, for at least one year; or

ii) has complied with any requirements as to professional involvement prescribed by regulations. (See Appendix 3).

Registration as a teacher expires after five years and may be renewed.

3. Limited Authority to Teach membership

The requirements for Limited Authority to Teach are that the applicant:

(a) has specialist knowledge, training, skills or qualifications;

(b) has been offered a teaching position at a school for which a suitable registered teacher is not available;

(c) has not been convicted of an offence the nature of which renders the person unfit to be a teacher; and

(d) is proficient in the English language both written and oral.

A Limited Authority to Teach may be issued for up to two years and may be renewed.

The requirements for a Limited Authority to Teach for relief teaching are that the applicant

(a) has been awarded a recognised three year teaching qualification;

(b) has been offered a relief teaching position at no more than six schools;

(c) has not been convicted of an offence the nature of which renders the person unfit to be a teacher; and

(d) is proficient in the English language both written and oral.

4. Associate membership

The requirements for Associate membership of the College are that the applicant:

(a) holds a qualification in teaching approved by the College or has made a contribution to education or teaching recognised by the College; and

(b) has not been convicted of an offence the nature of which renders the person unfit to be a member of the College.

Associate membership expires after one year and may be renewed."

115 Section 6 – Teaching qualifications of the Policy reads in part as follows:

"An applicant for membership must demonstrate that he/she meets the Board's minimum teaching qualification requirement for the category of membership sought.

1. The College may grant membership in the category of Registered Teacher, or Provisionally Registered Teacher, to an applicant who possesses a qualification in teaching approved by the College. A College-approved course has a minimum of four years full-time completed higher education incorporating:

(a) at least a one-year initial teacher education program covering K-12 in early childhood, primary, middle or secondary education; and

(b) a minimum of 45 days of satisfactory supervised practice teaching covering K-12 in early childhood, primary, middle or secondary school settings.

2. A person from New South Wales with a three year teaching qualification covering K-12 in early childhood, primary, middle or secondary education and a minimum of two years of recent and relevant teaching experience may be granted Provisional Registration.

3. A person with a three year teaching qualification covering K-12 in early childhood, primary, middle or secondary education who has taught in schools in Western Australia prior to 15 September 2004 for a minimum of 45 days may be granted registration in the category of either Provisional Registration as a Teacher or Registration as a Teacher.

4. The College may grant membership in the category of Associate member to a person who is a teacher or educator who holds a qualification in teaching or who has made a significant contribution to education or teaching recognised by the College who is no longer teaching but wishes to remain connected to the teaching profession.

5. The College may grant membership of the College in the category of Provisionally Registered Teacher, to a person who:

- has a three year teaching qualification awarded in Australia, Canada, Ireland, New Zealand or United Kingdom prior to 2000;
- was employed as a teacher following the awarding of their degree;
- has a minimum of two years recent and relevant teaching experience;
- has obtained a reference from a line manager attesting to their ability to meet the Western Australian Professional Standards for Teaching; and
- meets all other requirements for registration.

6. Teaching qualifications covering K-12 in early childhood, primary, middle or secondary education recognised for registration or accreditation by the Australian State or Territory registration authority in which they are delivered will be recognised as meeting the qualification requirement for membership of the College.

7. Applicants with qualifications gained overseas will be required to have their teaching qualifications recognised by the College as commensurate with College approved teacher education qualifications. Qualification assessments completed by the College override those completed by Teaching Australia.

8. If an applicant has completed four years of higher education studies which include a teaching qualification, but whose qualifications are not equivalent to the minimum qualifications set for registration to teach, they may be granted Provisionally Registered Teacher status with the condition they enrol in an approved program for a Graduate Certificate in Education and complete a minimum of one academic unit per semester. …"

116 There was no dispute that Mr Adams has an authority to teach under a LAT which is issued for a specific teaching position at a school where a suitable registered teacher was not available as Mr Adams does not qualify to be a fully registered teacher by WACOT. This is so because under the requirements contained in the WACOT Act he does not have an approved qualification – that is a minimum of four years full-time higher education study, including at least one year in a teacher education programme.

117 The WACOT Act provides that if a teacher such as Mr Adams lacks a tertiary teaching qualification he cannot be fully accredited by WACOT and can only teach by virtue of a LAT which is subject to restrictions. One of these restrictions relevantly is that if a registered teacher, that is one who holds a qualification approved by WACOT which has a minimum of four years full time completed higher education incorporating a teacher education programme of at least one year is available to undertake the role that Mr Adams currently undertakes then that tertiary trained teacher would be given priority to take up Mr Adams' teaching position.

118 Given that I have found that Mr Adams is an untrained/unqualified teacher for the purposes of the 2004, 2006 and 2006 agreements and the Award it is therefore not appropriate to issue Order 1(b) being sought by the applicant that Mr Adams has a right to automatic incremental progression beyond Level 1.8 with respect to his salary. It follows that Order 1(c) being sought by the applicant fails.

119 It is unfortunate in my view that people in Mr Adams' situation who hold qualifications to teach and have significant work and professional experience which is useful and contributes to their successful role as a teacher and teachers such as Mr Adams who successfully undertake the full range of duties expected of a tertiary trained teacher and are performance managed in the same manner as trained teachers, should not have access to the same salary scales as a tertiary trained teacher. However, I accept that the issue of the salary level to be paid to employees in this situation is ultimately a matter for the parties.

120 Order 1(d) has already been dealt with by the respondent confirming that Mr Adams is a permanent employee and it is clear that as a result of this being confirmed in writing this satisfies Order 1(e) being sought by the applicant.

121 The applicant is seeking an order that the right to incremental progression with respect to the salary of an untrained/unqualified teacher as defined in the relevant industrial instruments apply to all other employees in a similar situation to Mr Adams. As I have found that Order 1(b), which relates to Mr Adams should not issue then it is inappropriate to issue this order. Furthermore and in any event even if the Commission found that Mr Adams had a right to incremental progression with respect to his salary in my view it is inappropriate to apply this decision to other employees in a similar situation as the circumstances of each employee would vary.

122 An order will now issue dismissing this application.

2010 WAIRC 00102

DISPUTE RE EMPLOYMENT STATUS OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 5 MARCH 2010
FILE NO/S	CR 40 OF 2008
CITATION NO.	2010 WAIRC 00102

Result	Dismissed
Representation	
Applicant	Ms E J Carbone (of Counsel)
Respondent	Mr J Misso (of Counsel)

Order

HAVING HEARD Ms E J Carbone of Counsel on behalf of the applicant and Mr J Misso of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2010 WAIRC 00070

DISPUTE RE UNLAWFUL AND UNFAIR DOWNGRADING OF AN EMPLOYEE FROM LEVEL 4 TO LEVEL 3

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	MONDAY, 16 NOVEMBER 2009, TUESDAY, 17 NOVEMBER 2009, THURSDAY, 19 NOVEMBER 2009
DELIVERED	THURSDAY, 18 FEBRUARY 2010
FILE NO.	CR 13 OF 2009
CITATION NO.	2010 WAIRC 00070

Catchwords	Industrial Relations (WA) - Claim for employee to be confirmed as a permanent officer at Level 4.4 of the administrators' salary scale of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2008* without any break in service or loss of entitlements - Claim for employee to be deployed into a suitable position consistent with his level status - Application dismissed - *Industrial Relations Act 1979* s 44; *School Education Act 1999* s 236(2) and s 236(4); *Public Sector Management Act 1994*
Result	Dismissed
Representation	
Applicant	Mr M Amati
Respondent	Ms R Hartley (of Counsel)

Reasons for Decision

1 On 1 April 2009 the State School Teachers' Union of WA (Incorporated) ("the union") ("the applicant") applied to the Commission pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") seeking the Commission's assistance with respect to a dispute over the salary level of one of its members, Mr Gabriel Harfouche, employed by the Director General, Department of Education and Training ("the respondent"). The Commission convened several conciliation conferences however no agreement was reached between the parties.

2 Subsequent to these conferences the following consent interim orders issued:

"1. THAT the issue of Mr Gabriel Harfouche's substantive position be referred for hearing and determination.

2. THAT if Mr Harfouche's substantive position is found to be as a Level 3.4 Head of Department, Mr Harfouche will return to the position of Head of Department, English at Governor Stirling Senior High School from the commencement of the 2010 school year.

3. THAT on an interim basis the respondent is to employ Mr Harfouche in a temporary supernumerary Level 4.4 Acting Deputy Principal position at Thornlie Senior High School, on an agreed graduated return to work programme, commencing on 8 May 2009 and he will remain in this position until the end of the 2009 school year.

4. THAT Mr Harfouche will remain in this supernumerary position even if the issue of Mr Harfouche's substantive position is determined prior to the end of the 2009 school year.

5. THAT liberty to apply be granted to the parties in relation to this order."

3 As the respondent requested an adjournment of the hearing set down on 19 to 23 October 2009, on 6 October 2009 the interim orders were amended by consent as follows:

"THAT orders 2 and 3 in the Order that issued on 6 May 2009 be deleted and replaced with the following:

2. THAT if Mr Harfouche's substantive position is found to be as a Level 3.4 Head of Department, Mr Harfouche will return to the position of Head of Department, English at Governor Stirling Senior High School.

3. THAT on an interim basis the respondent is to employ Mr Harfouche in a temporary supernumerary Level 4.4 Acting Deputy Principal position at Thornlie Senior High School, on an agreed graduated return to work programme, commencing on 8 May 2009 and he will remain in this position until the determination of the matter before the Commission."

4 The schedule of the Memorandum of matters referred for hearing and determination is as follows:

"1. The applicant claims that the respondent has unfairly and unlawfully demoted Mr Gabriel Harfouche. The applicant is seeking the following orders:

(a) THAT Mr Harfouche be and is hereby confirmed as a permanent officer, Level 4.4 of the administrators salary scale of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2008* without any break in service or loss of entitlements.

(b) THAT Mr Harfouche be deployed by the respondent into a suitable position consistent with his Level status.

2. The respondent denies the claim and opposes the orders being sought and seeks an order that the application be dismissed.

Applicant's contentions

3. The applicant's contentions are as follows:

(a) Following the successful completion of the State-wide merit-selection process for a Level 4 Deputy Principal position, Mr Harfouche attained the status of a permanent Level 4 Deputy Principal with the respondent effective from 29 January 2004 and the position to which he was appointed was vacant and on-going.

(b) This position had been on-going for several years prior to Mr Harfouche being appointed to it and, even if the position was subsequently abolished, this does not have any effect on Mr Harfouche's salary level, which remains that of a Level 4 Deputy Principal.

(c) As a permanent employee of the respondent, the latter is not empowered to purport to have appointed Mr Harfouche to a "limited tenure" or "fixed-term contract" position at Level 4 as at 29 January 2004 and subsequently to downgrade Mr Harfouche's salary back to Level 3 administrator some five years later.

(d) The respondent acted incorrectly by appointing Mr Harfouche into a "limited tenure" position. This action was inconsistent with and in breach of the provisions of Clause 30 of the *Government School Teachers' and School Administrators' Certified Agreement 2000* (the "relevant agreement"), as it then applied, in that the relevant agreement overtly made all the then "*... current Limited Site Tenure provisions obsolete ...*" which, necessarily, includes Mr Harfouche's position at Carnarvon Senior High School ("Carnarvon SHS") as a Level 4 Deputy Principal, thus confirming his on-going tenure at Carnarvon SHS as a Level 4 Deputy Principal.

