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INDUSTRIAL APPEAL COURT—Appeals against decision of Commission under s.33S of the Police Act 1892—

[2010] WASCA 163

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA -v- AM [2010] WASCA 163
CORAM	:	PULLIN J BUSS J LE MIERE J
HEARD	:	14 JUNE 2010
DELIVERED	:	4 AUGUST 2010
FILE NO/S	:	IAC 2 of 2010
BETWEEN	:	THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA Appellant AND AM Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	BEECH CC HARRISON C MAYMAN C
Citation	:	AM v COMMISSIONER OF POLICE [2010] WAIRC 174
File No	:	APPL 8 of 2008

Catchwords:

Industrial Appeal Court - Right of appeal restricted - Grounds of appeal must conform to s 90 *Industrial Appeals Act 1979* (WA) - No jurisdiction to determine non-conforming grounds of appeal

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr G T W Tannin SC & Mr R J Andretich
Respondent	:	Ms K A Vernon & Ms C E Adams

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	Carol Adams Barristers and Solicitors

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

AM v Commissioner of Police [2009] WAIRC 1285

AM v Commissioner of Police [2010] WAIRC 61

AM v The State of Western Australia [2008] WASCA 196

1 **PULLIN J**: This is an appeal pursuant to s 90 of the *Industrial Relations Act 1979* (WA), read with s 33S of the *Police Act 1892* (WA), against orders of the Western Australian Industrial Relation Commission that:

(a) pursuant to s 33U(1) of the *Police Act*, the appellant's decision to remove the respondent from office was harsh, oppressive or unfair; and

(b) pursuant to s 33U(2) of the *Police Act* the respondent's removal from office is and is to be taken to have always been of no effect from 12 October 2008.

2 The right to appeal under s 90 of the Act is restricted. None of the grounds of appeal are grounds permitted by s 90. This court therefore has no jurisdiction to entertain them and as a result, the appeal must be dismissed for the reasons which are set out below.

3 Early in 2005, the respondent joined the WA Police Service. In 2005, the Police Force came into possession of information alleging that the respondent had sexually penetrated a girl without her consent in circumstances of aggravation, in that at the time she was over the age of 13 years and under the age of 16 years contrary to s 326 of the *Criminal Code* (WA). The Police Internal Investigation Unit carried out an investigation and in due course prepared a loss of confidence report dated 10 May 2006, recommending that the appellant issue the respondent with a Notice of Intention to Remove the respondent from the Police Force of Western Australia pursuant to s 33L(1) of the *Police Act*. This report contained a summary of investigation by an investigating officer dated 4 May 2006. On 15 May 2006, the appellant issued a Notice of Intention to Remove the respondent pursuant to s 33L(1).

4 On 7 June 2006 the respondent provided a written response and requested that his removal be deferred pending the outcome of a criminal trial, the respondent having been charged with aggravated sexual penetration on 28 March 2006.

5 As a result, the appellant deferred removal action pending the outcome of the trial. On 12 February 2008, the respondent was convicted of the charge following a trial by judge alone. On the same day the appellant issued a Notice of Removal from the Police Force. On 19 March 2008 the respondent appealed against the conviction and on 6 March 2008 the respondent appealed against the removal to the Full Bench of the commission.

6 On 26 September 2008, the Court of Appeal allowed the appeal against conviction, quashed the conviction and ordered a retrial. On 5 February 2009, the DPP filed a notice of discontinuance of the charge. On 12 August 2009, the commission granted leave to the respondent to tender new evidence, namely the Court of Appeal's reasons for decision in ***AM v The State of Western Australia*** [2008] WASCA 196 and the evidence of the discontinuance of the charge. On 11 September 2009, the appellant filed reformulated reasons for removal as permitted pursuant to s 33R(8)(a) of the *Police Act*. The respondent then filed amended grounds of appeal.

7 On 4 December 2009, the commission found that the removal was harsh, oppressive and unfair: see ***AM v Commissioner of Police*** [2009] WAIRC 1285. Subsequently, on 11 February 2010, the commission found that it was not

impracticable to order that the respondent's removal is to be taken to have always been of no effect: ***AM v Commissioner of Police*** [2010] WAIRC 61. On 1 April 2010, the orders referred to at the beginning of these reasons were made.

8 On 8 April 2010, the appellant filed a notice of appeal. The grounds of appeal read:

1. The Commission erred in law in construing Division 2 of Part IIB of the Police Act 1892 by having no or insufficient proper regard to the effect of Section 33W of the Police Act.
2. The Commission erred in law in failing to properly consider the reasons to remove the Respondent in accordance with Section 33Q(1) of the Police Act 1892.
3. The Commission erred in law in construing section 33Q(1) of the Police Act 1892 by determining the decision to remove the Respondent from the Police Force was unfair.
4. The Commission erred in law in construing section 33Q(4) of the Police Act 1892 by:
   (a) giving excessive weight to the interests of the Respondent in considering the public interest in determining the appeal;
   (b) failing to have sufficient regard to the interests of the Appellant;
   (c) failing to have proper regard to the special nature of the relationship between the Appellant and the Respondent.
   (d) incorrectly determining the use that could be made by the Commissioner of the Trial Judge's comments after the Respondent's conviction was quashed.
5. The Commission erred in law in finding that the Appellant could not in accordance with the requirements of Division 2 of Part IIB of the Police Act 1892 reasonably and fairly conclude on the evidence available and considered by him that he had lost confidence in the Respondent.
6. The Commission erred in law in construing section 33U of the Police Act 1892 by concluding that the Appellant could not on the evidence available and considered by him retain a lack of confidence in the Respondent that made reinstatement impracticable because of the presumption of innocence.

9 The appellant informed the court that grounds 2 to 5 were an elaboration of ground 1 and that if ground 1 failed, then grounds 2 to 5 must also fail.

10 Ground 1 and grounds 2 to 5 relate to the commission's reasons in ***AM v The Commissioner of Police*** [2009] WAIRC 1285 and ground 6 relates to the reasons in ***AM v Commissioner of Police*** [2010] WAIRC 61.

The right of appeal

11 Section 90 of the *Industrial Relations Act* when read together with s 33S of the *Police Act* confers a limited right of appeal to the Western Australian Industrial Appeal Court from a decision of the commission. As modified, s 90 reads:

(1) Subject to this section, an appeal lies to the Court in the manner prescribed from a decision of the Commission under s 33U of the *Police Act 1892* -
   (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;
   (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
   (c) on the ground that the appellant has been denied the right to be heard,

   but upon no other ground.

(2) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted -
   (a) by any party to the proceedings wherein the decision was made; or
   (b) by any other person who was an intervener in those proceedings.

(3) On the hearing of the appeal the Court may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of appeal and may remit the matter to the President, the Full Bench, or the Commission in Court Session, as the case requires, for further hearing and determination according to law.

(3a) If any ground of the appeal is made out but the Court is satisfied that no injustice has been suffered by the appellant or a person who is a member of or represented by the appellant, the Court shall confirm the decision the subject of appeal unless it considers that there is good reason not to do so.

(4) The Court may at any time, if it considers that to do so will not prejudice any party to an appeal under this section -
   (a) correct clerical mistakes in its judgments or orders, or errors arising in its judgments or orders from accidental slips or omissions; and

(b) generally correct any minor irregularities in its proceedings.

12 The appellant did not argue that s 90(1)(a) or (c) applies. The appellant contended that s 90(1)(b) applied and that the grounds of appeal were permitted by that provision. The task of the appellant was therefore to establish that the decision of the commission was erroneous in law 'in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against'. The word 'decision' is defined in s 7(1) as including 'award, order, declaration or finding'.

Ground 1

13 The relevant decision in relation to this ground was the order made by the commission that the appellant's removal of the respondent from office was harsh, oppressive or unfair. The Act which the appellant contended was misconstrued was the *Police Act*.

14 In the course of reasons for decision, at [47], Chief Commissioner Beech (Harrison C & Mayman C agreeing) referred to a submission made on behalf of the appellant that the appellant did not have before him the material contained in the summary of investigation. After first observing, at [47], that it was 'not clear' that the Commissioner of Police relied upon this material, Beech CC said [48]:

> The Commissioner of Police may not have relied upon this material due to the second difficulty which is that prior to AM's conviction, the Commissioner of Police recognised that the material contained in the Summary of Investigation was untested. It was, as Mr Andretich stated, a suspicion and therefore, properly in my view, the Commissioner of Police decided not to take removal action pending the outcome of the criminal trial in relation to the charges preferred against AM under s 326 of the Criminal Code (Tab 2). The fact is that the material contained in the Summary of Investigation remains untested. The reformulated reasons at [25] states that the Commissioner of Police relies upon the Summary of Facts in his response of 30 June 2009, however to the extent that the Summary of Facts states as fact the allegation made against AM (particularly [3] to [6]), the Commissioner of Police is not able to fairly rely upon the Summary at all: the allegation still remains an allegation and it has not been established as a fact. Therefore the earlier decision of the Commissioner of Police not to take removal action pending the outcome of the criminal trial in relation to the charges remains. I find Ground 3 is made out.

15 If the appellant had an unrestricted right of appeal, it may have been arguable that the commission erred in excluding from consideration the summary of facts, or at least the evidence led in relation to the asserted facts, but the appellant does not have such a right. The court only has jurisdiction to entertain appeals against a decision which is erroneous in law 'in that' there has been an error in the construction or interpretation of an Act, regulation, award, industrial agreement or order 'in the course of' making the decision appealed against: s 90(1)(b) *Industrial Relations Act*.

16 The appellant submitted that the commission paid no regard or no sufficient regard to s 33W of the *Police Act*. There are two difficulties with that submission. The first is that it is quite clear that the commission did have regard to s 33W. At [13], the commission noted that the appellant referred to s 33W of the *Police Act* which Beech CC set out in full.

17 When referring to ground 2, Beech CC said:

> [I]t is argued on behalf of AM, that although s 33W means that the Commissioner of Police is not precluded from acting to remove AM, he had decided to wait for the outcome of the criminal trial in relation to the charges preferred against AM [18].

18 At [29] Beech CC referred to the respondent's submission that at the date of his removal, the disposition of the criminal charge against him had not been finally determined and then said:

> In response, the Commissioner of Police submits that there is no obligation upon him to wait for that appeal period to expire. I agree with this submission in part, because of the terms of s 33W which I have set out earlier in these reasons.

19 Finally, the commission concluded that it was unfair to remove AM from the Police Force, stating:

> It was unfair because notwithstanding s 33W, the Commissioner of Police had decided not to take removal action pending the outcome of the criminal trial [56].

These extracts from Beech CC's reasons show that regard was had to s 33W. The second difficulty for the appellant is the fact that as appears from the quoted paragraphs, the commission properly understood and construed s 33W. As a result, ground 1 should be dismissed. It follows that grounds 2 to 5 must also be dismissed.

Ground 6

20 As stated above, this ground relates to the commission's decision in [2010] WAIRC 61. These reasons were published after submissions were received about whether it was appropriate to invoke s 33U(3) of the *Police Act*. Section 33U(1) states that the section applies if the commission decides on an appeal that the decision to take removal action relating to the appellant was harsh, oppressive or unfair. The commission had made such a decision. Section 33U(2) states that if the section applies, and unless an order is made under s 33U(3), the commission may order that the appellant's removal from office is, and is to be taken to have always been of no effect. Section 33U(3) provides that:

> If, and only if, the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, the Commission may instead of making an order under

subsection (2), subject to subsections (5) and (6), order the Commissioner of Police to pay the appellant an amount of compensation for loss or injury caused by the removal.

21 The appellant submitted that it was impracticable for an order to be made under s 33U(2). In making that decision, the commission had to consider the matters set out in s 33U(4) which reads:

In considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect it is relevant to consider -

(a) whether the position occupied by the appellant at the time of his or her removal is vacant; and

(b) whether there is another suitable vacant position in the Police Force.

22 An issue arose in the commission about whether in considering the question of impracticability, the two factors referred to in s 33U(4)(a) and (b) were the only factors which could be taken into account. The appellant submitted they were not the only factors which could be taken into account and the commission agreed with that submission.

23 There is no dispute that the appellant took into account the two relevant considerations referred to in s 33U(4). Ground 6 asserts that the commission erred in law 'by concluding that the appellant could not on the evidence available, and considered by him, retain a lack of confidence in the respondent that made reinstatement impracticable because of the presumption of innocence'. Even if the commission erred in that respect, the error is not an error in the construction or interpretation of s 33U.

24 As a result, this court has no jurisdiction to entertain any of the grounds of appeal. The appeal must be dismissed for that reason.

25 **BUSS J**: I agree with Pullin J.

26 **LE MIERE J**: I agree with Pullin J.

2011 WAIRC 00019

APPEAL AGAINST THE DECISION OF THE COMMISSION IN MATTER NO. APPL 8 OF 2008 GIVEN ON 1 APRIL 2010

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	AM
	RESPONDENT
CORAM	PULLIN J
	BUSS J
	LE MIERE J
DATE HEARD	MONDAY, 14 JUNE 2010
DATE DELIVERED	WEDNESDAY, 4 AUGUST 2010
FILE NO/S	IAC 2 OF 2010
CITATION NO.	2011 WAIRC 00019

Result	Appeal dismissed
Representation	
Appellant	Mr GTW Tannin (of Senior Counsel) and Mr RJ Andretich (of Counsel)
Respondent	Ms KA Vernon and Ms CE Adams (both of Counsel)

Order

HAVING HEARD Mr GTW Tannin (of Senior Counsel) and Mr RJ Andretich (of Counsel), for the Appellant, and Ms KA Vernon and Ms CE Adams (both of Counsel), for the Respondent, THE COURT HEREBY ORDERS THAT:-

1. The appeal be dismissed.

2. The respondent file and serve submission regarding costs within 7 days and the appellant file and serve submissions in response, 7 days from receiving the respondent's submissions.

(Sgd.) J SPURLING,
[L.S.] Clerk of Court.

2011 WAIRC 00021

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA -v- AM [2010] WASCA 163 (S)
CORAM	**:**	PULLIN J BUSS J LE MIERE J
HEARD	**:**	14 JUNE 2010 AND ON THE PAPERS
DELIVERED	**:**	4 AUGUST 2010
SUPPLEMENTARY DECISION	**:**	22 NOVEMBER 2010
FILE NO/S	**:**	IAC 2 of 2010
BETWEEN	**:**	THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA Appellant AND AM Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	BEECH CC HARRISON C MAYMAN C
Citation	**:**	AM v COMMISSIONER OF POLICE [2010] WAIRC 174
File No	**:**	APPL 8 of 2008

Catchwords:

Costs - Whether proceedings initiated frivolously or vexatiously

Legislation:

Industrial Relations Act 1979 (WA), s 86(2)

Result:

Application for costs dismissed

Category: A

Representation:

Counsel:

Appellant	:	Mr G T W Tannin SC & Mr R J Andretich
Respondent	:	Ms K A Vernon & Ms C E Adams

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	Carol Adams Barristers and Solicitors

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

Attorney-General v Wentworth (1988) 14 NSWLR 481

General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125

Hatchett v Bowater Tutt Industries Pty Ltd (No 2) (1991) 28 FCR 324

Heidt v Chrysler Australia Ltd (1976) 26 FLR 257

Hutchison v Bienvenu (Unreported, HCA, 19 October 1971)

Jones v Skyring (1992) 109 ALR 303

Matthews v Cool or Cosy Pty Ltd [2003] WASCA 136

Mudie v Gainriver Pty Ltd (No 2) [2002] QCA 546; [2003] 2 Qd R 271

Re Vernazza [1960] 1 QB 197

Re Williams and Australian Electoral Commission (1995) 21 AAR 467

The Commissioner of Police of Western Australia v AM [2010] WASCA 163

Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22

Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark (1995) 62 IR 334

1 **PULLIN J**: On 4 August 2010, this court dismissed an appeal by the appellant against a decision of the Western Australian Industrial Relations Commission. The respondent sought an order that the appellant pay the respondent's costs of the appeal. The appellant opposed this order. The court called for written submissions from the parties with a decision on costs to be made on the papers.

2 Section 86(2) of the *Industrial Relations Act 1979* (WA) (the Act) provides this court with the power to award costs:

> In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

3 The operation of s 86(2) was explained by this court in ***Matthews v Cool or Cosy Pty Ltd*** [2003] WASCA 136 [9]:

> It is clear that the policy envisaged by s 86(2) is that it will be on very rare occasions that a costs order will be made. Proceedings will have been 'frivolously or vexatiously' instituted where it can be said that the matter was 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; that it 'discloses a case which the court is satisfied cannot succeed'; or that 'under no possibility can there be a good cause of action'. See ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22 at 26-27.

4 I am grateful to Buss J for his thorough review of other cases and his conclusions about the meaning of the words 'frivolous' and 'vexatious'. I adopt what his Honour has said on the subject.

5 The respondent submits that the proceedings were frivolously or vexatiously instituted because the grounds of appeal did not conform to s 90 of the Act which specifies the permitted grounds for an appeal to this court.

6 The appellant submits that the proceedings were not frivolous or vexatious. The appellant contends that the appeal raised:

(a) 'serious matters' concerning the 'special relationship' between the Commissioner of Police and a police officer where the officer's conviction is set aside and reinstatement where the Commissioner retains a lack of confidence in the officer despite the commission determining his or her removal was unfair; and

(b) the proper application of s 33W of the *Police Act 1892* (WA).

7 The appellant submitted that these matters were 'in the public interest and of concern to the Commissioner having regard to his powers and duties under the Police Act in maintaining public confidence in the Police Force'. The appellant also submitted that the appeal 'tested the limits' of this court's jurisdiction under s 90(1)(b), was 'clearly arguable' and that simply because the appeal failed for lack of jurisdiction did not make it frivolous or vexatious, especially where this court did not suggest the appeal was instituted or argued frivolously or vexatiously.

8 The appellant's submissions should be rejected. The appellant had six grounds of appeal but conceded that grounds 2 to 5 simply elaborated on ground 1 and that if ground 1 failed, then grounds 2 to 5 must also fail.

9 The appellant's first ground of appeal read:

> The Commission erred in law in construing Division 2 of Part IIB of the Police Act 1892 by having no or insufficient proper regard to the effect of Section 33W of the Police Act.

10 This court found that it was 'quite clear' that the commission did have regard to s 33W. The ground as formulated had no merit because such an appeal ground was not permitted under s 90(1)(b). Even if the ground had been permitted it must have been dismissed because, as this court found, it was self-evident from the commission's reasons that the commission properly considered and construed the section [19].

11 Grounds 2 to 5 therefore fell away.

12 The appellant's sixth ground of appeal read:

> The Commission erred in law in construing section 33U of the Police Act 1892 by concluding that the Appellant could not on the evidence available and considered by him retain a lack of confidence in the Respondent that made reinstatement impracticable because of the presumption of innocence.

13 This court found that even if the error asserted in ground 6 was made out, it was not an error of construction or interpretation and thus did not fall within s 90(1)(b).

14 As a result, the appeal was dismissed because the court had no jurisdiction to entertain any of the appellant's grounds of appeal under s 90. In my opinion, the appeal was at all material times so obviously untenable that it could not possibly succeed, it was manifestly groundless, and the court was satisfied that none of the grounds could succeed. It will not always follow that an appeal will be held to have been frivolously instituted merely because the grounds are grounds which the court holds it has no jurisdiction to entertain. However, this was a very plain case involving a well-resourced appellant represented by the State Solicitor and it should have been apparent when the proceedings were instituted that none of the grounds were permitted under s 90 and that they could not succeed. Consequently, the proceedings were frivolously instituted. In my opinion, this is one of the rare cases where the appellant must pay the respondent's costs of the appeal.

15 The respondent sought an order that costs be fixed at $3,500. The appellant made no submissions about quantum. The amount sought is reasonable.

16 The order should be that the appellant pay the respondent's costs of the appeal fixed in the sum of $3,500.

17 **BUSS J**: On 4 August 2010, this court dismissed the appellant's appeal under s 90 of the *Industrial Relations Act 1979* (WA) (the Act), read with s 33S of the *Police Act 1892* (WA), against orders of the Western Australian Industrial Relations Commission that:

(a) pursuant to s 33U(1) of the *Police Act*, the appellant's decision to remove the respondent from office was harsh, oppressive or unfair; and

(b) pursuant to s 33U(2) of the *Police Act*, the respondent's removal from office is, and is to be taken to have always been, of no effect from 12 October 2008.

18 Section 90 of the Act confers a limited right of appeal to this court from, relevantly, any decision of the Commission. By s 90(1) an appeal lies:

> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act,
>
> regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,

but upon no other ground.

19 The appellant sought to base his alleged right of appeal on s 90(1)(b). His grounds of appeal read:

> 1. The Commission erred in law in construing Division 2 of Part IIB of the Police Act 1892 by having no or insufficient proper regard to the effect of Section 33W of the Police Act.
>
> 2. The Commission erred in law in failing to properly consider the reasons to remove the Respondent in accordance with Section 33Q(1) of the Police Act 1892.
>
> 3. The Commission erred in law in construing section 33Q(1) of the Police Act 1892 by determining the decision to remove the Respondent from the Police Force was unfair.
>
> 4. The Commission erred in law in construing section 33Q(4) of the Police Act 1892 by:
>
> (a) giving excessive weight to the interests of the Respondent in considering the public interest in determining the appeal;
>
> (b) failing to have sufficient regard to the interests of the Appellant;
>
> (c) failing to have proper regard to the special nature of the relationship between the Appellant and the Respondent.
>
> (d) incorrectly determining the use that could be made by the Commissioner of the Trial Judge's comments after the Respondent's conviction was quashed.

5. The Commission erred in law in finding that the Appellant could not in accordance with the requirements of Div 2 of Pt IIB of the Police Act 1892 reasonably and fairly conclude on the evidence available and considered by him that he had lost confidence in the Respondent.

6. The Commission erred in law in construing section 33U of the Police Act 1892 by concluding that the Appellant could not on the evidence available and considered by him retain a lack of confidence in the Respondent that made reinstatement impracticable because of the presumption of innocence.

20 At the hearing of the appeal, counsel for the appellant put his case on the basis that grounds 2 - 5 were an elaboration of ground 1. He conceded that if ground 1 failed then grounds 2 - 5 must also fail.

21 This court held that it had no jurisdiction to entertain any of the grounds of appeal and, for that reason, the appeal was dismissed. See ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163.

22 When this court published its reasons for decision and made an order dismissing the appeal, counsel for the respondent applied for an order that the appellant pay the respondent's costs of the appeal, being for the services of his counsel and solicitors, fixed in the sum of $3,500. The appellant opposed the application.

23 This court's jurisdiction with respect to costs is set out in s 86(2) of the Act, which provides:

> In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

24 Three general observations may be made about this court's power under s 86(2) to order the unsuccessful party to an appeal to pay the costs of any other party for the services of, relevantly, any legal practitioner of that party.

25 First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party.

26 Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. See ***Heidt v Chrysler Australia Ltd*** (1976) 26 FLR 257, 275 (Northrop J); ***Hatchett v Bowater Tutt Industries Pty Ltd (No 2)*** (1991) 28 FCR 324, 326 (von Doussa J).

27 Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. See ***Re Vernazza*** [1960] 1 QB 197, 208 (Ormerod LJ); ***Hutchison v Bienvenu*** (Unreported, HCA, 19 October 1971) 11 (Walsh J); ***Jones v Skyring*** (1992) 109 ALR 303, 309 - 310 (Toohey J).

28 The words 'frivolously' and 'vexatiously', in the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), are adverbs. They relate to the verbs 'instituted' or 'defended'. The Act does not define 'frivolously' or 'vexatiously'.

29 The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. See the *Shorter Oxford English Dictionary*, (5th ed) 1038, 3529; ***Mudie v Gainriver Pty Ltd (No 2)*** [2002] QCA 546; [2003] 2 Qd R 271 [35] - [37] (McMurdo P & Atkinson J), [59] - [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.

30 The words 'frivolous' and 'vexatious' have been considered extensively in the context of the exercise by the courts of their summary powers to strike out a pleading, or an action or defence, on the ground that the pleading, action or defence is frivolous or vexatious. The word 'vexatious' has also received consideration on numerous occasions in the context of proceedings to restrain vexatious litigants.

31 In ***General Steel Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125, the defendants sought to set aside the plaintiff's writ and statement of claim or, alternatively, to stay further proceedings thereon, upon the ground that the plaintiff had '*no viable cause of action against them or any of them*' (126) (emphasis added). Barwick CJ considered the circumstances in which an action may be summarily dismissed by a court under counterpart rules to O 26 r 18 of the *High Court Rules 1952* which, at the material time, provided:

> (1) The Court or a Justice may order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action or answer.

> (2) In that case, or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Justice may order the action to be stayed or dismissed, or judgment to be entered accordingly, as is just.

His Honour also referred to cases where the inherent jurisdiction of the court had been invoked.

32 Barwick CJ said:

> The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I have examined the case law on the subject, to some of which I was referred in argument and to which I append a list of references. There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, *unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated*. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
>
> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'.
>
> As I have said, some of these expressions occur in cases in which the inherent jurisdiction was invoked and others in cases founded on statutory rules of court but although the material available to the court in either type of case may be different the need for exceptional caution in exercising the power whether it be inherent or under statutory rules is the same (128 - 129). (emphasis added)

33 As I have mentioned, the word 'vexatious', in its ordinary meaning, has a broader connotation than the word 'frivolous'. This is reflected in the authorities concerned with the summary termination of pending proceedings. In ***Re Williams and Australian Electoral Commission*** (1995) 21 AAR 467, the Administrative Appeals Tribunal (Mathews J (President), Hill & Beaumont JJ (Presidential Members)) said that the test to be applied in determining whether pending proceedings are vexatious can be expressed either subjectively or objectively, depending upon the head of 'vexatiousness' under consideration (474 - 475). Their Honours referred to this statement of Roden J in ***Attorney-General v Wentworth*** (1988) 14 NSWLR 481-:

> It seems then that litigation may properly be regarded as vexatious forpresent purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:
>
> 1. Proceedings are vexatious if they are instituted with the intention ofannoying or embarrassing the person against whom they are brought.
> 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
> 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless (491).

34 In ***Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22, ***Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark*** (1995) 62 IR 334 and ***Matthews v Cool or Cosy Pty Ltd*** [2003] WASCA 136, this court adopted, in relation to the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), the various expressions of the test referred to by Barwick CJ in ***General Steel Industries*** for deciding whether a claim or defence in pending proceedings should be summarily terminated on the ground that it does not disclose a reasonable cause of action or defence. It was unnecessary in those cases for this court to consider the broader connotation of 'vexatiously' compared with 'frivolously'.

35 As Kennedy, Rowland & Nicholson JJ noted in ***Tip Top Bakeries***, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In ***Clark***, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).

36 It is plain from the earlier decisions of this court to which I have referred that something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. So, relevantly to the present case, not every appeal which is determined to be without merit, either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

37 In the present case, the respondent did not suggest (and it could not properly have been suggested) that the appeal was instituted with the intention of annoying or embarrassing the respondent or for an impermissible collateral

purpose. Rather, the respondent contended, in essence, that, viewed objectively, the appeal was at all material times so obviously untenable or manifestly groundless as to be utterly hopeless.

38 Although the appellant failed because, on analysis, none of his grounds of appeal was a ground in respect of which an appeal lies under the limited right of appeal conferred by s 90, this appeal was not one of those very rare occasions on which the costs of a legal practitioner should be awarded. I would not characterise the appellant's grounds of appeal as being 'so obviously untenable that they cannot possibly succeed', 'manifestly groundless' or 'so manifestly faulty that they do not admit of argument'. Accordingly, the appeal was not instituted frivolously or vexatiously. The respondent's application for costs should be dismissed.

39 **LE MIERE J**: I agree with Buss J that the respondent's application for costs should be dismissed for the reasons stated by his Honour.

2011 WAIRC 00018

APPEAL AGAINST THE DECISION OF THE COMMISSION IN MATTER NO. APPL 8 OF 2008 GIVEN ON 1 APRIL 2010

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	AM
	RESPONDENT
CORAM	PULLIN J
	BUSS J
	LE MIERE J
DATE HEARD	MONDAY, 14 JUNE 2010
DATE DELIVERED	MONDAY, 22 NOVEMBER 2010
FILE NO/S	IAC 2 OF 2010
CITATION NO.	2011 WAIRC 00018

Result	The application for costs be dismissed
Representation	
Appellant	Mr GTW Tannin (of Senior Counsel) and Mr RJ Andretich (of Counsel)
Respondent	Ms KA Vernon and Ms CE Adams (both of Counsel)

Order

HAVING HEARD Mr GTW Tannin (of Senior Counsel) and Mr RJ Andretich (of Counsel), for the Appellant, and Ms KA Vernon and Ms CE Adams (both of Counsel), for the Respondent, THE COURT HEREBY ORDERS THAT:-

The application for costs be dismissed.

(Sgd.) J SPURLING,
[L.S.] Clerk of Court.

FULL BENCH—Procedural Directions and Orders—

2011 WAIRC 00026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR EDUCATION
	APPELLANT
	-and-
	LIQUOR HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 13 JANUARY 2011
FILE NO	FBA 17 OF 2010
CITATION NO.	2011 WAIRC 00026

Result	Order issued
Appearances	
Appellant	Mr A Shuy (of counsel) and with him Mr R J Andretich (of counsel)
Respondent	Mr M J Aulfrey (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 12 January 2011, and having heard Mr A Shuy (of counsel) and with him Mr R J Andretich (of counsel) on behalf of the appellant, and Mr M J Aulfrey (of counsel) for the respondent, the Full Bench, 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,
[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2010 WAIRC 01250

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ROBINSON
	APPLICANT
	-and-
	MR PHIL WOODCOCK, ACTING SECRETARY INTERIM COMMITTEE, AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WA BRANCH
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 23 DECEMBER 2010
FILE NO/S	PRES 6 OF 2010
CITATION NO.	2010 WAIRC 01250

Result	Order issued

Order

HAVING heard Mr P Robinson on his own behalf as the applicant and Mr J Nolan (of counsel) on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that –

1. The date for compliance with Order 2 made by the Acting President on 28 October 2010 be extended to Tuesday, 11 January 2011;
2. The date for compliance with Order 3 made by the Acting President on 28 October 2010 be extended to Thursday, 3 March 2011.
3. The matter be listed for further directions on Tuesday, 8 March, 2011 at 10:30 am in Court 3.

(Sgd.) J H SMITH,
[L.S.] Acting President.

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2010 WAIRC 01259

ABORIGINAL MEDICAL SERVICE EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BROOME REGIONAL ABORIGINAL MEDICAL SERVICE AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	APPL 111 OF 2008
CITATION NO.	2010 WAIRC 01259

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS this matter was listed For Mention on 20 December 2010;

AND WHEREAS on 10 December 2010 the applicant filed a Notice of Discontinuance in the Commission;

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

THAT the application be, and is hereby, discontinued.

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

2010 WAIRC 01257

AMBULANCE SERVICE EMPLOYEES' AWARD, 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ST JOHN AMBULANCE AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	APPL 109 OF 2008
CITATION NO.	2010 WAIRC 01257

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS this matter was listed For Mention on 20 December 2010;

AND WHEREAS on 10 December 2010 the applicant filed a Notice of Discontinuance in the Commission;

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

THAT the application be, and is hereby, discontinued.

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

2010 WAIRC 01260

ANIMAL WELFARE INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WA BRANCH

APPLICANT

-v-

MR P S ADAMS AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN
DATE WEDNESDAY, 29 DECEMBER 2010
FILE NO APPL 97 OF 2008
CITATION NO. 2010 WAIRC 01260

Result Order issued
Representation
Applicant No appearance
Respondent No appearance

Order

WHEREAS this is an application pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS this matter was listed For Mention on 20 December 2010;

AND WHEREAS on 10 December 2010 the applicant filed a Notice of Discontinuance in the Commission;

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

THAT the application be, and is hereby, discontinued.

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

2010 WAIRC 01258

COMMUNITY WELFARE DEPARTMENT HOSTELS AWARD 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE HONOURABLE MINISTER FOR COMMUNITY DEVELOPMENT

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE WEDNESDAY, 29 DECEMBER 2010
FILE NO/S APPL 110 OF 2008
CITATION NO. 2010 WAIRC 01258

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS this matter was listed For Mention on 20 December 2010;

AND WHEREAS on 10 December 2010 the applicant filed a Notice of Discontinuance in the Commission;

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

THAT the application be, and is hereby, discontinued.

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

NOTICES—Award/Agreement matters—

2011 WAIRC 00024

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 1 of 2011

APPLICATION FOR A NEW AWARD ENTITLED

"ABORIGINAL COMMUNITIES AND ORGANISATIONS (WESTERN AUSTRALIA) INTERIM AWARD 2011"

NOTICE is given that an application was made to the Commission, on 6 January 2011, by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, under the Industrial Relations Act 1979, for the above named Award.

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

1. PARTIES BOUND BY THIS AWARD

3.1 This award shall apply throughout the state of Western Australia to the Aboriginal Communities and Organisations industry and to

3.1.1 each employer therein; and

3.1.2 each employee therein who is

(a) eligible for membership of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees; and

(b) employed in a classification to which this award applies;

3.1.3 the Union and its officers

3.2 This award does not apply to:

3.2.1 employees who are CDEP Participants.

3.2.2 employees:

3.2.2(a) who are eligible to be members of the Australian Liquor, Hospitality and Miscellaneous Workers Union;

3.2.2(b) who are engaged in work that is covered by any of the Western Australian State awards (as amended from time to time) listed in schedule E of this award; and

3.2.2(c) whose classification under that award (however described) is also nominated in schedule E of this award.

…

6. DEFINITIONS

…

6.2 **CDEP** means Community Development Employment Projects. This is a program funded by the Aboriginal and Torres Strait Islander Commission which provides indigenous people with an alternative to unemployment benefits.

6.3 **CDEP Participant** means a person engaged and paid under the CDEP program.

…

6.7 **Employer** means any employer to whom this award applies.

…

6.11 **Union** means the Western Australian Municipal, Administrative, Clerical and Services Union of Employees.

…

SCHEDULE E – WESTERN AUSTRALIAN STATE AWARDS

(See clause 3 of this award)

Aged and Disabled Persons Hostels Award 1987

Qualified Cook
Cook Working Alone
Other Cook
Supervisor
Assistant Supervisor
Domestic Workers
Driver

Aboriginal Medical Services Employees' Award No. A26 of 1987

Field Officer
Environmental Health Worker
Conditionally Registered Health Worker
A Fully Certificated Health Worker
A Fully Certificated Health Worker – Medication Certificate Grade 1
A Fully Certificated Health Worker – Medication Certificate Grade 2
Regional Health Coordinator
Enrolled Nurse
Enrolled Nurse – Special Class
Junior Employees
Gardener
Domestic
Cook
Driver of Motor Vehicle (under 1.2 tonnes)
Driver of Motor Vehicle (exceeding 1.2 tonnes capacity but not exceeding 3 tonnes capacity)
Bus Driver (under 25 passengers)
Storeperson (Grade 1)
Leading Hands

Nurses' (Aboriginal Medical Services) Award No. A23 of 1987

Nurse Grade 1
Nurse Grade 2

Child Care (Subsidised Centres) Award No. A26 of 1985

Administrators / Directors
Pre-school Teachers
Child Care Workers
Child Care Aide
Cook / Gardener
Domestic Employee

Children's Services (Private) Award – Award No. A10 of 1990

Child Care Support Employee – Grade One – Cleaner
Child Care Support Employee – Grade One – Kitchen Hand
Child Care Support Employee – Grade Two
Child Care Giver
Qualified Child Care Giver
Assistant Director
Pre-school Teachers
Director
Director Grade One

Teachers' Aides (Independent Schools) Award 1988

Teachers' Aide
Teachers' Aide (in Aboriginal Schools)
Teachers' Aide (in Special Schools)
Child Care Workers

School Employees (Independent Day and Boarding Schools) Award 1980

Cleaner
Domestic employees including Kitchen Attendant, House Attendant, Dining Attendant, Laundry Attendant and Sewing Attendant
Gardener / Groundsperson Grade 1
First Cook (Grade 1), or Cook Working Alone
Gardener / Groundsperson, Grade 2
Sewing Supervisor
Senior Gardener / Groundsperson, Grade 1
First Cook Grade 2
Senior Gardener / Groundsperson, Grade 2
Tradesperson Cook
Head Groundsperson

Further, this award will not apply to employees eligible to be members of the ALHMWU, provided this exception shall not apply to persons primarily engaged in social and community services work (as defined in clause 7).