(e) The respondent acted unfairly, harshly and unlawfully in transferring Mr Harfouche out of Carnarvon SHS:

(i) notwithstanding that the Principal of Carnarvon SHS was a bully and autocratic Mr Harfouche was coerced into moving to Mirrabooka Senior High School ("Mirrabooka SHS") in September 2006 without a proper explanation and without good cause;

(ii) Mr Harfouche was transferred without due process and without any finding of alleged improper conduct or performance against him, pursuant to the provisions of Part 5, Division 3 of the *Public Sector Management Act, 1994* ("the PSM Act");

(iii) Mr Harfouche was neither privy to nor was he ever given an opportunity to respond to any of the statements contained in the Carvosso Report;

(iv) Mr Harfouche was refused a copy of this report which he requested in writing on at least three different occasions between September 2006 and November 2006;

(v) after reading this report at a later date, Mr Harfouche disputes many of the statements made in the report and Mr Harfouche maintains that he was bullied and harassed by the then Principal;

(vi) Mr Harfouche has suffered both professionally and psychologically as a result of both the bullying and the respondent forcibly transferring him out of his position at Carnarvon SHS.

(f) Mr Harfouche remained a Level 4 Deputy Principal at Mirrabooka SHS until the end of the school year in 2006 and he was subsequently appointed at Yule Brook College at the same Level 4 at increment 4 from the beginning of the school year in 2007, without the need to undergo any further selection process.

(g) Mr Harfouche has been paid Level 4, increment 4, as per his entitlement in accordance with the administrators salary scale of the relevant agreement, since his appointment to Yule Brook College on the (sic) 29 January 2007.

(h) Section 236(4) of the *School Education Act 1999* allows the respondent to employ a teacher ***either*** "... *for an indefinite period as a permanent officer*, ***or*** *for a period not exceeding 5 years* ..." and as a result Mr Harfouche cannot be engaged as both a "permanent" officer on the one hand and for a finite period not exceeding five years (fixed-term contract).

(i) Mr Harfouche's permanent status as a Level 4 Deputy Principal is also confirmed pursuant to the provisions of Clause 66.1 of the relevant agreement, or alternatively, Clause 91.1 of the subsequent replacement agreement, the *Government School Teachers' and School Administrators' Certified Agreement 2004*, as Mr Harfouche served for 2 years and 9 months in a Difficult To Staff School, which Carnarvon SHS was categorised to be at that time, pursuant to the provisions of the abovementioned clauses.

(j) The applicant contends that the application of the provisions in Clause 66.1 have the effect of confirming Mr Harfouche's employment with the respondent at Level 4 of the administrators salary scale despite any considerations of the nature of the position that was occupied by Mr Harfouche at Carnarvon SHS.

(k) The respondent's authority to demote an employee only arises when, following the implementation of the provisions of Part 5, Division 3 of the PSM Act, a finding is made that the employee committed a breach of discipline pursuant to s 86(3)(b)(v) of that act. The respondent's demotion of Mr Harfouche is unlawful as no allegation of misconduct were ever made against Mr Harfouche, as there was never any suspicion of improper behaviour on his part.

Respondent's contentions

4. The respondent's contentions are as follows:

(a) Some of the issues in dispute with reference to application C 13 of 2009 were resolved following the Commission's order (2009 WAIRC 00256) that issued on 6 May 2009.

(b) Since 8 May 2009 Mr Harfouche has been placed in a supernumerary, fixed term position as acting Deputy Principal Level 4.4 at Thornlie Senior High School and is currently working in that role on an agreed return to work basis until the end of December 2009.

(c) This placement at Thornlie Senior High School is until the end of the 2009 school year and is pending the hearing and determination by the Commission of the issue of Mr Harfouche's substantive position.

(d) All matters that relate to the events surrounding the employer initiated transfer from Carnarvon SHS are irrelevant to the matters being referred for hearing and determination.

(e) On 31 January 2002 Mr Harfouche won, through merit selection, promotion to a Level 3 Head of Department position at Governor Stirling Senior High School.

(f) Mr Harfouche is a permanent Head of Department classified at Level 3.

(g) Mr Harfouche responded to an advertisement for a temporary vacancy and was appointed to act as Deputy Principal at Carnarvon SHS from 29 January 2004 to 17 December 2004 and he was paid higher duties to Level 4. This acting opportunity as a supernumerary Deputy Principal was because Carnarvon SHS was identified as being in need of systems support.

(h) This acting opportunity was extended, as is often the usual practice in schools that are identified as being in need of systems support, from 18 December 2004 to 16 December 2005.

(i) This acting opportunity was further extended on the same basis from 17 December 2005 to December 2006.

(j) In September 2006 Mr Harfouche was transferred from Carnarvon SHS in an employer initiated transfer to continue his acting opportunity at Mirrabooka SHS.

(k) After this employer initiated transfer to complete his acting opportunity the respondent granted a compassionate extension to the higher duties in recognition that Mr Harfouche may need additional time to continue developing skills and knowledge to enable him to be competitive in any future promotional merit selections for a Level 4 Deputy Principal position. This extension was from 24 January 2007 to 18 December 2007 and he was located at Yule Brook College.

(l) Following sick leave Mr Harfouche applied for workers' compensation which was approved from November 2007 and this claim was finalised in September 2008.

(m) Mr Harfouche has never been merit selected for or promoted to a permanent Level 4 position, he has had every opportunity to engage in merit selection to win a permanent Level 4 position and he continues to apply for promotion but to date he has been unsuccessful.

(n) Public Sector Standards, which must be complied with, ensure that recruitment, appointment and selection is open and competitive and it is not possible for the respondent to permanently place employees into positions without the standard recruitment processes being followed."

5 On 9 November 2009, prior to the hearing, a statement of agreed facts was lodged in the Commission and is as follows:

"1. Mr. Harfouche has been employed by the Director General of the Department of Education and Training since 1993, pursuant to section 235(1)(b) of the *School Education Act 1999* (the "SE Act"), as amended, as a member of the teaching staff, in a variety of positions.

2. The Respondent is an "Employing Authority", pursuant to section 5 of the *Public Sector Management Act, 1994*, as amended (the "PSM Act").

3. The relevant applicable instruments regulating Mr. Harfouche's employment with the Respondent are, *inter alia*, the *Teachers (Public Sector Primary and Secondary) Award, 1993*, as amended; as well as the *School Education Act Employees' (Teachers and Administrators) General Agreement, 2008*, or its predecessor award and agreements.

4. Part 5 of the *Public Sector Management Act 1994* applies to Mr. Harfouche's employment as a member of the teaching staff of the Respondent.

5. In 2002, Mr. Harfouche was appointed as a Head of Department - English - Level 3 at Governor Stirling Senior High School; a school located within the Metropolitan School District.

6. In November 2003, Mr. Harfouche applied for and successfully underwent a merit selection process advertised State-wide for a temporary full time, vacant, Level 4, Deputy Principal position at Carnarvon Senior High School (the "relevant position").

7. The advertisement to which Mr. Harfouche responded was the position advertised in the respondent's publication *School Matters* - No. 18, 21 November 2003 - as a position of "fixed-term" duration for the school years of both 2004 and 2005 - more specifically, from the (sic) 29 January 2004 to the (sic) 16 December 2005.

8. The advertisement also contained provisions for potentially extending the tenure in the relevant position - or "with possible extension" of tenure in the relevant position.

9. The additional Deputy Principal position at Carnarvon SHS was established some years prior to Mr. Harfouche applying for the position.

10. The Respondent appointed Mr. Harfouche to the relevant position effective from the (sic) 29 January 2004 and the applicant began to work in the relevant position from that date.

11. On the (sic) 25 August 2005, the Respondent issued a further contiguous "fixed-term" contract of employment for the relevant position to Mr. Harfouche for two further additional years - that is, for the period spanning from the (sic) 17 December 2005 to the (sic) 16 December 2007.

12. Mr. Harfouche occupied the relevant position for a total period of approximately two (2) years and nine (9) months - between the (sic) 24 January 2004 and the (sic) 15 October 2006.

13. On the (sic) 15 November 2007, Mr. Harfouche lodged a claim for a compensable injury pursuant to the *Workers' Compensation and Injury Management Act, 1981* (the "WCIM Act").

14. For the remainder of 2007 and 2008, Mr. Harfouche remained unfit for work, under continuous psychiatric supervision.

15. At a conciliation conference on the (sic) 27 October 2008, the Respondent accepted liability for the abovementioned injury only for the purposes of settlement and a *Memorandum of Agreement* - (Form 15C) pursuant to ss. 67 & 76 of the WCIM Act - was made between the parties in the terms thereby particularised.

16. On the (sic) 11 March 2009, on behalf of Mr. Harfouche, the Union wrote to the Respondent requesting that Mr. Harfouche be allowed to return to the position of Level 4, Deputy Principal, at Yule Brook College and, additionally, for the respondent to desist from *"... informally pressuring Mr. Harfouche into accepting an unfair, unreasonable and unjustified demotion..."."*

Applicant's evidence

6 Mr Harfouche has been employed variously as a teacher, a Head of Department ("HOD") and a Deputy Principal since he commenced employment with the respondent in January 1993. Mr Harfouche holds a Bachelor of Education qualification as well as a Masters degree in Educational Management.

7 Mr Harfouche gave evidence that whilst employed as a HOD at Governor Stirling Senior High School ("GSSHS") he responded to an advertisement in November 2003 for a temporary full-time Level 4 Deputy Principal position at Carnarvon Senior High School ("CSHS") in response to an advertisement in *School Matters* magazine No 18 dated 21 November 2003 (see Exhibit A2). On 17 December 2003 Mr Harfouche was sent a letter by the Principal at CSHS Mr John Dunning confirming that he was recommended for appointment to this position and a letter of appointment from the respondent dated 2 February 2004 was then sent to Mr Harfouche (see Exhibits A3 and A4).

8 Mr Harfouche was one of three Level 4 Deputy Principals at CSHS. In his role as a Level 4 Deputy Principal Mr Harfouche supported year 11 and 12 students to remain at school after year 10 by creating a programme that was meaningful to these students, he worked with students who were on work placement, he dealt with behaviour management issues, in conjunction with the Principal he created a marketing and business plan for CSHS, he supported new staff and he also undertook a range of other activities normally expected of a Deputy Principal. Mr Harfouche stated that he was very enthusiastic and passionate about his role and he stated that in undertaking his role he had to win over the support of the Principal and other administrative staff which he claimed was both challenging and difficult.

9 Subsequent to Mr Harfouche leaving CSHS in October 2006 he lodged a workers' compensation claim and at the hearing Mr Harfouche relied on a statement he made on 22 January 2008 with respect to this claim (see Exhibit A12). Mr Harfouche claimed that whilst at CSHS he suffered from extreme work related stress as a result of systematic abuse in the form of bullying, intimidation and harassment by Mr Dunning as well as a lack of support from the respondent with respect to this issue. By way of example Mr Harfouche stated that when he first met Mr Dunning he told him "You're lucky it was a telephone interview for the job because if we had seen the way you looked we would not have given you the job". Mr Harfouche stated that he felt as though Mr Dunning was trying to intimidate, humiliate and manipulate him from an early stage.

10 Mr Harfouche maintained that Mr Dunning picked on Mr Andrew Bleach who was a computing teacher. Mr Harfouche claimed that Mr Dunning arbitrarily changed his duties and asked other staff members to write letters complaining about him. Mr Harfouche stated that as a result of Mr Dunning's poor relationship with Mr Bleach he endeavoured to resolve their inter-personal problems.

11 Mr Harfouche maintained that he felt insecure about his ongoing employment at CSHS as a result of Mr Dunning placing him on a one year contract in January 2004 despite his position being advertised as a two year position with a possible extension and Mr Harfouche stated that towards the end of 2004 this resulted in him filling out a new appointment form for 2005 and taking it to Mr Dunning to sign. Mr Harfouche maintained the same thing happened the following year when parents wrote to the respondent to have his tenure at the school extended. Mr Harfouche said his concerns about his insecurity were exacerbated because his family had moved with him to Carnarvon. Mr Harfouche confirmed that in October 2004 his tenure at CSHS was extended until December 2005 and in August 2005 his tenure was extended for a further two years by the acting Principal at the time (see Exhibits A5 and A6).

12 Mr Harfouche maintained that Mr Dunning did not support him and gave as an example an occasion when Mr Dunning asked him to inform parents that their child had been suspended without knowing why he had been suspended. As a result of this lack of information Mr Harfouche was abused and threatened by them when he visited their home. Mr Harfouche stated that he left the parent's home shaken and distressed. Mr Harfouche stated that when he raised this issue with Mr Dunning he ignored him and Mr Harfouche stated that after this incident he rang the District Director Mr Rodney Baker about the incident however he did not offer him any advice or support apart from listening to him and he asked him to raise the matter again with Mr Dunning.

13 In April 2005 Mr Harfouche again spoke to Mr Baker about Mr Dunning and told him that he frequently entered his office when his door was closed without knocking and he would interrupt and take over Mr Harfouche's discussions with colleagues. When he approached Mr Dunning requesting that his privacy be acknowledged Mr Dunning responded by saying he would do what he considered appropriate.

14 Mr Harfouche stated that during a performance management meeting with Mr Bleach, which the District Director had asked him to undertake, Mr Dunning entered his office and after an altercation occurred between Mr Dunning and Mr Bleach, Mr Dunning asked Mr Harfouche to document Mr Bleach's unacceptable behaviour towards him and Mr Harfouche stated that he refused to do this as Mr Dunning was interrupting a progressive and positive meeting. Mr Harfouche maintained that Mr Dunning was continually trying to undermine him and the District Director was aware of this issue and did nothing.

15 Mr Harfouche maintained that his time working at CSHS was stressful because of Mr Dunning's unethical and unfair decision making as well as his lack of support for him and this exacerbated his health problems. Mr Harfouche stated that furniture disappeared from the camp school and had not been sent to where Mr Dunning maintained it was sent and when $30,000 was allocated for the purchase of computing items and professional development, at the request of Mr Dunning he created a program to utilise the funds however shortly after the program commenced Mr Dunning cancelled the program and Mr Harfouche stated that this money was not spent nor properly acquitted by Mr Dunning.

16 Mr Harfouche stated that when he applied for other Level 4 Deputy Principal positions in 2005 he felt undermined when he received feedback that Mr Dunning was not the right person to use as a referee because of what he might say about him. Mr Harfouche stated that his situation was difficult because the respondent required an employee's current line manager to be used as a referee when applying for positions.

17 Mr Harfouche stated that whilst he was at CSHS he was the recipient of a number of Certificates of Appreciation (see Exhibit A7).

18 Mr Harfouche stated that after numerous complaints were made to the respondent about Mr Dunning, the District Director asked the school council in November 2005 to conduct a survey about the school's leadership. As part of this process Mr Harfouche was asked to survey staff however because of the difficulties he had with Mr Dunning the school psychologist conducted this survey. When the District Director asked Mr Harfouche to present this report to the school council meeting in November 2005 Mr Dunning became agitated and he gave evidence that when the report was to be tabled Mr Dunning leaned over towards him and removed copies of the report from him in front of school council members. Mr Harfouche stated that when parents and council members threatened to walk out of the meeting because of Mr Dunning's behaviour towards him, Mr Dunning changed his attitude and handed out the report and stipulated that each copy had to be returned to him after the meeting. Mr Harfouche stated that he felt intimidated and distressed by Mr Dunning's behaviour during this meeting and he gave evidence that after this meeting Mr Dunning accused Mr Harfouche of not being a team player and of undermining him. Mr Harfouche stated that when the results of the survey were reported to staff Mr Dunning would not take questions from Mr Harfouche and when Mr Dunning manipulated the statistics in the survey at the meeting the union representative at the school asked members on the staff to leave the meeting. Mr Harfouche did so along with a number of other staff members and Mr Harfouche telephoned Mr Baker later that day and explained what had occurred.

19 Mr Harfouche stated that in October 2005 he made formal complaints against Mr Dunning to Mr Baker and on 15 November 2005 he received a letter from him in response to these complaints stating that three complaints were to be dealt with by a grievance panel and the others were to be referred to the respondent's Complaints Management Unit. Mr Harfouche maintained that the grievances he lodged against Mr Dunning which were handled by the grievance panel were upheld (see Exhibits A8 and A9).

20 Mr Harfouche was aware that WorkSafe improvement notices had been issued at CSHS in March 2006 in relation to bullying by Mr Dunning.

21 Mr Harfouche stated that an investigation into CSHS was commissioned by the respondent in 2006 and this investigation was conducted by Mr David Carvosso and a report was generated by him ("the Carvosso Report"). As a result of Mr Carvosso's report Mr Harfouche stated that he was subject to a forced transfer from CSHS in September 2006 and Mr Harfouche maintained that this occurred because Mr Carvosso recommended that both Mr Dunning and Mr Harfouche be transferred and Mr Baker told him that this was done as they could not allow there to be a perception that there was a winner and a loser in the matter. Mr Harfouche stated that he was deeply distressed by his forced transfer which resulted in him having to work in three different schools in the subsequent 12 months and he maintained that as a result of his forced transfer this adversely affected and jeopardised his career prospects.

22 Mr Harfouche claimed that it was unfair to be transferred out of CSHS because he had done nothing wrong and he had wanted to remain at CSHS as he was doing outstanding work. Mr Harfouche stated that after being advised that he was to be transferred, community members gave him referee reports which were passed on to Mr Baker and the Executive Director for Teaching and Learning North, Mr Keith Newton (see Exhibit A10).

23 Mr Harfouche stated that at some point in Term 4, 2006 he was given the opportunity to read the Carvosso Report in the presence of Mr Newton and he was later only given an edited copy of the Carvosso Report after he filed a Freedom of Information request and Mr Harfouche claimed that he was never given an opportunity to respond to the findings made by Mr Carvosso. Mr Harfouche maintained that some of the descriptions of him contained in the Carvosso Report were unreasonable and unfair and he denied negative claims made by colleagues about him and he claimed that these comments were made by staff who were favoured by Mr Dunning. Mr Harfouche claimed that he had worked hard to win Mr Dunning's support, he introduced new ideas and initiatives to CSHS and he worked positively with the Gascoyne Development Commission to improve the education outcomes of students in Carnarvon. He also initiated the Gascoyne Education Precinct Plan but this was not followed through because Mr Dunning refused to release Mr Harfouche to implement this plan (see Exhibit A13).

24 Mr Harfouche did not accept Mr Carvosso's conclusion that CSHS was dysfunctional and he stated that it was his view that the issues at CSHS were not insurmountable.

25 Mr Harfouche gave evidence that despite the claim in the Carvosso Report that his transfer was not punitive, he had completed approximately 34 applications for Level 4 positions but had been unsuccessful even though some of these applications were for very difficult to staff schools. It was Mr Harfouche's view that the Carvosso Report has had a detrimental and punitive impact on his standing with the respondent.

26 Mr Harfouche stated that when he was transferred to Mirrabooka Senior High School in Term 4, 2006 he was not appointed to this position even though it was a vacant position and he stated that he was not required to go through a selection process for this position. Mr Harfouche confirmed that he is currently employed as a Level 4 Deputy Principal at Thornlie Senior High School and he stated that he is progressing well at this school and he gets on very well with the Principal, Mr Paul Billing.

27 Mr Harfouche stated that during his employment with the respondent he has not been subject to any disciplinary proceedings.

28 Mr Harfouche maintains that his substantive position is not a Level 3 HOD at GSSHS because he is a substantive Level 4 Deputy Principal. Mr Harfouche stated that he believed that he should be a permanent Level 4 employee because he spent more than two years at CSHS which was a difficult to staff school.

29 Under cross-examination Mr Harfouche confirmed that he received a letter entitled Contract of Employment, dated 15 November 2001, when he was appointed as HOD at GSSHS and he confirmed that he was merit selected for this position. Mr Harfouche could not recall if the advertisement for this position referred to it being a permanent position (see Exhibit R1).

30 Mr Harfouche agreed that when he applied for the Level 4 position at CSHS the advertisement referred to this being a temporary position however Mr Harfouche maintained that he should be regarded as a permanent Level 4 employee in this position as he had worked at CSHS for over two years in a difficult to staff school and the Level 4 Deputy Principal position had been ongoing for some years.

31 Mr Harfouche stated that the union representative who attended the meeting with him on 7 September 2006 when he was told he was being transferred out of CSHS did not object to him being transferred from CSHS and he could not recall if he was told at the meeting that the transfer was not punitive. Mr Harfouche stated that he was unaware that he could have appealed his transfer at the time and he stated that given the way his transfer was presented he did not think this was possible and Mr Harfouche maintained that he was given no advice at the time that he could appeal this transfer.

32 Mr Harfouche reiterated that he believed that his forced transfer from CSHS as well as the findings of the Carvosso Report have had a negative impact on his career prospects and even though different panels have rejected his applications for Level 4 positions he believes that given the way in which the respondent's employees interact, discussions about Mr Harfouche between panel members would take place informally. Mr Harfouche also stated that as he had been moved three or four times in a short period of time this would be looked at poorly by the panels however he stated that he has not appealed the decisions to reject his applications for Level 4 positions. Mr Harfouche stated that whilst he had not been successful in obtaining a permanent merit selected Level 4 position he maintained that the vacancy at CSHS which he filled was advertised State-wide and was based on merit selection and he then conceded that it was not a permanent position.

33 Under re-examination Mr Harfouche understood that the third Deputy Principal position at CSHS, for which he claims he was merit selected, had been in place since 1999 and he recalled that in 2007 he appealed two Level 4 applications for which he was unsuccessful.

34 Mr Billing is the Principal at Thornlie Senior High School and he has held this position since the beginning of 2009. Mr Billing worked with Mr Harfouche between January and October 2007 and he has worked with him for three terms in 2009. Mr Billing gave evidence that he has an excellent working relationship with Mr Harfouche and he gets on well with him both personally and professionally and Mr Billing stated that the work that Mr Harfouche has undertaken both at Yule Brook College and at Thornlie Senior High School is "top notch". Mr Billing stated that Mr Harfouche had undertaken special responsibilities, he came up to speed quickly, he was enthusiastic and he gets on well with other staff members. Mr Billing stated that Mr Harfouche concentrated on student pastoral care and disciplinary issues and Mr Billing stated that Mr Harfouche has enabled a range of innovative things to be put in place in a short timeframe and he has been very effective as a Level 4 Deputy Principal.