SCHEDULE F – EMPLOYER PARTIES BOUND BY THIS AWARD

The parties who are bound by this award are listed below.

PERTH REGION

Aboriginal Alcohol and Drug Service (AADS)(Inc)

Derbarl Yerrigan Health Service

Swan Valley Nyungah Community Aboriginal Corporation

ALBANY REGION

Southern Aboriginal Corporation

PORT HEDLAND REGION

Bloodwood Tree Association

Onslow Women's Group Corporation

Pilbara Aboriginal Land Council

BROOME REGION

Kullari Regional Council

GERALDTON / CARNARVON REGION

Yamatji Regional Council

KALGOORLIE REGION

Bay of Isles Aboriginal Community Inc.

Goldfields Land Council Aboriginal Corporation

WESTERN DESERT REGION

Ngaanyatjarra Council (Aboriginal Corporation)

Warburton Community Incorporated

KUNUNURRA REGION

Kalumburu Aboriginal Association

DERBY REGION

Winun Ngari Aboriginal Corporation

A copy of the proposed Award may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) J SPURLING,
Registrar.

[L.S.]

12 January 2011

2011 WAIRC 00025

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 2 of 2011

APPLICATION FOR A NEW AWARD ENTITLED

"CRISIS ASSISTANCE, SUPPORTED HOUSING INDUSTRY – WESTERN AUSTRALIAN INTERIM AWARD 2011"

NOTICE is given that an application was made to the Commission, on 6 January 2011, by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, under the Industrial Relations Act 1979, for the above named Award.

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

4 COVERAGE OF AWARD

4.1 This award shall apply throughout the state of Western Australia to the crisis assistance and supported housing industry and to

4.1.1 each employer therein; and

4.1.2 each employee therein who is

(a) eligible for membership of the Western Australian Administrative, Clerical and Services Union of Employees; and

(b) employed in a classification to which this award applies.

4.1.3 the union and its officers.

4.2 This award will not apply to those persons employed in**:**

4.2.1 the industries or industrial pursuits of cleaners, security officers, caretakers, gardeners, laundry workers and/or domestic work/domestic workers; nor

4.2.2 the provision of supported and/or related support services which are specifically for aged, infirm, physically, psychiatrically or developmentally disabled persons or persons suffering from drug or alcohol addiction, or children under the aged of twelve years.

4.2.3 This award does not apply to a person who is in Holy Orders or is a member of a Religious institute unless it is so stated in a written contract of employment between the person and the employer.

…

CLASSIFICATION AND SALARY RATES

…

Level
Community Services Worker 1
1
2
Community Services Worker 2
1
2
3
Community Services Worker 3
1
2
3
Community Services Worker 4
1
2
3
4
Community Services Worker 5
1
2
3
Community Services Worker 6
1
2
3
Community Services Worker 7
1
2
3
Community Services Worker 8
1
2
3
Community Services Worker 9
1

A copy of the proposed Award may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) J SPURLING,
[L.S.] Registrar.

12 January 2011

2011 WAIRC 00037

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 4 of 2010

APPLICATION FOR A NEW AWARD

ENTITLED "LOCAL GOVERNMENT OFFICERS (WESTERN AUSTRALIA) INTERIM AWARD, 2011"

NOTICE is given that an application was made to the Commission, on 24 December 2010, by Western Australian Municipal, Administrative, Clerical and Services Union of Employees, under the Industrial Relations Act 1979, for the above named award.

As far as relevant, those parts of the proposed Award which relate to area of operation or scope are published hereunder:

5. – OPERATION OF AWARD (INCIDENCE AND DURATION)

5.1 This award shall apply throughout the State of Western Australia to all local government authorities and their agencies and their employees whether members of the Union/s or not, and upon the Union/s their officers and members.

13. – SALARIES – MINIMUM ANNUAL

13.5 General minimum salary scale

Level 1;

Level 2;

Level 3;

Level 4;

Level 5;

Level 6;

Level 7;

Level 8;

Level 9.

13.7 Negotiated salaries

Chief Executive Officer;

Executive Officer.

A copy of the proposed Award may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J SPURLING,
Registrar.

[L.S.]

14 January 2011

2011 WAIRC 00017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 81 of 2007

APPLICATION FOR VARIATION OF AN AWARD ENTITLED

"MISCELLANEOUS GOVERNMENT CONDITIONS AND ALLOWANCES AWARD NO A 4 OF 1992"

NOTICE is given that an application on the Commission's own motion has been made under s 40B of the Industrial Relations Act 1979 to vary the above Award.

As far as relevant, those parts of the proposed variation which relate to area of operation or scope are published hereunder:-

SCHEDULE B – LIST OF RESPONDENTS: Delete this schedule and insert in lieu:

SCHEDULE B – LIST OF RESPONDENTS

Minister for Health in his incorporated capacity under s7 of the *Hospitals and Health Services Act 1927* (WA) as:

(i) the Hospitals formerly comprised in the Metropolitan Health Service Board;

(ii) the Peel Health Service Board; and

(iii) the WA Country Health Service.

Director General

Department of Agriculture and Food

Director General

Department of Culture and the Arts

Director General

Department of Environment and Conservation

Director General

Department of Housing

Commissioner

Main Roads Western Australia

Minister for Police

Minister for Emergency Services

Minister for Corrective Services

Governing Council of Central Institute of Technology
Governing Council of Durack Institute of Technology
Governing Council of Challenger Institute of Technology
Governing Council of CY O'Connor Institute
Governing Council of Great Southern Institute of Technology
Governing Council of Kimberley College of TAFE
Governing Council of Pilbara TAFE
Governing Council of South West Institute of Technology
Governing Council of Polytechnic West
Governing Council of West Coast Institute of Technology
The Director General
Department of Education
Attorney General
Minister for Child Protection
Minister for Community Services
Minister for Seniors and Volunteering
Minister for Women's Interests
Minister for Youth
Minister for Disability Services
Minister for Culture and the Arts
WA Alcohol and Drug Authority
Director General
Disability Services Commission
General Manager
Metropolitan Cemeteries Board
Zoological Parks Authority
20 Labouchere Road
SOUTH PERTH WA 6151
Chief Executive Officer
Western Australian Sports Centre Trust trading as VenuesWest
Minister for Sport and Recreation
Minister for Racing and Gaming
Director General
Department of Mines and Petroleum
Director General
Department of State Development
Minister for Housing
Director
Country High School Hostels Authority
Rottnest Island Authority

A copy of the proposed variation may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J SPURLING,
[L.S.] Registrar.

7 January 2011

2011 WAIRC 00038

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 2 of 2010

APPLICATION FOR A NEW AWARD

ENTITLED "MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) INTERIM AWARD 2011"

NOTICE is given that an application was made to the Commission, on 24 December 2010, by Western Australian Municipal, Administrative, Clerical and Services Union of Employees, under the Industrial Relations Act 1979, for the above named award.

As far as relevant, those parts of the proposed Award which relate to area of operation or scope are published hereunder:

5. – OPERATION OF AWARD (INCIDENCE AND DURATION)

5.1 This award shall apply throughout the State of Western Australia to all local government authorities and their agencies and their employees whether members of the Union/s or not, and upon the Union/s their officers and members.

16. – WAGES

16.1 – Classification level

level 1;

level 2;

level 3;

level 4;

level 4A;

level 5;

level 6.

A copy of the proposed Award may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J SPURLING,
Registrar.

[L.S.]

14 January 2011

2011 WAIRC 00005

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSAA 1 of 2010

APPLICATION FOR A NEW AWARD ENTITLED

"WESTERN AUSTRALIA POLICE AUXILIARY OFFICERS' AWARD 2010"

NOTICE is given that an application was made to the Commission, on 17 December 2010, by The Civil Service Association of Western Australia Incorporated, under the Industrial Relations Act 1979, for the above named Award.

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

1.3 – AREA OF OPERATION

This Award shall apply throughout the State of Western Australia.

1.4 – SCOPE

This Award shall apply to all Police Auxiliary Officers appointed and employed by the Commissioner of Police, Western Australia Police Service, who are members of, or eligible to become members of, The Civil Service Association of Western Australia Incorporated.

A copy of the proposed Award may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) J SPURLING,
Registrar.

[L.S.]

22 December 2010

2011 WAIRC 00028

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 3 of 2010

APPLICATION FOR A NEW AWARD

ENTITLED "SOCIAL AND COMMUNITY SERVICES – (WESTERN AUSTRALIA) INTERIM AWARD 2011"

NOTICE is given that an application was made to the Commission, on 24 December 2010, by Western Australian Municipal, Administrative, Clerical and Services Union of Employees, under the Industrial Relations Act 1979, for the above named award.

As far as relevant, those parts of the proposed Award which relate to area of operation or scope are published hereunder:

5. – COVERAGE OF AWARD

5.1 This Award will apply throughout the State of Western Australia to all employers in the social and community services industry and those of their employees who are eligible to join the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (whether members or not) and the Union and its officers

5.2 This Award will not apply to those persons employed in:

5.2.1 a service, the predominant function of which is the provision of crisis and supported accommodation and/or related support services except those specifically providing services to people with disabilities;

5.2.2 a service, the predominant function of which is the provision of a community based labour market programme; or

5.2.3 a service, the predominant function of which is the provision of family day care and child care services.

5.3 This Award does not apply to a person who is in Holy Orders or is a member of a Religious Institute unless it is so stated in a written contract of employment between the person and the employer.

14. – CLASSIFICATIONS AND SALARY

Community Services Worker 1;

Community Services Worker 2;

Community Services Worker 3;

Community Services Worker 4;

Community Services Worker 5;

Community Services Worker 6;

Community Services Worker 7;

Community Services Worker 8;

Community Services Worker 9.

Schedule

RESPONDENTS

ANGLICARE	GPO BOX C138		PERTH	WA	6000
DRUG ARM WA INC	PO BOX 165		ARMADALE	WA	6992
MARRA WORRA WORRA ABORIGINAL CORPORATION	PO BOX 35		FITZROY CROSSING	WA	6765
RELATIONSHIPS AUSTRALIA	PO BOX 1206		WEST LEEDERVILLE	WA	6901
RICHMOND FELLOWSHIP OF WA	PO BOX 682		BENTLEY	WA	6982
THE SALVATION ARMY	PO BOX 8498		PERTH BC	WA	6849
SHELTER WA	1ST FLOOR, CLAISEBROOK LOTTERIES HOUSE	33 MOORE STREET	EAST PERTH	WA	6004
SUSSEX STREET COMMUNITY LAW SERVICE INC	LOCKED BAG 2		EAST VICTORIA PARK	WA	6981
TENANTS ADVICE SERVICE INC	PO BOX 6057		EAST PERTH	WA	6892
UNITINGCARE WEST	GPO BOX B74		PERTH	WA	6838
WESTERN AUSTRALIAN COUNCIL OF SOCIAL SERVICES	CITY WEST LOTTERIES HOUSE	2 DELHI STREET	WEST PERTH	WA	6005
YOUTH LEGAL SERVICE	138 MURRAY STREET		PERTH	WA	6000

A copy of the proposed Award may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J SPURLING,
Registrar.

[L.S.]

12 January 2011

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2010 WAIRC 01256

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICKY BALDWIN
	APPLICANT
	-v-
	20*20 PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	B 113 OF 2010
CITATION NO.	2010 WAIRC 01256

Result	Order issued
Representation	
Applicant	Mr N Baldwin
Respondent	Ms K Woods (of counsel)

Order

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

AND WHEREAS on 4 October 2010 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at that conference the applicant attended with his representative however there was no appearance on behalf of the respondent;

AND WHEREAS on 21 October 2010 the Commission convened a further conference;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS a further conference was listed on 5 November 2010;

AND WHEREAS the conference was adjourned due to the unavailability of the Commissioner;

AND WHEREAS a further conference was listed on 12 November 2010;

AND WHEREAS at that conference the respondent attended however there was no appearance on behalf of the applicant;

AND WHEREAS the application was listed for a To show cause hearing on 25 November 2010;

AND WHEREAS the hearing was adjourned due to the unavailability of the Commissioner;

AND WHEREAS the application was further listed for a To show cause hearing on 13 December 2010;

AND WHEREAS at that hearing there was no appearance by the parties;

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

2010 WAIRC 01255

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICKY BALDWIN
	APPLICANT
	-v-
	20*20 PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	U 113 OF 2010
CITATION NO.	2010 WAIRC 01255

Result	Order issued
Representation	
Applicant	Mr N Baldwin
Respondent	Ms K Woods (of counsel)

Order

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

AND WHEREAS on 4 October 2010 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at that conference the applicant attended with his representative however there was no appearance on behalf of the respondent;

AND WHEREAS on 21 October 2010 the Commission convened a further conference;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS a further conference was listed on 5 November 2010;

AND WHEREAS the conference was adjourned due to the unavailability of the Commissioner;

AND WHEREAS a further conference was listed on 12 November 2010;

AND WHEREAS at that conference the respondent attended however there was no appearance on behalf of the applicant;

AND WHEREAS the application was listed for a To show cause hearing on 25 November 2010;

AND WHEREAS the hearing was adjourned due to the unavailability of the Commissioner;

AND WHEREAS the application was further listed for a To show cause hearing on 13 December 2010;

AND WHEREAS at that hearing there was no appearance by the parties;

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

2011 WAIRC 00034

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JESSE BOOTH
	APPLICANT
	-v-
	ALL BOAT BUSINESS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 14 JANUARY 2011
FILE NO/S	U 73 OF 2010
CITATION NO.	2011 WAIRC 00034

Result	Dismissed

Order

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

WHEREAS on 21 May 2010 the Commission contacted the applicant by telephone about serving the application upon the respondent in accordance with the Commission's regulations and the applicant requested further time to consider what he wished to do with his application and undertook to advise the Commission within one week of his intentions however, this did not occur; and

WHEREAS on 27 July 2010 the Commission again contacted the applicant by telephone and the applicant advised that he did not wish to proceed with his application however, in a further telephone conversation a short time later he asked for a copy of his application to be sent to him as he wanted further time to consider his options; and

WHEREAS on 29 July 2010 the Commission wrote to the applicant enclosing the documentation he had requested and the applicant was advised that he was to advise his intentions in relation to the matter by the close of business on Friday 6 August 2010; and

WHEREAS on 25 August 2010 the respondent lodged a Notice of Answer and Counter-proposal with respect to this matter; and

WHEREAS the Commission convened a conference on 30 September 2010 for the purpose of conciliating between the parties; and

WHEREAS the applicant did not attend the conference; and

WHEREAS on 6 October 2010 the Commission wrote to the applicant requesting he contact the Commission by no later than 4.00pm on Wednesday 13 October 2010 to provide advice as to why he did not attend the conference; and

FURTHER the applicant was advised that if he did not contact the Commission by this date or provide an adequate reason for his non-attendance at the conference that the matter may be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS as the applicant did not contact the Commission by the due date the matter was listed for a show cause hearing on 14 January 2011 and the applicant was advised that non-attendance by the applicant at these proceedings will result in an order being issued dismissing the application for want of prosecution; and

WHEREAS the applicant did not attend the show cause hearing on 14 January 2011 nor did he advise the Commission beforehand as to any reason why he was unable to attend the hearing;

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

2010 WAIRC 01267

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL GRAF
	APPLICANT
	-v-
	LEN WOONINGS
	TOTAL EDEN/ALBANY DRILLING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	U 177 OF 2010
CITATION NO.	2010 WAIRC 01267

Result Application dismissed

Order

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

WHEREAS on the 16th day of December 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS following the conference the parties agreed to a settlement in respect of all matters associated with the employment; and

WHEREAS on the 24th day of December 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 dismissed.

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

2010 WAIRC 01238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	C. A. HAYDEN
	APPLICANT
	-v-
	PALACE CLEANING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 DECEMBER 2010
FILE NO/S	U 112 OF 2010
CITATION NO.	2010 WAIRC 01238

Result	Order issued
Representation	
Applicant	Ms M Aulfrey (of counsel)
Respondent	Mr N Ismail-Zia

Order

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

AND WHEREAS on 31 August 2010 and 10 September 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conferences no agreement was able to be reached between the parties;

AND WHEREAS the matter was listed for hearing and determination on 8 December 2010;

AND WHEREAS with the consent of the parties the hearing adjourned into conference;

AND WHEREAS at the conference agreement was able to be reached between the parties;

AND WHEREAS on 8 December 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,
Commissioner.

[L.S.]

2010 WAIRC 01239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNETTE MCSHERRY
	APPLICANT
	-v-
	LINDSAY ROBESON (T/A RAY WHITE REAL ESTATE ROBESON & ASSOC)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 DECEMBER 2010
FILE NO/S	B 198 OF 2009
CITATION NO.	2010 WAIRC 01239

Result	Order issued
Representation	
Applicant	Ms L McSherry
Respondent	Mr D.M Jones (as agent) and later Mr P Murray (of counsel)

Order

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

AND WHEREAS on 18 January 2010 and 24 March 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conferences no agreement was able to be reached between the parties;

AND WHEREAS the matter was listed for hearing and determination on 6 September 2010;

AND WHEREAS with the consent of the parties the hearing adjourned into conference;

AND WHEREAS at the conference agreement was able to be reached between the parties;

AND WHEREAS on 8 December 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.

2011 WAIRC 00035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARBARA ELIZABETH PETTERSEN KIM DARRYL PETTERSEN **APPLICANTS** **-v-** PORT HEDLAND PEACE MEMORIAL SEAFARERS CENTRE INC **RESPONDENT**
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	TUESDAY, 30 NOVEMBER 2010, WEDNESDAY, 1 DECEMBER 2010, THURSDAY, 2 DECEMBER 2010, FRIDAY, 3 DECEMBER 2010, MONDAY, 6 DECEMBER 2010
DELIVERED	FRIDAY, 14 JANUARY 2011
FILE NO.	B 55 OF 2010, B 56 OF 2010
CITATION NO.	2011 WAIRC 00035

CatchWords	Industrial law – Whether the WAIRC has jurisdiction to deal with claims for enforcement of contracts of employment – Whether applications deal with non-excluded matters under s 27(1) of the *Fair Work Act 2009* (Cth) – Denied contractual benefits – National system employer – Voluntary committee – Unsatisfactory performance and conduct – Repudiation of contract of employment – Breach of contract of employment – Co-terminus contract of employment – Implied terms – Failure to mitigate loss – *Commonwealth of Australia Constitution Act* s 51, s 54, s 55 – *Fair Work Act 2009* (Cth) s 27(1), s 27(1)(c), s 27(2)(o) , s 542(1), s 543 – *Fair Work Act 1994* (SA) – *Fair Work Bill* Explanatory Memorandum – *Industrial Relations Act 1979* s 23, s 26, s 29(1)(b)(ii)
Result	Jurisdiction found, applications dismissed
Representation	
Applicants	Mr G McCorry as agent
Respondent	Mr T Caspersz of counsel and Ms M Ivanovski of counsel

Reasons for Decision

1 Each of the applicants has referred to the Commission a claim in accordance with s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the *IR Act*) that they have been denied by their employer benefits arising from their contracts of employment. Those benefits are said to have arisen when the respondent dismissed Mr Pettersen on 20 November 2009 in circumstances where their contracts of employment are said to have provided fixed terms of two years. At the time of termination of employment they had been employed for approximately eight and a half months of the two year term.

JURISDICTION

2 The applicants and the respondent agree that the respondent is a national system employer within the meaning of that term as it is used in the *Fair Work Act 2009* (Cth) (the *FW Act*), on the basis of its substantial trading activities through its shop, bar and currency changing operations.

3 The issue is whether the applications deal with non-excluded matters pursuant to s 27(1) of the *FW Act*. If so, then the Commission has jurisdiction to deal with them. If not, then it does not have jurisdiction.

"Deals With"

4 In its Outline of Submissions at [16] – [20] the respondent said that to be a non-excluded matter the relevant law, being the *IR Act*, must deal with the non-excluded matter as the main or substantial subject of the law. The respondent refers to the decision in *Resch v Federal Commissioner of Taxation* (1942) 66 CLR 226 per Dixon J at 223. The respondent did not elaborate on this point when addressing those submissions. The essential point the respondent sought to make was that the law, in this case, the *IR Act*, could deal only with the issue of the non-excluded matter. To support this contention the respondent referred to s 55 of the *Commonwealth of Australia Constitution Act*, which provides that:

> "Tax Bill
>
> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

5 The respondent referred to a number of cases dealing with taxation law for the purpose of illustrating the limitation of the laws "dealing with" the subjects of taxation, customs and excise.

6 I note that s 55 of the Constitution falls within Part V – Powers of the Parliament. That Part also contains s 51 which sets out the legislative powers of the Commonwealth Parliament, including the "power to make laws for the peace, order, and good government of the Commonwealth with respect to:

> "(i) trade and commerce with other countries, and among the States;
>
> (ii) taxation; …
>
> …
>
> (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;"

7 Section 54 – Appropriation Bills has a similar limitation to that in s 55. It is only in respect of ss 54 and 55 that the Constitution provides that there is such a limitation that those laws shall deal only with the subject matter concerned, or that any provisions dealing with any other matter is of no effect. Part V of the Constitution does not impose such limitations on the other powers set out in s 51.

8 I do not accept that the requirement in the Constitution for very particular types of laws to deal only with the specified subject matter applies to the term "deals with" in s 27(1)(c) of the *FW Act* so as to mean that only a State law which deals mainly or substantially with claims for the enforcement of contracts of employment meets the requirement. Section 55 of the Constitution and the authorities referred to have application to those particular issues and there is no suggestion that the principle applies beyond that limited area.

Enforcement

9 Secondly, the respondent says that a claim referred under s 29(1)(b)(ii) of the *IR Act* does not deal with the non-excluded matter provided for in s 27(2)(o) of the *FW Act* of dealing with claims for the enforcement of contracts of employment.

10 The respondent also refers to the Explanatory Memorandum to the *Fair Work Bill 2008* where reference was made to s 14 of the *Fair Work Act 1994* (SA) as being an example of a law contemplated by the provision for enforcement.

11 The respondent says that s 543 of the *FW Act*, which provides for applications to the Federal Court to enforce an entitlement, is the nature of the enforcement provisions referred to in s 27(2)(o) of the *FW Act*. By contrast it is said that s 29(1)(b)(ii) of the *IR Act* is not an enforcement provision.

12 By reference to various authorities, the respondent says that s 29(1)(b)(ii) of the *IR Act* provides for an award of compensation for a denied contractual benefit as constituting the redress to resolve the conflict in relation to an industrial matter (see *Matthews v Cool or Cosy Pty Ltd* ("*Cool or Cosy*") [2004] WASCA 114 per Steytler J at [24] and [27]; *Hotcopper Australia Ltd v Saab* [2002] WASCA per Anderson J [18] and [24]; *Dellys v Elderslie Finance Corporation Ltd* [2002] WASCA 161 per Anderson J (Presiding Judge) at [5]). The respondent says that an award of compensation for denied contractual benefits is not enforcement of a contract and therefore s 29(1)(b)(ii) does not deal with claims for enforcement of contracts. Therefore these claims do not relate to matters which are non-excluded matters pursuant to s 27(1)(c) and (2)(o) of the *FW Act*.

13 The applicants say that the Commission's powers are those conferred by s 23 of the *IR Act*, subject to the limits imposed by the *IR Act* itself, and that accordingly the Commission's powers are at large. Those powers are not defined by particular remedies, nor is the Commission limited to the remedy claimed, but what it can do is subject to the *IR Act* and principles. The power under the *IR Act* and the Commission's jurisdiction enable the Commission to deal with claims for enforcement of contracts of employment by reference to s 23 and the definition of industrial matter; s 29(1)(b)(ii) merely enables an individual employee to bring a particular claim.

14 In *Christos Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004 I examined the Commission's jurisdiction in respect of whether the *I R Act* is a State law dealing with a claim for enforcement of a contract of employment, being a non-excluded matter specified in s 27(2)(o) of the *FW Act*. In doing so I examined in detail the decisions of the Industrial Appeal Court in *Cool or Cosy* and of the Full Bench in *Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732; (2009) 89 WAIG 76. Those decisions examined the Commission's jurisdiction and powers set out in s 26 in relation to a claim referred to the Commission by an employee under s 29(1)(b). In the process of that consideration members of both the Industrial Appeal

Court and the Full Bench made comments which set the context of a claim referred under s 29(1)(b)(ii) as being an application or claim to enforce a contract of employment. I adopt my reasons in *Triantopoulos v Shell* and my conclusions in that matter so far as they deal with the same issue in this matter raised by the respondent, as to the Commission's jurisdiction to enforce contracts of employment.

15 As to the respondent's argument that s 543 of the *FW Act* is of the nature of a law which deals with enforcement, the comments I have made in *Triantopoulos v Shell* regarding the comparative jurisdictions in Western Australia and South Australia apply equally in this instance also. Merely because other jurisdictions have their jurisdictions and powers arranged in a particular way does not exclude the *IR Act* providing for the Commission to have jurisdiction to enforce contracts of employment.

16 Section 543 of the *FW Act* falls within Chapter 4 – Compliance and Enforcement and provides for a national system employee or a national system employer to apply to the Federal Court or the Federal Magistrates Court to enforce an entitlement arising under s 542(1). Those entitlements are not contractual entitlements of the same nature as those referred to in s 29(1)(b)(ii) of the *IR Act.* They are entitlements arising from National Employment Standards, modern awards, enterprise agreements, workplace determinations, national minimum wage orders, or equal remuneration orders, that is, "safety net contractual entitlements". These are more akin to those entitlements which can be enforced under the *IR Act* by the Industrial Magistrate's Court. They are not common law contractual entitlements as are those dealt with on a referral of a claim under s 29(1)(b)(ii) of the *IR Act* (see *Cool or Cosy*).

17 Therefore I conclude that the Commission's jurisdiction is to deal with an industrial matter which includes the power to compel by order the performance of a benefit under the contract of employment or make a monetary order in the nature of damages, and includes the jurisdiction to enforce a breach of a contract of employment referred under s 29(1)(b)(ii). Such a claim is a claim for enforcement of a contract of employment and therefore a non-excluded matter under s 27(2)(o) of the *FW Act*. Accordingly, I find that the Commission has jurisdiction to deal with these claims.

THE SUBSTANTIVE CLAIMS

18 The Commission has heard evidence from the applicants, Barbara Elizabeth Pettersen and Kim Darryl Pettersen; Kaye Falconer Richardson, the Honorary Secretary of the respondent's Committee of Management (the Committee); Mark James Connolly, parish priest and chaplain of the respondent; Carol Ann Morgan, the Centre's manager at the time the applicants were engaged; Andrew Paul Gillie and Shelley Ann Gillie, who were initially volunteers at the Centre and upon the resignation of Carol Morgan and her husband Peter Morgan, were appointed as administrator and centre assistant of the Centre respectively; and John James Kingdom, the President of the Committee.

Background

1. The Centre

19 The respondent is an incorporated association jointly sponsored by "two international Seafarers' Welfare Agencies, namely The Apostleship of the Sea and The Mission to Seafarers". The Patrons of the association are the Anglican Bishop of the North West and the Catholic Bishop of Geraldton. There are two directors of the association appointed by the two sponsoring organisations, each in conjunction with a Patron (Exhibit R8 – Witness Statement of John James Kingdom, Attachment JJK 1 – The Port Hedland Peace Memorial Seafarers' Centre Incorporated Constitution). The respondent might simply be described as a Christian mission jointly supported and assisted by the Anglican and Catholic churches. Its first object is "[to advance] the social, material and spiritual welfare of seafarers" (Exhibit R8 – Witness Statement of John James Kingdom – Attachment JJK 1, the Port Hedland Peace Memorial Seafarers' Centre Incorporated Constitution, clause 3 – Objects).

20 The Centre performs its mission primarily by providing a welcoming and supportive place where seafarers of all nationalities coming into the port of Port Hedland can spend time relaxing; change foreign currency; purchase items including phone cards, toiletries, souvenirs; have access to computers, printers, telephones and other services, and receive Christian counselling and spiritual and emotional support.

21 As noted above the Centre operates a shop, a bar and a currency changing service. This means there are a number of tills and a float for those tills. The currency changing service relies on a separate float kept in a blue tin. The significance of this will be clear later.

22 The evidence demonstrates that seafarers attending the Centre may have been at sea for many months; may be alone, friendless and lonely in port; they may be in difficulty, may have experienced bereavements and other family and personal problems while away from home. They may have had problems on board their ships. Many do not speak English, or have limited English. The mission of the Centre is to help them in those circumstances. That help may be in the form of someone to listen to their problems, to give them moral support, comfort or guidance, including spiritual support, in particular but not exclusively, by the chaplain. Other members of staff are also expected to "act in accordance with the [Christian ethos] … [to] show compassion" (Exhibit R3 – Witness Statement of Father Mark James Connolly at [49]).

23 The Centre consists of a main building comprising a recreation room with games and television; computers and telephones; a shop which sells various items including religious materials; a chapel; a licensed bar, and a manager's flat which is down a passageway adjacent to the bar area. Apart from the main building, a few metres away, is a house used to accommodate other permanent staff members. Initially Mr and Mrs Pettersen lived in this house, however they moved into the manager's flat and were living there at the time their employment terminated.

24 The Centre operates buses which have regular runs to various parts of the port to collect seafarers from their vessels and return them there, to drop them in the town at shops, and collect them from the town, and to collect them from or deliver them to the airport. The buses are housed under cover adjacent to the main building.

25 The Centre is operated by the Committee which meets each month. The Committee is made up of interested members of the community along with the chaplain and director. It has employed a manager or administrator. When the applicants were first employed, Carol Ann Morgan and her husband Peter were employed at the Centre. They retired around September/October

2009 and were replaced by Andrew and Shelley Gillie. Mrs Gillie is Mrs Morgan's daughter. There is some conflict in the evidence as to whether Mrs Morgan was the manager and her husband was a centre assistant, or whether they were joint managers, and whether Andrew Gillie was subsequently the administrator and Shelley Gillie a centre assistant, or whether they were joint managers. This conflict is significant because this apparent lack of clarity appears to have affected staff relationships. However I conclude that Carol Morgan was the manager and Peter Morgan was a centre assistant, and Andrew Gillie was the administrator and Shelley Gillie was a centre assistant.

26 The Centre relied heavily on volunteers to perform its mission. Some of the members of the Committee were also volunteers and participated in a roster. Those volunteers worked both alongside and replaced the paid members of staff, both in a formal roster and on an ad-hoc basis when they were able to. As volunteers they had no obligation to attend as does a paid employee, and on occasion they advised that they would not be attending.

2. The Applicants are Engaged

27 The applicants are a married couple normally residing in Bunbury. In early 2009 they were staying with family in Karratha when they responded to an advertisement by the Centre seeking centre assistants, being "[a] caring couple … to work in the Port Hedland Seafarers Centre". The advertisement noted "[t]he position involves working together with the manager and her husband to maintain services in the centre". Particular duties were listed, and the hours were specified as approximately 84 per fortnight, including some weekend and night work. It also noted that "[t]his job requires a great deal of dedication and commitment to the well being of the seafarers" (Exhibit R8) – Witness Statement of John James Kingdom, Attachment JJK 3). The applicants met with Mrs Morgan and later were interviewed by members of the Committee. Immediately after that interview they were offered the positions. This was confirmed in a letter addressed to them both dated 3 March 2009, in the following terms:

> "3 March 2009
>
> Kim and Barbara Pettersen
>
> c/- Seafarers Centre
>
> Port Hedland
>
> Dear Kim & Barbara,
>
> The Management Committee is pleased to offer you both the position of Centre Assistants at the Port Hedland Seafarers Centre starting on the 9th March 2009.
>
> The position is for a period of two years with a possibility of extending beyond that time. However your employment is subject to a three month probation period from the starting date.
>
> You will report to the Centre Manager for all matters pertaining to the Centre.
>
> It is expected that you would work at the Centre for 84 hours a fortnight each. You will be entitled to a minimum of two days off each week, including every second weekend. The Manager will provide you with a roster and a list of duties. It will be necessary to be flexible in your hours or work according to the needs of the Centre and it will include evenings and weekend work at the same rate of pay. Your joint stipend is $3854 per month.
>
> You will receive four weeks annual leave each year. There are no special provisions for public holidays or weekends worked. There are also no long service leave provisions.
>
> The Centre will contribute statutory payments to a Superannuation fund of your choice provided that such contributions do not result in additional fees being incurred by the centre. The Anglican Diocese has its own superannuation fund, which you may wish to join.
>
> Should you wish to accept this offer of employment on the terms and conditions outlined above could (sic) please sign and return this offer to us.
>
> I trust that your time at the Centre will be enjoyable and fruitful for you and for the Seafarers with whom you interact.
>
> Yours truly
>
> (signed)
>
> John Kingdom
>
> President
>
> Committee of Management"
>
> (Exhibit A2 – Witness Statement of Kim Darryl Pettersen, Annexure B).

28 The letter provided spaces for the applicants to sign the letter to indicate their acceptance, and they did so in the following terms:

> "We accept the offered appointment as Centre Assistants with the Port Hedland Peace Memorial Seafarers' Centre Inc under the terms and conditions outlines (sic) above.
>
> Signed _____ Date 09/03/2009
>
> Kim Pettersen
>
> Signed _____ Date 09/03/2009
>
> Barbara Pettersen"

They also received an Overview of the Operations of the Centre, Staff Conditions of Employment and a duty statement in the following terms:

"Port Hedland Seafarers Centre

DUTIES OF CENTRE ASSISTANT

. Provide caring contact for all seafarers

. Cleaning as per roster

. Work in bar

. Tills – balance tills each day you work

. Bus trips as per roster.

. Work on phone counter – sell phone cards & internet

. Work in and maintain the centre's shop (including restocking shelves)

. Wash both buses inside and outside each week

. Assist with the Shoebox Appeal & Sea Sunday

. Assist with outside maintenance

. Assist with cleaning outside – raking of leaves, palm fronds etc

. Assist Chaplain with religious material

. Assist with catering for functions".

(Exhibit A2 – Witness Statement of Kim Darryl Pettersen, Attachment C).

29 In addition to those specified duties, attached to the side of the filing cabinet in the office of the Centre were schedules setting out daily duties in the form of "Daily Set-Up" and "Cleaning By Days" which set out schedules of particular duties (Exhibit R2 – Supplementary Witness Statement of Kaye Falconer Richardson – Attachment KFR 9, "S" and "T").

30 The evidence demonstrates that when they were interviewed, permanent staff and volunteers were told that "it is expected they will act in a charitable and compassionate manner towards the seafarers, and in accordance with the Centre's ethos" (Exhibit R8 – Witness Statement of John James Kingdom at [7]). Both applicants gave evidence that the importance of the seafarers being treated with care and compassion was explained to them and that the mission of the Centre was also explained. They were also informed of the importance of working as part of a team, including with the other couple permanently engaged and of the importance of volunteers to the Centre.

31 Mr and Mrs Pettersen were to be paid jointly an amount equal to the stipend for an Anglican priest. They had that divided equally between them although they could have chosen to have it divided differently. Together they arranged the division of duties between them, with Mr Pettersen driving the buses (because he had the appropriate licence) and cleaning them and Mrs Pettersen doing some of the cleaning. It seems that they shared the remainder of duties. Mrs Pettersen's evidence was that she understood the role she and her husband were to perform, their responsibility to not only do cleaning, serve in the shop, do re-stocking and the like, but that this role was performed in the context of the mission and objects at the Centre referred to earlier. She understood the need for teamwork with the Morgans and with volunteers; and the importance of volunteers to the successful operation of the Centre, and that it would be prejudicial to the Centre's mission if volunteers stopped volunteering.

32 She agreed that she and Mr Pettersen were engaged together, as a team, and that if something happened to break up the team arrangement, it would be the end of the team or that it was "one in, all in; one out, all out" (T 27).

33 Mr Pettersen also understood the role he and Mrs Pettersen were to perform, and how it fitted with the context, mission and objects of the Centre. He knew of the need to work as part of a team, with other couples and volunteers. He acknowledged that he was critical of volunteers when they did not attend in accordance with their roster, and agreed that he criticised Julie Barlow, a volunteer, when she was sitting with sailors in the computer area when there was no one to operate the till in the shop; although he denied that he was rude to her. He too agreed that he and Mrs Pettersen were employed to work as a team.

The Evidence Generally

34 I have observed the witnesses as they gave their evidence and make the following general comments.

35 Generally, Mrs Pettersen was a credible witness. However, it is clear that some aspects of her evidence, particularly in her Witness Statement, relied on information about working hours and calculations relating to her claim which was provided by others.

36 In observing Mr Pettersen as he gave his evidence, I believe he displayed hints of the arrogance and an attitude of being right, of knowing best, attributed to him by witnesses for the respondent. At times in cross-examination he was defensive and uncomfortable with questions put to him. Mrs Morgan referred to Mr Pettersen being unpleasant to seafarers, and she described him as having a brusque way of speaking and this was evidenced by his body language and the way he acted – she said "[y]ou really had to be there to see it" (T 195). In observing Mr Pettersen as he gave his evidence, I believe that he demonstrated this attitude.

37 John James Kingdom acknowledged from the outset that he has a notoriously poor memory in particular for details, however his evidence was quite clear and unshaken on those matters he recalled.

38 The evidence of the respondent's witnesses about how the float in the "blue tin" operates was not consistent, however I do not see that as an issue of credibility but of understanding.

39 Save for some confusion as to dates on which some issues arose, I accept the evidence of the respondent's witnesses. I also note that Mr Gillie acknowledged that he could not in fact smell alcohol on Mr Pettersen's breath when Mr Pettersen took the bottle of spirits from the bar because he was not close enough to Mr Pettersen. Otherwise I found the evidence to be credible, taking account of the usual differences which arise from people having different recollections of the same matters.

3. The Management Style of the Centre

40 Mrs Morgan's evidence demonstrated the difficulties of organisations such as the respondent which are managed by voluntary committees. She said that the Committee was not renowned for making quick decisions, that it was not unusual for things to be missed out of the minutes of the meetings of the Committee and further, that when she was having difficulty with balancing the tills she rang Mr Kingdom for advice. He advised her to ring Ilsa Gosper, the honorary treasurer. She did so and was told by the treasurer to take the money out of the blue tin to rebalance the tills and not to create waves (T 188).

41 Father Connolly's evidence was that committees such as this "can be very slow in getting their act together" (T 134). Mr Kingdom wanted to resolve issues by discussion; Father Bill Ross was said by Mrs Richardson to believe that differences could be resolved by mediation or conciliation and pushed for this approach. He was quite influential in the Committee given his status as a director.

42 I take into account the nature of this organisation, being a Christian mission, with a management committee made up of community members who, the evidence suggests, have other work commitments. This was an organisation which dealt with problems informally, it attempted to resolve them through discussion, reminder and encouragement, not with formal directions and discipline.

4. Problems in the Employment

43 The evidence demonstrates that from fairly early in their employment, the Pettersens both encountered difficulties in their relationship and dealings with Mrs Morgan and her husband Peter, who worked as a centre assistant.

44 Mrs Pettersen said that she and Mr Pettersen did not receive a proper induction when they commenced, and were left to discover a number of things themselves. She was critical of Mrs Morgan's management and approach towards them.

45 Mrs Morgan was not happy with Mr and Mrs Pettersen's performance. She recited a number of complaints about them both, dealing with inadequacies in cleaning, re-stocking and shopping. She complained that Mr Pettersen frequently came into the Centre on his days off, seemingly drunk, and she believed he smelled of alcohol. Mr Pettersen complained about he and Mrs Pettersen working excessive hours, which she did not observe them doing. She was critical of their failure to assist on Sea Sunday on 12 July 2009, (which fell on their day off) an important day in the Centre's calendar, and that this reflected a refusal to act in the flexible way required by their contract.

46 I find that Mrs Morgan's management style was that she attempted to resolve issues amicably and diplomatically, however when that failed she took the line of least resistance performing the particular task herself, or she acquiesced to or ignored problems with, in particular, Mr Pettersen's attitude. She seems to have been worn down by attempting to deal with them in circumstances where she says Mr Pettersen was uncooperative, and when issues were raised with Mrs Pettersen she would become upset and tearful. In considering why Mr and Mrs Pettersen were not performing to the standard she expected, Mrs Morgan questioned whether it was her own standards that were too exacting - whether she was being too pedantic and unreasonable in her unmet expectations of the Pettersens. She knew that she and her husband were planning to leave, so she hoped that her replacement would take a stronger approach to dealing with, in particular, Mr Pettersen. Her husband, Peter, was less tolerant according to Mrs Morgan and to the Pettersens, because he became quite angry on a number of occasions in dealing with Mr and Mrs Pettersen, but in particular with Mr Pettersen.

47 At the conclusion of the three months' probation period, Mr Kingdom, Ms Gosper and Father Connolly discussed the applicants' performance. They considered comments and complaints made by Mrs Morgan. Mrs Richardson also reported concerns about unsatisfactory behaviour on Mr Pettersen's part to Mr Kingdom. However it was decided to "give them the benefit of the doubt", continue with their employment and hope that encouragement would effect a positive change (see Exhibit R 8 – Witness Statement of John James Kingdom at [25] – [29]). Mr Kingdom started attending staff meetings and again, when an issue arose, he chose the approach of drawing everyone's attention to the issue, urging and encouraging as a means of correction.

48 In July 2009, Mrs Morgan raised a number of issues with the Committee, in particular about Mr Pettersen's performance and attitude. Mr Kingdom again dealt with Mr and Mrs Pettersen, this time urging cooperation with Mr and Mrs Morgan, rather than directing that they do so.

49 Mr Kingdom had a number of discussions with Mrs Morgan and with Mr Pettersen. When Mrs Morgan raised issues of concern with him he discussed those issues with her and with the Pettersens. Those discussions were not formal and were held within the Centre. He attempted to encourage the Pettersens to do a better job, and to take their job more seriously. He told them to comply with Mrs Morgan's directions but he believed he was being fobbed off by the response Mr Pettersen gave. He says when Mrs Morgan subsequently reported that Mr Pettersen in particular had not complied with what Mr Kingdom had asked, he would try again, however there would be no change.

50 There were two attempts to mediate between Mrs and Mr Morgan and Mr and Mrs Pettersen, the first of which, according to Mrs Pettersen, dealt with complaints by her that Mr Morgan was abusive towards her, and also complaints by Mrs Morgan that Mr and Mrs Pettersen would not take direction. The second mediation occurred in early August 2009. Mrs Morgan initially declined to participate but later relented. Mr Morgan appears to have maintained his refusal to participate. The discussion was chaired by Rev Bill Ross, and Mrs Richardson was present. The discussion was not successful in resolving difficulties. The evidence suggests that Rev Ross sought to portray the difficulties as misunderstandings when I believe they went well beyond that. Mrs Richardson encouraged both couples to work together and expressed her support to each in their troubled relationships.

51 I note that during this meeting, Mrs Pettersen was very upset, saying she was sick of being treated badly by the Morgans. Mrs Morgan said she was sorry that Mrs Pettersen felt that way but she needed their cooperation in running the Centre. Mrs Richardson described Mrs Pettersen as being very confrontational towards Mrs Morgan. Mrs Morgan was asked if she had any complaints she wanted to raise. Her response was that "I would only be nitpicking but the phone booths were not cleaned to my standard". It appears that by this stage Mrs Morgan was distressed and did not wish to participate further. She made her excuses, that she had to go to the bank, and left. Mrs Morgan later burst into tears at the bank. Mr and Mrs Pettersen took stress leave.

52 From this point it seems that Mrs Morgan and the Pettersens tolerated each other, with Mrs Morgan attempting to ignore their differences knowing that she and her husband would be leaving the Centre.

53 Mrs Morgan and her husband resigned in September/October 2009 and were replaced by Mr Gillie as Administrator and Mrs Gillie as centre assistant. Mrs Morgan's evidence was that there were two reasons for deciding when they would leave, firstly that her husband's health required it but that the timing of the departure was brought about by them not wishing to continue to work with Mr Pettersen in particular. As Mrs Morgan said in her evidence, she hoped that her successor would take a firm line with Mr Pettersen and have him perform as he was required to do.

54 When the Manager's position was to become vacant with Mrs and Mr Morgan's departure, Mr and Mrs Pettersen initially did not apply for the positions. Mr Pettersen wrote to the Committee in the following terms, formal parts omitted:

> "This letter is written to address comments made by Carol to the committee at your last meeting regarding my attitude.
>
> It seems strange to me that this happened in the same week that Carol & Peter interviewed a couple in their flat & again on the Wednesday in the centre, the committee meeting was on Thursday & you interviewed them on the Friday.
>
> Was this a case of bagging me to help slide the couple of their choice "under the radar" into this position??
>
> I believe that it was suggested that the committee together with Carol & I have a meeting to address my attitude but Carol refused. This stop (sic) me from a right of reply.
>
> Barb and I were going to apply for this position but without the confidence of the committee there seems little point, as we would then have a conflict that would be untenable.
>
> As you know a meeting was held between Kaye, Bill, Carol, Barb & I (Peter did not attend) & many items of concern were discussed. It is yet to see if things improve but with Peters (sic) wild mood swings & Carols (sic) management style, we like others before us would not be here for long.
>
> We believe, as a committee you have a Duty of Care to protect employees from ongoing harassment & verbal abuse & this has not happened, either now or with previous employees.
>
> As Carol & Peter have now given notice we feel we can see this time out & then the centre can move forward to a more staff involved, happy environment to work in.
>
> We also believe that as the "other couple" we should have some input into who is employed as we are the ones who will be working closely with them. We had couples coming into the centre regarding the advertised position & Carol showing them around but not one couple were (sic) introduced to us.
>
> The list of problems is too long to itemise here but both Barb & I will be available to the executive committee if you wish to speak with us.
>
> Lastly, let me state that in over 45 yrs in the workforce neither Barb nor I have had to have stress leave to cope with the above problems."
>
> (Exhibit A2 – Witness Statement of Kim Darryl Pettersen, Annexure N)

55 This letter demonstrates amongst other things that there were complaints about the Pettersens which Mr Pettersen knew about, and that he and Mrs Pettersen saw no point in applying for the positions because they perceived that the Committee did not have confidence in them, and that Mr Pettersen in turn was very critical of Mrs Morgan.

56 As Annexure "O" to Exhibit A2 – Witness Statement of Kim Darryl Pettersen demonstrates, they were subsequently encouraged to apply for the positions and did so, however Mr and Mrs Gillie were appointed.

57 Mr Gillie gave evidence that when he became administrator, Mr Pettersen did not carry out his directions. In those circumstances Mr Gillie generally did the job himself, to avoid confrontation, and he would report issues to the Committee. He said that it was not his job to pursue those matters in a disciplinary sense with Mr Pettersen, it was a matter for the Committee.

58 Mrs Gillie also gave evidence of having difficulty with Mr Pettersen's attitude and lack of cooperation. She seems to have believed that she had the authority to direct Mr Pettersen, however, technically speaking, she did not. She did however have the right to expect cooperation from a colleague.

59 Mr Kingdom was made aware of concerns regarding discrepancies with the float in the blue tin, however he believed he could not point the finger at the Pettersens because he would have to rely on third party information. He addressed the issue at staff meetings by encouraging them all to be more careful. He says he did not assume that the discrepancies arose from mistakes being made but that was how he portrayed it when he discussed the issue with them. I conclude that this was part of his conciliatory and encouraging approach. He arranged for another committee member to assist Shelley Gillie to count the float when there were discrepancies so as to provide her with support, assistance and confirmation rather than it being a poor reflection on her capacity to undertake that role.

60 From relatively early in their employment, Mr Pettersen commented or complained about working excessive hours. It was demonstrated in cross-examination of Mr Pettersen that he had assumed that the statement in the roster (Exhibit A2 – Witness

Statement Kim Darryl Pettersen, Annexure F) of the hours being 84 each per fortnight was correct when the rostered hours were only 81.4 each per fortnight. Further, the evidence demonstrated that Mr Pettersen's calculation of the hours they actually worked was over-estimated on some occasions. There was also evidence of them having been relieved on the odd occasion for a meal break, so their hours of work included meal breaks, when they were able to take them. Further still, there was evidence that Mr Pettersen, initially with Ms Morgan's concurrence, took time during working hours to walk his dog. He says this was 15 minutes or so each time, where others say it was between 30 and 40 minutes. In all of those circumstances they each worked a very small number of extra hours, and it could not be said that they worked excessive hours. On the contrary, given the necessity expressed in their contract "to be flexible in [their] hours or work according to the needs of the Centre," the fact that Mr Pettersen raised this issue a number of times during his employment and appears to have kept a record of his and Mrs Pettersen's "overtime" (Exhibit A2 – Witness Statement of Kim Darryl Pettersen – Annexure G) from eight days after they commenced indicates Mr Pettersen's attitude towards that 'flexibility' from the outset was not one of give and take to the extent necessary.

61 In any event, all parties seem to have assumed that the 84 hours specified on the roster was correct, when the correct figure was 81.4 hours. Mr Pettersen's complaint about working excessive hours was taken seriously. Mr Kingdom says that he decided to increase Mr and Mrs Pettersen's pay and agreed to their request to move to the manager's flat, for the purpose of encouraging and appeasing the Pettersens for their claimed additional hours and to improve their behaviour. Father Connolly (T 134) and Mrs Richardson (T 149) each recalled the pay increase as being an incentive to improve performance. Mr Kingdom discussed the situation with Ilse Gosper, the treasurer, and then either he or Ms Gosper advised the Pettersens. Notwithstanding what is contained within paragraph 3.4 of the 17 September 2009 Minutes, both Mr Kingdom and Father Connolly maintained adamantly that the purpose was to be an incentive not a reward.

62 I conclude that Mr and Mrs Pettersen were given a pay increase and allowed to move to the manager's flat not as a reward for effort or good performance, but as an incentive and an appeasement.

5. The Dismissal

63 Mr Gillie reported to Mr Kingdom and Father Connolly that Mr and Mrs Petersen were not taking instructions, and he raised concerns about Mr Pettersen's performance and attitude. Following a number of incidents having arisen since he became administrator in early October 2009, Mr Gillie made a verbal report to the Committee's November 2009 meeting. He subsequently submitted a written version of that report in the following terms:

> "Administrators Report to committee concerning Kim and Barbara Pettersen
>
> Following are a list of issues regarding Kim and Barb for the committee to discuss.
>
> - Leaves Centre understaffed: in addition to taking meal breaks, to which we are all entitled, leaves Barb to run centre while he takes his dog on walks that take 30-40 mins.
> - Leaves centre unattended, he will be on a bus run, and Barb will be out the back hanging washing on the line, ourselves and other people have walked into the centre and have gone unnoticed for 10 mins
> - Came into the centre and got a bottle of Bundaberg rum on a Sunday, did replace on the Tuesday, but we do not do takeaways and on a Sunday takeaway alcohol is illegal
> - I attempted to reset a tripped fuse, had to get him to remove all his tools so we could have access to fuse box, he said if the centre won't pay for storage, it is just bad luck
> - Has on numerous occasions came into the centre reeking of alcohol on days off, not a good image.
> - Will book bus runs for our weekends on and either not tell us, or book them for times when our standard bus runs are.
> - Removed his and Barbs list of duties from the front of the stationary (sic) cabinet, their personnel file and most importantly the administrator's computer, going so far as to remove the evidence from the recycle bin.
> - Constantly complains about all the extra hours done, but is rostered til 10:30pm when they work nights. The latest the centre has closed since this complaint was first lodged with me is 10:10pm, as I have been watching.
> - Entering office after hours and on days off always when I am on a bus run and Shelley is busy with Seafarers. For what reason??
> - If Shelley ever informs Kim he is not quite doing something right he will NEVER do it, Continually asked to mop toilets with only the pink mop, a hygiene issue, and yet he constantly mops the bar floor and the bus with this mop, to prove what point??
> - Kim refuses to order, this a job for the women
> - Only charges Filipino's (sic) for bus runs, because the others "don't understand me" I never have an issue with them understanding me.
> - Has had dog in the centre's car for trips to vet, leaving dog hair everywhere.
> - Most volunteers have mentioned his rudeness to them. If tills or blue box is out, always say's (sic) must have been volunteer's (sic)
> - Is scathing with his comments if a volunteer cannot make their shift. Does not seem to understand the concept of what a volunteer is.
> - Was very disappointed with his treatment of the Iranians from Iran Hamadan. He was rude and unsympathetic to the entire crew, their words not mine. When I told him that I was going to talk to 2 crew members sitting at the bus stop and that I had my mobile if I needed to contact Customs, he still called customs the second I walked out the door to

tell them that 2 crew members were escaping. They had missed the bus by over an hour, so they were not escaping to the next day. He completely undermined me by disregarding what I had said, and could only have been trying to cause these seafarer's (sic) an issue. The very seafarer's (sic) we are employed to support!

- As part of his tasks he deleted, it was his and Barb's job to ensure the buses were clean, yet my children were the one's (sic) washing them weekly.
- Bus runs to shops are not appearing on till tapes. Where is the money going?
- He deliberately undermines my wife, she asks him to help with things, not as an authority figure, as a co-worker seeking assistance, he tells her no problem will be done, but never is.
- Money is still a huge issue. The blue tin should never, ever be down. We make enough on the exchange rate so that this tin should always be up and constantly increasing. We have days where it is hundreds of dollars down, usually corresponding with Kim and Barbara sharing a shift with volunteers. Julie and Steve were unwell on the Tuesday, Shelley balanced the tin on the Monday evening at the end of our shift and the tin was $400 up after our long weekend on. Kim and Barb worked all day without volunteer's (sic) on the Tuesday. Shelley balanced the blue tin on the Wednesday morning and the tin was $120 down, she asked Kaye Richardson to come in and check the tin balance, Kaye came up with the same as Shelley, a decrease in the tin of $520. We purposefully stayed out of the centre on this day. This is a constant issue. How and Why??

  Most of these issues my wife and I feel are to deliberately make us look like we are doing a poor job. He has obvious resentment at being overlooked for the administrator s (sic) position, but rather than ask himself why he was overlooked, he seems more intent on making us look bad. My wife and I are still on 3 months trial and absolutely love the centre and the seafarers but we are not sleeping and my wife is constantly in tears and is not a woman who breaks down easily. If you mention to Kim anything he becomes sullen and does even less.

  What precisely are we to do here? We have just been doing everything, but we need some support it is wearing us out.

  Regards

  Andrew

  Administrator

  17th Nov 2009

  As a footnote, from the 20th of November, till the 30th of November the blue tin was $897 up in 10 days" (Exhibit R 7 – Witness Statement of Andrew Paul Gillie, Attachment APG 2).

64 Mr Gillie says he added the footnote dealing with the balance of the 'blue tin' from 20 to 30 November 2009 after he made the verbal report to the Committee.

65 Father Connolly gave evidence that he was at that November 2009 meeting. Father Connolly said that he viewed Mr Gillies' complaints together with Mr Pettersen's lack of cooperation with the Morgans as constituting "an unbridgeable gap between what the Centre's expectations of the Pettersens were, taking into account the Centre's business and its Christian mission, and what the Pettersens were doing in their role" (Exhibit R3 – Witness Statement of Mark James Connolly [52]). He also took account of the problems with the balance in the blue tin. He says that given all the circumstances, he no longer had confidence in the Pettersens. He believed their continued employment would adversely impact on the Centre, and he supported a motion by Mrs Richardson for their dismissal.

66 Mrs Richardson's evidence was that a report of money missing from the blue tin was the "straw that broke the camel's back" for her. In the context of the history of problems, she believed the situation was not going to change, and that the Pettersens' continued employment was "incompatible with, and prejudicial to, the Centre's business of discharging its mission to seafarers" (Exhibit R1 – Witness Statement of Kaye Falconer Richardson [43]). In cross examination she said that the focus of the Committee's discussion was on Mr Pettersen (T 155).

67 The Committee discussed the options and according to Mrs Richardson agreed that there was no viable option but to terminate Mr Pettersen's services. She moved the motion, it was seconded by Father Connolly and carried. The minutes of the meeting record:

> "**4.4 Confidential Staff Issue – Misconduct Report**
>
> Moved Kaye Richardson seconded Fr Mark that Centre staff person in question be advised in writing of dismissal effective from 20 November 2009 with one week pay in lieu of notice and further that the accommodation unit is to be vacated by Thursday 26 November 2009.
>
> **CARRIED"**
>
> (Exhibit R 1 – Witness Statement of Kaye Falconer Richardson, KFR 4)

68 Mr Kingdom was not at the meeting. Mr Hollenberg, who was acting Chairman at that meeting, and later Mrs Richardson, telephoned him and advised him of the decision. He says he agreed with the decision. He agreed to Mrs Richardson's offer to draft a letter of termination, which she did.

69 Mr Kingdom supported the decision for a number of reasons. He saw Mr Pettersen's rudeness and unhelpfulness towards seafarers as being contrary to the Christian mission of the charitable, compassionate ethos of the Centre.

70 On 20 November 2009, Mr Kingdom and Father Connolly went to the Centre and met with Mr and Mrs Pettersen. The conversation was directed to Mr Pettersen. Mr Kingdom says he began discussing the issues of lack of cooperation and

treatment of seafarers and volunteers, and said that the situation with them was not working out, and offered them the opportunity to resign. This was rejected. The letter drafted by Mrs Richardson was then read out. It was addressed to Mr Pettersen only, in the following terms (formal parts omitted):

> "The Port Hedland Peace Memorial Seafarers' Centre Management Committee regrettably advises that your services are no longer required. Your dismissal is effective today Friday 20 November 2009.
>
> Seafarer Centre keys currently held by you and Mrs Pettersen shall be surrendered to the Committee forthwith.
>
> The Management Committee requests you to vacate the Centre accommodation no later than 4.00pm Friday 27 November.
>
> Your dismissal is for the following misdemeanors
>
> 1) Failure on several recorded occasions to foster the charitable ethos of the International Mission to Seamen and the Port Hedland Peace Memorial Seafarers' Centre
>
> 2) After two mediation meetings with Management and colleagues, a continuing failure to accept direction and work as a team member
>
> 3) A lack of observance to safety and hygiene procedures as prescribed within your Duty Statement
>
> 3)(sic) Leaving the Centre unattended during your rostered shift
>
> 4) Appearing inebriated within the confines of the Centre work place whilst rostered off duty
>
> 5) Removing bottled spirits from the Centre Bar for personal consumption in breach of the Liquor Act governing the Centre's License
>
> 6) A documented failure to respect the culture and religion of visiting international seafarers in demonstrated need of pastoral care and support.
>
> 7) A documented failure to respect work colleagues, Centre Volunteers and members of the Management Committee."
>
> (Exhibit R8 – Witness Statement of John James Kingdom, Attachment JJK 7)

71 Mr and Mrs Pettersen were ultimately paid five weeks pay in lieu of notice.

ISSUES AND CONCLUSIONS

1. The Reasons for Dismissal

72 I will address firstly whether the evidence supports the issues raised in the letter of termination.

> "1) Failure on several recorded occasions to foster the charitable ethos of the International Mission to Seamen and the Port Hedland Peace Memorial Seafarers' Centre"

73 I accept the evidence of a number of witnesses that Mr Pettersen was unpleasant, impatient or rude when dealing with seafarers and would not make the effort to try to communicate with and understand those whose English was not good. (Exhibit R4 – Witness Statement of Carol Ann Morgan [14(e)] and T 181; Exhibit R1 – Witness Statement of Kaye Falconer Richardson [16(a)]; Exhibit R7 – Witness Statement of Andrew Paul Gillie at [22(l)]; Exhibit R6 Witness Statement of Shelley Ann Gillie [15(f)]).

74 The most significant and damaging incident regarding Mr Pettersen's attitude and behaviour towards seafarers was towards a number of the crew of the *Iran Hamadan*.

75 In late October 2009, the vessel came into Port Hedland. Mr Gillie's evidence was that crew members who came to the Centre told him that "conditions on the ship were very bad and the captain was a tyrant. The crew also told me they were fearful of the captain" (Exhibit R7 – Witness Statement of Andrew Gillie at [28]). The crew had discussed the issues with the Rev Ross. The crew also suggested to Mr Gillie that there were "physical assaults taking place on the vessel and also threats of repatriation being made by the captain" [30]. Mr Gillie says he discussed the situation of the crew with the Pettersens, and he remembers "saying to Mr Pettersen that the crew were in a lot of trouble" [31]. (Mr Gillie also gave evidence of further rudeness by Mr Pettersen, this time to members of this crew, while they were spending time at the Centre.)

76 Mr Gillie says that after a day or so he began to think that two of the crew were planning to jump ship, as they asked him questions which aroused his suspicions.

77 Mr Pettersen says he was approached by Customs officers when he did a bus run to the port. They told him they suspected that the crew members were going to jump ship and that he should call them if anything appeared suspicious. He says that when he dropped the crew members in town he asked whether they wanted to be picked up and they said no. He says that this aroused his suspicions and he then advised Customs of this. He says that he advised Mr Gillie who said he was going to talk to the crew members.

78 On the other hand, Mr Gillie says that he saw the two crewmen sitting at a bus stop with a large backpack. Mr Gillie was walking with his wife at the time. They returned to the Centre. Mr Pettersen was there. Mr Gillie says:

> "[35] I told [Mr Pettersen] what was happening and that I thought the Iranians were going to 'do a runner'. I also told [Mr Pettersen] that I had my mobile on me just in case I had to notify customs and that the situation was under control.
>
> [36] From the Centre I walked straight to the bus stop and spoke to the two (2) Iranian gentlemen. I told them that they had missed the bus and that if need be I could go to customs with them to discuss their situation" (Exhibit R7 – Witness Statement of Andrew Paul Gillie).

79 According to Mr Gillie, a couple of minutes later, two Customs officers turned up. Mr Gillie went to Customs with the crew members. Customs officers told Mr Gillie that they knew about the men being at the bus stop because they had a call from "that guy at the Centre". This evidence suggests that Mr Pettersen had not already told Mr Gillie of his call to Customs before Mr Gillie returned to the bus stop to talk to the crew members.

80 Mrs Gillie gave evidence of the contents of her diary regarding that incident including that she was very angry with Mr Pettersen for his handling of the situation - that instead of being concerned for the crew members and trying to help them, he had simply reported them to Customs. Mrs Gillie's evidence included that Mr Gillie was with the crew members at Customs for three hours, and that she had called Rev Ross who then went to be with the crew members also.

81 There can be no doubt that Mr Pettersen knew of his duty to care for the seafarers. In a letter to the Committee in which they applied for the manager's position Mr and Mr Pettersen set out their relevant experience and then noted:

> "The above covers the basic[s] of the management side, but the more important side is the **SEAFARES** (sic**) WELFARE**. We take great pride in being involved with their wellbeing & try to support them as much as time allows within a very busy retail store.
>
> As the new wharf's (sic) come on line this will be a growing problem that both management & committee must address, so that all staff can be supportive of seafarer's (sic) in need. The time spent is very important and comforting to them as they are a long way from their love (sic) ones. Sometimes just a chat will see them through their next voyage" (Exhibit A2 – Witness Statement of Kim Darryl Pettersen – Annexure O).

82 Although the letter is said to be from "Kim and Barb", the first line makes reference to "Barb and I". I draw the inference that the letter was actually written by Mr Pettersen, thus confirming his understanding of the requirement of caring and compassion towards the seafarers.

83 Mr Pettersen's first duty in accordance with his duty statement was to provide caring contact for all seafarers. For his employer to meet its object of advancing the social, material and spiritual welfare of seafarers, it required Mr Pettersen to give them consideration and help. He did not give crew members of the *Iran Hamadan* care and consideration but simply reported the matter to Customs. Mr Pettersen's own evidence demonstrates that he met what he saw as an obligation to report his suspicions to Customs rather than meet his duty to support the seafarers. He could have done both – they were not mutually exclusive. He simply reported his suspicions and let the situation take its course. The seafarers were in clear difficulty and he did not provide caring contact. He left them to Customs to deal with, and they would have been dealt with alone if Mr Gillie had not done what Mr Pettersen ought to have done – that is talk to them, and encourage them to talk to Customs, and support them when Customs officers arrived after Mr Pettersen's call to them. I find that the first complaint in the letter of dismissal is made out.

> "2) After two mediation meetings with Management and colleagues, a continuing failure to accept direction and work as a team member"

84 I accept the evidence of Mr Kingdom, Mrs Morgan, Mr Gillie and Mrs Gillie that issues would be raised with Mr Pettersen and he would disregard them and continue as he saw fit.

85 The issue of cleaning the buses was raised with him. I accept that there may have been some confusion about whose duty it was when Mr and Mrs Gillie's children were asked to clean the buses, however, I draw the inference that this was done partly because of Mr Pettersen's failure to do it when it was necessary.

86 Mr Pettersen's attitude to team work was earlier exemplified on Sea Sunday. He had previously offered to help with setting up for the event. He refused to do so after he says he had been abused by Mr Morgan the day before Sea Sunday. He seems to have overlooked that it was to the Centre's benefit that he intended to assist, and to refuse because of Mr Morgan was petty and vindictive. This is particularly so when assisting with Sea Sunday was a specific part of his duty statement, and was to be seen as part of the flexibility in his hours which was necessary for the Centre to achieve its object, even though he was rostered off duty.

87 Mr Gillie also gave evidence that when he had attempted to reset a tripped fuse, he had to get Mr Pettersen to remove all his tools which were in the way, so he could get access to the fuse box. Mr Pettersen said "if the Centre won't pay for storage, its just bad luck". This reflected his attitude that if things were not done to accommodate what he wanted, then he would not cooperate with others.

88 I find that this second complaint is made out.

> "3) A lack of observance of safety and hygiene procedures as prescribed within your Duty Statement"

89 Mr Gillie (Exhibit R7 – Witness Statement of Andrew Paul Gillie [22(a)]) and Mrs Gillie (Exhibit R6 – Witness Statement of Shelley Ann Gillie [15(b)]) refer to there being different mops in the Centre for different purposes. One mop was pink and had a label "toilet" on it to distinguish it from the mop used for cleaning the bar and the bus. Both Mr and Mrs Gillie say they each spoke to Mr Pettersen a number of times about not using the pink mop to clean areas other than the toilets. Mrs Gillie gave evidence that on one occasion when she saw Mr Pettersen taking the pink mop to the bus she told him it was not for use on the bus, only for the toilet floors. He responded "the bus is like a toilet" and continued on his way. Mr Pettersen denies using the pink mop, but also denies that he made this comment. He says that when the issue was raised with him it was too late as he had already used the mop.

90 I accept the evidence of Mr and Mrs Gillie that Mr Pettersen not only used the pink mop on the bus when he was told that it was not appropriate, but also that his attitude was such that if told something by them he would deliberately do as he wanted as a means of rejecting any authority they might claim to be able to direct him.

91 His attitude of arrogance and being deliberately difficult is exemplified by what might, taken alone, be seen to be a minor issue.

92 I find that the third complaint is made out.

> "3)(sic) Leaving the Centre unattended during your rostered shift"

93 The evidence regarding this issue seems to be that on occasion, when Mr Pettersen was undertaking a bus run, Mrs Pettersen might go outside the Centre to hang out washing and that people might come into the Centre and no one would be there to attend to them. It is almost impossible to say, on the state of the evidence, whether Mr Pettersen or Mrs Pettersen was at fault, how often and for how long this occurred. In the scheme of things, if proved, this is not a serious issue.

> "4) Appearing inebriated within the confines of the Centre work place whilst rostered off duty"

94 Mr Pettersen recited two occasions when he entered the Centre after consuming alcohol: when he took a meal to Mrs Pettersen when she worked an extra shift, and he went and sat and talked with a sailor who was experiencing family problems; and when he was called over to join a sailor he knew.

95 Mrs Morgan's evidence was that Mr Pettersen "frequently came to the Centre on his days off seeming to me to be drunk. He reeked of what I thought smelled like alcohol and would talk in a very extravagant manner" (Exhibit R4 – Witness Statement of Carol Ann Morgan [14(d)]). Mrs Morgan said in her evidence that this occurred every second or third time Mr Pettersen was off duty, and she did nothing about it because he did not stay long and he was off duty. She said that it was not relevant because he was off duty (T 180).

96 Mrs Richardson also gave evidence of Mr Pettersen appearing to her to be under the influence of alcohol (Exhibit R1 – Witness Statement of Kaye Falconer Richardson [51(4)]).

97 Mrs Gillie gave evidence of Mr Pettersen coming into the Centre on his day off "reeking of what smelt to me to be alcohol", and that this happened many times. His consumption of alcohol meant that he could not be called on to drive the bus should the need arise (Exhibit R6 – Witness Statement of Shelley Ann Gillie [15(g)]).

98 Mr Gillie says that there were many occasions when he witnessed Mr Pettersen come into the Centre drunk and reeking of alcohol. He says Mr Pettersen appeared to him to be drunk and he "had smelt [alcohol] on Mr Pettersen's breath on previous occasions" (T 253).

99 I conclude that whether he was off duty or not, it was not appropriate for an employee of the Centre to appear in the Centre noticeably affected by alcohol. While I find this complaint made out, in the circumstances of the respondent doing nothing about it and apparently condoning it over a long period, its seriousness as a complaint is diminished. It does however add to the context of the dismissal.

> "5) Removing bottled spirits from the Centre Bar for personal consumption in breach of the Liquor Act governing the Centre's License."

100 The Centre has a Special Facility Licence under the *Liquor Licensing Act 1988.* The conditions of that licence include that "[t]he sale of packaged liquor is prohibited". The licensed premises covered by the license "does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access". (Exhibit R8 – Witness Statement of John James Kingdom, Attachment JJK 1).