35 Mr Bleach currently teaches computing at Mandurah Senior College and he has undertaken this role since November 2006. Mr Bleach previously taught at CSHS between January 2002 and November 2006. Mr Bleach gave evidence that when he first commenced employment at CSHS things went well but in 2003 his relationship with Mr Dunning deteriorated and he claimed that from that time onwards Mr Dunning bullied him. Mr Bleach believed that Mr Dunning used his position and authority to bully him because he disagreed with him about the procurement of computer items. Mr Bleach claimed that Mr Dunning yelled at him, he subjected him to verbal abuse, he denigrated his abilities, he removed critical resources and he impeded opportunities to better himself. As a result of the problems he had with Mr Dunning he complained about him in mid 2005 however once this grievance was heard the respondent found that there was no case to answer. Mr Bleach maintained that Mr Dunning's abuse of him then increased.

36 Mr Bleach gave evidence that subsequent to the Carvosso Report being completed he was offered an alternative position in November 2006 and this resulted in him being transferred to Mandurah Senior College.

37 Mr Bleach stated that he had time off work because of stress he had suffered as a result of Mr Dunning bullying him. Mr Bleach stated that after he contacted WorkSafe in Term 1 or 2, 2006 five improvement notices were issued against CSHS.

38 Mr Bleach confirmed that Mr Harfouche mediated between himself and Mr Dunning in late 2005. Mr Bleach stated that he was not given a copy of the Carvosso Report and only obtained a heavily edited one after completing a Freedom of Information application. Mr Bleach denied that he was part of a dissident group which was one of the findings of the Carvosso Report. Mr Bleach maintained that he only wanted a safe and healthy work environment and in doing so he was operating alone and Mr Bleach stated that he was trying to survive and was not acting in concert with anyone. Mr Bleach maintained that Mr Harfouche should have remained at CSHS because he was the only effective administrator who acted ethically and in the interests of both staff and students to resolve issues.

39 Ms Janine Hall is currently employed by the respondent as an Education Assistant at the Bentley Transition Unit and she has been in this role for four years. Ms Hall was employed as an Education Assistant at Carnarvon Primary School up to the end of 2005 and her children attended CSHS during this period. Ms Hall was a member of the school's Parents and Citizens Association and she was on the CSHS school council for five to six years when Mr Dunning was the Principal. Ms Hall also worked in the office at CSHS one day a week for part of this time.

40 Ms Hall stated that in her role on the school council she was aware for a number of years that many parents were unhappy with the way in which the school was being run by Mr Dunning and she maintained that parents and other groups in the local community wanted him removed from his position. Ms Hall described Mr Dunning as a "do it my way or no way" person, she stated that at times he was sarcastic at school council meetings and condescending and she maintained that parents did not have confidence in him and the way he did things.

41 Ms Hall made a statement on 1 May 2008 in support of Mr Harfouche's Workers' Compensation claim (Exhibit A15). Ms Hall claimed that after Mr Harfouche arrived at CSHS parents had a positive attitude to him given his initiatives and how he dealt with the behaviour management of students.

42 Ms Leanne Robertson is an Art teacher and worked at CSHS between 2001 and the end of Term 1, 2005. Whilst at CSHS Ms Robertson taught Career and Vocational Education, Work Studies, English and Art and Ms Robertson worked with Mr Harfouche during part of the time she worked at CSHS. Ms Robertson later taught at Donnybrook District High School between 2006 and 2009. During a telephone interview with Mr Carvosso she gave feedback about the situation at CSHS. Ms Robertson stated that even though CSHS was her first teaching post she found the atmosphere in general at the school was unpleasant and she believed that the school was not being smoothly run and Ms Robertson stated that as a result she obtained a compassionate transfer out of the school in 2005. Ms Robertson described Mr Harfouche as personable, supportive of both staff and students and a good leader who listened to her concerns. Ms Robertson stated that she left the school because she did not feel safe or supported.

43 Ms Robertson said CSHS had a significant staff turnover each year.

44 Ms Robertson gave evidence that from time to time Mr Dunning exhibited inappropriate behaviour toward staff in front of other staff members and Ms Robertson stated that Mr Dunning often yelled at staff in front of other staff members and did not listen. Ms Robertson stated that she attended a meeting with Mr Bleach as an observer and she stated that Mr Dunning belittled Mr Bleach and was rude and disrespectful towards him. Ms Robertson stated that Mr Colin Sheffield, one of the other Deputy Principals at CSHS, also attended the meeting and was not supportive of Mr Bleach. Ms Robertson stated that communication between the school's administration and teachers was poor and Ms Robertson described decision making at the school as being a dictatorship and if a teacher disagreed with Mr Dunning's decisions they were seen as a troublemaker. Ms Robertson said that after leaving CSHS she became aware of how varying views and ideas could be seen in a positive way at a school and not negatively as had occurred at CSHS.

45 Ms Robertson described the performance management procedure at the school as ineffective and she believed her opinions about the leadership at CSHS were objective as she also had positive views about her experience at the school.

46 Ms Anne Crawford has been an organiser with the union for nine years and during 2005 and 2006 she was the district organiser for the Mid-West region which included CSHS. Ms Crawford stated that she was involved in the events leading up to the Carvosso Report being generated in 2006 and she stated that as a result of the findings of the Carvosso Report Mr Harfouche, Mr Bleach, Mr Dunning and Mr Sheffield were told that they were to be subject to employer initiated transfers. Subsequent to the Carvosso Report being completed Ms Crawford attended a meeting in September 2006 with Mr Harfouche, Mr Baker and Mr Newton. Ms Crawford confirmed that at this meeting when Mr Harfouche was told that he would be subject to a forced transfer he stated that he was not happy with his transfer on the basis that his family had moved to Carnarvon, he believed he was doing a good job at the school and he felt he was being targeted for raising concerns about Mr Dunning. Mr Harfouche was also keen to retain his Deputy Principal status and felt he would be at a disadvantage if he was transferred out of CSHS.

47 Ms Crawford said that when Mr Dunning was the Principal of CSHS a number of informal complaints were made against him by staff and instead of following up their concerns staff chose to transfer out of the school. Ms Crawford stated that many teachers found it difficult to raise concerns with Mr Dunning or Mr Baker. Ms Crawford gave evidence that she encouraged teachers who had grievances against Mr Dunning to make formal complaints and it was only when this occurred that changes were made at CSHS. Ms Crawford stated that the union also encouraged employees to pursue WorkSafe improvement notices if they were disillusioned with the lack of response by the respondent to their concerns.

48 Under cross-examination Ms Crawford agreed that Mr Sheffield requested a transfer out of the school rather than it being employer initiated and she understood he chose this course of action because Mr Dunning was being transferred out of the school.

49 Ms Crawford stated that the union was not involved in the respondent's decision to transfer employees after the Carvosso Report was completed but she stated that the union did not object to these transfers occurring. Ms Crawford said that she had sympathy for Mr Bleach and Mr Harfouche given they had made formal complaints against Mr Dunning but she believed that in the circumstances it was appropriate that they have a fresh start even though Mr Dunning was at fault. Ms Crawford confirmed that she did not advise Mr Harfouche to appeal the respondent's decision to transfer him out of CSHS.

Respondent's evidence

50 Mr Neil Wilson is the respondent's Manager of Teacher Staffing and he worked in the respondent's staffing section between 1994 and 1998 and also from 2002 onwards. In this role Mr Wilson is responsible for the appointment and transfer of the respondent's teaching staff but he is not involved in the movement of employees in promotional positions.

51 Mr Wilson is aware of the circumstances surrounding Mr Harfouche's employment with the respondent. Mr Wilson confirmed that Mr Harfouche became a permanent employee at the beginning of 1995 after he had completed two years of probationary service with the respondent, in 2000 Mr Harfouche was promoted to a Level 3 position at Hedland Senior High School and in 2002 he obtained a merit select promotion to a Level 3 position as HOD at GSSHS and this promotion was confirmed by a letter dated 15 November 2001 (Exhibit R1).

52 Mr Wilson clarified the difference between a permanent employee and an employee in a substantive position. Mr Wilson stated that if an employee has permanent status the respondent has an ongoing obligation to employ that person in their substantive role as either a teacher or school administrator.

53 Mr Wilson maintained that Mr Harfouche was appointed to a temporary Deputy Principal position at CSHS as opposed to being appointed to one of the two substantive Level 4 Deputy Principal positions at CSHS and Mr Wilson understood that Mr Harfouche's employment at CSHS was extended after two years. Mr Wilson stated that when Mr Harfouche was transferred out of CSHS under an employer initiated transfer this was done to honour the remaining period of the contract the respondent had given to Mr Harfouche when he was at CSHS. Mr Wilson gave evidence that employer initiated transfers are legislated for under s 236(2) of the *School Education Act 1999* ("the SE Act") and that District Directors, as they were known at the time, have delegated authority from the Director General to effect these transfers. Mr Wilson described Mr Harfouche's appointment at CSHS as a fixed-term limited tenure position and he stated that at the expiry of his contracted term at CSHS he would revert to his substantive position at GSSHS. Mr Wilson was aware that Mr Harfouche had unsuccessfully applied for a number of substantive Level 4 positions.

54 Mr Wilson stated that Mr Harfouche worked at Mirrabooka Senior High School after leaving CSHS so that the respondent could honour the remainder of his contract in a Level 4 position. When Mr Harfouche was at Yule Brook College he was acting in a supernumerary Level 4 position and Mr Wilson stated that he understood the respondent continued this acting Deputy Principal position at Yule Brook College in 2007 to allow Mr Harfouche the opportunity to gain further experience at Level 4 to assist him to apply for substantive Level 4 positions. Mr Wilson stated that Mr Harfouche had never been promoted nor merit selected to a permanent Level 4 position with the respondent.

55 Under cross-examination Mr Wilson stated that a position advertised as "temporary duration" or "fixed-term" is an acting position because it is offered in the absence of the incumbent or because the position does not have ongoing funding attached to it. Mr Wilson stated that the position at CSHS which Mr Harfouche applied for was advertised on the basis that it could be extended subject to funding being available and if this occurred it was possible for Mr Harfouche to remain in the position without any further selection process taking place. Mr Wilson stated that he understood that the temporary Level 4 position at CSHS commenced in 1999 and was no longer in place. Mr Wilson stated that until Mr Harfouche wins another substantive position he remains at his substantive Level 3 position at GSSHS. Even though an email generated by the respondent's payroll section refers to Mr Harfouche being transferred to Yule Brook College Mr Wilson said that this was a mistake and employees in the respondent's payroll section have no authority to alter the status of an employee (see Exhibit A17). Mr Wilson stated that Mr Harfouche did not work at Yule Brook College in a substantive position.