101 The respondent has a policy that no credit is provided over the bar.

102 One Sunday, Mr and Mrs Gillie were both on duty in the Centre, and Ms Gosper was in the office. According to Mrs Gillie's diary this was on 1 November 2009. Mr Gillie was dealing with someone in the Centre and there were other people present. Mr Pettersen was off duty. At the time, he and Mrs Pettersen were residing in what was referred to as the manager's flat down a passageway adjacent to the bar area.

103 Mr Pettersen does not dispute that on this day he came out of the flat, walked into the bar, removed a bottle of spirits and returned with it to the flat. He says that he asked "Peter" (sic) Gillie's permission "to take the bottle for a function we were having because I had not been able to go shopping and he approved my doing so. The alcohol was not taken out of the Centre" (Exhibit A2 – Statement of Kym Darryl Pettersen, [51]). At [57] Mr Pettersen reiterated that he had asked Mr Gillie's permission and says that "[h]is answer was "I have no problem with that".

104 Mrs Pettersen gave evidence that when Mr Pettersen returned with the bottle "I looked at him and he said 'I have Andrew's permission to take this, and I'm going to replace it tomorrow'" (T 30).

105 Both Mr and Mrs Gillie gave evidence that Mr Pettersen did not ask permission either before or after he took the bottle. They saw him leave the bar to go back to the flat with the bottle and when he saw them he said "I've got friends over, I'll replace it on Monday" (Exhibit R7 – Witness Statement of Andrew Paul Gillie [22(f)]) or "I'll replace it tomorrow", (Exhibit R6 – Witness Statement of Shelley Anne Gillie [15(g)] and attachment SAF 3; diary entry for Sunday, 1 November 2009).

106 In any event, he did not replace the bottle until two days later.

107 I find that Mr Pettersen did not ask Mr Gillie's permission but took the bottle and went back to the flat. Although he says he did not take it out of the Centre, it was taken into his private residence. According to the liquor licence, this is not part of the licensed premises. So, in fact, he took it out of the Centre's licensed premises. When Mr and Mrs Gillie saw him with the bottle he said he would replace it the next day. Mr Pettersen knew that the licence did not permit liquor to be taken away from the bar. He knew that the Centre's policy was not to give credit at the bar. He said in evidence that although he knew these things that it was just between himself and Mr Gillie, the inference being that it was a secret, and therefore notwithstanding the conditions of the license and the policy, it was acceptable for him to have done it. He also knew that it was contrary to the good image of the Centre for him to be seen taking alcohol from the bar in those circumstances.

108 Mr Pettersen denies that he knew that what he was doing was wrong but said he did not even think about it. However, I note Mrs Pettersen's evidence, that when Mr Pettersen returned to the flat with the bottle, she looked at him and he said that Andrew had given him permission. In observing Mrs Pettersen as she gave her evidence of this issue, it was quite clearly a

situation of a wife challenging or questioning her husband with a look. He knew he was being challenged by Mrs Pettersen. He knew that it was not the right thing to do, he knew that she knew, and he was defensive.

109 I find that if Mr Pettersen removed the bottle from the bar and did not think about it, it demonstrates a significant failing on the part of a man of his maturity and position. If he did think about it, and I believe he did because of his response to his wife, then he blatantly breached his obligations to his employer.

110 Mr Gillie did not attempt to stop Mr Pettersen. He was in the middle of dealing with someone else. He said that as administrator it was not his role to deal with Mr Pettersen over this, but to report it to the Committee, which he did. The Committee then acted on it.

> "6) A documented failure to respect the culture and religion of visiting international seafarers in demonstrated need of pastoral care and support."

111 As the evidence did not appear to specifically address any issue relating to respecting the culture and religion of seafarers I am unable to conclude that there is any substance to this complaint.

> "7) A documented failure to respect work colleagues, Centre Volunteers and members of the Management Committee."

112 I accept the evidence of Mr Gillie that two of the volunteers, Julie Hull and Julie Barlow, were not prepared to work with Mr Pettersen because he was rude to them (Exhibit R7 – Witness Statement of Andrew Gillie [22(j)]. (See also Exhibit R3 – Witness Statement of Mark James Connolly [48] that Julie Barlow told him that Mr Pettersen had been rude to her while she was volunteering and that she would not volunteer while he, Mr Pettersen, was there, and Exhibit R6 – Witness Statement of Shelley Ann Gillie [15(e)]).

113 I also accept Mrs Richardson's evidence that Mr Pettersen was rude to her when she worked as a volunteer, and she gave an example of his abrupt manner towards her and his "begrudging" assistance. (Exhibit R 1 – Witness Statement of Kaye Falconer Richardson (16(b)].

114 Mr Kingdom gave evidence of Mr Pettersen's attitude and behaviour regarding an incident where Mr Kingdom had spoken to a friend of Mr Pettersen about moving a caravan they had parked at the Centre as it had a power cable running across a drive way. When the person said that she was leaving the next day, Mr Kingdom told her not to worry about it. Mr Pettersen then told Mr Richardson in an aggressive and rude manner that "she can park where I tell her to park". (Exhibit R8 – Witness Statement of John James Kingdom [35] – [36]). I accept this evidence as truthful.

115 These instances demonstrate that this complaint is made out.

2. The Blue Tin

116 There was a good deal of evidence about the way in which the Centre provides a service to seafarers by changing their foreign currency into Australian dollars for them to use while in Port Hedland, and changing it back before they leave port. For the purpose of this arrangement, the Centre maintained a large float in a blue tin kept in the office. All members of staff and volunteers undertook the work of changing currency. There were only very limited procedures in place, for example there was no record of individual transactions, and there could be many transactions in a day. I note that although Mrs Richardson and Father Connolly each gave evidence of the significance to them personally of the issue of money said to be missing from the blue tin, it did not feature in the reasons for the dismissal set out in the letter of termination. Therefore, notwithstanding that this was the subject of a significant amount of evidence, and the views of Mrs Richardson and Father Connolly as to its significance to them, I conclude that it is not relevant to these considerations.

Conclusions

117 Mr Pettersen understood that his role in driving the bus, serving in the shop and the bar and in cleaning the Centre were not the essence of the job. He understood that those things were necessary for the Centre to operate, but its purpose in operating was to provide caring support for seafarers. I believe he understood or should have understood that from the discussions he had with members of the Committee, Rev Bill Ross and Mr Kingdom in particular. Mr Pettersen is a mature person who, if he did not understand this after over eight months, ought to have known, that what he was doing was inconsistent with his obligations. I have referred earlier to his letter of application for the manager's position which I conclude demonstrated his understanding of the importance of care and compassion towards the seafarers. In his conduct towards the crew of the *Iran Hamadan*, he not only failed to display care and compassion, but he compromised their well-being by his telephone call to Customs without taking any supportive action.

118 His rudeness to colleagues and volunteers and his lack of cooperation undermined the work of the Centre and made for an unpleasant work environment. His action in taking the bottle of spirits was contrary to the Centre's licence and may have created difficulties for the Centre.

119 There were numerous other examples of criticism of Mr Pettersen, some not justified, and others justified but less significant. Some occurred months before the dismissal and were not acted upon. Others were dealt with through the management style I have referred to earlier. However, the effect of the evidence of his impatience and lack of compassion to seafarers; his rudeness to volunteers; his unhelpfulness and deliberate refusal to cooperate with other staff, and his unjustified complaints about excessive hours demonstrates a general lack of suitability for the position he held. Further, and more significantly, I am firmly of the view that Mr Pettersen's lack of compassion and assistance to the crew members of the *Iran Hamadan* in favour of notifying Customs, and his attitude and conduct in helping himself to a bottle of spirits and taking it to his residence are not merely attitudinal problems, they are significantly at odds with his obligations in his employment.

3. Breach of Contract

120 The issue in this case does not arise from a claim of harsh, oppressive or unfair dismissal, but whether the respondent is obliged to pay to the applicant damages for bringing the contract of employment to an end prior to the expiration of the contract. This involves a question, in this particular case, of whether there was conduct on the part of the applicants, or one of them, which constituted such a serious breach of the contract of employment as to allow the employer to dismiss the employee, or whether the conduct of the employee demonstrated an intention no longer to be bound by the contract. In *Blyth Chemicals v Bushnell* (1933) 49 CLR 66, Dixon and McTiernan J J said:

> "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest or his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal … [b]ut the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found." (p 81-82)

121 In *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at [51], Kirby J said:

> "It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed … that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer … the establishment of important, relevant instances of misconduct, such as dishonesty on the part of the employee … will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal."

122 The High Court has dealt with the question of repudiation in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 at [44] to [49] per Gleeson C J; Gummow, Heydon and Crennan JJ:

> "44. … The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. … The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation of either of the contract as a whole or of a fundamental obligation under it … [s]econdly, it may refer to any breach of contract which justifies termination by the other party … [t]here may be cases where a failure to perform, even if not a breach of an essential term … manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions speak louder than words.
>
> 45. In the past, some judges have used the word 'repudiation' to mean termination, applying it, not to the conduct of the party in default, but to the conduct of the party relying upon such default. It would be better if this were avoided.
>
> …
>
> 47. For present purposes, there are two relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The first is where the obligation with which there has been failure to comply has been agreed by the contracting parties to be essential. Such an obligation is sometimes described as a condition.
>
> …
>
> 48. … It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination.
>
> 49. The second relevant circumstance is where there has been a sufficiently serious breach of a non-essential term."

4. The Terms of the Contract

123 In order to determine whether Mr Pettersen has breached an essential term or condition of his contract of employment it is necessary to look at the terms of the contract, "…the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and commercial purpose it served" (*Koompahtoo*). The term "commercial purpose" in the context of this employer is the purpose of these parties' contract, being to help the respondent fulfil its mission and object of "advancing the social, material and spiritual welfare of seafarers".

124 The letter of appointment of 3 March 2009, addressed to both applicants, does not specifically set out all of the terms of the contract or the essential terms. However the essential terms are implied by that letter. They include reference to being provided with a list of duties, and that it would be necessary to be flexible in their hours of work and work according to the needs of the Centre. The duties of centre assistant are set out in Exhibit A2 (Witness Statement of Kim Darryl Pettersen, Attachment C) the very first of which duties is to "provide caring contact for all seafarers". I find that providing caring contact for all seafarers was an essential term of the contract.

125 As I have noted earlier the context of the employment must also be taken into account and as the authorities indicate, an employee's conduct should not be contrary to the employer's interests.

126 Mr Pettersen in his conduct towards seafarers did not provide caring contact. His behaviour towards them was demonstrated to be impatient and unhelpful. Most importantly for the purposes of the question of repudiation, is Mr Pettersen's conduct in respect of the crew of the *Iran Hamadan*. In that case it is clear that Mr Pettersen in particular understood his obligations to the seafarers and what that required of him. He simply reported his suspicions to Customs without providing any assistance or caring contact for the seafarers themselves. In my view this was such a significant breach of the contract as to constitute a repudiation of the contract.

127 The respondent also relies on a refusal to obey a lawful instruction. The evidence is somewhat unclear as to whether Mr Gillie expressly instructed, or impliedly instructed, Mr Pettersen not to contact Customs and he did so after that instruction, or whether Mr Pettersen had contacted Customs before Mr Gillie spoke with him and he did not advise Mr Gillie that he had already reported the matter to Customs. However, he failed in his duty in a significant way if he did either of those things. Albeit that they may not constitute a direct failure to comply with a particular lawful instruction, they constituted a refusal or a failure to comply with the first of the duties listed on the duty statement, which might be considered to be an instruction. In any event the conduct itself was such a serious breach of his obligations to his employer as to justify termination without any other incident occurring.

128 However other incidents and circumstances did arise. Mr Pettersen's conduct towards other staff members and volunteers discouraged volunteers from working with him and their participation was essential to its success in its mission of providing for the well being of seafarers.

129 Mr Pettersen's conduct in taking the bottle of spirits from the bar into his residence was in breach of the respondent's liquor licence and accordingly it was conduct contrary to the respondent's ongoing interests. Had this been a single isolated incident it may not have justified dismissal, although I make no such conclusion in that regard. Certainly in this case it constituted part of the conduct which went to the heart of the contract and was not an isolated incident.

130 In all of those circumstances I conclude that Mr Pettersen's conduct in respect of essential matters was such as to constitute a repudiation of the contract of employment which allowed the respondent to bring the contract to an end.

5. Mrs Pettersen's Contract

131 Mr and Mrs Pettersen together applied for positions as Centre Assistants in response to an advertisement calling for "a caring couple …". They were interviewed together by the Committee (see Exhibit A2 – Witness Statement of Kim Darryl Pettersen [7]). They were provided with a letter of employment addressed to them both and, according to the letter of appointment, they were to receive a joint stipend. As it turned out that stipend was paid to them on the basis of it being divided equally between them, however, the evidence demonstrates that it could have been divided in another way. Evidence also demonstrates that they divided the duties between them. They were provided with accommodation together. There was no provision for one of them to be employed in isolation of the other.

132 Mrs Pettersen's evidence was that she accepted that it was the case that if something occurred to break up the team arrangement, it would be the end of the team or that it was "one in-all in; one out-all out" (T 27). In those circumstances I conclude that if the employment of one of the two of Mr and Mrs Pettersen came to an end then it was implied that the employment of the other would also come to an end. The conduct of one affected the contract in respect of both of them. In the terms used by Mr Caspersz, there was an implied term that this was a co-terminus contract, and Mrs Pettersen agrees that this was so.

133 If I am wrong in that conclusion and that in fact Mrs Pettersen was entitled to continue in employment or to be paid damages by way of compensation for the contract coming to an end prior to the conclusion of its term, then at common law she would have been obliged to mitigate her loss. The evidence is that she made no efforts to mitigate her loss (see Exhibit A1 – Witness Statement of Barbara Elizabeth Pettersen [49]). She says that she has been unable to work due to medical problems with a bad back and trouble with her right eye (T 44). She also felt very stressed and disillusioned by the poor treatment she says she received while employed by the respondent however there was no evidence of this preventing her seeking work. Accordingly, if my conclusion is wrong in respect of her termination of employment then Mrs Pettersen has no entitlement to any benefit arising from that early termination of the contract.

134 In all of the circumstances, neither of the applicants is entitled to a benefit arising from their contracts of employment and the applications will be dismissed.

2011 WAIRC 00032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARBARA ELIZABETH PETTERSEN
	APPLICANT
	-v-
	PORT HEDLAND PEACE MEMORIAL SEAFARERS CENTRE INC
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 JANUARY 2011
FILE NO/S	B 55 OF 2010
CITATION NO.	2011 WAIRC 00032

Result Jurisdiction found, application dismissed

Order

HAVING heard Mr G McCorry as agent on behalf of the applicant and Mr T Caspersz of counsel and with him Ms M Ivanovski of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT jurisdiction is found and this application be, and is hereby dismissed.

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

2011 WAIRC 00033

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM DARRYL PETTERSEN
	APPLICANT
	-v-
	PORT HEDLAND PEACE MEMORIAL SEAFARERS CENTRE INC
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 JANUARY 2011
FILE NO/S	B 56 OF 2010
CITATION NO.	2011 WAIRC 00033

Result Jurisdiction found, application dismissed

Order

HAVING heard Mr G McCorry as agent on behalf of the applicant and Mr T Caspersz of counsel and with him Ms M Ivanovski of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT jurisdiction is found and this application be, and is hereby dismissed.

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

2010 WAIRC 01246

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL QUARRY
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION & TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 27 JULY 2010, WEDNESDAY, 28 JULY 2010, WEDNESDAY, 29 SEPTEMBER 2010
DELIVERED	THURSDAY, 23 DECEMBER 2010
FILE NO.	U 38 OF 2009
CITATION NO.	2010 WAIRC 01246

Catchwords	Termination of employment - Claim of harsh, oppressive or unfair dismissal - Serious breach of discipline - Failure to comply with a lawful directive - Principles considered - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed - *Industrial Relations Act 1979* (WA) s 27(1), s 29(1)(b)(i); *Public Sector Management Act 1994* s 40, s 78, s 78(2), s 78(4), s 80, s 81(2)(a), s 83(1)(b), s 86(2), s 86(4)
Result	Dismissed
Representation	
Applicant	Mr M Quarry on his own behalf
Respondent	Ms R Hartley (of Counsel)

Reasons for Decision

1 On 3 March 2009 Michael Quarry ("the applicant") lodged an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") against the Department of Education & (sic) Training ("the Department") claiming that he was harshly, oppressively or unfairly dismissed on 3 February 2009. The respondent denies that the applicant was unfairly dismissed and opposes the applicant's claim for reinstatement and/or compensation.

Background

2 The applicant commenced employment with the respondent as a teacher in April 1999 and he was terminated on 3 February 2009. The applicant's terms and conditions of employment were governed by the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the 2006 Agreement") which was replaced by the *School Education Act Employees' (Teachers and Administrators) General Agreement 2008*.

3 The parties agree that the correct name of the respondent is the Director General, Department of Education and Training. As the respondent had been incorrectly named and given the Commission's powers under s 27(1) of the Act, and having formed the view that it is appropriate in the circumstances to amend the name of the respondent, I propose to issue an order that the Department of Education & Training be deleted as the named respondent in this application and be substituted with the Director General, Department of Education and Training (see *Rai v Dogrin Pty Ltd* [2000] 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Chronology of relevant events

4 On 8 May 2002 the applicant signed a Notebook for Teachers Program registration form acknowledging acceptance of the Department's offer of access to the notebook program. In signing this form the applicant confirmed that he had read, agreed to and understood the attached Conditions of Entry and was willing to participate in and abide by those conditions. The Notebook for Teachers Program involved laptop computers being leased to the Department by a finance company and the laptop was then made available to teachers under a registration agreement. Under this program teachers agreed to make fortnightly payroll deductions for the period they used the laptop and neither the Department nor the teacher owned the laptop.

5 The registration form signed by the applicant in May 2002 was for a three year lease expiring on 23 May 2005 and the payroll deduction in return for the use of the laptop agreed to by the applicant was for a fortnightly amount of $14.60.

6 The Conditions of Entry attached to the registration form included the following conditions:

> "1.3 In the event of my going on leave without pay, I will make arrangements with the Department to pay the amount due over this period or return the Notebook package.
>
> …

1.5 If my employment status changes, or if I breach any of these conditions of entry, the Department may revoke the allocation of my Notebook package by giving written notice of 14 days."

(Extract from Exhibit R1.1)

7 The applicant commenced unpaid leave on 24 July 2004. On 23 September 2004 the Coordinator of the Notebook for Teachers Program, Mr Martyn Griffiths, wrote to the applicant advising him that due to him being on leave without pay the Notebook for Teachers Program fortnightly payroll deductions were not taking place and the applicant was asked to forward payment in the amount of $350.40 to clear the debt he had accrued and to cover the payments up to the expiration of the lease for the laptop on 23 May 2005.

8 On 18 April 2005 an information pack was posted to the applicant advising him that the lease for the laptop in his possession was due to expire shortly and the applicant was offered a replacement laptop and advised that the deadline for re-enrolment in the new program was 9 May 2005. This information pack stated that the Department did not guarantee that teachers had the opportunity to take delivery of a new laptop prior to surrendering the old laptop in order to facilitate file transfer but endeavoured to allow such a process to occur but could only do so when the teachers concerned take advantage of the opportunity of receiving a new laptop during the timeframe specified in the replacement offer. However, the deadline for re-enrolment passed without the applicant applying for a replacement laptop.

9 The lease agreement signed by the applicant in May 2002 expired on 23 May 2005 without the applicant returning the laptop.

10 On 31 May 2005 a letter was sent to the applicant by the Department's Chief Information Officer Mr Bevan Doyle advising him that the Notebook for Teachers Program laptop in his possession was overdue for return and the applicant was given an opportunity to return the laptop free of charge by making it available at the Department's Joondalup District office by 8 June 2005.

11 The applicant wrote to the Department on 11 June 2005 acknowledging receipt of the re-enrolment information package sent to him on 18 April 2005 as well as receipt of Mr Doyle's letter dated 31 May 2005. In this correspondence the applicant advised the Department that he had received the letter dated 18 April 2005 on 28 April 2005 and had not opened it for several days and he also advised the respondent that he received the letter dated 31 May 2005 on 9 June 2005. The applicant said that he had not been previously notified of the surrender date of his existing laptop and he asked who was required to sign for and authorise the issuance of a new laptop, when he would be able to collect his new laptop and when he should surrender his old laptop allowing sufficient time to transfer files and transfer or reinstall software.

12 Mr Griffiths again wrote to the applicant on 29 June 2005 detailing the arrears of $350.40 the applicant owed the Department for the lease of the laptop due to the applicant being on leave without pay from 24 July 2004 thereby providing a means for him to clear his debt to the Department and he advised the applicant that the laptop was overdue for return and should be immediately delivered to the supplier at the address provided. As the laptop was not returned by the applicant, on 24 August 2005 Mr Doyle wrote to the applicant about the seriousness of his failure to return the laptop in his possession and informed him that it must be returned to the supplier as a matter of urgency and at his own expense however, the letter was sent to an address not connected to the applicant.

13 Mr Doyle wrote to the applicant on 2 March 2006 informing him that his statement detailing the reasons for the non-return of the laptop contained in his facsimile dated 11 June 2005 had been considered by a review panel which found that the circumstances outlined did not warrant waiver of the costs incurred by the Department. An invoice was enclosed for the applicant to pay $728.84, comprising $87.60 in further rental arrears, $66.24 pro-rata cost of the laptop's lease extension and $575.00 for the financier's late return penalty. From March 2006 to April 2006 three automated reminders were sent to the applicant regarding this outstanding $728.84 which the applicant owed to the Department however the applicant did not pay the amount requested.

14 On 24 May 2006 the applicant submitted a registration form requesting a new laptop but this request was rejected.

15 On 1 June 2006 the applicant wrote to the Department's Payroll Division requesting it cease his payroll deductions for the Notebook for Teachers program immediately and the applicant stated that he was withdrawing and rescinding his previous authority to make such deductions from his pay. However, it appears that in any event as at 1 June 2006 no deductions were being made from the applicant's pay for the use of the laptop as this payment was put on hold when the applicant commenced leave without pay in 2004.

16 By letter dated 16 April 2007 Mr Peter McCaffrey instructed the applicant to return the laptop to the Coordinator of the Notebook for Teachers Program within seven days of the date of the letter and the letter went on to advise the applicant that this request constituted a lawful instruction given under Mr McCaffrey's authority as the Department's Deputy Director General, Finance and Administration. The letter warned the applicant that failure to comply with the instruction would result in a disciplinary process being commenced against him. This letter was sent by registered post to the applicant's residential address and from the period 16 April 2007 to 7 May 2007 Australia Post made four separate unsuccessful attempts to deliver the letter to the applicant. The letter was then returned to the Department on 24 May 2007 with advice from Australia Post that it had not been claimed by the applicant. As the applicant was working at Cecil Andrews Senior High School at the time the respondent forwarded this letter to the Principal, Mr Richard Hunter, so he could hand deliver it to the applicant which he did on or about 31 May 2007.

17 The applicant submitted a further Notebook for Teachers Program registration form on or about 26 April 2007 and on 2 May 2007 the applicant was advised that the application had not been accepted.

18 On 7 June 2007 the applicant wrote the Minister for Education and Training about Mr McCaffrey's letter dated 16 April 2007 and the respondent replied to this letter on behalf of the Minister. The respondent told the applicant the following: "I would also strongly encourage you to comply with the instruction given in Mr McCaffrey's letter and promptly return the

notebook computer, to avoid disciplinary action being taken against you.". On 24 September 2007 the applicant responded to the respondent stating that he had written to Mr Griffiths on 11 June 2005 stating that he was not notified of the surrender date for the laptop and he asked who could sign and authorise the issue of a new laptop to him and when he would like him to surrender the laptop allowing sufficient time to transfer files and software. The applicant also responded to other issues raised in the respondent's letter asking for a copy of his "being notified of the surrender date" of the laptop prior to the date of return and he demanded "natural justice" by the Department providing him pay details for the period 1 January 2004 to 31 December 2006 in order to reconcile his pays. The applicant stated that he would then happily pay any monies owing to the Department. The applicant then detailed his concerns about the Department's failure to comply with statutory requirements, its ineffective management practices and its incompetence in regard to managing his rehabilitation. He also stated that he challenged the payment of a penalty for the non-return of the laptop and he refused to pay any money until he was provided with a copy of his being notified of the surrender date of the laptop prior to its due date.

19 By letter dated 6 September 2007 the respondent informed the applicant that he was suspected of acting in a manner which constitutes a breach of discipline pursuant to s 80 of the *Public Sector Management Act 1994* ("the PSM Act"). Specifically it was alleged that he failed to comply with the lawful directive issued to him on 16 April 2007 contained in the letter to the applicant from Mr McCaffrey dated 16 April 2007. This letter went on to provide the applicant with an opportunity to provide a written explanation in relation to the allegation contained within. When no response was received from the applicant to this letter the Department initiated a formal investigation. Mr Justin Goodwin, Senior Investigator with the Department's Standard and Integrity Directorate, was appointed in accordance with s 81(2)(a) of the PSM Act to conduct an investigation into the suspected breach of discipline and Mr Goodwin's appointment was conveyed to the applicant in a letter dated 26 November 2007. Mr Goodwin completed his investigation report on or about 9 July 2008 and found that the allegation that the applicant failed to comply with a lawful directive issued to him on 16 April 2007 was proven.

20 On 5 September 2008 the respondent sent the applicant a letter charging him with a serious breach of discipline pursuant to s 83(l)(b) of the PSM Act, and as provided for in s 86(2) of the PSM Act, the applicant was required to indicate whether he admitted or denied the charge. When the applicant returned the charge letter dated 5 September 2008 to the Department unopened the disciplinary process continued as if he had denied the charge. By letter dated 16 October 2008 the applicant was informed that Mr Matt Elliott, an independent inquirer, had been directed to hold a disciplinary inquiry into the charge and Mr Elliott's appointment was made in accordance with s 86(4) of the PSM Act. Mr Elliott completed an inquiry report on 12 December 2008 and he stated in this report that he was satisfied that there was ample evidence before him to prove on the balance of probabilities that the applicant had committed the serious breach of discipline in question in that he failed to comply with a lawful directive issued to him on 16 April 2007.

21 By letter dated 21 January 2009 the Acting Director General informed the applicant of the outcome of Mr Elliott's disciplinary inquiry and he was also advised of the proposed penalty to be imposed as a result of his misconduct, that of dismissal, and the letter stated that dismissal was deemed to be the only penalty that fully recognised the seriousness of the applicant's conduct and the applicant was given the opportunity to provide written reasons as to why the Acting Director General should not take this proposed course of action.

22 By letter dated 27 January 2009 the applicant provided written submissions to the respondent and after considering the applicant's submissions the respondent decided that the penalty of dismissal was the appropriate action to take.

23 The applicant was advised by letter dated 3 February 2009 that his employment with the Department had been terminated.

Applicant's evidence

24 The applicant confirmed that he signed a three year lease agreement to access a laptop computer in May 2002 and in return he would make ongoing fortnightly payments to the Department. The applicant stated that just prior to the lease for the laptop expiring he was waiting for his workers' compensation claim to be accepted and he was not working at a school. The applicant gave evidence that when he received the package about the expiry of the lease agreement for his laptop sometime after 18 April 2005 it contained a registration form to re-enrol for a new laptop but he did not fill this out because he was unsure who could sign this form as he was not teaching at a school at the time. The applicant confirmed that the laptop given to him in May 2002 has not been returned to the supplier or the Department as at the date of hearing.

25 The applicant stated that he heard nothing further about the laptop until he received a letter from Mr Doyle dated 31 May 2005 advising him that he had not returned his laptop by the due date and he was asked to return it to the Joondalup District Office by 8 June 2005. The applicant stated that he was busy at the time and his priority was dealing with his workers' compensation claim. The applicant stated that he wrote to Mr Griffiths on 11 June 2005 advising him that he had not received the letter from Mr Doyle until early June 2005 and he also asked for advice about who could sign and authorise his re-enrolment in the laptop program given that he was not working at a school. The applicant also informed Mr Griffith that he had not previously been notified of the surrender date for his laptop.

26 The applicant stated that he was unsure at the time if he was paying the $14.60 per fortnight for the rent of the laptop because his sick leave payments had expired and he was not receiving any salary. The applicant gave evidence that when his workers' compensation claim was accepted by the respondent he received back pay but he was unclear about the details of the quantum of his back pay and whether or not deductions had been made from his back pay for the rent of the laptop during this period. The applicant said that he was subsequently advised that he had been over paid by the Department when he was paid his back pay and despite attempts to obtain information from the Department about the details of this overpayment he has not been advised how the overpayment occurred.

27 The applicant maintained that he was unclear who could sign an authority for him to re-enrol in the laptop program to receive a replacement laptop and the applicant wanted the opportunity to continue using the laptop program but he also wanted access to a new laptop prior to returning his old laptop because he wanted to transfer a significant amount of files and data on to his new laptop.

28 When the applicant was next contacted by the Department in July 2005 about the laptop being overdue for return he sought evidence from the Department about when he had been notified about a return date and confirmation that the late return was due to a mistake on his behalf. The applicant also maintained that any penalty that he was to incur as a result of not returning his laptop by the due date was not due to any failing on his part but on the part of the Department.

29 When the applicant returned to teaching at Australind Senior High School on a rehabilitation program in April 2006 he lodged a registration form for a replacement laptop but the Department advised him that he would not be supplied with a new one because his old laptop still had not been returned and was overdue for return. At the time the applicant told his Principal Mr Slavin that he still had his old laptop and he was still waiting for information from the Department to resolve issues which included the date the laptop was due to be returned and who could authorise a replacement laptop. The applicant also wanted resolution of the issue of who was liable for the penalties imposed upon him for the late return of the laptop. When Mr Slavin told him that he would not be receiving a new laptop until the old one was returned the applicant told Mr Slavin that this was unfair.

30 The applicant completed his rehabilitation program and he returned to full-time work at Cecil Andrews Senior High School in 2007 and he again sent a registration form to the Department to obtain a replacement laptop, however this request was refused. The applicant gave evidence that Mr Griffiths contacted him at the time and told him that he had received his registration form but a new laptop would not be supplied to him as he still had his old laptop which was two years overdue for return. The applicant stated that he had a discussion with the Deputy Principal at Cecil Andrews Senior High School Mr William Friday either before or after his discussion with Mr Griffiths about returning his overdue laptop and Mr Friday indicated that he may be subject to criminal charges and the applicant saw this as a threat. The applicant told Mr Friday that the issue of the non-return of the laptop was not a criminal issue because the Department knew that he had the laptop and its non-return was part of a dispute that he had with the Department whereby it had refused to supply information that he had requested as well as confirmation of the correct procedures for obtaining a replacement laptop.

31 The applicant gave evidence that on 31 May 2007 a directive from Mr McCaffrey was handed to him by Mr Hunter. The applicant stated that the letter was dated 16 April 2007 and the letter stated that he had seven days from the date of the letter to return the laptop. It was therefore impossible for him to comply with this directive given the timeframes contained in the letter had passed. The applicant stated that as there was a reference to disciplinary proceedings occurring if he did not comply with the directive he assumed that they had already commenced and this would be the appropriate mechanism for him to raise the fact that he had not received the directive until 31 May 2007 and he could therefore not comply with the directive and the applicant understood the Department would then reissue the directive.

32 The applicant stated that in early December 2007 Ms Bev Dornan, who was from the local district office attended Cecil Andrews Senior High School and gave him a letter containing a notice of an investigation being undertaken in relation to the allegation that he had disobeyed the directive issued by Mr McCaffrey. The applicant said that as this meeting occurred at short notice he did not have the opportunity to organise an independent person to be present and it was only part way through his discussion with Ms Dornan that he was advised that he could have a support person at this meeting. The applicant gave evidence that Ms Dornan outlined how the disciplinary investigation would proceed and when the applicant asked Ms Dornan whether as a matter of justice he was entitled to paid time or the equivalent to address matters in relation to the investigation in response Ms Dornan told him that she "believed not" but she would look into it. The applicant claims that at that point he commenced the dispute resolution proceedings under the relevant award against the Department in relation to this issue.

33 The applicant gave evidence that he heard nothing further from the respondent about disciplinary proceedings against him until 9 April 2008 when Mr Hunter hand delivered a copy of an email from Mr Goodwin seeking the applicant's input into the investigation that he was undertaking about the allegation that the applicant had breached the directive issued by Mr McCaffrey. The applicant stated that he was given until 11 April 2008 to respond to this email otherwise Mr Goodwin would progress the matter as if the applicant did not wish to participate. Even though he asked Mr Goodwin about the scope of the investigation and he asked him to send documentation to him he did not receive a response from Mr Goodwin.

34 The applicant gave evidence that he recalled being advised at some point by the respondent that the outcome of Mr Goodwin's investigation was that he had breached the directive issued by Mr McCaffrey and also that a disciplinary inquiry was to be held by Mr Elliott.

35 The applicant stated that when Mr Elliott sent him a letter about the inquiry and whether he wished to have input into it he was not given any specific timeframe within which to reply to him and at the time he was unwell and not at work and he therefore did not deal with the issue.

36 The next event the applicant recalled was when he was visited at home by Mr Matthew Read and another officer from the Department on or about 22 January 2009 and he was given a letter detailing an intention by the respondent to terminate him and he was told that he had seven days to make a submission in response. The applicant stated that he was annoyed and told them to leave as he had previously advised the Department that he required notification of any future meetings so that he could have an independent witness present. He also refused to take the letter from the respondent and it was left at the door however some time later, and after having sought assistance as he was distressed, he read the letter. The applicant stated that the following day he saw his specialist who was unhappy about the way in which the respondent had treated him.

37 The applicant stated that he wrote detailed submissions in response to the respondent's intention to terminate him but it was done without viewing Mr Goodwin's investigation report and Mr Elliott's inquiry report.

38 The applicant stated that he was terminated on 3 February 2009 by letter given to him by Mr Read when he was on sick leave.

39 The applicant is seeking the following remedies for what he claims is his unfair termination:

- reinstatement to his position at Cecil Andrews Senior High School;
- full continuous payment of his salary from 8 November 2008;
- the respondent be deemed liable for his injury recurrence;
- reinstatement of all entitlements;
- the respondent be ordered to supply evidence that the laptop return notification occurred, supply evidence that the laptop late return penalties are his liability, supply pay remittance advice in electronic form and participate in mediation at the Commission to resolve all issues before he returns to work;
- compensation for legal costs equal to and based upon the respondent's and State Solicitor's combined expenditure, compensation for his costs and time to be deemed to be the same as the respondent's and State Solicitor's and there is to be no consideration of any "charge out differentiation" between a solicitor and teacher;
- the respondent is to fix "mal-administration problems" to ensure internal processes and systems are in accordance with the PSM Act, occupational health and safety legislation and provisions of the 2006 Agreement (and/or any subsequent amendments);
- the respondent is to comply with the PSM Act, occupational health and safety legislation and provisions of the 2006 Agreement (and/or any subsequent amendments); and
- the transcript of this matter and all evidence presented is to be supplied to the Office of the Public Sector Standards Commission to permit a review of PSM Act compliance and disciplinary proceedings to be instigated against any officers found to be in breach; and
- the transcript of this matter and all evidence presented is to be supplied to the Corruption and Crime Commission, the Western Australian College of Teaching and to the applicant and any costs associated with the provision of copies of the transcript are to be the respondent's liability.