56 Mr Wilson gave evidence that any alteration to a school administrator's substantive position in 2004 would have been dealt with by the respondent's promotions branch and any changes would have been confirmed in writing. On the other hand fixed-term positions were dealt with by the staffing branch. Mr Wilson stated that a work flow is electronic advice from either the promotions or staffing branch to advise the respondent's payroll section that a staffing movement has occurred and an employee's pay may need to be reviewed. Mr Wilson disputed that the Movement Advice dated 23 August 2005 confirms that Mr Harfouche was a permanent Level 4 employee (Exhibit A18). Mr Wilson stated that Mr Sheffield incorrectly filled this form out and the Level 4 position held by Mr Harfouche was an end dated temporary appointment as shown on this form which was contrary to Mr Harfouche being a permanent employee. Mr Wilson stated that if Mr Harfouche was permanently attached to a Level 4 Deputy Principal position this would have been confirmed in writing by the respondent and a contract reflecting this provided to Mr Harfouche.

57 Mr Wilson stated that under the country teaching programme permanent status was offered to employees as an incentive and Mr Wilson stated that under this programme permanency refers to an employee's employment status with the respondent not the position of an employee. Mr Wilson stated that permanent status under the country teaching programme could not apply to Mr Harfouche in his Level 4 position at CSHS because he became a permanent employee of the respondent in 1995. He re-iterated that Mr Harfouche's substantive position was at GSSHS as a Level 3 and he was in an acting position undertaking higher duties when he was at CSHS. Mr Wilson stated that Mr Harfouche was not permanent or substantive in the Level 4 position at CSHS as this was not a substantive nor ongoing position. Mr Wilson agreed that when Mr Harfouche was transferred out of CSHS he was placed as a Level 4 employee with the respondent in 2007 because of the respondent's contractual obligations to Mr Harfouche.

58 Mr Wilson stated that a substantive position is an ongoing permanent position which an employee "owns" and has gained through a merit selection process. It is not a fixed-term position. In Mr Harfouche's case when he was appointed to CSHS it was not to a substantive position nor was this position ongoing. Mr Wilson stated that there were only two Level 4 substantive positions at CSHS and one extra Level 4 temporary fixed-term position had been established to deal with short term issues. Mr Wilson stated that if the Level 4 position occupied by Mr Harfouche was a substantive position it would have been advertised differently.

59 Mr Newton was the Executive Director Teaching and Learning North for the respondent in 2005 and 2006 and during this period he was Mr Baker's line manager. Mr Newton gave evidence that Mr Baker discussed difficulties at CSHS with him and the apparent dysfunctional way in which the school was being run. Mr Newton stated that after a number of grievances were

lodged, in May 2006 he visited CSHS with Mr Baker to familiarise himself with the difficulties and concerns expressed from members of the local community. After this visit the respondent decided to undertake an independent review of the school to establish the nature of the working relationships at the school and the Carvosso Report arose out of this review. Mr Newton stated that the respondent acted on all 13 recommendations contained in this report and a risk management plan for CSHS was put in place.

60 Mr Newton recalled having a meeting with Mr Harfouche in September 2006 to advise him of his employer initiated transfer and Mr Newton said that at this meeting Mr Harfouche was unhappy at being transferred. Mr Newton maintained that issues at the school could not be resolved without people being transferred.

61 Mr Newton confirmed that Mr Harfouche was transferred under an employer initiated transfer in line with the respondent's policy document headed Placement, Transfer and Deployment of School Administrators. The relevant sections are as follows:

> "**3.4 EMPLOYER-INITIATED TRANSFER (EIT)**
>
> An EIT is a transfer initiated by the Department, based on an organisational need.
>
> Decisions to transfer staff will comply with these procedures, the Transfer and Redeployment Standards (as applicable), the General Principles specified in Sections 8 and 9 of the *Public Sector Management Act 1994* (PSM Act) and the principles of procedural fairness.
>
> …
>
> **5.3 EMPLOYER-INITIATED TRANSFER (EIT)**
>
> a) Where the Directors General or a relevant delegated officer considers it is in the best interest of the Department to transfer or deploy a school administrator, that person will be informed of the intention and asked for their response. This response will be taken into account in making the final decision, as will the impact of any such decision on the Department's ability to fill vacancies through merit selection.
>
> b) The relevant District Director will be asked to provide details on the organisational need for the transfer and confirm there are no adverse performance management issues.
>
> c) The decision maker must take the following factors into account:
>
> - organisational need;
> - school need; and
> - employee need.
>
> d) The District Director must notify the school administrator in writing of the transfer or deployment decision. Notification of deployment decisions must state: a start date, an anticipated end date and action at the completion of the deployment (if applicable).
>
> e) The District Director must forward a copy of the decision to the Promotions Unit for recording purposes.
>
> f) EIT decisions are subject to the Public Sector Standards in Human Resource Management. A school administrator who claims that a Public Sector Standard has been breached must follow the procedures set out in the policy, Managing a Breach of Public Sector Standard Claim."

(Exhibit R2)

62 Under cross-examination Mr Newton believed that the recommendations and findings of the Carvosso Report were made available to Mr Harfouche around the time of his meeting with him in September 2006 and he thought that Mr Harfouche had received a copy of the recommendations and findings of this report. Mr Newton stated that Mr Harfouche was transferred in accordance with the respondent's policy and it was not a punitive transfer. Mr Newton gave evidence that he was aware that Mr Harfouche was contracted by the respondent in a Level 4 position until the end of 2007 and Mr Newton stated that he was aware that Mr Harfouche was appointed on a temporary basis at CSHS when making the decision to transfer Mr Harfouche. Mr Newton believed that Mr Harfouche was advised that he could reapply to return to CSHS at some point.

63 Mr Baker is currently the Principal at Kalumburu Remote Community School and in 2005 and 2006 he was the respondent's Director of Education for the Mid-West. Mr Baker stated that the administrative positions at CSHS consisted of a Principal and two substantive Deputy Principals and a third Level 4 Deputy Principal position was created which was supplementary to the substantive allocations. Mr Baker stated that the filling of this position had to be justified on an ongoing basis.

64 Mr Baker confirmed that grievances were raised against Mr Dunning at the end of 2005 and he and Ms Crawford dealt with these complaints. Mr Baker stated that as things were still not going smoothly at CSHS in early 2006 he advised Mr Dunning that if this continued he would need to organise a review of the school. Mr Baker stated that concerns were also being raised about the running of CSHS by external entities including the Gascoyne Development Commission and the Carnarvon Shire and Mr Baker said that the school's reputation in the community was poor and these organisations wanted something done about it.

65 Mr Baker stated that in May 2006 he visited the school with Mr Newton over two days and interviewed a number of persons and identified serious issues at the school. As a result the Carvosso review was commissioned and a risk management plan was put in place to deal with his recommendations. Mr Baker stated that on 7 and 8 September 2006 Mr Baker attended the school with Mr Newton to implement the recommendations and liaise with staff. Mr Baker stated that he became a referee for Mr Harfouche at this time given the problems that Mr Harfouche had with Mr Dunning (Exhibit R6).

66 Under cross-examination Mr Baker said that it was appropriate that Mr Harfouche be transferred from CSHS because it was a positive step to resolve the situation at CSHS at the time. Mr Baker said that it was not appropriate to only remove Mr Dunning because he was not the only person who was complained about and both Mr Harfouche and Mr Bleach were also identified as being part of the problem at CSHS. Mr Baker stated that he accepted that Mr Harfouche had issues communicating with Mr Dunning and Mr Harfouche approached him about this.

67 Mr Baker stated that it was his understanding that Mr Harfouche was not eligible to be placed permanently in his Level 4 position at CSHS after two years as the position he was in was temporary to the school and the position had now been abolished.

Submissions

Applicant

68 The applicant no longer relies on its contention at 3(d) in the schedule of the Memorandum of matters referred for hearing (see paragraph 4).

69 The applicant maintains that when Mr Harfouche was demoted by the respondent from his permanent Level 4 position at CSHS to a Level 3 position this was unfair and unlawful. The applicant maintains that Mr Harfouche was merit selected for a Level 4 Deputy Principal position at CSHS effective from 29 January 2004 and this position was vacant and ongoing. Even if this position was subsequently abolished the applicant argues that Mr Harfouche remains as a permanent Level 4 employee.

70 The applicant argues that even if Mr Harfouche was paid higher duties in his Level 4 position this is an irrelevant consideration as Mr Harfouche was the recommended candidate for the Level 4 position. The applicant argues that the process used that eventuated in Mr Harfouche's appointment as a Level 4 employee was no different to employees applying for other substantive Level 4 positions and his Level 4 position is therefore his substantive position. Additionally, Mr Harfouche remained in his Level 4 position on an ongoing basis under a contract which lasted until the end of 2007 and if Mr Harfouche had not been subject to a forced transfer from CSHS in September 2006 the applicant argues that Mr Harfouche would have remained as a permanent Level 4 employee in the Level 4 Deputy Principal position he occupied at CSHS.

71 The applicant claims that as the respondent transferred Mr Harfouche out of CSHS in an unfair and oppressive manner then this warrants the intervention of the Commission (see *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* [1985] 65 WAIG 385). The applicant submits that when Mr Harfouche was subject to a forced transfer out of CSHS his transfer was procedurally and substantively unfair. When the transfer took place Mr Harfouche had no warning that it was to happen, no reasons were given to him as to why he was being transferred, he had no access to the findings made by Mr Carvosso and he had no opportunity at the time to dispute his transfer. As Mr Harfouche was successful in his role at CSHS he should not have been transferred out of CSHS and the applicant argues that this contention is supported by the direct evidence given by the witnesses during the hearing. The applicant also submits that the direct evidence given with respect to this issue at the hearing should be given greater weight than some of the negative statements made to Mr Carvosso about Mr Harfouche.

72 The applicant submits in the alternative that Mr Harfouche became a permanent Level 4 employee when he completed two years service at CSHS at the end of 2005, which is a difficult to staff school, because the terms of Clause 66.1 of the *Government School Teachers' and School Administrators' Certified Agreement 2000* ("the 2000 Agreement") and Clause 91.1 of the *Government School Teachers' and School Administrators' Certified Agreement 2004* ("the 2004 Agreement") confirm that Mr Harfouche was entitled to became a permanent employee at CSHS after completing two years of service (see *Norwest Beef Industries Limited and Anor and West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* [1984] 64 WAIG 2124). The applicant also relies on Mr Harfouche having been paid as a Level 4 employee since January 2004 and his Level 4 status is also in accordance with information contained in internal documentation relevant to Mr Harfouche's employment in support of its claim that Mr Harfouche is a substantive Level 4 employee (see Exhibit A17).

73 The applicant argues that Mr Harfouche could not be regarded as acting in his Level 4 position given the terms of s 236(4) of the SE Act. Section 236(4) of the SE Act only allows the respondent to employ a teacher either for an indefinite period as a permanent officer or for a period not exceeding five years and Mr Harfouche therefore cannot be engaged as both a permanent officer on the one hand and engaged for a finite period not exceeding five years under a fixed-term contract at the same time. The applicant also argues that the payment of a higher duties allowance to an employee contemplates short periods and not periods involving a number of years.

74 The applicant argues that if Mr Harfouche is to be regarded as a Level 3 employee he has effectively been demoted from his Level 4 position in breach of his contract of employment with the respondent (see *DVG Morley City Hyundai v Mauro Fabbri* [2002] 82 WAIG 3195). The applicant also submits that the authority relied upon by the respondent in support of its claim that Mr Harfouche is not a Level 4 employee is not on point as this case related to an employee moving from one employer to another employer.

Respondent

75 The respondent argues that Mr Harfouche's substantive position with the respondent is as a Level 3 employee and even though he has acted as a Level 4 employee with the respondent this does not mean that Mr Harfouche has been promoted to a permanent Level 4 Deputy Principal position with the respondent.

76 The respondent maintains that the position Mr Harfouche applied for at CSHS was a temporary position, as confirmed by the evidence of Mr Wilson. The respondent also submits that Mr Harfouche has never been merit selected or promoted to a substantive Level 4 Deputy Principal position and his substantive position remains that of a Level 3 HOD at GSSHS. A contract was provided to Mr Harfouche confirming his Level 3 status and a contract in similar terms confirming

Mr Harfouche's status as a Level 4 employee was not provided to Mr Harfouche because he remains in his substantive Level 3 position. The Movement Advice completed in relation to Mr Harfouche subsequent to him transferring out of GSSHS confirms that he was acting as a Level 4 Deputy Principal and being paid a higher duties allowance (see Exhibit R7) and the advertisement for the Level 4 Deputy Principal position at CSHS that Mr Harfouche was successful in obtaining confirms that he applied for a temporary, as opposed to a permanent position, and his position was supernumerary to the two existing Level 4 permanent Deputy Principal positions. This additional Deputy Principal position was allocated at the request of CSHS and had to be justified in order to continue to be filled. As this position ceased at the end of 2007 this demonstrates that it was not a permanent ongoing position. The respondent maintains that statements made by Mr Harfouche in his witness statement which was prepared for his workers' compensation claim shows that he was aware that the Level 4 position at CSHS was advertised for two years with possible extensions which is in direct contravention to his current claim that the appointment was a permanent one. Additionally, when Mr Harfouche's contract at CSHS was rolled over in 2005 he was not merit selected for this position as this was permitted by the wording of the initial advertisement.

77 The respondent argues that the applicant cannot rely on permanency being granted to Mr Harfouche in a Level 4 position as a result of the terms of Clause 66.1 of the 2000 Agreement and Clause 91.1 of the 2004 Agreement. The respondent submits that these clauses refer to employees who are not already permanent employees and who are seeking to become permanent employees of the respondent. In Mr Harfouche's case he had already gained permanent status with the respondent prior to transferring to CSHS and he cannot be made permanent twice.

78 The respondent argues that Mr Harfouche's employer initiated transfer in September 2006 and the circumstances surrounding this event are irrelevant to this matter and even if the transfer had not occurred Mr Harfouche would still not have attained permanent Level 4 Deputy Principal status at CSHS. The fixed-term contract that Mr Harfouche had at the time with the respondent that he occupy a Level 4 position was honoured and that was why he was provided with a Level 4 Deputy Principal position until the end of 2007. Mr Harfouche could have appealed the respondent's decision to transfer him out of CSHS but he did not do so and in any event as the transfer was governed by a Public Sector Standard the respondent contends that the Commission does not have jurisdiction to inquire into or deal with this transfer.

79 The respondent maintains that it is common practice for its employees to act in a position or perform higher duties where an employee holds an existing substantive position, but this is for a finite period and it is never the intention or expectation that the employee acting in this role will attain permanent status at that level by virtue of this acting appointment. The respondent relies on Clause 17.1 of the 2000 Agreement which enables it to appoint employees on a fixed-term basis.

80 Even though the Movement Advice dated 23 August 2005 refers to Mr Harfouche being promoted, this document relating to Mr Harfouche's ongoing appointment at CSHS was incorrectly filled out by Mr Sheffield the Acting Principal at CSHS and this document is not binding on the respondent as it does not have the status of a contract and is an administrative document (see Exhibit A18). Internal emails which make incorrect references to Mr Harfouche being transferred are also not binding on the respondent and these errors do not mean that Mr Harfouche is a permanent employee at Level 4.

81 The respondent maintains that the difference between access to permanent status and occupying a substantive position is clear. Permanent status is where there is an ongoing employment relationship between the parties and suggests an ongoing obligation on the respondent to provide work to that employee regardless of their substantive position with the respondent as opposed to a fixed-term relationship. Appointment to a substantive position arises where an employee applies for a vacant ongoing position that has been advertised and the employee is merit selected and appointed to that role.

82 The respondent argues that Mr Harfouche was never appointed to a permanent, ongoing Level 4 position at CSHS as this position was never advertised as such and this position no longer exists. The respondent also maintains that if the Commission grants the order the applicant is seeking it would require the respondent to act contrary to its obligations under the *Public Sector Management Act 1994* (see *Civil Service Association of Western Australia Incorporated v The Director General, Department of Justice and Hon Attorney General* [2003] 83 WAIG 1481).

Findings and conclusions

Credibility

83 I listened carefully to the evidence and closely observed each witness. In my view all of the witnesses gave their evidence honestly and to the best of their recollection and I therefore accept their evidence. In particular I find that Mr Harfouche gave his evidence in a considered and forthright manner and much of his evidence was supported by documentation and evidence given by a number of his former colleagues. In the circumstances I prefer the direct evidence he gave about his success as a Deputy Principal and his positive interactions with staff members whilst at CSHS to the adverse comments made about Mr Harfouche by some staff members at CSHS who were interviewed by Mr Carvosso when conducting his review.

84 There was no dispute and I find that Mr Harfouche commenced employment with the respondent as a teacher in 1993 and in 2002 he was appointed as a substantive HOD Level 3 at GSSHS on a permanent basis. I find that when Mr Harfouche was appointed to this substantive position this was confirmed in a new contract of employment between the parties (see Exhibit R1). It was not in dispute and I find that in November 2003 Mr Harfouche applied for and was merit selected to fill a full-time vacant Level 4 Deputy Principal position at CSHS and it is clear from the advertisement for this position that it was a temporary position with the successful candidate holding this position for a fixed-term duration for 2004 and 2005 with the possibility of an extension subsequent to 2005. It is therefore clear and I find that this position was not ongoing. There was no dispute and I find that in August 2005 Mr Harfouche's fixed-term contract at CSHS as a Level 4 Deputy Principal was extended until December 2007 and this was confirmed by way of a letter of appointment (see Exhibit A6). However, Mr Harfouche only remained in this position until October 2006 because he was subject to an employer initiated transfer at that time and was posted to Mirrabooka Senior High School until the end of 2006. I accept that this transfer was made by the

respondent under its Placement, Transfer and Deployment of School Administrators policy after the respondent determined that the findings contained in the Carvosso Report should be accepted and acted upon and one of the findings included that Mr Harfouche be transferred out of CSHS along with the Principal of CSHS, Mr Dunning. I find that because the respondent had already offered a fixed-term contract to Mr Harfouche to continue in his Level 4 Deputy Principal position at CSHS until December 2007, it honoured this contract, notwithstanding Mr Harfouche's removal from CSHS. As a result, and after working at Mirrabooka Senior High School until the end of 2006, Mr Harfouche was placed as a Level 4 Deputy Principal at Yule Brook College at the beginning of 2007. It was also common ground and I find that between November 2007 and May 2009 Mr Harfouche had time off work as a result of a workers' compensation claim he made with respect to an injury suffered subsequent to being transferred out of CSHS. This claim was resolved on 27 October 2008 and Mr Harfouche currently remains as a Level 4 Deputy Principal under an interim consent order of this Commission pending the finalisation of this dispute (see *The State School Teachers' Union of WA (Incorporated) v The Director General, Department of Education and Training* 2009 WAIRC 00969 [unreported]).

85 I reject the applicant's claim that Mr Harfouche was promoted to a substantive, ongoing Level 4 Deputy Principal position when he was placed in his Level 4 Deputy Principal position at CSHS in January 2004 and he should therefore enjoy the benefit of a Level 4 Deputy Principal position on a permanent basis. I also reject the applicant's alternative claim that Mr Harfouche holds a Level 4 Deputy Principal position on a permanent basis given the terms of the "Professional Incentives" clauses in the industrial instruments and other legislation applying to his employment from January 2004 onwards.

86 I find that in order for Mr Harfouche to be appointed as a permanent Level 4 Deputy Principal with the respondent he would have to apply for and be merit selected on a State-wide basis to fill a vacant substantive, ongoing Level 4 Deputy Principal position. I find that the Level 4 position that Mr Harfouche was appointed to at CSHS was a temporary, fixed-term position which was not ongoing and he held this Level 4 Deputy Principal position on an acting basis under a series of fixed-term contracts and I find that when Mr Harfouche was appointed to the Level 4 Deputy Principal position at CSHS he retained his substantive Level 3 HOD at GSSHS and was paid a higher duties allowance whilst he acted in this position and other Level 4 Deputy Principal positions after leaving CSHS. Even though Mr Harfouche has continued to be paid as a Level 4 Deputy Principal since January 2004 this does not confirm that Mr Harfouche was appointed to a permanent Level 4 Deputy Principal position with the respondent since that time. In reaching the conclusion that Mr Harfouche was never appointed to a Level 4 Deputy Principal position on an ongoing and permanent basis I take into account that Mr Harfouche gave evidence confirming that the Level 4 Deputy Principal position that he was selected for and occupied at CSHS was a temporary, fixed-term position, the Level 4 Deputy Principal position Mr Harfouche occupied at CSHS was confirmed as being temporary in the statement of agreed facts and the advertisement for the Level 4 Deputy Principal position at CSHS referred to this position as being a temporary position with only the possibility of the incumbent's tenure being extended subsequent to 2005. I also accept Mr Wilsons' evidence that Mr Harfouche's Level 4 Deputy Principal position at CSHS was not a permanent, ongoing position and was additional to the two substantive ongoing Level 4 Deputy Principal positions existing at CSHS under the respondent's normal staffing formula for this school and I find that the Level 4 Deputy Principal position occupied by Mr Harfouche at CSHS remained in place subject to the needs of CSHS and as approved by the respondent. I also note that when Mr Harfouche worked at CSHS he had to ensure that extensions to his fixed-term contracts at the end of 2004 and 2005 were completed in order for him to remain in his Level 4 Deputy Principal position (see Exhibits A18 and R7 and Transcript pages 15-16). Additionally, there was no evidence confirming Mr Harfouche's claim that his position at CSHS was a permanent, ongoing position nor was there any evidence confirming that Mr Harfouche was guaranteed tenure in this Level 4 Deputy Principal position as long as this position remained in place. Indeed evidence was given during the hearing, which I accept, which confirmed that the third Level 4 Deputy Principal position that Mr Harfouche occupied no longer exists. I also accept the evidence given by the respondent that an employee is only appointed to a substantive, ongoing position and holds that level and position on a permanent basis after an employee is merit selected for a vacant position which is advertised as an ongoing, vacant substantive position and this was not the case with respect to the Level 4 Deputy Principal position Mr Harfouche applied for at CSHS. Even though Mr Harfouche was merit selected for this appointment this does not mean the Level 4 Deputy Principal position at CSHS was an ongoing permanent position to which a substantive appointment was made.