40 Under cross-examination the applicant verified that he had received the instruction dated 16 April 2007 to return the laptop and he stated that he received this letter on 31 May 2007 when it was handed to him by Mr Hunter.

41 The applicant confirmed that he signed the registration form to participate in the Notebook for Teachers Program in May 2002 and that a number of terms and conditions were attached to this document and he had agreed to abide by these terms and conditions. The applicant also conceded that one of the terms related to paying amounts due or returning the laptop if he went on leave without pay.

42 The applicant agreed that during the term of the three-year agreement for the laptop he was on unpaid leave as a result of a dispute he had over a workers' compensation claim and he stated that he did not make arrangements to make fortnightly payments for the laptop during this period as he was awaiting the outcome of his workers' compensation claim. The applicant stated that he was aware that the laptop was not his property but he maintained that the contract he signed to lease the laptop was irrelevant to his termination as he was terminated for refusing to obey a lawful directive. The applicant conceded that under the terms and conditions of the lease agreement the Department could revoke the allocation of the laptop to him if he breached any of the conditions.

43 The applicant agreed that he received the information package sent out to teachers on 18 April 2005 and notification that he had until 9 May 2005 to re-enrol in the Notebook for Teachers program (Exhibit R1.3). The applicant also agreed that the Department did not guarantee that there would be an overlap between the return of the old laptop and the allocation of a new laptop under this program.

44 The applicant maintained that as he was not given a date to return his old laptop he was denied natural justice and it was necessary for him to be informed of the date of the return of the laptop before it was overdue. The applicant confirmed that he received the information package sent out to teachers on 18 April 2005 about re-enrolling in the laptop program on 28 April 2005 however he could not recall if he read the documentation before or after the deadline of 9 May 2005 for returning the registration form for a replacement laptop. The applicant maintained that he was unable to complete the form to obtain a new laptop because he was not sure which school he was attached to at the time and therefore which person could countersign the form.

45 The applicant confirmed that in the letter from the Department dated 31 May 2005 his unattached status was confirmed and he was advised to return the laptop to the Joondalup District Office by 8 June 2005 (Exhibit R1.4). The applicant stated that he did not return the laptop at the time as he was unwell and away from work and it was desirable for him to have access to a laptop. The applicant stated that even though the laptop did not belong to him if he returned it to the Department his other concerns would be ignored by the Department. The applicant also agreed that he was using the laptop as a bargaining chip and because he believed he "had every entitlement to a laptop and I wasn't prepared to be without a laptop just because the department didn't get it right" (T49).

46 The applicant conceded that he returned mail to the respondent and/or the Department on a couple of occasions and he did so because he was being ignored by the Department after sending it mail. The applicant stated that he did not recall receiving the letter dated 29 June 2005 from Mr Griffiths about the payment of arrears for the laptop and informing him that his laptop was now late and he must return it to the supplier.

47 The applicant could not recall receiving a letter dated 2 March 2006 from Mr Doyle to the applicant about the non-return of the laptop and a series of three invoices issued in March 2006 and April 2006 for outstanding payments for the non-return of

the laptop and the applicant did not dispute that the correspondence dated 24 August 2005 and 2 March 2006 had been generated by the Department (Exhibits R1.7 and R1.8).

48 The applicant maintained that when he sought to re-enrol in the laptop program in May 2006 when he was at Australind Senior High School he did so because he wanted to resolve outstanding issues with the Department. The applicant also maintained that he tried to back up his laptop but the Department would not assist him.

49 The applicant conceded that the letter he sent to the Department dated 1 June 2006 removing his authority to deduct payments from his salary for the Notebook for Teachers program was of no effect. The applicant stated that he sent this letter because a person from the Department had advised him that the Department could take money from his pay without his authority so he was advising the Department not to do so (Exhibit R1.11).

50 The applicant stated that after he received the letter from Mr McCaffrey dated 16 April 2007 via Mr Hunter he was aware that disciplinary proceedings against him may take place but as he received this letter after 23 April 2007, which was seven days after the date of the letter, as he could not comply with this instruction and return the laptop he presumed that the disciplinary process had therefore started. When asked why he did not just return the laptop after receiving this letter the applicant stated "I just saw, "Cannot comply with that. I'm busy. Get on with other things," didn't think more of it." (T53).

51 The applicant stated that he could not recall if there were any attachments to the letter delivered to him on 6 December 2007 by Ms Dornan in which the respondent alleged he had acted in a manner which constituted a breach of discipline by failing to comply with a lawful directive to return the laptop and the applicant confirmed that he did not respond to this letter. The applicant also understood that on the day the letter was delivered to him as he had instigated a dispute resolution process through Ms Dornan the status quo would be maintained. The applicant maintained that he was raising a dispute with Ms Dornan even though he did not refer to the dispute settlement clause under the 2006 Agreement as he did not know about this clause at the time. The applicant then stated that he may have been confused about which letter was delivered to him by Ms Dornan on 6 December 2007 and it may have been the letter dated 26 November 2007 from the Department's Director of Standards and Integrity informing him that an investigation was to commence into the suspected breach of discipline.

52 The applicant stated that the Department never responded to his letter dated 11 April 2008.

53 The applicant confirmed that in his letter dated 15 September 2008 to the respondent he advised the respondent that he would return unopened and unread any correspondence hand delivered to him by the respondent's officers and with this letter he returned four letters from the respondent without opening them. The applicant stated that he did this as he wanted natural justice and procedural fairness and he was following the respondent's precedent, that is, as it would not respond to his correspondence he was doing the same with the respondent's correspondence. The applicant disagreed that it was difficult to communicate with him when he refused to receive mail from the Department particularly when the Department was obliged under legislation to keep the applicant notified throughout the disciplinary process. The applicant stated that by his actions in this regard he was saying that until he received the information he asked for from the Department he would not deal with the Department's correspondence. The applicant also stated that as he had invoked the dispute resolution clause this required the maintenance of the status quo and he was therefore not obliged to participate in anything further. The applicant also stated that he was tired of the Department "doing its own thing" and ignoring his requests for information and he had made every effort to resolve matters with the Department but the Department had denied him natural justice and procedural fairness. The applicant maintained that even though the deadline for returning the laptop had passed it was okay for him to keep it even though it was not his because he was trying to get information from the Department.

54 The applicant denied that he contributed to not receiving the directive dated 16 April 2007 in time to return the laptop by the due date by refusing to accept the letter sent to him by registered post and he conceded that this registered letter was sent to him and he did not accept it.

55 The applicant conceded that the requirement to return the laptop to the Department remains and the applicant gave evidence that he was aware that he was terminated for his failure to comply with the directive to return the laptop by 23 April 2007.

56 Under re-examination the applicant stated that he has never claimed ownership of the laptop and he has always agreed that it has to be returned to the Department but he maintained that this would not occur until the Department's policies and procedures and natural justice are complied with.

> "… Mr Quarry, now is your opportunity to clarify or expand on any issues that Ms Hartley raised with you in cross-examination?---I, again, clarify. I have never claimed ownership of the laptop. I have always agreed that it has to be returned to the department, subject to policies, procedures, natural justice, procedural fairness, et cetera. ..."
>
> (Transcript p 60)

57 The applicant disputes the amount that the Department maintains that he owes for the use of the laptop during the period he was on unpaid leave and he claims that the quantum has been incorrectly calculated (see Exhibit R1.6).

58 The applicant stated that he was unaware that the Joondalup District Director could sign his re-enrolment form to lease a laptop. The applicant maintained that when he received mail from the Department when he was on sick leave and/or workers' compensation leave the timeframes contained for responses to the correspondence were unrealistic and he was unwell at the time.

59 The applicant maintained that as the Department failed to provide the information he sought to enable him to re-enrol in the laptop program this put him in a position where he could not access a new laptop before returning the old laptop and he claimed that he should have been given an opportunity to transfer data to a new laptop. Furthermore, he did not have a school network to assist him to transfer data and it was too costly for him to make his own arrangements to do so.

60 The applicant stated that he had not followed up with invoking the dispute settlement procedure after December 2007 because he has been too unwell and preoccupied with other matters.

61 Mr Liam Smythe has been a principal investigator with the Department's Standards and Integrity Directorate for three years and he has been in this position since June 2007 when the directorate was first set up. When he commenced his position he reviewed the applicant's file and wrote a brief synopsis of the required action and then allocated the file to Mr Goodwin who then commenced a disciplinary process against the applicant.

62 Mr Smythe agreed that the applicant could not return the laptop by 23 April 2007, as directed in Mr McCaffrey's letter dated 16 April 2007, given that the applicant did not receive this letter until the end of May 2007 but he stated that the applicant had been asked on numerous occasions to return the laptop and if the applicant had returned the laptop to the Department at any point subsequent to this date there would not have been any investigation into this matter. Mr Smythe believed that the directive given to the applicant on 16 April 2007 and the charge that led to his termination were two different issues and he maintained that the applicant had failed to comply with a lawful directive to return the laptop to the Department.

63 Mr Smythe stated that the Department had continual problems serving documents on the applicant and the Department's inability to communicate with the applicant was unprecedented. It was also very unusual to attend an employee's home address to deliver mail to an employee.

Respondent's evidence

64 In 2007 Mr Goodwin was a senior investigator with the Department's Standards and Integrity Directorate. Mr Goodwin ceased employment with the respondent in July 2008.

65 In August 2007 Mr Goodwin commenced investigating issues surrounding the applicant's non-return of the laptop and in September 2007 he drafted the allegation letter sent to the applicant about the applicant disobeying a directive sent to him by Mr McCaffrey in April 2007. Mr Goodwin stated that he contacted Australia Post sometime in November 2007 about this letter, which had been sent to the applicant by registered post, and was advised that it would be returned to sender as it had not been collected. Mr Goodwin gave evidence that after he received the applicant's letter dated 11 April 2008 asking for information about the scope of his investigation Mr Hunter was asked on 29 April 2008 to hand deliver a copy of the allegation letter and the attachments to this letter to the applicant.

66 Mr Goodwin said he went to some lengths to ensure that the applicant participated in the applicant's disciplinary process. Mr Goodwin stated that it was unusual to involve a Principal in disciplinary proceedings but on 9 April 2008 he asked Mr Hunter to deliver an email to the applicant asking him if he wished to be involved in the disciplinary proceedings against him (see Exhibit R1.21). Mr Goodwin said that on a number of occasions he tried to contact the applicant by phone at his home but he was unsuccessful. At one point, and at the applicant's direction, Mr Goodwin contacted the State School Teachers' Union ("the Union") about representing the applicant but the Union indicated that it was not representing the applicant. Mr Goodwin stated that he spoke to the applicant by telephone towards the end of April 2008 about the applicant being involved in the disciplinary process and the applicant asked him to provide all documents to the Union. When Mr Goodwin told him that he had spoken to the Union and it said it would not represent him the applicant said he did not want to take any further part in the process.

67 Mr Goodwin stated that he stood by his findings and recommendations detailed in his investigation report completed in July 2008.

68 Under cross-examination Mr Goodwin stated that he understood the letter from Mr McCaffrey dated 16 April 2007 was sent by registered post to the applicant but after the applicant did not pick it up this letter was then sent to Mr Hunter to give to the applicant.

69 Mr Goodwin confirmed that in compiling his investigation report he reviewed the contract signed by the applicant in 2002 for the lease of the laptop and other correspondence with respect to the cessation of payments being made by the applicant for the lease of the laptop. Mr Goodwin stated that it was clear that the applicant had retained the laptop after the timeframe for returning it.

70 Mr Goodwin confirmed that he was aware that there were issues surrounding the applicant's non-return of the laptop but he understood that Mr McCaffrey's directive to return the laptop was not related to any other dispute and he was investigating the directive issued to the applicant by Mr McCaffrey. Mr Goodwin checked that the directive was lawful by reading the contract the applicant signed to use the laptop and as the applicant was no longer paying to lease the laptop and as he had received the directive issued to the applicant on 16 April 2007 then the applicant was required to return the laptop.

71 Mr Goodwin gave evidence that it was his view that the applicant could have complied with the directive. Mr Goodwin stated that the Department attempted to deliver Mr McCaffrey's letter dated 16 April 2007 to the applicant by registered post and the letter was hand delivered to him by Mr Hunter at the first opportunity. Mr Goodwin did not dispute that the applicant received this letter after 23 April 2007 however it was his belief that the issue was not that the applicant did not comply with the lawful directive within seven days of the date of the letter but that the applicant did not return the laptop to the Department and he maintained that a reasonable person would believe that if they could not have returned the laptop within seven days they should do so at a later date.

72 Mr Goodwin was unaware if Mr McCaffrey's letter dated 16 April 2007 was sent to the applicant during school holidays and Mr Goodwin stated that he was unaware that the applicant relied on him being on leave as a reason for not returning the laptop.

73 Under re-examination Mr Goodwin stated that his investigation about the return of the laptop was difficult as the applicant had elected not to become involved in the disciplinary process and investigation and even though he wanted to ensure that the applicant was involved he was also mindful of not placing the applicant under duress. Mr Goodwin stated that even if the applicant had difficulties returning the laptop within the seven day timeframe after 16 April 2007 the applicant did not have a right to retain the laptop indefinitely. Mr Goodwin said that the applicant had the opportunity to return the laptop prior to and during the investigation but he did not do so.

74 Mr Elliott is an independent inquiry officer and he has undertaken a number of inquiries for the Department. Mr Elliott said he endeavoured to involve the applicant in the inquiry by contacting the Union which he understood was representing the applicant but the Union advised him that it was not representing him as he was not a member. Mr Elliott stated that when he contacted Mr Hunter to ask the applicant to contact him he was told that the applicant was on sick leave and he then wrote to the applicant at his home address but he received no response. Mr Elliott stated that on two other occasions he spoke to Mr Hunter and on the second occasion he was informed that the applicant had 'disappeared and his whereabouts were unknown'. Mr Elliott then proceeded to complete the report.

75 Prior to completing his report Mr Elliott confirmed that the laptop had not been returned by the applicant. Mr Elliott stated that he recommended that the applicant be terminated because he had failed to comply with a lawful directive to return the laptop and this was a dismissible offence.

76 Under cross-examination Mr Elliott stated that he would not have interviewed the applicant if he was on sick leave and Mr Elliott then stated that when Mr Hunter told him that the applicant's whereabouts were unknown this did not indicate to him that the applicant was on sick leave.

77 Mr Elliott conceded that in the letter he wrote to the applicant dated 10 November 2008 asking the applicant whether he wanted to speak to him as part of the disciplinary inquiry he did not give the applicant a specific timeframe within which to respond to him.

78 Mr Elliott stated that he had not seen the investigation report completed by Mr Goodwin prior to completing his inquiry report.

79 Mr Elliott stated that he was unaware that the applicant did not receive the directive from Mr McCaffrey dated 16 April 2007 until the end of May 2007 and he agreed that if this was the case then the applicant could not have returned the laptop to the Department by 23 April 2007. However he stated that the applicant could have complied with the directive once the applicant received the letter from Mr McCaffrey by returning the laptop within seven days of the receipt of the letter.

80 Under re-examination Mr Elliott stated that if he had made contact with the applicant prior to completing his inquiry report and the applicant raised as a defence that he had not received the letter of 16 April 2007 until the end of May 2007 he would have considered this as part of his determination. Mr Elliott stated that it was his view that even though the applicant received the letter containing the directive at the end of May 2007 the applicant still did not return the laptop and the applicant had therefore not complied with a lawful directive.

81 Mr Elliott stated that when undertaking his inquiry he could not recall any reference to the letter dated 16 April 2007 containing the directive being sent to the applicant by registered mail being returned to the Department. Mr Elliott stated that when he reviewed documentation received from the Department as part of his inquiry the copy of this letter provided to him did not have any annotation on it about the letter being sent registered post to the applicant and it being returned and hand delivered to the applicant (Exhibit R1.12).

82 Mr Read is currently the Acting Principal Investigator with the Department's Standards and Integrity Directorate and he has been in this position since 18 June 2007. Mr Read stated that he became involved in the applicant's disciplinary proceedings when Mr Elliott was undertaking his inquiry.

83 Mr Read stated that after sighting all correspondence sent to the applicant he was satisfied that all requirements under the PSM Act with respect to the disciplinary process conducted by the respondent into the applicant's non-return of the laptop had been satisfied and adhered to.

84 Mr Read gave evidence that he recommended in his briefing note to the Acting Director General that the applicant be terminated because he had committed a serious breach of discipline as the non-return of the laptop could be characterised as stealing.

85 Mr Read stated that his notation on a letter dated 21 January 2009 from Ms Margery Evans, the Acting Director General to the applicant about the respondent's intention to dismiss the applicant confirms that this correspondence was hand delivered to the applicant. Mr Read stated that the letter was hand delivered to the applicant because of the Department's previous experience during the disciplinary process when the applicant did not accept mail and returned mail and as a result of the applicant's failure to respond to telephone calls. Mr Read stated that when he handed the applicant his letter of termination at his home he explained the terms of the letter and he gave the applicant an opportunity to return the laptop at that time but the applicant refused to do so and he told Mr Read that the issue was or would be in the hands of the Ombudsman.

86 Mr Read stated that he considered the submissions made by the applicant subsequent to the applicant being given the letter indicating that the respondent intended to terminate him. Mr Read stated that his recommendation that dismissal was appropriate remained given that the applicant had committed a serious breach of discipline as the applicant retained the laptop and as a result there was a breakdown of trust between the applicant and the respondent.

87 Under cross-examination Mr Read was asked about the notation on the briefing note he prepared for the respondent after Mr Elliott completed his report. Mr Read stated that he was aware that the notation was written by Mr Paul O'Connor the Executive Director of Professional Standards and Conduct at the Department and he stated that the applicant had a history of failing to receive registered mail and it was difficult to make appointments with the applicant to deliver correspondence to him and the Department had eliminated other options for contacting him. Mr Read said personal service of correspondence by the Department on an employee was unusual and in his recollection this was the only time it had occurred. Mr Read then stated that Mr O'Connor was aware that registered mail to the applicant had been returned unopened to the Department as he passed these letters on to Mr Read.

88 Mr Read stated that when the applicant's disciplinary process was being undertaken the Department did not provide copies of investigation and inquiry reports to employees involved in disciplinary processes however this policy has since changed.

89 Mr Griffiths is currently employed as an acting Senior Project Officer in the Department's Information and Communications Technologies Directorate. Previously he coordinated the Notebooks for Teachers Program. When Mr Griffiths became aware that the applicant had taken unpaid leave and was not making contributions as part of this program he wrote to the applicant on 23 September 2004 telling the applicant that it had come to his attention that he was currently on leave without pay and the fortnightly deductions for the lease of the laptop were no longer active. He asked the applicant to make arrangements to pay amounts from 24 July 2004 up to the expiry of the lease on 23 May 2005 (Exhibits R1.2). Mr Griffiths confirmed that an information package for re-enrolment in the Notebooks for Teachers program was sent out to teachers on 18 April 2005. Mr Griffiths gave evidence that if a teacher returned a laptop after the due date this could result in a financial impost on the Department. Mr Griffiths stated that the Department intended that there be an overlap with an old laptop being returned and a new one being issued but this was not guaranteed.

90 Mr Griffiths stated that no re-enrolment form to lease a laptop had been received from the applicant by 9 May 2005 and the applicant's lease arrangement with respect to the laptop expired at the end of May 2005.

91 Mr Griffiths stated that the letter sent to the applicant on 31 May 2005 was a form letter sent to a number of employees and the reference in the letter to the applicant making the laptop available for pickup at Joondalup District Office was based on information from the Department's payroll section (Exhibit R1.4).

92 Mr Griffiths stated that when he received the letter dated 11 June 2005 from the applicant he was concerned that no registration form for re-enrolment in the Notebook for Teachers program was attached and it was his view that the information the applicant asked for in this letter was addressed in the package sent to the applicant on 18 April 2005. Mr Griffiths stated that the Department would not have been opposed to providing a new computer to the applicant at this stage if the applicant had provided a registration form and if the Department could negotiate a return of the old laptop with the applicant.

93 Mr Griffiths gave evidence that the letter sent to the applicant on 29 June 2005 addressed the issue of the non-payment of contributions for the laptop and the issue of whether the laptop was late for return and this letter indicated to the applicant that the return of the laptop matter was urgent. Mr Griffiths understood that this letter was returned to the Department by the applicant. Mr Griffiths confirmed that correspondence was sent to the applicant on 2 March 2006 about the financial impost imposed by the finance company because the applicant had not returned the laptop by the due date and this letter advised the applicant that the Department would not waive this cost and it was therefore passed on to the applicant (Exhibit R1.8). Mr Griffiths stated that when he received a registration form from the applicant to participate in a new lease program, signed on 25 May 2006, this application was not accepted as it was inappropriate to give the applicant a new laptop because he had been in breach of his original contract for some time and he had not returned his old laptop. Mr Griffiths stated that this was also the case when the applicant applied subsequently on 26 April 2007. Mr Griffiths stated that he spoke to the applicant by telephone on 2 May 2007 and advised him that his application was rejected and he also told the applicant to collect Mr McCaffrey's letter which had been sent to him by registered post. Mr Griffiths stated that on or about 1 June 2006 the applicant then sent a letter to the Department requesting that payroll deductions for the Notebook for Teachers program cease immediately however no deductions were being taken from his pay at the time for the lease of the laptop. Mr Griffiths confirmed that he wrote an annotation on the letter dated 16 April 2007, which contained the directive to the applicant to return the laptop, as his section had sent this letter on behalf of Mr McCaffrey via registered post and it had been returned to sender as it had not been claimed by the applicant after four attempts by Australia Post to deliver it to the applicant.

94 Under cross-examination Mr Griffiths stated that the amount the Department claimed the applicant owed for the lease of the laptop was correct and Mr Griffiths conceded that the applicant may not have been given an opportunity to give information to a review panel about waiving penalties for the non-return of his laptop (Exhibit R1.8). Under re-examination Mr Griffiths stated that even if the applicant had been given the opportunity to make submissions to the review panel the outcome would have been no different as the applicant did not dispute that he had received the original information package.

Applicant's submissions

95 The applicant argues that he has been unfairly terminated as the directive given to him to return the laptop was impossible to comply with. Even though he still retains the laptop he maintains he would have returned it to the respondent if the respondent had provided him with relevant information and feedback. The applicant also maintains that he was denied procedural fairness given the events surrounding his termination.

96 The applicant maintains that the dispute over the non-return of his laptop had its genesis in 2004 and 2005 when he was absent from work on workers' compensation when the lease for his laptop was due for renewal. The applicant claims that whilst he was away from his normal workplace he was not notified that the lease for his laptop was about to expire and penalties with respect to the non-return of the laptop were therefore imposed on him. The applicant claimed that at the time he was unaware who could authorise a replacement laptop and even though he had requested this information from the Department it still has not been supplied to him. Even though two Principals had authorised replacement laptops being given to the applicant the Department has refused to supply a replacement laptop to the applicant on the basis that he had lease arrears and had not returned the old laptop.

97 The applicant argues that he has requested verification of the make up of the penalties imposed on him for the non-return of his laptop but to date this information has not been supplied to him by the Department. The applicant has also requested clarification about the quantum of the laptop lease contributions deducted from his pay and despite agreeing to make arrangements to pay this debt the Department has provided insufficient detail to the applicant to allow him to confirm what this payment should be. The applicant is also seeking clarification about over payments the Department maintains were made to him prior to returning the laptop and the applicant maintains that the amount the Department claimed he was required to pay for arrears for the lease of the laptop was inaccurate. Given his mistrust of the Department as well as being denied income by the Department he was unable to make these payments.

98 The applicant argues that he received the letter from Mr Doyle dated 31 May 2005 on 9 June 2005 which was after the date to return the laptop free of charge.

99 The applicant maintains that he did not receive the letter dated 24 August 2005 advising him of the seriousness of his failure to return the laptop as it was sent to an incorrect address. The applicant maintains that if had been given the opportunity to respond to this letter he would have submitted to the Department that the incurred financial penalty was as a result of the Department's failures as:

- he received the letter post marked 18 April 2005 on 28 April 2005 but did not open or read it for several days as he had other more pressing matters to deal with;
- he noted that the re-enrolment date was 9 May 2005 and re-enrolment authorisation required the signature of the school Principal;
- he did not know the identity or location of his Principal;
- the document referred to the return date being notified in the near future;
- he received a letter from Mr Doyle dated 31 May 2005 advising him that he had failed to return his laptop prior to the advertised date;
- he was not given the opportunity to take delivery of a new laptop prior to surrendering the old laptop to facilitate file transfer;
- he had requested to be advised who was required to sign and authorise the issue of a new laptop to him and when he could collect the new laptop; and
- he had requested to be advised when the Department would like him to surrender his old laptop allowing sufficient time to transfer files and transfer or reinstall software.

100 The applicant maintains that the invoice total of $728.84, which comprises rental arrears for the laptop, the pro-rata cost of the laptop's lease extension and the financier's later return penalty, is erroneous. The applicant also maintains that he did not receive invoices for these amounts which the Department claims were sent to him between March and April 2006.

101 The applicant argues that the first opportunity he had to submit an application form for a new laptop was 24 May 2006 and when he was advised that this application was refused he retained the laptop as he was seeking to be treated equitably under the Department's policy of allowing an overlap for the transfer of files to the new laptop however the Department did respond to this request.

102 The applicant argues that the Mr McCaffrey's directive was impossible to comply with as the date for returning the laptop had expired when he received the letter. Furthermore, it required the delivery of the instruction to him and compliance during school holidays which was an imposition. The applicant also argues that the directive expired on 23 April 2007 and was obsolete by the time he received it and that the worst he could be guilty of is an error of judgement for not subsequently returning the laptop by 7 June 2007. The applicant submits that he assumed the disciplinary process had already commenced when he received this letter on 31 May 2007. The applicant maintains that at the time he was receiving correspondence about returning the laptop he was unwell and therefore had limited capacity to deal with issues relevant to his employment and he stated that his priority at the time was dealing with his workers' compensation claim.

103 The applicant maintains that because of the respondent's failure to act in accordance with its policies and its obligations under the PSM Act the issues surrounding his termination have "compounded", "escalated" and "become self perpetuating". The applicant argues that the respondent breached its Core Shared Values Overview policy as well as its Discipline and Disputes and Complaints policies and s 80 of the PSM Act given the manner in which it has treated him prior to his termination. The applicant relies on the respondent also breaching parts of the PSM Act, the Equal Employment Opportunity/Diversity policy, Staff Conduct policy and the 2006 Agreement, in particular Clause 18 – Teachers' Duties and Responsibilities, Clause 73 – Sick Leave, Clause 89 – Occupational Safety and Health, Clause 111. – Occupational Safety and Health and Clause 112 – Dispute Resolution. The applicant also quoted extracts from Wikipedia, the free encyclopaedia, in support of his contention that he was unfairly dismissed. At Appendix A of his written submissions the applicant included details of his termination payment overpayment information and at Appendices B and C he included information about interpreting Venn diagrams and interpreting truth tables which he maintains is relevant to his termination.

104 The applicant agrees that under the conditions of the laptop's leasing arrangement he would have to make alternative arrangements with the Department to pay the amounts due if he was on leave without pay and he agrees that if his employment status changed or if he breached any conditions of the lease arrangement the Department could revoke the allocation of his laptop by giving him 14 days written notice. The applicant argues however, that when he went on leave without pay in 2004 this was something over which he had no control and he was waiting on the outcome of his workers' compensation claim. He was therefore not obligated to make alternative arrangements about payments for the lease of the laptop and furthermore at the time he went on leave without pay the Department did not ask him to return the laptop. Even though Mr Griffiths may have written to the applicant on 23 September 2004 advising him that as a result of him being on leave without pay his fortnightly payroll deductions were no longer occurring he had no record of receiving this letter and in any event the applicant was denied income by the Department at this point in time and was therefore unable to make lease payments for the laptop.

105 The applicant maintains that when the Department sent him an information pack on 18 April 2005 advising him that the lease for the laptop was due to expire it did not contain any information about the exact date the laptop was to be returned. The applicant concedes that the lease expired on his laptop on 23 May 2005 however he has not been provided with any evidence by the Department that he was notified before it was overdue of the exact date to return the laptop.

106 The applicant disputes that he received a letter from the respondent dated 6 September 2007 informing him that he may have acted in a manner which constitutes a breach of discipline pursuant to s 80 of the PSM Act as this letter was sent by registered mail and the investigation report states that the letter was returned to sender. The applicant submits therefore that he was not provided with an opportunity to provide a response to the allegation made against him in accordance with the PSM Act. The applicant argues that this failure to afford the applicant the opportunity to respond to the allegations against him invalidates all subsequent steps with respect to the disciplinary process against him.

107 The applicant submits that during a meeting with Ms Dornan on 6 December 2007 when she hand delivered a letter dated 26 November 2007 from the Director of Standards and Integrity with respect to Mr Goodwin being appointed to investigate the suspected breach of discipline against the applicant he invoked Clause 112. - Dispute Settlement Procedure (sic) of the 2006 Agreement, in an indirect manner. There was therefore no requirement on him to respond to matters relevant to Mr Goodwin's investigation until the processes and procedures contained in the dispute settlement procedure had been undertaken.

108 The applicant argues that Mr Goodwin's investigation was fundamentally flawed and this resulted in his findings and report being invalid. The applicant also argues that he did not receive the letter dated 5 September 2008 from the respondent charging him with a serious breach of discipline after Mr Goodwin completed his investigation report.

109 The applicant maintains that he did not receive the letter dated 16 October 2008 from Mr Elliott about holding the inquiry into the charge against him. The applicant also argues that as the findings in Mr Goodwin's investigation were invalid Mr Elliott's inquiry was unwarranted and thus his findings and the subsequent steps involved in the applicant's disciplinary process and his dismissal are invalid.

110 The applicant argues that the manner in which the letter dated 21 January 2009 from the Acting Director General informing him of the outcome of Mr Elliott's disciplinary inquiry was given to him violated his rights and disregarded his health.

111 The applicant maintained that he did not become involved in the investigation and the inquiry because he was struggling with health issues at the time and he was focussing on other matters.

112 The applicant concedes that he made submissions to the respondent in relation to whether or not he should be terminated but he claims that he was unable to address "misrepresentations, logical fallacies, and errors" contained in the investigation and inquiry reports as he was not supplied with copies of these documents and this was a denial of natural justice and procedural fairness. The applicant concedes that he was advised by letter dated 3 February 2009 that his employment with the respondent had been terminated but the respondent was aware at the time that he had a "psychological disorder" and he believes that the manner in which the letter which informed him of his termination was delivered to him at his home by the Department's officers constituted harassment and bullying.

113 The applicant disputes that the respondent conducted the disciplinary processes into the non-return of the laptop in accordance with the requirements under the PSM Act and the applicant claims that he was not afforded procedural fairness and natural justice throughout the course of the disciplinary process. The applicant also maintains that he was not given sufficient details about the alleged breach of discipline to allow him to provide a meaningful response to the allegation levelled against him.

114 The applicant maintains that he has never wanted to retain the laptop, which as at the date of hearing he still retains, however the applicant wanted to be given a replacement laptop before returning his old one.

115 The applicant maintains that the orders he is seeking to be issued are appropriate given that he was unfairly, harshly and oppressively dismissed. The applicant stated that even though he retains the laptop and he was aware that he had to return the laptop at some point in time he was unaware of the specific date that he had to return it and the applicant then stated that if he had been provided with a revised directive to return the laptop with he could have complied with then he would have felt compelled to return the laptop so as to avoid being terminated.

Respondent's submissions

116 The respondent argues that the applicant was not unfairly terminated. The respondent submits that after an investigation and inquiry were conducted pursuant to the terms of the PSM Act it became evident that the applicant did not comply with a lawful directive issued on 16 April 2007 to return the laptop.

117 The respondent relies on the following:

- The applicant signed a Notebook for Teachers registration form on 8 May 2002 acknowledging acceptance of the respondent's offer of access to the laptop package program and when he signed the registration form the applicant confirmed that he had read, agreed to and understood the attached Conditions of Entry and was willing to abide by those conditions. The Notebook for Teachers Program involved laptops being leased to the Department by a finance company and the Department then made the laptop computers available to teachers under a registration agreement whereby teachers agreed to fortnightly payroll deductions for the period they have use of the laptop. Under this program neither the Department nor any teacher takes ownership of a laptop and ownership remained with the lessor.
- The registration form signed by the applicant was for a three year lease expiring on 23 May 2005 and the payroll deduction specified and agreed to by the applicant in return for this lease was for a fortnightly amount of $14.60. The Conditions of Entry attached to the registration form included the following condition:

  > "1.3 In the event of my going on leave without pay, I will make alternative arrangements with the Department to pay the amount due over this period or return the Notebook package."

  Under this agreement teachers who took approved leave without pay of less than 12 months must arrange for payment of the deductions due in advance and when teachers take approved leave without pay of more than 12 months there is the option to return the laptop and end the agreement with the Department. In the applicant's case he went on leave

without pay for a period of less than 12 months and failed to make alternative arrangements to pay the amount in payroll deductions due over the period of his absence.

- The respondent confirmed by way of background that on 6 February 2004 the applicant was put on sick leave pending resolution of a workers' compensation claim and from 24 July 2004 the applicant was on leave without pay. On 5 August 2005 the respondent's Employee Support Bureau advised its Payroll section that as the applicant was to be placed on workers' compensation effective 6 February 2004 all sick leave taken over that period was reinstated as well as periods of leave without pay. On 23 September 2004 Mr Griffiths wrote to the applicant advising that due to him being on leave without pay the Notebook for Teachers Program fortnightly payroll deductions were no longer active and the applicant was asked to forward payment of $350.40 to clear the debts he had accrued and cover the payments up to the expiration of the lease on 23 May 2005 (Exhibit R1.2).
- On 18 April 2005 an information pack was posted to the applicant advising him that the lease for the laptop currently in his possession was due to expire shortly and the applicant was offered a replacement laptop and advised that the deadline for re-enrolment in the program was 9 May 2005 (Exhibit R1.3). This information pack included a covering letter which stipulated that any teacher wishing to re-enrol for a new laptop lease had to complete and return the enclosed registration form by 9 May 2005 and the applicant was advised that registration forms received after that date would be returned. The covering letter dealing with 'Return of Current Notebook' also stated:

  > "… Our target for this pickup date will normally be approximately a week after delivery of the new notebooks, to allow you time to transfer files from your old notebook to the new one. However, the possibility of unforeseen events means this cannot be guaranteed.
  >
  > We strongly advise that you should back up your data in advance in case a direct transfer of data is not possible in the event."

  This inability to guarantee an overlap between provision of a new laptop and return of the old one was repeated in the NFT Program — Return & Replacement of Notebooks at Expiry of Agreement Frequently-Asked Questions document included in the information pack sent to the applicant on 18 April 2005. The final question posed on the first page of that document was "Will I have to hand back the old notebook before receiving the new one?" to which the following answer was provided:

  > "Usually, **no**. We and our agents will endeavour to deliver the new notebook approximately a week prior to the return date of the old notebook, to allow for transfer of data files. However, this will depend on a variety of factors and no guarantee is made that this will be possible in all cases."

  The blank Notebook for Teachers Program 8th Round of Offers Notebook Registration Form included in the information pack clearly allowed for the form to be approved by not only a teacher's Principal but, in the case of a teacher not currently attached to a particular school, the appropriate District Director.