87 I accept Mr Wilson's evidence and I find that when an employee is promoted by the respondent to a substantive, ongoing position he or she receives confirmation of this change to his or her status with the respondent by being sent a revised contract of employment in the same way that Mr Harfouche was when he was promoted to his permanent position as a Level 3 HOD at GSSHS (see Exhibit R1). When Mr Harfouche was transferred to CSHS to take up the Level 4 Deputy Principal position the only documentation he received about his Level 4 Deputy Principal status at CSHS was a letter of appointment to CSHS and confirmation of his fixed-term contracts at CSHS for the period 2004 to 2005 and 2006 to the end of 2007. Whilst I accept that the respondent's Movement Advice dated 23 August 2005 refers to Mr Harfouche being promoted I find that this document was incorrectly filled out by the then acting Principal at CSHS, Mr Sheffield.

88 As I have found that Mr Harfouche was not promoted to a substantive, ongoing, permanent Level 4 Deputy Principal position at CSHS he is therefore not entitled to the benefit of a permanent Level 4 Deputy Principal position. As a result I find that Mr Harfouche's current status is that of a permanent Level 3 HOD at GSSHS.

89 The applicant argues in the alternative that Mr Harfouche became a permanent Level 4 employee when he completed two years of service at CSHS as a Level 4 Deputy Principal given the terms of Clause 66.1 of the 2000 Agreement and Clause 91.1 of the 2004 Agreement and should therefore enjoy the benefit of being a Level 4 employee. The applicant also claims that if Mr Harfouche had not been subject to a forced transfer out of CSHS he would have retained his Level 4 position at CSHS.

90 Even if Mr Harfouche was unfairly transferred out of CSHS, as claimed by the applicant, there was no evidence presented at the hearing that Mr Harfouche would have remained in this Level 4 Deputy Principal position on an indefinite basis and I have already noted that there was uncontested evidence given at the hearing that the Level 4 Deputy Principal position occupied by Mr Harfouche was abolished sometime after Mr Harfouche ceased working at CSHS.

91 There is no dispute and I find that Mr Harfouche worked as a Level 4 Deputy Principal at CSHS for approximately two years and nine months. It is also the case that under the 2000 Agreement and the 2004 Agreement CSHS is classed as a difficult to staff school (see Schedule C of the 2000 Agreement and Schedule L of the 2004 Agreement). I also find that Mr Harfouche was made a permanent employee of the respondent in 1995.

92 The interpretation of an award is a matter of law. When interpreting an award one must read the terms of the award, give the words in the clause or clauses in question their ordinary commonsense meaning and ascertain whether the words used have an unambiguous meaning. If the terms of the Award are clear and unambiguous it is not permissible to look at extrinsic material to qualify the meaning of the clause or clauses in issue (see *Norwest Beef Industries Limited and Another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers* [op cit]).

93 In *Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board* (2001) 81 WAIG 665 at 671 Smith, C, as she was then, also observed the following:

> "In interpreting industrial instruments tribunals usually do not apply a literal approach, as awards and enterprise agreements may have been drafted by industrial rather than skilled draftsmen (*Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union* per Kennedy J at 1100). This approach to interpretation was explained by Street J in *Geo A Bond and Co Ltd (in liq) v McKenzie* (1929) 28 AR 499 at 503-504—
>
> > 'Now, speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relation as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.'"

94 The applicant relies on the following terms of the 2000 Agreement and the 2004 Agreements in support of this claim. Clause 66 of the 2000 Agreement provides as follows:

"**PROFESSIONAL INCENTIVES**

66.1 Employees shall be granted permanency with the Education Department upon the completion of 2 years continuous good service in a Difficult to Staff school.

66.2 For each year of continuous good service in a DTS school employees shall receive bonus transfer points, subject to the completion of 3 years continuous good service in a DTS school.

66.3 The bonus transfer points will be as published by the Staffing Directorate from time to time in consultation with the Union."

Clause 91 of the 2004 Agreement provides as follows:

"**PROFESSIONAL INCENTIVES**

91.1 Employees shall be granted permanency with the Department of Education and Training upon appointment to a school identified in Schedule L – Country and Metropolitan Teaching Program subject to satisfactory completion of two (2) years continuous good service in the Country and Metropolitan Teaching Program.

91.2 For each year of continuous good service in a school identified in Schedule L of the Country and Metropolitan Teaching Program employees shall receive bonus transfer points, subject to the completion of two (2) years continuous good service.

91.3 The bonus transfer points will be as published in *School Matters* by the Staffing Directorate from time to time in consultation with the Union."

95 In my view the applicant has misconstrued the content of these clauses. When the ordinary and common sense meaning is given to the words contained in Clause 66.1 of the 2000 Agreement and Clause 91.1 of the 2004 Agreement within the context of these clauses and the agreements as a whole it is clear that a person entitled to be classified as a permanent employee in these clauses relates to a scheme whereby employees who have not yet gained permanent status with the respondent are encouraged to seek employment at difficult to staff school or country schools listed in the agreements and in return permanent status with the respondent would be gained after two years as opposed to a longer period when an employee works in a school which was not difficult to staff or in the country. Furthermore I accept the respondent's submissions and I find that an employee of the respondent, in this case Mr Harfouche, cannot be granted permanent status twice.

96 In the circumstances I find that the terms of Clause 66 of the 2000 Agreement and Clause 91 of the 2004 Agreement do not confirm that Mr Harfouche became a permanent employee who was entitled to the benefit of a substantive Level 4 Deputy Principal position at CSHS.

97 The applicant relies on the provisions of s 236(4) of the SE Act in support of its claim that Mr Harfouche is a substantive Level 4 Deputy Principal. Section 236(4) reads as follows:

> "(4) Members of the teaching staff and other officers may be engaged —
>
> (a) on a full-time or part-time basis; and
>
> (b) for an indefinite period as permanent officers, or for a period not exceeding 5 years."

98 In my view the terms of this provision do not assist the applicant's claim that Mr Harfouche is entitled to a permanent ongoing Level 4 Deputy Principal position with the respondent. This provision states that the respondent's employees may be employed either full-time or part-time for an indefinite period as a permanent employee or on a fixed-term basis for a period not exceeding five years. In Mr Harfouche's case he is employed by the respondent on a full-time ongoing basis as a permanent employee and in my view the respondent is therefore complying with the provisions of this section of the SE Act. Additionally, these provisions are not inconsistent with a permanent employee performing acting and/or higher duties in a fixed-term role.

99 I reject the applicant's claim that Mr Harfouche was unlawfully transferred out of CSHS. The respondent is able to effect an employer initiated transfer under its Placement, Transfer and Deployment of School Administrators policy and used this policy to effect Mr Harfouche's transfer out of CSHS in September 2006. However I find there is some merit to the applicant's claim that Mr Harfouche was treated unfairly when he was subject to this employer initiated transfer out of CSHS. There was overwhelming evidence before the Commission that Mr Harfouche completed his duties as a Level 4 Deputy Principal at CSHS in a professional and exemplary manner and I find that he interacted positively and productively with colleagues and community members throughout his tenure at CSHS. I also find on the evidence that there were concerns about staffing at CSHS and its status in the local community for a number of years, both prior to and during Mr Harfouche's time at CSHS, due to poor oversight of the school by Mr Dunning who had been the Principal of CSHS for many years. I accept the evidence given in the proceedings that in his role as the Principal at CSHS Mr Dunning had poor interpersonal relationships with a number of staff members and I accept that this contributed to a high staff turnover at the school. I also accept that some local community members and organisations lacked confidence in the way in which the school was being run by Mr Dunning. Notwithstanding complaints made by staff members and community members highlighting these problems the respondent did not deal with Mr Dunning's poor oversight until both Mr Harfouche and Mr Bleach lodged formal complaints against Mr Dunning.

100 As I accept Mr Harfouche's evidence I find that the difficulties between Mr Harfouche and Mr Dunning were not due to any actions or poor behaviour on the part of Mr Harfouche.

101 There was no dispute and I find that Mr Harfouche was not given any opportunity to respond to the findings of the Carvosso Report or the respondent's view that he be transferred out of CSHS prior to this occurring and in my view this contributed to Mr Harfouche being treated unfairly by the respondent. It may also be the case that Mr Harfouche's forced and unwarranted removal from CSHS has adversely impacted on Mr Harfouche's efforts to successfully obtain a promotion to a substantive Level 4 Deputy Principal position and it is clear that subsequent to his transfer out of CSHS Mr Harfouche suffered significant health issues arising from his employment at CSHS and his forced transfer out of the school.

102 Notwithstanding my view that Mr Harfouche was treated unfairly when he was subject to a forced transfer out of CSHS the issue remains that Mr Harfouche has never been appointed to a substantive Level 4 Deputy Principal position with the respondent. Even if Mr Harfouche had remained as a Level 4 Deputy Principal employee at CSHS and had not been subject to a forced transfer out of CSHS the Level 4 Deputy Principal position he occupied at CSHS was temporary and subject to being filled on a needs basis and at some point Mr Harfouche would have had to be successful in being merit selected on a State-wide basis for a vacant ongoing Level 4 Deputy Principal position in order to be appointed to a substantive Level 4 Deputy Principal position.

103 I have some sympathy with the difficulties that Mr Harfouche has experienced as a result of having worked in a number of schools subsequent to his forced transfer out of CSHS and the fact that this may have adversely affected his ability to be promoted to an ongoing, substantive Level 4 position. In the circumstances it is my view that the respondent should give Mr Harfouche every assistance to enable him to apply for a permanent Level 4 Deputy Principal position.

104 As I have found that Mr Harfouche was never appointed to a substantive Level 4 Deputy Principal position it follows that Mr Harfouche was not demoted when he was advised by the respondent that he was to return to his substantive position at GSSHS.

105 As the applicant has not demonstrated that Mr Harfouche is entitled to the benefit of a substantive Level 4 Deputy Principal position an order will issued dismissing this application.

2010 WAIRC 00071

DISPUTE RE UNLAWFUL AND UNFAIR DOWNGRADING OF AN EMPLOYEE FROM LEVEL 4 TO LEVEL 3

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 18 FEBRUARY 2010
FILE NO/S	CR 13 OF 2009
CITATION NO.	2010 WAIRC 00071

Result	Dismissed
Representation	
Applicant	Mr M Amati
Respondent	Ms R Hartley (of Counsel)

Order

HAVING HEARD Mr M Amati on behalf of the applicant and Ms R Hartley of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health in Right of the Minister for Health as Sir Charles Gairdner Hospital	Acting Scott SC	PSAC 4/2009	26/02/2009 3/03/2009 25/06/2009 25/08/2009 8/10/2009 6/11/2009 26/11/2009	Dispute re alleged misconduct of union member	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Department for Education and Training	Harrison C	PSAC 26/2009	N/A	Dispute in relation to conditions of employment	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2010 WAIRC 00096

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBYNNE JEAN BOURKE
	APPLICANT
	-v-
	ROCKY BAY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 3 MARCH 2010
FILE NO.	U 237 OF 2009
CITATION NO.	2010 WAIRC 00096

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr D McKenna of counsel

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr D McKenna of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT each party shall give an informal discovery by serving its list of documents by 23 March 2010.

(2) THAT inspection of documents shall be completed by 30 March 2010.

(3) THAT the matter be listed for hearing for not more than 4 days.

(4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2010 WAIRC 00109

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the awards listed in Schedule 1 on the grounds that there are no longer any employees to whom the awards apply because of the operation of the Fair Work Act 2009 (Cth).

Any person who has a sufficient interest in these matters may, within 30 days of the date of the publication of this notice, object to the Commission making such an order.

Please quote the award title on all correspondence.

(Sgd.) J SPURLING,
[L.S.] Registrar.

DATED THIS 8TH DAY OF MARCH 2010

SCHEDULE 1

1. Aerospace Engineering Services Pty Ltd Enterprise Award 2005
2. Ambulance Service Communication Centre Employees' Award 1991
3. Argyle Diamonds Production Award 1996
4. BHP-Utah Minerals International Cadjebut Production Award 1989, No. A 11 of 1989
5. Bibra Lake Fabrication Workshop Award
6. BP Fremantle Ltd Oil Bunkering Award 1992, No. A 20 of 1981
7. BP Refinery (Kwinana) (Security Officers') Award, 1978
8. BRADKEN Bassendean (WA) Way Forward Enterprise Award 2003
9. The Brewery Laboratory Employees Award 1983
10. Brewing Industry Award 1993
11. Building and Engineering Trades (Nickel Mining and Processing) Award, 1968
12. Building Materials Manufacture (CSR Limited – Welshpool Works) Award, 1982
13. Burswood Catering and Entertainment Pty Ltd Employees Award 2001
14. Burswood Hotel (Maintenance Employees') Award, 1990
15. Burswood International Resort Casino Employees' Award 2002
16. Burswood Island Resort (Maintenance Employees') Award No. A22 of 1986
17. Burswood Resort Casino (Theatrical Employees) Award No. A 19 of 1991
18. Can Manufacturing (Production and Maintenance - Amalgamated Industries Pty. Ltd) Award 1985

19. Cargill Australia Limited Salt Production and Processing Award 1988
20. Cement Tile Manufacturing Award No 3 of 1966
21. Cement Workers' Award, 1975
22. Clerks (Commercial Radio and Television Broadcasters) Award of 1970
23. Clerks' (R.A.C. Control Room Officers) Award of 1988
24. Clerks' (Swan Brewery Co. Ltd.) Award 1986
25. Cockburn Cement Limited Award 1991
26. CSBP & Farmers Award 1990
27. Dampier Salt Award 2004
28. Electrical, Engineering and Building Trades (West Australian Newspapers Limited) Award, 1988
29. Engine Drivers' (Gold Mining) Consolidated Award, 1979
30. Engine Drivers' (Nickel Mining) Award 1968
31. Engine Drivers' Minerals Production (Salt) Industry Award, 1970
32. Engineering and Engine Drivers' (Nickel Smelting) Award, 1973
33. Engineering Trades and Engine Drivers (Nickel Refining) Award, 1971
34. Fibre Cement Workers Award
35. Foodland Associated Limited (Western Australia) Warehouse Award 1982
36. Gold Mining Consolidated Award, 1980
37. Gold Mining Engineering and Maintenance Award
38. Government Water Supply, Sewerage and Drainage Employees Award 1981
39. Government Water Supply, Sewerage and Drainage Foremen's Award 1984
40. Grain Handling Maintenance Workers Award
41. Grain Handling Salaried Officers' Consolidated Award 1989
42. Heat Containment Industries (Refractory Specialties) Award No. 3 of 1981
43. Hospital Employees' (Brightwater) Consolidated Award 1981
44. Hospital Salaried Officers (Australian Red Cross Blood Service, Western Australia) Award, 1978
45. Hospital Salaried Officers (WorkPower) Award of 1996
46. Industrial Catering Workers' Award, 1977
47. Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award
48. Iron Ore Production and Processing (Hamersley Iron Pty Limited) Award 1987
49. Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002
50. The Iron Ore Production & Processing (Locomotive Drivers) Award 2006
51. Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006
52. The John Lysaght (Australia) Limited Award
53. Journalists' (Suburban and Free Newspapers) Award, 1984
54. Kalgoorlie Consolidated Gold Mines Award 2002
55. Laboratory and Technical Employees' (Peters (W.A.) Limited) Award of 1981
56. Malting Industry Award 1993
57. Manufacturing Chemists Award, 1976
58. Masters and Deckhands Total Harbour Services Pty Ltd Award
59. Masters Dairy Award 1994
60. Matilda Bay Brewing Company Limited Enterprise Award 1994
61. Metals and Engineering Rapid Metal Developments (Aust) Pty Ltd Award 1993
62. Mineral Earths Employees' Award
63. Mineral Sands Industry Award 1991
64. Mineral Sands Mining and Processing (Engineering and Building Trades) Award, 1977
65. Mineral Sands Mining and Processing Industry Award, 1981
66. Minerals Production (Salt) Industry Award 1969
67. Nickel Mining and Processing Award, 1975

68. Nickel Refining Award, 1971
69. Nickel Smelting (WMC Resources Ltd) Award 2003
70. Particle Board Employees' Award, 1964
71. Particle Board Industry Award No. 10 of 1978
72. Permanent Building Societies (Administrative and Clerical Officers) Award, 1975
73. Pipe, Tile and Pottery Manufacturing Industry Award
74. Plastic Manufacturing Award 1977
75. Porcelain Workers Award, 1970
76. Printing (Community Newspaper Group) Award, No. A 21 of 1989
77. The Printing (Newspaper) Award 1979
78. Printing (The Sunday Times Guaranteed Employment and Voluntary Retirement) Award, 1983
79. Printing (West Australian Newspapers Limited, Guaranteed Employment and Voluntary Retirement) Award
80. RAC Road, Mechanical and Fleet Services Award 1999
81. Salaried Staff Curtin University of Technology Award 1985
82. Security Officers and Cleaners (West Australian Newspapers) Award, 1992
83. Shark Bay Salt and Gypsum (Production and Processing) Useless Loop Award 1989
84. State Energy Commission of Western Australia Wages and Conditions Award, 1988
85. Storemen IWD Pty Ltd Award 1982
86. Storemen's Rapid Metal Developments (Aust.) Pty. Ltd. Award 1982
87. Supermarkets and Chain Stores (Western Australia) Warehouse Award
88. Telfer Gold Mine Fly In/Fly Out Award
89. Tin and Associated Minerals Mining and Processing Industry Award No. 14 of 1971
90. Titanium Oxide Manufacturing Award 1975
91. Transport Workers (Burswood Island Resort) Award 1987
92. Transport Workers' (Eastern Goldfields Transport Board) Award 1976
93. Water Corporation (Staff) Award 2003
94. Western Australian Mint Security Officers' Award, 1988
95. Western Australian Mint Award 2005
96. Wire Manufacturing (Australian Wire Industries Pty. Ltd.) Award No. 24 of 1970
97. Wundowie Foundry Award 1986

PUBLIC SERVICE APPEAL BOARD—

2010 WAIRC 00093

APPEAL AGAINST THE DECISION MADE ON 31 AUGUST 2009 RELATING TO FINDINGS OF MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANE CURRAN
	APPELLANT
	-v-
	GOVERNMENT OF WESTERN AUSTRALIA - DEPARTMENT OF HEALTH - HEALTH CORPORATE NETWORK
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR N HASTINGS-JAMES - BOARD MEMBER
	MS A SPAZIANI - BOARD MEMBER
DATE	WEDNESDAY, 3 MARCH 2010
FILE NO	PSAB 21 OF 2009
CITATION NO.	2010 WAIRC 00093

Result Appeal received out of time

Order

HAVING heard Mr K Trainer on behalf of the appellant, and Mr D Matthews on behalf of the respondent, and by consent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be received out of time.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00108

APPEAL AGAINST THE DECISION MADE ON 31 AUGUST 2009 RELATING TO FINDINGS OF MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANE CURRAN
	APPELLANT
	-v-
	GOVERNMENT OF WESTERN AUSTRALIA - DEPARTMENT OF HEALTH - HEALTH CORPORATE NETWORK
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR N HASTINGS-JAMES - BOARD MEMBER
	MS A SPAZIANI - BOARD MEMBER
DATE	MONDAY, 8 MARCH 2010
FILE NO	PSAB 21 OF 2009
CITATION NO.	2010 WAIRC 00108

Result Name of respondent amended

Order

WHEREAS this is an appeal pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 23rd day of February 2010 the Public Service Appeal Board convened a hearing for the purpose of scheduling; and

WHEREAS at the hearing the parties agreed that the name of the respondent be amended to "Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act (WA) as the hospitals formerly comprised in the Metropolitan Health Services Board";

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby orders:

THAT the name of the respondent in the appeal be amended to "Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act (WA) as the hospitals formerly comprised in the Metropolitan Health Services Board".

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00088

APPEAL AGAINST THE DECISION MADE ON 1 SEPTEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE SMIT
	APPELLANT
	-v-
	SAFETY BAY SENIOR HIGH SCHOOL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR J ROSSI - BOARD MEMBER
DATE	FRIDAY, 26 FEBRUARY 2010
FILE NO	PSAB 26 OF 2009
CITATION NO.	2010 WAIRC 00088

Result Appeal received out of time

Order

WHEREAS this is an appeal pursuant to the *Industrial Relations Act 1979* filed beyond the 21 days allowed by the Act; and

WHEREAS at a conference convened on Thursday, the 18th day of February 2010 the respondent consented to the appeal being received out of time; and

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby orders:

THAT the appeal be received out of time.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2010 WAIRC 00076

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT FOR PLANNING & INFRASTRUCTURE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 22 FEBRUARY 2010
FILE NO	PSA 58 OF 2008
CITATION NO.	2010 WAIRC 00076

Result Reclassification appeal dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*;

and

WHEREAS on Monday, the 18th day of January 2010 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS on Thursday, the 18th day of February 2010, the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2010 WAIRC 00064

FURTHER REVIEW OF IMPROVEMENT NOTICE 303884

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MORTON SEED AND GRAIN PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 15 FEBRUARY 2010
FILE NO/S	OSHT 30 OF 2009
CITATION NO.	2010 WAIRC 00064

Result	Order issued
Representation	
Applicant	Mr A. Koroveshi (of counsel)
Respondent	Mr K. Burgoyne (of counsel)

Order

WHEREAS the applicant referred this matter to the Occupational Safety and Health Tribunal (the Tribunal) pursuant to s 51A of the *Occupational Safety and Health Act 1984* (the Act) seeking a further review of Improvement Notice 303884;

AND WHEREAS the matter was listed for hearing on 27 January 2010 and the parties sought and were granted an adjournment of 14 days;

AND WHEREAS the matter was relisted for hearing on 12 February 2010;

AND WHEREAS the applicant sought an order in these proceedings modifying the WorkSafe Commissioner's decision of 4 December 2009;

AND WHEREAS the respondent consented to an order issuing in these proceedings to modify the WorkSafe Commissioner's decision of 4 December 2009 but opposed the application being adjourned sine die;

AND WHEREAS I have had regard for the submissions of each party;

NOW THEREFORE having regard to s 51A(5)(b) I the undersigned, pursuant to the powers conferred on me under the Act hereby order –

1. The decision of the WorkSafe Western Australia Commissioner dated 4 December 2009, in respect of Morton Seed and Grain Pty Ltd, be affirmed with a single modification.
2. The single modification extend the time limit for compliance with Improvement Notice 303884 from 5.00pm 19 March 2009 until no later than 4.00pm Friday, 30 April 2010.
3. The application is otherwise adjourned sine die.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.