  The deadline for re-enrolment, 9 May 2005, passed without an application for a replacement laptop from the applicant and the applicant's agreement with the respondent expired on 23 May 2005 without the return of the laptop in the applicant's possession.
- A letter dated 31 May 2005 was sent to the applicant by Mr Doyle advising him that the laptop in his possession was overdue for return and the applicant was given a final opportunity to return the laptop free of charge by making it available for pickup at Unattached Joondalup District by 8 June 2005 (Exhibit R1.4).
- The applicant wrote to the Department on 11 June 2005 acknowledging receipt of the re-enrolment information package of 18 April 2005 as well as the letter from Mr Doyle dated 31 May 2005 and he advised the Department that he had received the letter of 18 April 2005 on 28 April 2005 and had not opened or read it for several days and it would seem reasonable to expect that the applicant opened and read the re-enrolment information package prior to the re-enrolment deadline of 9 May 2005 (Exhibit R1.5). In his letter dated 11 June 2005 the applicant also advised that he had received Mr Doyle's letter of 31 May 2005 on 9 June 2005 and the applicant asked who was required to sign and authorise the issuing of a new laptop, when he would be able to collect his new laptop and when he should to surrender his old laptop, allowing sufficient time to transfer files and transfer or reinstall software. It is not open for teachers to insist upon provision of a new laptop prior to handing in their old one.
- Mr Griffiths wrote to the applicant on 29 June 2005 again detailing arrears of $350.40 on his lease rental payments due to his being on leave without pay from 24 July 2004 to provide the applicant with a means for clearing of the debt and the letter also advised that the laptop was overdue for return and should be delivered to the supplier, at the address provided, immediately (Exhibit R1.6).
- By letter dated 24 August 2005 Mr Doyle advised the applicant of the seriousness of his failure to return the laptop in his possession and informed him that it must be returned to the supplier as a matter of urgency, at his own expense. The applicant was also advised that the Department had incurred a financial penalty due to the applicant failing to return the laptop to the finance company which owned it and the letter went on to warn the applicant that unless he could provide details of extenuating circumstances the financial penalty would be passed on to him (Exhibit R1.7).
- Mr Doyle wrote to the applicant on 2 March 2006 informing him that the reasons for the non-return of the laptop, contained in his facsimile of 11 June 2005, had been considered by a review panel which found that the circumstances outlined did not warrant waiver of the costs incurred and an invoice for the amount of $728.84 comprising $87.60 in further rental arrears, $66.24 pro-rata cost of one month lease extension and $575.00 financier's later return penalty was enclosed. This letter was sent by registered post but was returned to sender (Exhibit R1.8). Written notes on the letter of 2 March 2006 record attempts to contact the applicant by both mobile telephone and on his home number and

from March to April 2006 three automated reminders were sent to the applicant regarding the outstanding amount of $728.84 owing to the respondent (Exhibit R1.9).

- On 24 May 2006 the applicant submitted an application form requesting a new laptop and this application was returned to the applicant's Principal Mr Slavin at Australind Senior High School with an explanation as to the situation with the non-return of the laptop (Exhibit R1.10). On 1 June 2006 the applicant wrote to the Department's Payroll Division requesting that they cease payroll deductions for the Notebook for Teachers Program immediately and the applicant further advised that he was withdrawing and rescinding, effective immediately, any previous authority to make such deductions from his pay (Exhibit R1.11). In any event as at 1 June 2006 no payroll deductions were occurring as they had been put on hold when the applicant commenced leave without pay in 2004.
- By letter dated 16 April 2007 Mr McCaffrey instructed the applicant to return the laptop to the Coordinator of the Notebook for Teachers Program within seven days of the date of the letter and the letter went on to advise that the request constituted a lawful instruction. The applicant was further warned that failure to comply with the instruction would result in a disciplinary process being commenced against him (Exhibit R1.12). This letter was sent by registered post to the applicant's residential address and from the period 16 April to 7 May 2007 Australia Post made four separate, unsuccessful attempts to deliver the letter to the applicant but the letter was returned to the Department on 23 May 2007 with the advice that it had not been claimed by the applicant (Exhibit R1.13).

  Ultimately this letter was hand delivered to the applicant by his Principal Mr Hunter at Cecil Andrews Senior High School on 31 May 2007.
- After the applicant submitted a Notebook for Teachers Program registration form dated 26 April 2007 Mr Griffiths advised him by telephone on 2 May 2007 that the application was not accepted and he was also advised to collect the registered mail letter from Mr McCaffrey dated 16 April 2007 (Exhibit R1.14).
- By letter from the respondent dated 6 September 2007, the applicant was informed that he was suspected of acting in a manner which might constitute a breach of discipline pursuant to s 80 of the PSM Act. Specifically it was alleged that he failed to comply with a lawful directive issued to him on 16 April 2007. The letter went on to provide the applicant with an opportunity to provide a written explanation in relation to the allegation contained within and enclosed with the letter were the relevant provisions of the PSM Act and the Department's Discipline Policy, Procedures and Guidelines (Exhibit R1.19). This letter, including enclosures, was hand delivered to the applicant by his Principal Mr Hunter on 29 April 2008 (See page 4 of the Investigation Report of Mr Goodwin Exhibit R1.23).
- Mr Goodwin was appointed in accordance with s 81(2)(a) of the PSM Act to conduct an investigation into the suspected breach of discipline and his appointment was conveyed to the applicant by letter dated 26 November 2007 (Exhibit R1.20).

  An email dated 9 April 2008 from Mr Goodwin to the applicant about being interviewed as part of his investigation was hand delivered to the applicant by Mr Hunter and the applicant responded to this email by letter dated 11 April 2008 advising his availability and attendance would be determined by the Union. Mr Goodwin also provided evidence of a telephone call he made to the applicant during the course of his investigation and was told by the applicant that he wanted no involvement. Mr Goodwin also contacted the Union but was advised that is was not representing the applicant. Mr Goodwin completed his investigation report on 9 July 2008 and found that the allegation that the applicant failed to comply with a lawful directive issued to him on 16 April 2007 was proven (Exhibit R1.23).
- In a report dated 18 June 2008 the Department's Occupational Physician, Dr John Pearce concluded that the applicant was fit to perform the full inherent requirements of his substantive position and that any ongoing sickness absence or issues at the school level would need a non-medical determination (Exhibit R1.18).
- A briefing note was sent to the respondent requesting that a letter be signed charging the applicant with a serious breach of discipline (Exhibit R1.24) and by letter dated 5 September 2008 the respondent charged the applicant with a serious breach of discipline pursuant to s 83(1)(b) of the PSM Act and, as provided for in s 86(2) of the PSM Act, the applicant was required to indicate whether he admitted or denied the charge (Exhibit R1.25).
- The applicant wrote to the respondent on 15 September 2008 with the subject line 'EDWA's STRATEGIES TO RESOLVE DISPUTES' and with this letter the applicant returned, unopened, envelopes delivered to him on 29 April 2008, 13 June 2008, 2 September 2008 and 15 September 2008 and he advised that he would continue to return mail to the Department unopened and unread. The applicant also insisted that any meetings he had with the Department would be subject to the availability of Mr David Kelly of the Union who would from now on be attending as his nominated independent representative (Exhibit R1.26).
- When the applicant returned the charge letter to the Department unopened the disciplinary process continued as if he had denied the charge and by letter dated 16 October 2008 the applicant was informed that Mr Elliott had been directed to hold a disciplinary inquiry into the charge in accordance with his appointment pursuant to s 86(4) of the PSM Act (Exhibit R1.27).
- Mr Elliott sent two letters to the applicant offering him the opportunity to partake in the inquiry process and Mr Elliott then received advice from the Department on 7 November 2008 that the applicant was not represented by the Union.

  Mr Elliott completed an inquiry report dated 12 December 2008 and he was satisfied that there was ample evidence before him to prove, on the balance of probabilities, that the applicant committed the serious breach of discipline in question in that he failed to comply with a lawful directive issued to him on 16 April 2007 (Exhibit R1.28).

- On 19 January 2009 a briefing note was sent to the Acting Director General recommending a letter proposing dismissal be signed and sent to the applicant (Exhibit R1.29) and by letter from the Acting Director General dated 21 January 2009 the applicant was informed of the outcome of Mr Elliott's disciplinary inquiry and the applicant was advised that the proposed penalty to be imposed as a result of his misconduct was that of dismissal as this was the only penalty that fully recognised the seriousness of the applicant's conduct and the applicant was given the opportunity to provide written reasons as to why the Acting Director General should not take the proposed course of action (Exhibit R1.30).
- After the applicant provided written submissions to the respondent in a letter dated 27 January 2009 ultimately the respondent decided that the applicant's dismissal was justified and reasonable in the circumstances on the basis that the applicant had been issued with a very clear, lawful directive to return a laptop that he no longer had the right to maintain possession of, yet he consistently refused to do so and such a serious and flagrant breach of discipline was not compatible with his ongoing employment with the Department.
- On 30 January 2009 the respondent was sent a briefing note recommending a letter dismissing the applicant be signed and sent to the applicant and the applicant was advised by way of letter dated 3 February 2009 that his employment with the respondent had been terminated (Exhibit R1.33).

118 The respondent maintains that the disciplinary process which led to the applicant's dismissal was conducted in accordance with the relevant provisions of the PSM Act and the respondent further asserts that the applicant was afforded procedural fairness and natural justice throughout the course of the disciplinary process. The applicant was given the opportunity to take part in both the investigation and inquiry process but declined to do so and the applicant was furnished with sufficient details in relation to the alleged breach of discipline to allow him to provide a meaningful response to the allegation leveled against him.

119 It is acknowledged that the applicant received copies of the investigation and inquiry reports after the filing of this application, however, if the Commission was to find that the failure to provide the applicant with the reports prior to concluding the disciplinary process constituted a breach of procedural fairness and/or denial of natural justice the respondent would argue that such a breach does not invalidate the respondent's decision to terminate his employment. The respondent also argues that even though the investigation and inquiry reports were not provided to the applicant prior to him making submissions about why he should not be terminated given the nature of the breach in this instance which is not disputed by the applicant that is the non-return of the laptop, then the non-provision of these reports did not put the applicant at any disadvantage. The applicant was aware of the nature of the breach and therefore he could have responded to the respondent's view that he be terminated without reviewing the reports. The applicant also had the opportunity to respond as part of the inquiry and the investigation but chose not to do so. Furthermore, the applicant had the opportunity to cross-examine both Mr Elliott and Mr Goodwin during the hearing.

120 The respondent submits that the numerous irrelevant and potentially complicating complaints that the applicant has raised with the respondent with respect to this issue are irrelevant to his claim for unfair dismissal and the respondent strongly opposes any suggestion that the decision to terminate the applicant's employment was based upon anything other than a belief that it was the appropriate penalty given the applicant's unwarranted refusal to comply with the lawful directive issued on 16 April 2007 which was only made after repeated attempts to resolve the issue without resorting to threats of disciplinary action.

121 The respondent maintains that Mr McCaffrey's letter dated 16 April 2007 was a lawful instruction despite it being conveyed to the applicant more than seven days after the date of the letter and to date the laptop in question has not been returned to the supplier or the respondent. The respondent acknowledges that the directive given to the applicant dated 16 April 2007 was not received by the applicant until 31 May 2007 however the delay in the applicant receiving the directive was not the fault of the respondent. The respondent argues that the order to return the laptop was still lawful notwithstanding the return date not being able to be complied with as the laptop never belonged to the applicant and the respondent had sought the return of the laptop through reasonable means for a lengthy period of time. In the circumstances what is reasonable needs to be applied to this situation.

122 The respondent argues that the applicant's claim that the instruction that he return the laptop was impossible to comply with as it was not supplied or communicated to him until after the timeframe for compliance had passed was due to no fault on the part of the respondent. The respondent submits that applicant's refusal to receive or collect registered post was a pattern of behaviour of the applicant, such that the respondent was left with no choice but to arrange for the letter dated 16 April 2007 to be hand delivered to him. For the applicant to now rely on his own refusal to accept correspondence sent via registered post as a means of reneging on his obligations as an employee is untenable. There could be no doubt as to the fact that the letter of 16 April 2007 required that the applicant return the laptop as a matter of urgency and this request was not made in a vacuum. It was the culmination of a long and frustrating series of attempts by the respondent to have the applicant return the laptop and the applicant could have been under no misapprehension as to the fact that the requirement to return the laptop was not going to lapse seven days after the date of the letter containing the lawful instruction.

123 Even though the applicant suggested that he had invoked the dispute resolution procedure contained within the 2006 Agreement upon receiving correspondence from Ms Dornan during the course of the disciplinary process, in cross-examination the applicant conceded that he had not been aware of the dispute resolution provisions of the 2006 Agreement at the time that disciplinary proceedings against him were on foot and he did not raise any attempt to rely upon it at that time.

124 The respondent maintains that most of the orders being sought by the applicant are outside of the Commission's jurisdiction. For example, the Commission does not have the power to order that transcript be provided to a third party. Costs should not be awarded to the applicant as claimed as no legal costs have been incurred by the applicant in the conduct of his application and in any event the Commission does not have the power to award costs for a legal practitioner under the Act.

125 The respondent submits that the applicant has failed to show that his dismissal was harsh, oppressive or unfair and requests that the Commission dismiss his application.

Findings and conclusions

Credibility

126 I listened carefully to the evidence given by each witness and closely observed each witness. In my view each witness gave their evidence to the best of their recollection and I find that each witness gave evidence in a considered and forthright manner. Notwithstanding this I find that at times Mr Quarry was not as forthcoming as he could have been about whether or not he received correspondence from the Department and/or the respondent. At times the applicant's evidence was inconsistent when discussing his intention to return the laptop. For example, Mr Quarry stated that he would not have returned the laptop to the Department until he received information from the Department about a range of matters and he then submitted he would have returned the laptop if a directive was given to him with an appropriate timeframe for its return. In the circumstances where there is any inconsistency in the evidence given in these proceedings I prefer the evidence given by the respondent's witnesses to the evidence given by the applicant.

127 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*see Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz* (op cit), Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

128 Section 78 of the PSM Act, which is contained in Part 5 of that act and is headed 'Substandard performance and disciplinary matters', outlines the rights of appeal to the Commission for relevant employees and there was no dispute and I find that the applicant is a relevant employee for the purposes of these proceedings under s 78(2) of the PSM Act.

129 In *Geoffrey Johnston v Mr Ron Mance, Acting Director General Department of Education* (2002) 83 WAIG 1553 at 1557 Kenner C discussed the approach which should be taken by the Commission with respect to a referral under s 78(2) of the PSM Act. Kenner C stated the following:

> "Whilst s 78(2) does not refer to an "appeal" to the Commission, it seems plain enough from the language in the section as a whole, that it is concerned with challenges to a decision taken by the employer in relation to which the employee is "aggrieved". Reference to "aggrieved" is made in s 78(1)(b) dealing with appeals to the Public Service Appeal Board, and also in ss 78(2)(b), (3) and (4) dealing with referrals to the Commission. In my opinion, given the nature of the proceeding contemplated by s 78 of the PSMA, a matter referred to the Commission pursuant to s 78(2) by an aggrieved employee from one of the nominated decisions, is to be dealt with in the same manner as a matter referred under s 78(1) of the PSMA. That is, I do not consider that such a proceeding ought to be regarded as an "appeal" in the strict sense, as that issue was discussed by the Full Bench in *Milentis*. Nor is it the case in my opinion, that the Commission is limited to determining only the reasonableness of the employer's decision.
>
> In other words, depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": *Ormsby*. It would seem to be the case therefore, that consistent with the reasoning of the Full Bench in *Milentis*, the decision of the employer is not to be totally disregarded in the Commission hearing and determining the matter.
>
> Furthermore, it also seems to me that if the referral to the Commission pursuant to s 78(2) of the PSMA involves an allegation of harsh, oppressive or unfair dismissal, then, consistent with the referral of such a matter to the Commission pursuant to s 44 of the Act, s 23A should apply to such matters in terms of the relief to be granted. Such a matter, although referred to the Commission under s 78(2) of the PSMA, would nonetheless constitute "a claim of harsh, oppressive or unfair dismissal" for the purposes of s 23A of the Act and any relief to be granted. In my opinion, it would be incongruous if this were not to be the case, as claimants commencing proceedings under ss 29(1)(b)(i) and 44 would be entitled and limited to the remedies under s 23A if successful, whereas those under s 78(2) of the PSMA would not be so limited, for example, as to matters of compensation for loss and injury. Given the scheme of the Act in relation to such matters, I do not think parliament could have intended such an outcome. Different considerations may apply of course in cases where it is alleged that a dismissal was unlawful, for example, on the grounds of a failure by the employer to comply with a mandatory statutory requirement.
>
> …
>
> Therefore, matters referred to the Commission pursuant to s 78(2) of the PSMA are not restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate."

130 In *Peter John Ayling v Director-General, Department of Education and Training* (2009) 89 WAIG 824 Smith SC, as she was then, questioned this approach. Smith SC stated the following at 856:

"With respect I am not sure that the approach adopted by Kenner C is correct insofar as he concludes that matters referred to the Commission pursuant to s 78(2) of the PSMA, are not restricted to consideration of the reasonableness of the employer's conduct, but may review the employer's decision de novo. The reason why I question this approach is that the nature of proceedings referred under s 78(2) requires a review of decisions made following the consideration of the conduct of an employee by an employing authority in respect of events that have past and require a consideration of circumstances that existed when that conduct occurred. Notwithstanding my reservations about the analysis of Kenner C in respect of the nature of a hearing of a matter referred under s 78(2) of the PSMA, it is not necessary for me to conclusively express an opinion in respect of this matter as notwithstanding the statement made by the applicant's counsel at the outset of the hearing that the Commission should hear this matter de novo, the way in which the appeal has been in part conducted on behalf of the applicant has been to treat the appeal as an appeal stricto sensu, supplemented by oral evidence from the applicant. No objection has been made on behalf of the respondent that the Commission should not have regard to the evidence given by the applicant in these proceedings. Consequently, I intend to consider his oral evidence given in these proceedings together with the documentary evidential material collected by the respondent and oral evidence given by the respondent's witnesses."

131 Given the way that this appeal has been conducted and the facts relevant to this appeal which in the main are not in dispute it is my view that this application should be treated in the manner adopted by Smith SC, as she was then, in *Peter John Ayling v Director-General, Department of Education and Training* (op cit). The applicant was terminated for not returning a leased laptop to the Department and the applicant conceded at the hearing that he retains possession of this laptop. In the circumstances I find therefore that this matter does not require a review and consideration of the reasons for the applicant's termination afresh but a determination is necessary with respect to whether or not in all of the circumstances the applicant's termination was unfair.

132 Section 80 of the PSM Act is as follows:

"An employee who —

(a) disobeys or disregards a lawful order;

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics;

(c) commits an act of misconduct;

(d) is negligent or careless in the performance of his or her functions; or

(e) commits an act of victimisation within the meaning of section 15 of the *Public Interest Disclosure Act 2003*,

commits a breach of discipline."

133 Section 81 of the PSM Act is as follows:

"(1) An employing authority may, when it suspects that a person has committed a breach of discipline whilst serving as an employee in its public sector body and has given the person such notice in writing of the nature of the suspected breach of discipline as is prescribed, give the person a reasonable opportunity to submit an explanation to the employing authority.

(2) After having given the respondent the reasonable opportunity referred to in subsection (1), the employing authority may —

(a) if it is not the Minister, investigate or direct another person to investigate; or

(b) if it is the Minister, direct another person to investigate,

the suspected breach of discipline in accordance with prescribed procedures.

(3) A person to whom a direction is given under subsection (2) shall comply with that direction.

(4) A direction shall not be given under subsection (2) to the Commissioner."

134 Section 83 of the PSM Act is as follows:

"(1) If, following the investigation of an alleged breach of discipline under section 81, an employing authority which is not the Minister finds, whether as a result of its own investigation or that of a person directed under section 81(2)(a), that —

(a) a minor breach of discipline was committed by the respondent, that employing authority may in accordance with prescribed procedures —

(i) reprimand the respondent;

(ii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the last day during which he or she was at work as an employee before the day on which that finding was made; or

(iii) both reprimand, and impose the fine referred to in subparagraph (ii) on, the respondent;

(b) a serious breach of discipline appears to have been committed by the respondent, that employing authority shall cause the respondent to be charged in accordance with prescribed procedures with having committed that alleged breach of discipline; or

(c) no breach of discipline was committed by the respondent, notify the respondent of that finding and that no further action will be taken in the matter.

(2) For the purposes of this section, a breach of discipline committed as a result of disobedience to, or disregard of, a lawful order referred to in section 94(4) is a serious breach of discipline."

135 Section 86 of the PSM Act is as follows:

"(1) A charge under section 83(1)(b), 84(2)(b)(ii) or 85 shall —

(a) be in writing;

(b) contain the prescribed details of the alleged breach of discipline; and

(c) require the respondent to indicate within such period of not less than 7 days as is specified in the charge whether or not he or she admits or denies the charge.

(2) A respondent charged under section 83(1)(b), 84(2)(b)(ii) or 85 shall admit or deny the charge within the relevant period referred to in subsection (1)(c).

(3) Subject to section 89, if a respondent admits a charge under subsection (2) and the employing authority finds the charge to be proved, the employing authority —

(a) shall, if the charge is a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent; or

(b) may —

(i) reprimand the respondent;

(ii) transfer the respondent to another public sector body with the consent of the employing authority of that public sector body or, if the respondent is an employee other than a chief executive officer or chief employee, transfer him or her to another office, post or position in the public sector body in which he or she is currently employed;

(iii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work as an employee immediately before the day on which the finding of a breach of discipline was made;

(iv) reduce the monetary remuneration of the respondent;

(v) reduce the level of classification of the respondent; or

(vi) dismiss the respondent,

or, except when the respondent is dismissed under subparagraph (vi), take action under any 2 or more of the subparagraphs of this paragraph.

(4) If a respondent denies a charge under subsection (2) and the employing authority is not the Minister, the employing authority may —

(a) hold, or direct a person to hold, a disciplinary inquiry into the charge in accordance with prescribed procedures; or

(b) if it considers that a special disciplinary inquiry should be held into the charge, request the Minister to direct that a special disciplinary inquiry be held into the charge by a person named in that direction.

(5) A directed person shall, subject to subsections (6) and (7), comply with the relevant direction given under subsection (4)(a).

(6) If, at any time after the commencement of a disciplinary inquiry held under subsection (4)(a), the employing authority or directed person considers that a special disciplinary inquiry should be held into the charge, the employing authority may request the Minister to direct that —

(a) a special disciplinary inquiry be held into the charge by a person named in that direction; or

(b) the disciplinary inquiry be converted into a special disciplinary inquiry and that the person holding the disciplinary inquiry hold the resulting special disciplinary inquiry.

(7) If the Minister complies with a request made under subsection (4)(b) or (6) and makes a direction referred to in —

(a) subsection (4)(b), the person named in that direction shall comply with that direction;

(b) subsection (6)(a), the person named in that direction shall comply with that direction and the relevant disciplinary inquiry being held under subsection (4)(a) is terminated; or

(c) subsection (6)(b), the disciplinary inquiry concerned is converted into a special disciplinary inquiry and the person holding that disciplinary inquiry shall hold the resulting special disciplinary inquiry.

(8) If a directed person finds at the conclusion of a disciplinary inquiry that —

(a) a breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it act in relation to the respondent under subsection (3) as if the respondent had admitted the charge under subsection (2); or

(b) no breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it notify the respondent of that finding and that no further action will be taken in the matter.

(9) On receiving a finding and recommendation under subsection (8), the employing authority shall —

(a) accept the finding; and

(b) in the case of a recommendation made under —

(i) subsection (8)(a) in relation to a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent;

(ii) subsection (8)(a) in relation to a charge other than a charge referred to in subparagraph (i), accept that recommendation and act accordingly in relation to the respondent, or decline to accept that recommendation and take such other action in relation to the respondent as could have been recommended under that subsection; or

(iii) subsection (8)(b), accept that recommendation and act accordingly in relation to the respondent.

(10) If an employing authority finds at the conclusion of a disciplinary inquiry held by itself that —

(a) a breach of discipline was committed by the respondent, the employing authority shall act under subsection (3) as if the respondent had admitted the charge under subsection (2); or

(b) no breach of discipline was committed by the respondent, the employing authority shall notify the respondent of that finding and that no further action will be taken in the matter.

(11) If a respondent denies a charge under subsection (2) and the employing authority is the Minister, the Minister shall direct a person to hold a special disciplinary inquiry into the charge and the person shall comply with that direction.

(12) A direction shall not be given under this section to the Commissioner.

(13) In this section —

directed person means person directed under subsection (4)(a) to hold a disciplinary inquiry into the charge concerned;

disciplinary inquiry means disciplinary inquiry held or directed to be held under subsection (4)(a)."

136 I have considered the evidence given in these proceedings and reviewed the substantial amount of documentation tendered at the hearing. On the evidence before me and given my views on witness credit I find that the respondent had good reason to form the view that the applicant should be terminated after he failed to comply with a directive given to him on 31 May 2007 to return the laptop to the Department even though the timeframe specified in the letter to return the laptop had elapsed by the time the applicant was given this lawful directive.

137 Paragraph 2 sets out the background to this application.

138 It was not in dispute and I find that the applicant was terminated for not returning a laptop to the Department after he was directed to do so by letter dated 16 April 2007. It was also not in dispute and I find that the applicant has retained possession of the laptop since May 2002 even though he has been aware that the three-year lease agreement he signed in May 2002 for the use of the laptop expired on 23 May 2005. It is also the case that the applicant ceased making payments in return for the use of the laptop sometime in 2004 when the applicant was on leave without pay.

139 I find the following with respect to the events leading up to the applicant's termination. The applicant signed a Notebook for Teachers Program registration form on or about 8 May 2002 to lease a laptop for a period of three years in return for making a fortnightly payment of $14.60 which was deducted from his pay and by signing this form the applicant accepted the conditions of entry for this leasing arrangement. The lease arrangement, which expired on 23 May 2005, included a condition that if an employee went on leave without pay he or she would make alternative arrangements with the Department to pay the lease amount due over this period or return the laptop. However, when the applicant went on leave without pay from 24 July 2004 pending the resolution of a workers' compensation claim against the respondent the applicant did not make alternative arrangements to pay for the lease of the laptop. As the applicant had not paid for the lease of his laptop during his period of leave without pay Mr Griffiths wrote to the applicant on 23 September 2004 and asked him to forward payment of $350.40 to clear the debt he had accrued during the period when he was on leave without pay, including lease payments up to the expiration of the lease of the laptop on 23 May 2005, but the applicant did not pay the amount requested. On 18 April 2005 the Department sent the applicant an information pack advising him that the lease for his laptop was due to expire, he was offered a replacement laptop and he was advised that the deadline for re-enrolment in the programme to lease another laptop was 9 May 2005. The applicant was also advised that as the Department could not guarantee an overlap between the provision of a new laptop and the return of the old one the applicant was urged to ensure that any data on his laptop was backed up. The dead line for re-enrolment of 9 May 2005 passed with no application being made by the applicant for a replacement laptop. On or about 31 May 2005 the Department sent a letter to the applicant advising him that as his laptop had not been returned to the Department he was requested to make the laptop available to be picked up at the Joondalup District Office by 8 June 2005. By letter dated 11 June 2005 the applicant told the Department that he had received the information package sent to him on 18 April 2005 on 28 April 2005, he had not opened or read the correspondence for several days, he asked the respondent who was required to sign and authorise the issuance of a new laptop, when he could collect a new laptop and when he should surrender his old laptop. By letter dated 29 June 2005

Mr Griffiths responded to the applicant and advised him that his laptop was overdue for return and arrears were owed by him of $350.40 for the lease of the laptop which had to be paid to the Department. As the applicant did not pay this amount to the Department nor return the laptop, on 24 August 2005 Mr Doyle wrote to the applicant advising him that he had to return the laptop to its supplier as a matter of urgency and he was also advised that a substantial financial penalty had been incurred by the Department due to the applicant's failure to return the laptop. However, it appears this letter was not sent to the applicant's correct address and I accept that he did not receive this letter. On 2 March 2006 the Department sent the applicant an invoice for $728.84 comprising $87.60 in further rental arrears, $66.24 being the pro rata cost of the lease extension for the laptop and $575.00 to recoup the financier's late return penalty for the non-return of the laptop in the applicant's possession however, the applicant did not pay this invoice. On 22 March 2006 and twice in April 2006 further invoice reminders where sent to the applicant for the payment of this amount however the applicant did not pay the monies requested by the Department nor did he return the laptop to the Department or the supplier. On or about 24 May 2006 the applicant submitted a form with a request to lease a new laptop which was declined by the Department. On 1 June 2006 the applicant requested that the Department immediately cease payroll deductions for the lease of his laptop which in any event had not been occurring since 24 July 2004.

140 By letter dated 16 April 2007, sent by registered post to the applicant, Mr McCaffrey instructed the applicant to return the laptop to the Department within seven days of the date of the letter and the applicant was told that this was a lawful instruction. This letter was not picked up by the applicant from Australia Post despite four attempts by Australia Post to deliver it so the letter was returned to the Department on 24 May 2007 and it was then hand delivered to the applicant by his Principal on 31 May 2007. This letter reads as follows:

"I understand you have contacted the Department of Education and Training's Customer Service Centre regarding repairs to a notebook computer. The notebook in question was originally provided to you as part of your participation in the Department's Notebooks for Teachers (NFT) program. In registering to participate in this program you agreed to return the notebook at the expiry of its three year lease. The lease and warranty both expired in May 2005 and return of the notebook is now extremely overdue. In the Department's view you are no longer holding the notebook legally.

Given these circumstances, I am sure you would understand why service and support for the notebook are no longer available via the Department's NFT Program support arrangements. The Department's Customer Service Centre will therefore not accept any further requests for service work on the notebook.

The Department has written to you previously regarding this matter, particularly the need to return the notebook. Instructions to return the notebook have also been passed on via your former Principal at Australind Senior High School, Mr Gregory Slavin, and by your current Deputy Principal at Cecil Andrews Senior High School, Mr William Friday. I understand your response to Mr Friday was to the effect that you intend to retain the notebook indefinitely.

It seems possible that you may be under a misapprehension regarding the ownership of the notebook. To clarify, NFT program notebook computers are leased to the Department by a finance company and the Department then makes the notebooks available to teachers under a registration agreement. There is no intent that either the Department or an individual teacher will own a notebook at the end of the lease. Instead the notebooks must be returned to the finance company at the date on which the lease expires.

However, by your failure to return the notebook computer on time the Department was forced to make restitution to the finance company in lieu of the notebook not being returned. I must warn you that any intent to indefinitely retain such property may have legal consequences both on civil grounds (for example, breach of contract) and criminal grounds (for example, stealing).

Therefore I am instructing you to promptly return the notebook computer and all accessories, within seven days of the date of this letter, to the address below:

The Coordinator, Notebooks for Teachers Program

Department of Education & Training

151 Royal Street

EAST PERTH WA 6004

Please be aware that this is a lawful instruction given under my authority as Deputy Director General, Finance and Administration. I must therefore also warn that in the event that you fail to comply with this instruction, a disciplinary process will be commenced against you."

(Exhibit R1.12)

141 On the basis of the preceding chronology of events and given the terms of the above letter which was handed to the applicant on or about 31 May 2007 I find that the respondent and the Department informed the applicant on numerous occasions about the necessity to return the laptop to the Department or the supplier both prior to and after the expiry of the lease for the laptop in May 2005. However, the applicant ignored these repeated requests even after being given a directive to do so by Mr McCaffrey in May 2007. Furthermore, I find that the applicant is aware that he owes monies to the Department for the lease of this laptop and penalties which have accrued to the Department as a result of him not returning the laptop but he has refused to pay these monies notwithstanding the fact that he continues to possess and use the laptop.

142 I accept that the letter containing the directive from Mr McCaffrey is dated 16 April 2007 and the applicant was required to return the laptop within seven days of the date of the letter and the applicant did not receive this letter until on or about 31 May 2007 and was therefore unable to comply with the timeframe contained in this letter. It is also the case however that this letter was given to the applicant on or about 31 May 2007 after numerous unsuccessful attempts were made by Australia Post to deliver the letter to the applicant and the reason the applicant did not receive the letter within seven days of the date

of the letter was because the applicant refused to pick up the letter. I find that the applicant's inability to comply with the timeframe contained in the letter from Mr McCaffrey was a situation of his own making and did not absolve the applicant from his duty to return the laptop to the Department. I therefore reject the applicant's claim that he could not comply with the directive as over seven days had elapsed by the time he received the letter. I find that after receiving the letter from Mr McCaffrey the applicant was clearly aware that he had to return the laptop to the Department as soon as possible, yet he ignored this request. Furthermore, this was not the first occasion that the applicant was requested to return the laptop or that it was overdue for return as the letter from Mr McCaffrey confirmed that the lease for the use of the laptop expired in May 2005, through Mr Slavin and Mr Friday the applicant had previously been instructed to return the laptop to the Department, the applicant was reminded that neither he nor the Department owned the laptop and a penalty had been paid by the Department to the finance company as a result of the applicant's non-return of the laptop. As the applicant failed to return the laptop to the Department after the lease he signed to have possession of it expired, as required in the lease agreement the applicant signed for the use of the laptop and after receiving a directive from Mr McCaffrey to do so as well as other reminders to this effect, I find that the applicant breached his obligations to the respondent as an employee and the respondent therefore had good reason to terminate the applicant.

143 I find that prior to and post the lease expiring on the laptop on 23 May 2005 the applicant decided of his own volition not to deal promptly with correspondence sent to him or to accept a number of items of correspondence from the respondent and the Department concerning the laptop and its return and in my view he can not therefore rely on receiving correspondence late from the respondent and the Department as an excuse for not returning the laptop. Critically, one of the Department's letters which the applicant refused to accept after four attempts were made to deliver it to him by registered post contained the directive dated 16 April 2007 which resulted in a delay in the applicant receiving this letter after the due date for the return of the laptop as stated in that letter. I find that this was a situation of the applicant's own making and his obligation to return the laptop to the Department remained as at 31 May 2007 and he continues to refuse to do so.

144 It appears that Mr Goodwin and Mr Elliott did not focus on the applicant being unable to comply with the timeframe detailed in Mr McCaffrey's directive to the applicant to return the laptop when conducting their respective investigation and inquiry however I find that even if the applicant received the directive to return the laptop within the specified timeframe and was able to return the laptop within seven days of the date of the letter he would not have returned the laptop notwithstanding his claims to the contrary during the hearing. I find that the applicant has used the issue of the non-return of the laptop as a lever in an attempt to deal with a range of other matters in dispute between himself and the Department since 2005. In my view this is confirmed by the content of the applicant's letter to the respondent dated 27 January 2009 with respect to his claim as to why the respondent should not terminate the applicant for not returning the laptop. This letter does not refer directly to the applicant's inability to comply with the timeframe contained in Mr McCaffrey's letter as a reason for not terminating the applicant. The applicant stated the following about the directive issued on 16 April 2007 for him to return the laptop:

"• The alleged "lawful directive" is not a lawful directive.

- ➢ It is an attempt to circumvent the undertaking given to the Court.
- ➢ It is of itself an act of Contempt of Court.
- ➢ Therefore it is an "illegal" order.
- ➢ Compliance with this order would make me complicit in the Contempt of Court.
- ➢ Compliance with illegal orders is not a defence to an illegal act.
  - ▪ There are many legal precedents attesting to this fact.
  - ▪ The My Lai massacre (in the Vietnam War) is one well recognised example."

(Extract Exhibit R1.31)

145 In this letter the applicant claims that it was unfair that he be terminated by the respondent for a range of reasons including a dispute over wages the Department was reclaiming from him, a dispute about the allocation of housing to him by the Department and a dispute about what the applicant regarded as an unfavourable posting. This letter refers to a chronic medical condition which he had which had been ongoing for some time and his workers' compensation claim and two major reoccurrences caused by the Department after 2001, the applicant claimed that in 2004 he was threatened by an employee of the Department about a separate issue and no action was taken by the Department despite this matter being reported to the Department and the applicant referred to his deteriorating health in 2008 based on the Department failing to fulfil its obligations to the applicant in relation to issues over his pay and lack of information being given to him by the Department about this issue. The applicant claimed he was not given information about when the laptop was due to be returned before it was overdue and the applicant referred to court action taken by the respondent in 2006 against him to recover an alleged overpayment of his salary and court action taken by the Department regarding the recovery of the laptop.

146 The applicant claimed that the respondent should discipline employees who had failed to supply him with the information he required about when the laptop was due to be returned before it was overdue and the applicant maintained he was treated less favourably than other employees with respect to where he was posted and he claimed he was denied natural justice given the manner in which his letter of proposed termination was delivered to him. The applicant summarised his submissions in support of him not being terminated as follows:

"• I have no doubt that as a result of my diminishing health (and DET failings), I have made some poor decisions.

- In light of the "big picture", I belief (sic) "Dismissal" to be inappropriate.
  - ➢ Other DET Officers have not been disciplined for their role in the disputes.

- Following resolution of these issues, I am willing to be "disciplined" as a result of these indiscretions, consistent with the disciplinary actions imposed on the other officers who are to be disciplined.
- I am mature enough to accept that I make mistakes, apologise, and accept appropriate consequences.
  - "Dismissal" is inappropriate.
- My preference throughout the dispute has been that of "resolution and continuous improvement".
  - My previous career has involved being actively involved in, and developed this philosophy.
  - This previous career, and my experiences (briefly outlined above) give an insight into the malaise within the DET administration.
    - A healthy organisation does not:
      - Consist of sycophants.
      - Condemn dissent.
      - Utilise "power plays", bullying, and brinkmanship.
      - Discourage or refuse to engage in open communication and attempts to resolve dispute.
      - Censure or stifle creativity and/or unnecessarily burden employees with additional responsibilities, to the detriment of the performance of the employee's core duties (teaching students).
      - Have a focus on "administrative convenience" (rather than customer focus – teaching students).
      - Hypocrisy relating to referral of incidents to the Standards and Integrity Branch.

I shall end this, knowing there is much more that should be documented, but unable to sustain the effort required to continue with this response.

Furthermore, in previous correspondence to you, I outlined the above "dispute" content, and sought your involvement to resolve the matter.

As I advised the officers who delivered the letter from Margery Evans on 21st January, it is my intention to refer this matter to the Office of the Ombudsman. It may also be appropriate to refer the matter to the "Office of the Public Sector Management" regarding DET officers' being "negligent or careless in the performance of his or her functions".

However, the effort involved in doing so is currently preventing this being progressed. It would be my preference that this matter be addressed and resolved without the need to refer this matter to the Office of the Ombudsman, the "Office of Public Sector Management", and subsequent waste of resources (mine, DET's, the "Office of Public Sector Management" and the Office of the Ombudsman's)."

(Extract Exhibit R1.31)

Clearly the above submissions do not focus on issues related to the applicant's inability to comply with Mr McCaffrey's directive.

147 I reject the applicant's claim that as Mr McCaffrey's directive was sent to him when he was on leave he therefore did not have to comply with this directive on the basis that I have already found that the applicant had an obligation to return the laptop to the Department as at 31 May 2007 when he received the directive from Mr McCaffrey and he should have done so as soon as practicable after receiving the directive, whether or not he was on leave.

148 The applicant was given further opportunities to return the laptop subsequent to 31 May 2007 which would have obviated disciplinary proceedings being commenced against him yet he chose not to return the laptop. After the applicant received Mr McCaffrey's letter on or about 31 May 2007 the applicant was reminded by the respondent to return the laptop promptly to avoid disciplinary action in a letter sent to him on or about 2 July 2007 by the respondent in response to a letter the applicant wrote to the Minister for Education and Training complaining about the directive given to him to return the laptop. It is also the case and I find that the applicant received this correspondence as he referred to it in his letter to the respondent dated 24 September 2007 (Exhibit R1.17). I also accept Mr Read's evidence that when he handed the applicant his letter of termination on 3 February 2009 the Department gave the applicant a final opportunity to return the laptop but he refused to do so at the time and referred to this issue being 'in the hands of the Ombudsman'.

149 After carefully reviewing the requirements on the respondent pursuant to ss 80, 81, 83 and 86 of the PSM Act when dealing with disciplinary matters with respect to an employee I am satisfied and I find that the respondent complied with the procedural requirements contained therein when effecting the applicant's termination. There was no dispute and I find that the respondent wrote to the applicant on 6 September 2007 advising him that he was suspected of acting in a manner which constitutes a breach of discipline pursuant to s 80 of the PSM Act and the applicant was given an opportunity to provide a written explanation in respect to this allegation. Mr Goodwin gave evidence, which I accept, that this letter was sent to the applicant but returned to the Department on 28 November 2007 and after Mr Goodwin contacted the applicant via his Principal about participating in the investigation process this letter was then hand delivered to the applicant by his Principal on 29 April 2008. As the applicant did not respond to this letter Mr Goodwin was appointed pursuant to s 81(2)(a) of the PSM Act to conduct an investigation into the suspected breach of discipline and his appointment was conveyed to the applicant by letter dated 26 November 2007 and a copy of this letter was hand delivered to the applicant on 6 December 2007. I find that after Mr Goodwin made a number of attempts to involve the applicant in the investigation process without success he completed his investigation report on or about 9 July 2008 and he found that the allegation that the applicant had failed to comply with a lawful directive issued on 16 April 2007 had been proven. I find that pursuant to s 83(1)(b) of the

PSM Act the respondent charged the applicant with a serious breach of discipline and the applicant was required to indicate whether he admitted or denied the charge. I find that the applicant returned the charge letter to the respondent unopened and as a result the disciplinary process continued as if he had denied the charge which in my view was an appropriate course of action in the circumstances. I find that the Department then wrote to the applicant care of the Union to advise the applicant that Mr Elliott had been appointed as an independent inquirer pursuant to s 86(4) of the PSM Act and I accept Mr Elliott's evidence that he made attempts to involve the applicant in the inquiry however the applicant did not respond to his correspondence in this regard nor was the Union, who the applicant claimed was representing him, prepared to make representations on his behalf. I find that Mr Elliott completed his inquiry report on or about 12 December 2008 and he was satisfied that there was ample evidence to prove on the balance of probabilities that the applicant had committed a serious breach of misconduct in that he had failed to comply with a lawful directive issued to him on 16 April 2007. By letter dated 21 January 2009, which was hand delivered to the applicant on that date, the Acting Director General informed the applicant of the outcome of the inquiry and the respondent was required under s 86(9)(a) of the PSM Act and did accept the finding of the inquirer and the applicant was advised that the proposed penalty to be imposed on him as a result of his misconduct was dismissal. The applicant was then given an opportunity to provide written reasons as to why the Acting Director General should not take this proposed course of action.

150 I find that after considering the applicant's written submissions the respondent determined that the applicant should be dismissed for committing a serious breach of discipline and by letter dated 3 February 2009 the applicant was terminated.

151 Even though the respondent failed to provide the applicant with a copy of the investigation and inquiry reports prior to imposing a penalty on him for the breach of discipline and the applicant therefore did not have the opportunity to review the material it relied on to form the view that the applicant should be terminated prior to his termination being effected I find that the applicant was not disadvantaged as a result of this failure (see *Kioa and Others v West and Another* [1985] HCA 81; [1985] 159 CLR 550). The applicant was terminated because he has consistently refused to return the leased laptop to the Department and the applicant has never disputed this. I have already found that the respondent and the Department notified the applicant on numerous occasions both pre and post April 2007 that he was required to return the laptop. Furthermore I find that the applicant was given opportunities to participate in both the investigation and the inquiry but he refused to do so. In the circumstances it is my view that even if copies of the investigation and inquiry reports were given to the applicant before he made submissions to the respondent as to why he should not be terminated this would not have made any difference to the applicant being terminated.

152 I find that the applicant's other claims that his termination was unfair and he was denied procedural fairness given the manner of his termination lack substance. I reject the applicant's claims that it was the Department's fault that he did not return the laptop after the lease for it had expired because he did not know where to return the laptop and it was unfair for him to return the laptop without being issued a replacement laptop prior to doing so as he needed to transfer data across to the new laptop as the applicant conceded that he received a letter from the Department dated 31 May 2005 advising him to return the laptop to the Joondalup District Office. In any event the applicant was told in Mr McCaffrey's letter dated 16 April 2007 to return the laptop to the Department's head office. Furthermore, the applicant also agreed that the lease agreement he signed for the laptop included a provision that the Department could not guarantee an overlap between the return of a laptop and the provision of a new one. The applicant claimed that the Department's actions with respect to a range of matters not related to the return of the laptop escalated the dispute about the non-return of the laptop to the point where he was unfairly terminated. I have already found that the respondent had good reason to terminate the applicant on the basis that he disobeyed a directive to return the laptop to the Department and in my view the applicant's reliance on other issues he had with the Department is therefore of no effect. In any event I find that the linking of his disputes with the Department and the non-return of the laptop was a situation of his own making.

153 I reject the applicant's claim that the Department failed to act in accordance with its policies and obligations and this compounded, escalated and become self perpetuating with respect to the issue of the non-return of the laptop as I find that these claims lack substance. I find that the applicant has not demonstrated that the respondent breached any of its policies and procedures during the disciplinary process against him and I have already found that the respondent followed correct procedures under the PSM Act when effecting the applicant's termination. I find that the applicant cannot rely on perceived incorrect calculations made by the Department with respect to debts owed by him to the Department incurred by the non-return of the laptop by the due date and not knowing to whom he could apply to have a replacement laptop given to him as he was not working at a school when the lease for his laptop expired because these issues were not impediments to the applicant returning the laptop. The applicant's complaint about the inappropriateness of correspondence being sent or given to him whilst he was on leave is also of no consequence in my view as the applicant has been on notice for over five years that he has been required to return the laptop to the Department and/or supplier yet he has continued to refuse to do so. For the same reason I reject the applicant's claim that he was unfairly terminated when he was on leave. Additionally, it does not appear that the applicant asked for the disciplinary process to be deferred because of any illness.

154 The applicant maintains that he invoked the dispute settlement procedure when he received correspondence via Ms Dornan during the course of the disciplinary process and as a result this had to be resolved prior to the disciplinary proceedings against him continuing. I find that the applicant's reliance on this procedure arose after the event and he cannot therefore rely on this as being an estoppel to the disciplinary proceedings against him. In any event the applicant has not prosecuted his claim under this procedure.

155 The applicant made submissions about the respondent breaching s 78(4) and s 40 of the PSM Act however these clauses are not relevant to this application.

156 For the reasons set out above I find that the applicant has failed to show that his dismissal was harsh, oppressive or unfair and I will dismiss this application.

2010 WAIRC 01245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL QUARRY
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 23 DECEMBER 2010
FILE NO/S	U 38 OF 2009
CITATION NO.	2010 WAIRC 01245

Result	Dismissed
Representation	
Applicant	Mr M Quarry on his own behalf
Respondent	Ms R Hartley (of Counsel)

Order

HAVING HEARD Mr M Quarry on his own behalf 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 –

1. THAT the name of the respondent be deleted and that Director General, Department of Education and Training be substituted in lieu thereof.
2. THAT the application otherwise be and is hereby dismissed.

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

2010 WAIRC 01227

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARMEN TAYLOR
	APPLICANT
	-v-
	BROOME INTERNATIONAL AIRPORT
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 16 DECEMBER 2010
FILE NO/S	U 158 OF 2010
CITATION NO.	2010 WAIRC 01227

Result	Application dismissed

Order

WHEREAS this application claiming unfair dismissal was filed 20 September 2010;

AND WHEREAS since then no further contact has been received from the applicant;

AND WHEREAS when the application was listed for mention only on 8 December 2010 there was no appearance by or on behalf of the applicant;

AND WHEREAS at the hearing on 8 December 2010 the Commission decided that unless there was contact received from the applicant within a further 7 days, the application would be dismissed for want of prosecution;

AND WHEREAS no contact has been received from the applicant within that time,

NOW THEREFORE I, the undersigned, having given reasons for decision extemporaneously and pursuant to the powers conferred on me under section 27(1) of the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby, dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2010 WAIRC 01222

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATIE TOWNROW
	APPLICANT
	-v-
	P W & J I GARDINER, EDALE STUD AND FARM PARTNERSHIP
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 DECEMBER 2010
FILE NO/S	U 101 OF 2010
CITATION NO.	2010 WAIRC 01222

Result	Order issued
Representation	
Applicant	Mr G Sturman (as agent)
Respondent	Mr P Brunner (of counsel)

Order

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

AND WHEREAS on 29 July 2010 and 27 August 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conferences no agreement was able to be reached between the parties;

AND WHEREAS on 30 November 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 01223

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MALCOLM STUART TOWNROW
	APPLICANT
	-v-
	P W & J.I GARDINER EDALE STUD AND FARM PARTNERSHIP
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 DECEMBER 2010
FILE NO/S	U 100 OF 2010
CITATION NO.	2010 WAIRC 01223

Result	Order issued
Representation	
Applicant	Mr G Sturman (as agent)
Respondent	Mr P Brunner (of counsel)

Order

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

AND WHEREAS on 29 July 2010, 27 August 2010, 29 October 2010 and 10 November 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conferences no agreement was able to be reached between the parties;

AND WHEREAS the matter was listed for hearing and determination on 13 and 14 December 2010 in Moora;

AND WHEREAS on 30 November 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.

2011 WAIRC 00004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOS TRIANTOPOULOS
	APPLICANT
	-v-
	SHELL COMPANY OF AUSTRALIA LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	MONDAY, 23 AUGUST 2010 AND SUBMISSIONS IN WRITING
DELIVERED	FRIDAY, 7 JANUARY 2011
FILE NO.	B 54 OF 2010
CITATION NO.	2011 WAIRC 00004

CatchWords	Industrial law – Whether the Commission has jurisdiction to deal with claims for enforcement of contracts of employment against national system employers – Whether denied contractual benefit claim referred under s 29(1)(b)(ii) is a non-excluded matter under the *Fair Work Act 2009* s 27(2)(o) – Common law contracts – Exercise of judicial power – Comparison with South Australian legislation – Contract of employment – Denied contractual benefits – National system employer – Enforcement – Industrial matter – Powers of the WAIRC – *Fair Work Act 2009* s 26, s 26(1), s 26(2), s 26(2)(e), s 26(3), s 27, s 27(1A), s 27(2)(o), s 541, s 542, s 543 – *Fair Work Act 1994* (SA) s 11, s 12, s 13, s 14, s 15, s 26, s 26(1) – *Fair Work Bill* Explanatory Memorandum – *Industrial Relations Act 1979* s 7, s 7(1a), s 23, s 23(1), s 23A, s 23A(1)(a), s 23A(1)(ba), s 26, s 26(2), s 29(1), s 29(1)(b), s 29(1(b)(i), s 29(1)(b)(ii), s 83, s 83A – *Workplace Relations Act*
Result	Jurisdiction found
Representation	
Applicants	Mr P Mullally as Agent
Respondent	Mr D Parker of counsel

Reasons for Decision

1 The applicant claims that he had a contract of employment with the respondent which entitled him to redundancy pay as a result of the termination of his employment by the respondent and he has referred that claim to the Western Australian Industrial Relations Commission (the Commission) pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the *IR Act*).

2 The respondent does not concede that it was the applicant's employer. However, for the purposes only of the determination of a jurisdictional issue raised by the respondent, it has made explicit assumptions of fact and law for the purposes of its submissions, being:

> "(a) At all relevant times, the Applicant was employed by the Respondent under a valid contract of employment; and
>
> (b) At all relevant times, the employment contract referred to above provided for certain entitlements."

3 The parties agree that the respondent is a national system employer pursuant to the *Fair Work Act 2009* (Cth) (the *FW Act*).

The Respondent's Submissions

4 The respondent says that the Commission does not have jurisdiction to deal with this claim because the *FW Act* generally excludes the application of the *IR Act* to national system employers and in particular that s 27 of the *FW Act* provides that the general exclusions in s 26 of the *FW Act* do not apply to laws which deal with any non-excluded matters. The relevant non-excluded matters referred to in s 27(2)(o) of the *FW Act* are claims for the enforcement of contracts of employment.

5 The respondent says that the Commission does not have jurisdiction and is not empowered to "enforce" a common law contract of employment within the meaning of that term in s 27(2)(o) of the *FW Act*. Its jurisdiction is limited to inquiring into and dealing with an industrial matter (s 23(1)) of the *IR Act*.

6 As the term "enforce" is not defined in either the *FW Act* or the *IR Act*, the respondent refers to the ordinary meaning of the term being "to compel observance of" according to the Oxford Dictionary. The Commission does not have jurisdiction to compel or force a party to a matter before it to observe the terms of a contract of employment. Its jurisdiction is to enquire into and deal with an industrial matter, which may culminate in the Commission making a decision or an order. If that order is not complied with then the order may be "enforced" in a court. The respondent says that "enforce" in s 27(2)(o) of the *FW Act* means an ability to compel the observance of its decision in relation to the claim. The Commission does not have jurisdiction to compel observance of its decision in relation to an industrial matter and so it does not have jurisdiction to compel observance of a contract of employment.

7 The respondent says "[t]he WAIRC's ability to enquire into and deal with claims made under section 29(1)(b)(ii) of the IR Act is not a law dealing with a non-excluded matter for the purposes of the FW Act."

8 The meaning of "enforce" under the *FW Act* can be ascertained by reference to the Explanatory Memorandum to the *Fair Work Bill* where at page 21, it states that:

> "… [Section 27] saves State or Territory laws dealing with the following non-excluded matters …
>
> - claims for enforcement of contracts of employment (e.g., under section 14 of the Fair Work Act 1994 (SA)), but not the variation or setting aside of unfair contracts."

9 Therefore the respondent says that the Commonwealth Parliament's intention in respect of the meaning of the term "enforce" is to be informed by the operation of s 14 of the *Fair Work Act 1994* (SA) (the *FW Act* (SA). The *FW Act* (SA) establishes both an Industrial Relations Commission and an Industrial Relations Court with distinct jurisdictions. The Industrial Relations Commission is similar in nature to the Commission and its jurisdiction is to "hear and determine any matter or thing arising from or relating to an industrial matter" (s 26 of the *FW Act* (SA)). By contrast the Industrial Relations Court's jurisdiction includes:

> (i) interpreting awards and enterprise agreements;
>
> (ii) deciding questions of law and jurisdiction;
>
> (iii) making declaratory judgments;
>
> (iv) deciding monetary claims; and
>
> (v) granting injunctive relief.

10 Section 14 of the *FW Act* (SA) gives the Court jurisdiction to hear and determine monetary claims for a sum of money due to an employee or former employee from an employer or former employer, under a contract of employment. There is no requirement for the monetary claim to be an industrial matter. Section 15 of the *FW Act* (SA) provides the Court with jurisdiction to order a person who contravenes or fails to comply with a provision of the *FW Act* (SA) to remedy or avoid the contravention.

11 The respondent says that the Commission's jurisdiction under s 23(1) of the *IR Act* is to enquire into and deal with industrial matters and it does not have the ability to enforce its own decisions or orders. Rather the Registrar, or another person specified, must apply to the Industrial Magistrate's Court to enforce an order of the Commission and the Industrial Magistrate's Court may then compel a remedy to be afforded (ss 83 and 83A of the *IR Act*).

12 The respondent says in those circumstances the enforcement provisions are those applicable to the Industrial Magistrate's Court and in limited circumstances to the Full Bench of the Commission to enforce some provisions of the *IR Act* and impose penalties if required. However, the Commission, when dealing with industrial matters under s 23(1) of the *IR Act*, has no enforcement jurisdiction and cannot compel a party to comply with an order.

13 In those circumstances the respondent says that the Commission has no jurisdiction to deal with the claim as the *IR Act* is not a law to deal with claims for enforcement of contracts of employment.

The Applicant's Submissions

14 The applicant says that an interpretation of s 27(2)(o) of the *FW Act*, which promotes the purpose or object underlying that Act, should be preferred to a construction that would not promote the purpose of that Act (see *Acts Interpretation Act 1901* (Cth) s 15 AA).

15 The applicant notes that the *FW Act* provides for applications to the Federal Court and the Federal Magistrate's Court for entitlements under the safety net contractual entitlements in ss 541, 542 and 543. The applicant's claim is not of that nature and if the respondent is correct, then the industrial matter referred by the applicant has no appropriate forum other than the common law courts, which the respondent says is not in the spirit of either the *IR Act* or the *FW Act*.

16 The applicant says that the preferred construction of s 27(2)(o) of the *FW Act* is that the non-excluded matter now enables an employee under a common law contract to have a forum for redress where his existing rights are disputed whereas under the *Workplace Relations Act* there was no such ability.

17 The South Australian legislation is said to be merely one example of a legislative framework which is preserved in a State and that this is not confined.

18 The applicant says that if enforcement is defined to mean only existing or determined rights such as those found in awards and orders, it would mean that claims such as the one made by the applicant for determination of the common law contract continue to be excluded when such a position is not evidenced from the changes to the federal industrial law, which was previously excluded under the *Workplace Relations Act* but now has "… a broad coverage in S27(2)(o)" of the *FW Act*.

19 The applicant says that a claim referred by an employee pursuant to s 29(1)(b)(ii) of the *IR Act* sees the Commission dealing with a claim for the enforcement of an existing right, and the Commission is engaged not in an arbitral function but in a judicial function not unlike that exercised in the Industrial Relations Court of South Australia (see *Conti Sheffield Real Estate v Denise Brailey* (FB) (72 WAIG 1965 at 1969)).

20 The applicant says that the claim in this matter is the referral of a dispute by the applicant with his employer regarding his right to the payment for the termination of his employment due to redundancy. It is a claim for enforcement of his contract of employment and that is a "non-excluded matter" as set out in s 27(2)(o) of the *FW Act.* Therefore it is within the Commission's jurisdiction.

The Respondent's Reply

21 The respondent says that the purpose and underlying object of the *FW Act* is to create a comprehensive workplace relations system for national system employers and national system employees. There are only limited exceptions to that broad purpose and they are listed in non-excluded matters. The Commission should prefer a construction which promotes the purpose or object underlying the *FW Act*, that is the creation of a comprehensive workplace relations system for national system employers and national system employees. There is no case for an expansive reading of s 27(2)(o) of the *FW Act.*

Consideration

22 There is no dispute between the parties that the respondent is a *national system employer* as defined by the *FW Act.*

23 The inter-relationship between the *FW Act* and the *IR Act* in respect of a national system employer and a national system employee is set out in ss 26 and 27 of the *FW Act*. Section 26(1) provides that:

> "26(1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer."

24 Section 26(2) defines a State or Territory industrial law. There is no dispute that s 26(3) of the *FW Act* specifies the *IR Act* as being a general State industrial law referred to in s 26(1).

25 Section 27(1A) specifies those laws to which s 26 does not apply. Subsection (1) says that:

> "Section 26 does not apply to a law of a State or Territory so far as:
>
> …
>
> (c) the law deals with any non-excluded matters; or
>
> …"

26 Subsection (2) specifies the "non-excluded matters" as including:

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

27 I note that paragraph 26(2)(e) is not relevant for the present purposes.

28 Therefore, so far as the *IR Act* deals with any non-excluded matters, s 26(1) of the *FW Act* does not apply to exclude that law in its application to a national system employee or a national system employer.

29 The question is, does the *IR Act*, by a claim referred under s 29(1)(b)(ii) deal with the non-excluded matter of a claim for enforcement of a contract of employment?

30 The Commission's jurisdiction is specified in s 23 of the *IR Act* as:

> "(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

31 "Industrial matter" is defined by s 7 as:

> "***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
>
> (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
>
> (ca) the relationship between employers and employees;
>
> (d) any established custom or usage of any industry, either generally or in the particular locality affected;
>
> (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;
>
> (f) in respect of apprentices, these additional matters —
>
> (i) their wage rates and, subject to the *Vocational Education and Training Act 1996* Part 7 Division 2, other conditions of employment; and
>
> (ii) the wages, allowances and other remuneration to be paid to them, including for time spent in performing their obligations under training contracts registered under the *Vocational Education and Training Act 1996* Part 7 Division 2, whether at their employers' workplaces or not; and
>
> (iii) without limiting subparagraphs (i) and (ii), those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not;
>
> (g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —
>
> (i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or
>
> (ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;
>
> [(h) deleted]
>
> (i) any matter, whether falling within the preceding part of this interpretation or not, where —
>
> (i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and
>
> (ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;
>
> and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —
>
> (j) compulsion to join an organisation of employees to obtain or hold employment;
>
> (k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organisation of employees;
>
> (l) non-employment by reason of being or not being a member of an organisation of employees; or
>
> (m) any matter relating to the matters described in paragraph (j), (k) or (l);"

32 Section 26(2) of the *IR* Act provides that "[i]n granting relief or redress under this Act the Commission is not restricted to the specific claim made or to the subject matter of the claim."

33 Section 29(1) of the *IR Act* does not confer jurisdiction but provides who may refer particular types of industrial matters to the Commission. Section 29(1)(b) provides that the type of industrial matters an employee may refer to the Commission are claims:

> "(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment".

34 The Commission's power in dealing with these matters, as noted in s 26(2) of the *IR Act* is not restricted to the specific claim or to the subject matter of the claim. The power is to enquire into and deal with the industrial matter referred to the Commission.

35 The nature of the Commission's jurisdiction under s 23 of the *IR Act* and its relationship with s 29(1)(b)(ii) has been examined by the Industrial Appeal Court most recently in *Matthews v Cool or Cosy Pty Ltd & Anor* [2004] WASCA 114; (2004) 84 WAIG 2152. That decision was considered by the Full Bench in *Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732; (2009) 89 WAIG 76.

36 In *Cool or Cosy* Steytler J noted that the matter before the Court dealt with an application referred to the Commission of a claim of harsh, oppressive and unfair dismissal, and a claim that the applicant had been denied benefits under his contract of employment.

37 The grounds of appeal and the issue before the Industrial Appeal Court was that the Full Bench applied the "cap" of six months' pay set out in s 23A of the *IR Act* to the award of compensation which was said to be in error because it overlooked that the claim included a denied contractual benefit of reasonable notice referred under s 29(1)(b)(ii) of the *IR Act*, and that the cap had no application to the denied contractual benefit claim.

38 It is in that context that the Industrial Appeal Court examined the Commission's powers and jurisdiction particularly in relation to ss 23(1), s 29(1)(b) and 23A. It is noted that s 23A has since been amended and is in quite a different form and structure, however it dealt with and still deals with the power of the Commission in dealing with a claim of harsh, oppressive or unfair dismissal, and not in respect of a claim for contractual benefits. As noted by Steytler J, that power is narrower than that given by s 23, which is to "inquire into and deal with" an industrial matter arising in the case of a claim of denied contractual benefits [17].

39 Steytler J said the question before the Industrial Appeal Court was whether the Commission can, for the purposes of the exercise of power under s 23(1) (to inquire into and deal with a matter referred to it under s 29(1)(b)(ii)) award compensation or damages in lieu of the denied contractual benefit [22].

40 After considering the characterisation of s 29(1)(b)(ii) benefits and how the Commission might "deal with" them set out in *HotCopper Australia Ltd v Saab* (2002) 117 IR 256; *Perth Finishing College v Watts*; *Wardell v Donnybrook Stone Co* (1992) 72 WAIG 2250, and *Slee and Stockton Pty Ltd v Blewitt* (1992) 47 IR 104, his Honour said:

> "[24] In my respectful opinion, the better analysis of each of those cases should have been that the contractual benefit which was denied by the employer was that which was provided for by the contract of employment itself (respectively the full term of employment provided for by the contract, the right to a defined period of notice and the right to reasonable notice) and that the award of compensation was the means by which the Commission dealt with the industrial matter referred to it under s 29(1)(b)(ii), utilising the broad power given it under s 23(1) of the IR Act read, if necessary, with s 26(2) thereof."

41 In dealing with comments made by Kennedy J in *Robe River Iron Associates v Association of Drafting, Supervisory and Technical Employees of Western Australia* (1987) 68 WAIG 11, Steytler J remarked on the amendment to the *IR Act* since those comments by Kennedy J, and that the introduction of s 7(1a) of the *IR Act* on 9 May 1995 seemed to him to:

> "evince a legislative intention that compensation may be awarded in lieu of a denied contractual benefit. Were the position otherwise, the extended definition of 'industrial matter' provided for by s 7(1a)(b) would have application only in cases in which the 'benefit' was one which was still capable of being provided in the form contracted for, even though the employment relationship had ended. I very much doubt that could have been the legislature's intention" [26].

42 His Honour went on to say that he favoured Anderson J's obiter comments in *HotCopper* that in a claim referred under s 29(1)(b)(ii), the Commission was empowered to make "a monetary order for compensation – that is, a damages award – in an appropriate case, as long as its purpose is to do no more than is necessary to 'redress the matter by resolving the conflict in relation to the industrial matter' – *Welsh v Hills* – and as long as its effect is so limited" [27].

43 Pullin J in *Cool or Cosy* also dealt with the question of whether the Commission has power to award damages where the contract could not be performed *in specie*, for example where notice has not been given and the contract has ended. He noted, by reference to *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 that:

> "If a contract containing a term requiring notice to be given, is terminated by an employer without cause and without notice, and therefore in breach of such a term, then the employee is entitled to an award of damages" [48].

44 In respect of the Commission's jurisdiction under s 23, he said "… it simply confers jurisdiction on the Commission to enquire into and 'deal with' the claims. In my opinion, this provision confers jurisdiction on the Commission to order damages for the non-allowance of a benefit if the non-allowance amounts to a breach of contract" [49] (emphasis added).

45 At [51] Pullin J rejected arguments which deal with denied contractual benefits claims by reference to the powers under s 23A(1)(a) or (ba) saying:

> "Those two authorities did not bear at all on the question about whether the Commission had jurisdiction to 'deal with' a claim for a disallowed contractual benefit to notice before dismissal, by awarding damages for breach of the contractual promise to give notice" [51].

Pullin J went on to agree with the "tentative" view expressed by Anderson J in *HotCopper* saying:

> "[54] … it is my opinion that in a case where the employer dismisses an employee without cause, and in breach of a contractual promise to give notice, then the employee may refer a claim to the Commission that he has been denied a contractual benefit, and the Commission may 'deal with' the claim by awarding damages. My decision on this point means that an employee who has a contractual right to more than six months' notice, and who is dismissed without cause, would be able to bring a claim for damages for a disallowed contractual benefit, and thereby avoid the restriction on the amount of compensation (imposed by s 23A(4) (now s 23A(8)) which may be ordered on a claim for unfair dismissal … The right to damages for a breach of contract is a common-law right, and the restriction on the right to compensation

which has been imposed by s 23A(4), has been imposed by Parliament only in relation to an employee who formulates his or her claim as a claim that he or she has been harshly, oppressively, or unfairly dismissed."

46 Heenan J also considered the Commission's powers in dealing with the two types of claims which may be referred under s 29(1)(b) and distinguished the powers available to the Commission. In respect of s 29(1)(b)(ii) he said the entitlements "… are contractual and, therefore, common law claims which exist independently of the provisions of the *IR Act* and which could, if necessary, be pursued in any court of appropriate general civil jurisdiction" [60].

47 Heenan J referred to the Commission's powers "… to enforce the payment of (such) entitlements in addition to the payment of compensation … when dealing with a claim for harsh, oppressive or unfair dismissal. That power was expressly confirmed under subs 23A(1)(a) of the Act as it stood at the date material to these proceedings and, as the Act now stands as a result of the combined effects of s 23(1) and s 29(1)(b)(ii). This is, of course, the conclusion reached also by each of Steytler J and Pullin J in their separate reasons" [64] (emphasis added).

48 Heenan J went on to conclude in respect of this point:

"[73] I agree, with respect, with the conclusions of Steytler J and of Pullin J in this case that in circumstances such as the present the Commission is empowered to make a monetary order, in the nature of damages, to deal with the industrial matter before it, as it is empowered to do under s 23(1) notwithstanding that the relief granted is to award damages for breach of the employment contract arising from the employer's dismissal without notice or with inadequate notice. However, I do not wish to be understood as suggesting that this is a special exception or qualification upon limits of the Commission, otherwise, to give effect to common law entitlements on an application by an employee under s 29(1)(b)(ii)."

49 Heenan J at [78] also dealt with the manner in which the Commission is to deal with claims under s 29(1)(b)(ii) and said:

"[78] Having arrived at a figure for any proved damages for breach of contract suffered by the appellant as a result of his wrongful dismissal it may become necessary to compare that figure with any award of 'compensation' which the Commission might contemplate awarding under s 23A in (1)(ba) (now s 23A(6) of the amended Act)" (emphasis added).

50 In *Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732, the Full Bench examined the Commission's powers and jurisdiction in dealing with an industrial matter referred under s 29(1)(b)(ii). Having examined the conclusions of the majority in *Cool or Cosy* referred to above, Ritter A P referred to his own decision in *Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service* (2008) 88 WAIG 543 (HSU). He said:

"[80] I then said at [173]:

> 'On the contrary if the Commission is arbitrating a claim referred by an employee under s 29(1)(b)(ii) of the Act which asserts they have not been given a contractual entitlement, the Commission must decide what the terms of the contract were and whether or not they have been complied with by the employer. The Commission does not have licence to add to or subtract from the terms of the contract or the facts and order, for example, that a benefit be given to an employee because they think it would be equitable or fair. The terms of the contract cannot be disregarded as '*technicalities or legal forms*' or for any other reason supposedly supported by s 26(1)(a) of *the Act*.'

[81] From this paragraph I would change the word 'arbitrating' to 'deciding'. This is because the use of the word could be misunderstood as meaning the Commission is engaging in a discretionary arbitral exercise rather than deciding if there has been a denial of a contractual benefit at common law. That is, as described in more detail below, a judicial function.

[82] In my opinion these observations accord with the approach of at least a majority of the judges in *Cool or Cosy*. It follows that the applicant's submission, agreed with by the respondent, that she is simply seeking access to the Commission to enforce under the common law an alleged breach of a former contract of employment, should be accepted."

51 At [122] Ritter AP went on to say:

"… the determination of a denial of contractual benefits claim by the Commission does involve the enforcement of legal rights and the exercise of judicial power. Put simply and at risk of repeating myself, a benefit to which someone is entitled under his or her contract of employment is an existing legal right; and the way in which the Commission deals with a claim that it has not been 'allowed' is, as made clear in *Cool or Cosy*, in accordance with the common law."

52 Kenner C in *Saldanha* also examined the decisions in *Cool or Cosy*, and concluded in that regard:

"[317] On the basis of the views expressed by the members of the Court in *Matthews* [*Cool or Cosy*], contractual benefits claims may therefore be regarded as common law based claims for a range of remedies arising from the denial by an employer of a benefit due to an employee or former employee under the contract of service. Such are able to be recovered before the Commission as part of the Commission's jurisdiction to enquire into and 'deal with' an industrial matter of this particular kind. Importantly however, although the source of such a claim [under s 29(1)(b)(ii)] is the common law, the capacity to enforce it is a statutory function, pursuant to the powers conferred on the Commission by the Parliament in s 23(1) of the [*IR Act*]."

53 As an examination of those decisions demonstrates, in the process of considering whether the Commission has power under s 23(1) of the *IR Act* to order not merely the performance of the contractual benefit but compensation or damages in lieu of the benefit, the Industrial Appeal Court in *Cool or Cosy* and Full Bench in *Saldanha* viewed the Commission's role in dealing with

a claim referred by an employee under s 29(1)(b)(ii) as being to enquire into and deal with a claim to enforce the terms of a common law contract of employment, that is, to compel the employer to observe the benefits under the contract.

54 A claim referred under s 29(1)(b)(i) is not a claim to enforce an order or award of the Commission, which is a matter for the Industrial Magistrate's Court. Nor is it a matter which is the subject of enforcement proceedings before the Full Bench. Merely because the Commission's power as set out in s 26 of the *IR Act* is to enquire into and deal with industrial matters does not mean that the Commission is not dealing with a claim for enforcement of a contract of employment. On the contrary the Industrial Appeal Court and Full Bench are of the view that this is what the Commission is doing. As noted, in doing so the Commission is exercising judicial power not arbitral power, utilising common law principles.

55 I note the respondent's argument that the Explanatory Memorandum in respect of the *Fair Work Bill* refers to the South Australian legislation as providing an example of enforcement. It needs to be noted that the Western Australian legislation, the structure of the Commission and its powers are quite different from those applying in South Australia. The *IR Act* provides the Commission with the capacity to deal with a far broader range of matters than the South Australian Industrial Relations Commission. Some of the jurisdiction of the South Australian Industrial Relations Court is also dealt with by the Commission pursuant to the powers under the *IR Act*, for example, the power to interpret awards and enterprise agreements and to decide monetary claims is pursuant to ss 11-15 of the *Fair Work Act 1994* (SA). The Western Australian Industrial Relations Commission has the power to interpret awards by s 46 of the *IR Act.* It also has the power to decide questions of law and jurisdiction.

56 Therefore, while the Explanatory Memorandum suggests that claims for enforcement of contracts of employment are those which s 14 of the *Fair Work Act 1994* (SA) exemplify, that is not to exclude the jurisdiction of this Commission by the *IR Act* which enables enforcement of contracts of employment as part of the wide jurisdiction set out in s 23, and whereby s 29(1)(b)(ii) provides an employee with standing to refer such a claim. In those circumstances the reference to the South Australian legislation in the Explanatory Memorandum does not mean that the *IR Act* does not also deal with enforcement as described above.

57 I now turn to the respondent's argument that the Commission does not have jurisdiction to compel observance of its decisions in relation to an industrial matter and it does not have jurisdiction to compel observance of a contract of employment. This misunderstands the jurisdiction of the Commission. As noted in *Cool or Cosy* and *Saldanha*, the Commission in dealing with a claim referred under s 29(1)(b)(ii) by an employee is enforcing the terms of a common law contract, it is not enforcing its own order or award. That does not make the role of the Commission in the enforcement of the common law contract any less of an enforcement. Furthermore as noted by Ritter A P in his references to comments by Pullin J that the process is that which is applicable to the enforcement of common law contracts, that is, the Commission must decide what the terms of the contract were and whether or not they have been complied with by the employer. The Commission is then empowered to make, amongst other orders, a monetary order in the nature of damages to deal with the industrial matter before it.

Conclusion

58 In summary the authorities lead to the following conclusions:

1. The Commission's jurisdiction is to deal with the industrial matter which includes the power to compel by order the performance of a benefit under a contract of employment or where the contract does not continue, to make a monetary order in the nature of damages (*Cool or Cosy*, per Heenan J [73]).

2. The Commission has power by the combined effects of s 23(1) and s 29(1)(b)(ii) "… to enforce the payment of entitlements" (*Cool or Cosy*, per Heenan J [64]), and "… is empowered to make a monetary order, in the nature of damages, to deal with the industrial matter before it … for breach of the employment contract" [73]. This is "… to give effect to common law entitlements on application by an employee under s 29(1)(b)(ii)".

3. The benefit claimed is contractual and exists independent of the provisions of *IR Act* (*Cool or* Cosy per Heenan J [60]).

4. It is an enforcement of legal rights involving the exercise of judicial power (*Saldanha*, per Ritter A P [122]).

5. A claim under s 29(1)(b)(ii) would be determined upon common law principles (*Saldanha*, per Ritter A P [73]), the process being the same as that for enforcement in courts of appropriate jurisdiction – the Commission must decide:

    a. what the terms of the contract were;

    b. whether or not they have been complied with,

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

59 Taking account of legislation and the authorities, I conclude that the *IR Act*, in particular s 26 combined with s 29(1)(b)(ii), is a law of the State not excluded by s 26 of the *FW Act*, in respect of the non-excluded matter of claims for enforcement of contracts of employment. Accordingly the Commission has jurisdiction to deal with a claim referred by an employee pursuant to s 29(1)(b)(ii) in relation to a national system employee or a national system employer.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Astrid Irene (Fae) Gerrits	Kimberley Land Council Aboriginal Corporation	B 102/2010	Commissioner J L Harrison	Consent order issued
Ernanee R Lualhati	Acergy Australia Pty Ltd	B 157/2009	Commissioner S Wood	Discontinued
Judy Ellis	William and Irene Sherrington ABN 28532733176	U 111/2010	Commissioner J L Harrison	Consent order issued
Patricia M Maynard	Hong Ngoc Peart-Tang Ritz Caffe	U 103/2010	Commissioner J L Harrison	Consent order issued
Sandra Beverley Rutley	RJ & MAG Smith T/A Brooke Discount Tyres	U 104/2010	Commissioner J L Harrison	Consent order issued

CONFERENCES—Matters arising out of—

2010 WAIRC 01242

DISPUTE RE SHIFT COMPENSATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

THE DIRECTOR GENERAL OF HEALTH AS A DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 FOR THE METROPOLITAN HEALTH SERVICES BOARD FORMERLY COMPRISING THE METROPOLITAN HEALTH SERVICES BOARD

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 22 DECEMBER 2010

FILE NO. PSAC 36 OF 2010

CITATION NO. 2010 WAIRC 01242

Result Recommendation issued

Recommendation

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") on the 1st day of December 2010 whereby the Health Services Union of Western Australia (Union of Workers) ("the applicant") sought the Public Service Arbitrator's assistance with respect to negotiations with The Director General of Health as a delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 for the Metropolitan Health Services Board formerly comprising the Metropolitan Health Services Board ("the respondent"), on new on-call conditions applicable to the staff of the Sexual Assault Resource Centre ("SARC"); and

WHEREAS on the 9th day of December 2010 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties;

NOW THEREFORE, having heard Mr C Panizza on behalf of the applicant and Mr M Warner on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* makes the following recommendations:

1. THAT the parties trial the proposed ***Sexual Assault Resource Centre (SARC) On Call Agreement*** dated 11 August 2010 for a period of not less than six months, provided that either party may elect in accordance with the terms of the agreement, to withdraw from the trial by giving 90 days notice, in writing, to the other party.
2. THAT the respondent applies a retrospective operative date of 1 May 2009.
3. THAT no later than four weeks after the conclusion of the six months' trial period, the parties meet to consider the results of the trial period.

4. THAT within eight weeks of the conclusion of the trial period, the Public Service Arbitrator convene a conference for the purpose of reporting to the Public Service Arbitrator regarding the outcome of the trial and the resolution of any issues which were identified as a consequence of the trial period.

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

2010 WAIRC 01221

DISPUTE RE INTERPRETATION OF INDUSTRIAL AGREEMENTS CONCERNING PERSONAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DEPARTMENT OF HEALTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 13 DECEMBER 2010
FILE NO/S	C 37 OF 2009
CITATION NO.	2010 WAIRC 01221
Result	Name of respondent amended

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS by an email on the 9th day of December 2010 the applicant sought to amend the name of the respondent to "The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board and the WA Country Health Service Board";

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

THAT the name of the respondent in the application be amended to "The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board and the WA Country Health Service Board".

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

2010 WAIRC 01244

DISPUTE RE INTERPRETATION OF INDUSTRIAL AGREEMENTS CONCERNING PERSONAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR HOSPITALITY AND MISCELLANEOUS UNION, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD AND THE WA COUNTRY HEALTH SERVICE BOARD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 22 DECEMBER 2010
FILE NO/S	C 37 OF 2009
CITATION NO.	2010 WAIRC 01244

Result	Consent order issued
Representation	
Applicant	Ms E Palmer
Respondent	Mr N Fergus

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission convened conferences on the 16th day of November 2009, the 29th day of April 2010, the 19th day of May 2010 and the 17th day of December 2010; and

WHEREAS the parties reached an agreement and sought to have that agreement reflected in an order of the Commission;

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

1. THAT the "Personal (Sick) Leave – Support Workers Guidelines to Line Managers/ Supervisors" attached at Schedules 1 and 2 to this Order be recognised by the parties as the correct interpretation and application of "evidence to satisfy a reasonable person" for the purposes of Clause 35. – Personal Leave of the *WA Health - LHMU - Support Workers Industrial Agreement 2007* (as varied or replaced) and Clause 45. – Personal Leave of the *WA Health - LHMU - Enrolled Nurses and Assistants in Nursing Industrial Agreement 2007* (as varied or replaced) respectively.
2. The effective date of the order is the 17th day of December 2010.

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

SCHEDULE 1

PERSONAL (SICK) LEAVE – SUPPORT WORKERS

In accordance with subclause 35.21 of the WA Health – LHMU – Support Workers Industrial Agreement 2007, an employee who is unable to attend for work due to illness or injury is required, where practicable, to give reasonable notice prior to taking leave. Where prior notice cannot be given, an employee must advise their line manager as soon as reasonably practicable of their absence, the nature of the illness or injury and the estimated period of the absence from work. Other than in extraordinary circumstances an employee is required to provide this advice within 24 hours of the commencement of the absence.

Subclauses 35.22 and 35.27 of the Industrial Agreement provide that an employee is required to support their application for any period of personal (sick) leave exceeding two consecutive working days, or any period of personal (sick) leave without pay, with evidence that would satisfy a reasonable person of the entitlement.

Line managers are required to properly consider each application on its individual merits and approve reasonable and legitimate requests for personal leave, subject to available credits.

Applications for personal (sick) leave supported by a certificate from a registered medical practitioner, or written advice from a relevant health professional (such as a physiotherapist or dentist), will normally be approved by line managers.

In certain circumstances line managers are able to approve personal (sick) leave on the basis of the obvious appearance and behaviour of an employee where they are satisfied that the employee is ill or injured.

In many circumstances the nature of the illness or injury is such that the employee needs to attend a medical practitioner or relevant health professional for diagnosis and treatment or prescription of medication. In these circumstances the employee is able to obtain appropriate certification to submit in support of their claim for leave.

However, WA Health recognises that on occasions there can be some difficulty in obtaining certification by a medical practitioner or relevant health professional or that it may not be necessary for an employee to consult with a medical practitioner or relevant health professional.

On such occasions, an employee could submit a self-certified application for leave that is supported by a statutory declaration which adequately details the nature of the illness or injury and the circumstances that resulted in the non-attendance with a medical practitioner or relevant health professional. In each case the line manager will assess the application in light of the facts and circumstances relevant to the application. What is considered to be reasonable will depend on the circumstances of each case.

General examples of such occasions include where an employee:

- contacts their line manager and advises the nature of the illness or injury and expects to return to work after two days absence (or less) but is still unable to attend work on the third day and is unable to secure an appointment before becoming fit to return to work.
- is able to secure an appointment but is unable to obtain a certificate that is back-dated to cover the entire period of the absence.
- attempts but is unable to secure an appointment at short notice.

- has a recurrent previous medically certified illness or injury known to the line manager that causes a standard period of absence from work (e.g. dialysis treatment).
- has an illness or injury that does not require prescription of medication or diagnosis and treatment by a medical practitioner or relevant health professional (e.g. a common cold).

Line managers should be aware that if an employee's absence from work on the grounds of illness or injury extends over such a length of time or occurs with such frequency and regularity to cause the line manager to believe that the employee is in such a state of health as to render a danger to themselves, fellow employees or the public, the employee can be required under Clause 35.24 to obtain and furnish a report as to the employee's condition from a registered medical practitioner nominated (and paid for) by the employer.

SCHEDULE 2

PERSONAL (SICK) LEAVE – ENROLLED NURSES & ASSISTANTS IN NURSING

In accordance with subclause 45.16 of the WA Health - LHMU - Enrolled Nurses and Assistants in Nursing Industrial Agreement 2007, an employee who is unable to attend for work due to illness or injury is required, where practicable, to give reasonable notice prior to taking leave. Where prior notice cannot be given, an employee must advise their relevant line manager as soon as reasonably practicable of their absence, the nature of the illness or injury and the estimated period of the absence from work. Other than in extraordinary circumstances an employee is required to provide that advice within 24 hours of the commencement of the absence.

In accordance with subclauses 45.17.1 and 45.20.1 of the Industrial Agreement, an employee is required to support their application for any period of personal (sick) leave exceeding two consecutive working days, or any period of personal (sick) leave without pay, with evidence that would satisfy a reasonable person of the entitlement.

Line managers are required to properly consider each application on its individual merits and approve reasonable and legitimate requests for personal leave, subject to available credits. .

Applications for personal (sick) leave supported by a certificate from a registered medical practitioner, or written advice from a relevant health professional (such as a physiotherapist or dentist), will normally be approved by line managers.

In certain circumstances line managers are able to approve personal (sick) leave on the basis of the obvious appearance and behaviour of an employee where they are satisfied that the employee is ill or injured.

In many circumstances the nature of the illness or injury is such that the employee needs to attend a medical practitioner or relevant health professional for diagnosis and treatment or prescription of medication. In these circumstances the employee is able to obtain appropriate certification to submit in support of their claim for leave.

However, WA Health recognises that on occasions there can be some difficulty in obtaining certification by a medical practitioner or relevant health professional or that it may not be necessary for an employee to consult with a medical practitioner or relevant health professional.

On such occasions, an employee could submit a self-certified application for leave that is supported by a statutory declaration which adequately details the nature of the illness or injury and the circumstances that resulted in the non-attendance with a medical practitioner or relevant health professional. In each case the line manager will assess the application in light of the facts and circumstances relevant to the application. What is considered to be reasonable will depend on the circumstances of each case.

General examples of such occasions include where an employee:

- contacts their line manager and advises the nature of the illness or injury and expects to return to work after two days absence (or less) but is still unable to attend work on the third day and is unable to secure an appointment before becoming fit to return to work.
- is able to secure an appointment but is unable to obtain a certificate that is back-dated to cover the entire period of the absence.
- attempts but is unable to secure an appointment at short notice.
- has a recurrent previous medically certified illness or injury known to the line manager that causes a standard period of absence from work (e.g. dialysis treatment).
- has an illness or injury that does not require prescription of medication or diagnosis and treatment by a medical practitioner or relevant health professional (e.g. a common cold).

Line managers should be aware that if an employee's absence from work on the grounds of illness or injury extends over such a length of time or occurs with such frequency and regularity to cause the line manager to believe that the employee is in such a state of health as to render a danger to themselves, fellow employees or the public, the employee can be required under Clause 45.17.3 to obtain and furnish a report as to the employee's condition from a registered medical practitioner nominated (and paid for) by the employer.

2010 WAIRC 01229

DISPUTE RE NEGOTIATIONS FOR A NEW AGREEMENT FOR UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 17 DECEMBER 2010
FILE NO/S	C 58 OF 2010
CITATION NO.	2010 WAIRC 01229

Result	Consent order issued
Representation	
Applicant	Ms E Palmer
Respondent	Mr V Ritorto

Order

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") on 10 December 2010 whereby the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch ("the applicant") sought the Commission's assistance with respect to a dispute the applicant was having with the Disability Services Commission ("the respondent") regarding negotiations with respect to a replacement agreement for the *LHMU – Disability Services Commission – Disability Support Workers Industrial Agreement 2008* ("the Agreement") since July 2010; and

WHEREAS on 14 December 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference the parties informed the Commission that they had reached agreement on wage increases to be paid to employees covered by the Agreement however the applicant and the respondent were in dispute about the form of this agreement; and

WHEREAS the Commission was advised that after discussions between the parties had taken place just prior to the conference an agreement had been reached about the form of the order to issue containing the wages to apply to employees subject to the Agreement; and

WHEREAS the Commission is of the view that as the parties have reached agreement about the future wage rates to be paid to employees subject to the Agreement that a consent order should issue in the terms agreed by the parties;

NOW THEREFORE having heard Ms E Palmer on behalf of the applicant and Mr V Ritorto on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT the following wage rates apply to employees of the Disability Services Commission, who are or who are eligible to be members of the Liquor, Hospitality and Miscellaneous Union, and who are employed in the classifications prescribed herein:

Classification	Increment	24 October 2010 to 31 July 2011	01 August 2011 to 31 July 2012 and thereafter
Level 1/2	1st Year	$767.63	$794.50
Level 1/2	2nd Year	$776.23	$803.40
Level 1/2	3rd Year	$795.04	$822.86
Level 3/4	1st Year	$782.89	$810.30
Level 3/4	2nd Year	$802.47	$830.55
Level 3/4	3rd Year	$819.98	$848.68
Level 5	1st Year	$800.59	$828.61
Level 5	2nd Year	$806.50	$834.73
Level 5	3rd Year	$816.87	$845.46
Level 6	1st Year	$804.85	$833.02
Level 6	2nd Year	$809.21	$837.54
Level 6	3rd Year	$818.50	$847.15
Level 7	1st Year	$814.52	$843.03
Level 7	2nd Year	$820.54	$849.26
Level 7	3rd Year	$830.76	$859.84

Classification	Increment	24 October 2010 to 31 July 2011	01 August 2011 to 31 July 2012 and thereafter
Level 8	1st Year	$831.71	$860.81
Level 8	2nd Year	$839.33	$868.71
Level 8	3rd Year	$851.11	$880.90
Level 9	1st Year	$850.73	$880.50
Level 9	2nd Year	$858.20	$888.24
Level 9	3rd Year	$870.45	$900.91
Level 10	1st Year	$861.72	$891.88
Level 10	2nd Year	$867.26	$897.61
Level 10	3rd Year	$877.14	$907.84
Level 11	1st Year	$884.93	$915.90
Level 11	2nd Year	$892.94	$924.19
Level 11	3rd Year	$905.88	$937.59
Level 12	1st Year	$904.62	$936.28
Level 12	2nd Year	$913.13	$945.09
Level 12	3rd Year	$926.33	$958.75
Level 13	1st Year	$935.46	$968.21
Level 13	2nd Year	$944.74	$977.80
Level 13	3rd Year	$958.45	$992.00

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

2010 WAIRC 01241

DISPUTE RE ALLEGED SUBSTANDARD PERFORMANCE ALLEGATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRUCE REYNOLDS

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS A DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 FOR THE METROPOLITAN HEALTH SERVICES BOARD FORMERLY COMPRISING THE METROPOLITAN HEALTH SERVICES BOARD

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

HEARD TUESDAY, 14 DECEMBER 2010

DELIVERED WEDNESDAY, 22 DECEMBER 2010

FILE NO. PSAC 35 OF 2010

CITATION NO. 2010 WAIRC 01241

CatchWords Public Service Arbitrator – Referral of an industrial matter by an organisation or association – Standing to bring an application – Competence and conduct of registered industrial agent– *Industrial Relations Act 1979* s 7, s 44, s 44(1), s 44(7), s 112A – *Industrial Relations (Industrial Agents) Regulations 1997* Reg 12, Schedule 1 – Code of Conduct – *Employment Dispute Resolution Act 2008*

Result Application dismissed

Reasons for Decision

1 The applicant filed an application on Form 1 – Notice of application (general) for "a conference/orders pursuant to s.44 Industrial Relations Act 1979" on 26 November 2010.

2 The Particulars of Claim attached to the Form 1 make clear that the respondent has instigated a substandard performance process relating to Mr Reynolds, and he seeks that this process cease.

3 Also filed on 26 November 2010 was a Form 18 – Warrant to appear as agent by which Mr Reynolds authorised Paul King of Regis Industrial Relations to appear and act for him. I note that Paul Anthony King trading as Regis Industrial Relations is a registered industrial agent, registered in accordance with s 112A of *the Industrial Relations Act 1979* (the Act) and the *Industrial Relations (Industrial Agents) Regulations 1997* (the Regulations).

4 The application was listed for mention on 14 December 2010 at which time I raised with Mr King whether in light of the provisions of s 44(7) of the Act, Mr Reynolds has standing to refer to the Commission a matter in which he seeks a s 44 conference. Mr King indicated that on the basis that Mr Reynolds is an employee as defined in s 7 of the Act, is a member of the Health Services Union, and that the Health Services Union had referred the matter to him, that the application could be dealt with.

5 Mr King also said that numerous attempts had been made to deal with the matter under the *Employment Dispute Resolution Act 2008*. Further, he indicated that the dispute related to an "industrial matter". He said that the matter had in fact been raised by an organisation or association in accordance with the requirements of s 44(7) in that the Health Services Union (HSU) had referred the matter to him because he had "been dealing with Mr Reynolds all along".

6 Mr King said that Mr Reynolds came to him, he contacted the HSU and they said that he, Mr King, could do this on their behalf because Mr Reynolds had only become a member during the course of the issue, the subject of the application. Further Mr King said that the matter had been referred to him by the "legal barrister" for the HSU.

7 Mr King also said that the matter ought to proceed in the interests of justice.

8 As an alternative, Mr King suggested that he would have the claim amended so that it is "from the HSU" which appoints him to represent Mr Reynolds. When I raised with Mr King that this would involve an amendment to completely substitute one party, being the applicant, with another party being the HSU, he said that he would not change the party but that the HSU would say that he was acting because they had farmed the matter out to him.

9 Mr King said that it was an injustice if the matter was not dealt with and he would seek leave of the Commission to have the HSU "fill in the form".

Issues and Conclusions

10 The Commission is a creature of statute. That statute is the Act and s 44(1) provides:

> "(1) Subject to this section, the Commission constituted by a commissioner may summon any person to attend, at a time and place specified in the summons, at a conference before the Commission."

11 Sub section (7) of s 44 provides who may refer a matter to the Commission under s 44 in the following terms:

> "(7) The Commission may exercise the power conferred on it by subsection (1) —
>
> (a) on the application of —
>
> (i) any organisation, association or employer;
>
> (ii) the Minister on behalf of the State; or
>
> (iii) an employee in respect of a dispute relating to his entitlement to long service leave;
>
> or
>
> (b) on the motion of the Commission itself whenever industrial action has occurred or, in the opinion of the Commission, is likely to occur."

12 In those circumstances, it is not to the point that the application deals with a matter which is otherwise an industrial matter pursuant to s 7 of the Act, or whether the applicant is an employee. It is a question of who has standing to bring the application. The legislature has restricted the types of applications which individual employees may bring to the Commission. It has specifically provided for particular bodies or persons to bring particular types of applications. In this case, there is no provision for an individual employee to bring an application seeking that the Commission exercise the power to summon any person to attend a conference pursuant to s 44 of the Act except as it relates to an entitlement to long service leave. This application does not relate to such a claim but relates to a substandard performance process. In those circumstances the applicant does not have standing to bring the claim.

13 The applicant is not an organisation or association which would have standing to bring an application under s 44. Should the applicant wish to have the HSU represent his interests then the HSU may, if it decides to do so, file an application in its own name. There is nothing before me to indicate that the HSU has authorised Mr King to file this application on its behalf to enable Mr Reynolds' claim to be pursued. Even if the HSU did in some way authorise Mr King to represent Mr Reynolds, the HSU itself would need to be the applicant. In the circumstances the application will be dismissed.

Competence and conduct of Industrial Agent

14 I note one further matter and that is Mr King's competence and his conduct during the course of the brief hearing to deal with this matter. Mr King is a registered industrial agent. A person who is a registered industrial agent has the privilege of representing clients before the Commission and charging them for the services provided. Industrial agents may be registered pursuant to s 112A of the Act.

15 Section 112A(5) provides for the making of regulations to:

> 1. Provide for a scheme of registration;
>
> 2. Prescribe a code of conduct for persons registered;
>
> 3. Prescribe the circumstances in which, and the procedures by which, a person may be disqualified from obtaining registration, or if registered, registration may be cancelled; and
>
> 4. Provide for appeals from disqualification or cancellation of registration.

16 The Regulations provide some of those things. They provide criteria and a process for registration as an industrial agent. One of the requirements is that a person applying to be registered is to make a statutory declaration declaring amongst other things that they "will comply with the code of conduct" (r 4(2)(c)(iii)).

17 The Code of Conduct is set out in Schedule 1 to the Regulations. It provides that:

1. It is the duty of an industrial agent to be "competent as an industrial agent" (clause 1 – Code of Conduct);
2. An industrial agent must not attempt to further a client's case by unethical or dishonest means (clause 3(1));
3. An industrial agent must at all times –
   (a) act with due courtesy to the Commission or a court;
   (b) use his or her best endeavours to avoid unnecessary expense and waste of the Commission's or court time (Clause 6(3)).

1. Duty to be competent and wastage

   It was clear to me that Mr King did not have a basic understanding of the provisions of the Act under which he, on behalf of his client, made the application. He did not understand the issue of standing or what was involved in the naming of or amendment to the name of the parties to applications before the Commission. If the registered agent is unable to file an application in which his client has standing, then he has wasted his client's time and money and the Commission's time, and demonstrated a lack of the basic competency necessary to start the process of seeking redress for his client.

2. Discourtesy to the Commission

   Mr King's behaviour during the course of the hearing was discourteous. When I indicated to him that the application was to be dismissed, he threw his pencils on the bar table and said "then Mr Reynolds has been denied natural justice and I will be making an appeal because there are cases which deal with this." He continued to talk over me when I indicated that I had finished hearing from him and that I would then adjourn.

3. Misleading the Commission

   Mr King's explanations of how the matter came to him were confused and conflicting. Initially he suggested that the HSU had referred Mr Reynolds to him because the HSU was unable to assist Mr Reynolds as he had only become a member after the issue, the subject of the application, had arisen. Mr King's subsequent explanation suggested that in fact he had already been dealing with Mr Reynolds when Mr Reynolds attempted to have the HSU represent him.

   The HSU regularly appears before this Commission and in particular, before me. I am familiar with that union and the way it conducts itself. On that basis I would be surprised if the HSU has referred Mr Reynolds to Mr King. Secondly, if the HSU authorised the making of the application it would have made the application in its own name.

   I conclude that Mr King's intention was to do two things. Firstly, he intended to mislead, to have the Commission believe that the HSU had referred Mr Reynolds to him and this is not the case. Secondly, he intended to obtain some legitimacy for the application by the suggestion that the HSU had approved the application.

18 In the course of a very brief hearing following the filing of an application, Mr King has shown himself to have failed to comply with his obligations as a registered industrial agent. What can be done about it?

19 In *Reynolds v The Minister for Health and Another* [2010] FMCA 843 Lucev FM examined the requirements for registration as an industrial agent under s 112A of the Act. He said:

> "… provided that a person who applies to be registered as an industrial agent, who:
>
> a. has no criminal record; and
>
> b. holds, or has sufficient resources to hold, professional indemnity insurance as an industrial agent,
>
> can be registered as an industrial agent. There is no requirement of qualification or experience to be registered as an industrial agent [72]."

20 The remainder of the requirements for registration are met by self assessment and declaration. The bar therefore is very low.

21 I have noted earlier that registration as an industrial agent brings with it a privilege. In other callings and professions, such registration brings corresponding disciplinary measures and sanctions including deregistration for incompetence or not complying with appropriate standards. The only provision for any such sanction against a registered industrial agent is set out in r 12 of the Regulations. That provides only for a process for written complaints to the Registrar in respect of obtaining registration and for a complaint by a client of the industrial agent.

22 Where an industrial agent is the subject of a complaint by a client, the Registrar is to enquire into the complaint. Where the Registrar determines that there are reasonable grounds for the complaint, the Registrar's only power is to attempt to resolve that complaint by conciliation. If the complainant is not satisfied by that conciliation process, then the complainant may initiate proceedings before the Industrial Magistrate. If the Industrial Magistrate finds the industrial agent failed to comply with a condition of registration, he or she may reprimand the industrial agent or cancel the industrial agent's registration.

23 There is no provision for the Commission or the other party to a matter to refer a complaint about the conduct or competence of an industrial agent or for any action to be taken upon such a complaint. In that regard the requirements of the Code of Conduct, the obligations on the agent to be competent, to conduct themselves courteously towards the Commission, and to use their best endeavours to avoid unnecessary expense and waste of the Commission's are meaningless.

24 In these circumstances, the answer to the question I posed earlier as to what could be done about Mr King as a registered agent appears to be "nothing". That, I suggest, needs rectification. This is not the first time that the Commission has encountered difficulties in dealing with industrial agents who do not meet their obligations. Rather it has been happening since the Regulations were made in 1997. Issues began being raised by members of the Commission in 1997. I refer to the comments of Beech C in *Victoria May Adams and Tiwest Pty Ltd* ((1998) 78 WAIG 1391), Cawley C in *Firriolo v All Spray Equipment Pty Ltd* ((1998) 78 WAIG 158), my own decision in *Barnes v Elbia Pty Ltd* ((1998) 73 WAIG 3343).

25 They have continued to be raised since then.

26 More recently, Mr King's competency, conduct and discourtesy were raised by Harrison C in *Tamara Bartlett v Brumbys Coogee* [2008 WAIRC 01247]. Comment has also been made about Mr King's qualifications, experience, and capabilities in the context of an application to represent Mr Reynolds before the Federal Magistrates Court of Australia in a claim of victimisation, discrimination and harassment said to be in contravention of the *Disability Discrimination Act 1992* (Cth) (*Reynolds v The Minister for Health and Another* [2010] FMCA 843).

27 In a system where registration provides to an industrial agent a privilege of being able to represent employees or employers before the Commission, history demonstrates that there is a need for a process for issues regarding the competence and conduct of agents to be raised by the Commission and dealt with. Yet there is no such process.

2010 WAIRC 01240

DISPUTE RE ALLEGED SUBSTANDARD PERFORMANCE ALLEGATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRUCE REYNOLDS
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS A DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 FOR THE METROPOLITAN HEALTH SERVICES BOARD FORMERLY COMPRISING THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 22 DECEMBER 2010
FILE NO	PSAC 35 OF 2010
CITATION NO.	2010 WAIRC 01240

Result	Application dismissed
Representation	
Applicant	Mr P King as agent
Respondent	Mr N Fergus and with him Ms J Love

Order

HAVING heard Mr P King on behalf of the applicant and Mr N Fergus and with him Ms J Love on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

[L.S.]

CONFERENCES—Matters referred—

2010 WAIRC 00874

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COMMISSIONER
DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE TUESDAY, 7 SEPTEMBER 2010

FILE NO. PSACR 25 OF 2010

CITATION NO. 2010 WAIRC 00874

Result Direction issued

Representation

Applicant Mr J O'Keefe

Respondent Ms T Borwick

Direction

HAVING heard Ms J O'Keefe on behalf of the applicant and Ms T Borwick on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

1. THAT the parties file and serve an agreed statement of facts no later than three days prior to the date of hearing.
2. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.
3. THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 01243

DISPUTE RE CLASSIFICATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COMMISSIONER
DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

HEARD WEDNESDAY, 27 OCTOBER 2010, TUESDAY, 2 NOVEMBER 2010

DELIVERED WEDNESDAY, 22 DECEMBER 2010

FILE NO. PSACR 25 OF 2010

CITATION NO. 2010 WAIRC 01243

CatchWords	Industrial Law (WA) – Jurisdiction of Public Service Arbitrator in relation to Public Sector Standards – Whether Arbitrator engaging in judicial review – Whether an Approved Procedure has the status of delegated legislation – Meaning of 'in accordance with' in s29(1)(h)(ii) of the Public Sector Management Act 1994 – Application of Approved Procedure – Application upheld, order made – Industrial Relations Act 1979 s44(9), s80E – Public Sector Management Act 1994 s3(2)(a), s8(1), s9, s15, s21, s29, s64, s97(1) – Interpretation Act 1984 s42
Result	Application upheld. Order made.
Representation	
Applicant	Ms J O'Keefe and Ms L Kennewell
Respondent	Ms T Borwick and Ms M Maher

Reasons for Decision

1 This is a matter referred for hearing and determination under s 44(9) of the Industrial Relations Act 1979 ("the Act"). The schedule to the s 44(9) referral is in the following terms:

"Schedule"

The applicant and respondent are in dispute in relation to a claim by the applicant's member Mr Giblett, to classify Mr Giblett as a Level 7 officer commensurate with the classification of his Position No 4082 Assistant Superintendent, Prisoner Management, Casuarina Prison.

The applicant seeks an order that Mr Giblett be personally reclassified at Level 7 commensurate with the level of his substantive position being Position no 4082 Assistant Superintendent, Prisoner Management, Casuarina Prison.

The respondent objects to and opposes the applicant's claim. Moreover, the respondent says that the claim is beyond the jurisdiction of the Arbitrator."

2 By way of background to the matter, the parties have prepared a statement of agreed facts which is as follows:

"1. The Applicant is the Civil Service Association of Western Australia Incorporated ('the CSA').

2. The CSA is a registered organisation of employees authorised to represent Mr Phillip Giblett.

3. The Respondent is the Commissioner, Department of Corrective Services ('the Respondent').

4. Mr Giblett is currently employed by the Respondent pursuant to Section 64(1) (b) of the Public Sector Management Act 1994. Mr Giblett was appointed through merit selection to the position of 4082, Assistant Superintendent Prisoner Management, Level 6, on 19 September 2005.

5. The position of 4082 was subject to a work value assessment, known as the Prison Management Work Value Review, and was reclassified to Level 7. Due to Respondent not personally reclassifying Mr Giblett with the position, he is currently held in a supernumerary Level 6 position and receiving a higher duties allowance to Level 7 for performing the duties of 4082.

6. The date of effect for positions reclassified as part of the Prison Management Work Value Review is 27 January 2009.

7. The terms and conditions of employment of Mr Giblett are governed by the Public Service Award 1992 and the Public Service General Agreement 2008.

8. The Respondent and Applicant were unable to agree on all facets of Mr Giblett's employment history and will tender separate documents.

9. On 15 September 2009 the Respondent wrote to Mr Giblett setting out reasons why the Classification Review Committee (CRC) had determined he was ineligible for a personal reclassification.

10. In October 2009 the Respondent provided an internal appeal mechanism for additional information to be considered by the CRC. Mr Giblett elected to utilise this opportunity to appeal the Respondent's decision and lodged his appeal on 20 October 2009.

11. Correspondence of 31 December 2009 to Mr Giblett advised his appeal was unsuccessful and he was provided with all information utilised to make that determination i.e. Internal Memorandum and attachments to the Classifications Unit, advice from the Classifications Unit to the CRC and the CRC Meeting Minutes.

12. On 1 February 2010 Mr Giblett submitted an application to the WAIRC, PSA 2 of 2010, disputing the Respondent's decision of his ineligibility for a personal reclassification.

13. On 5 March 2010 the Respondent attended a conference before the Public Service Arbitrator, Acting Senior Commissioner Scott. At the conference the Respondent agreed to consider through its CRC new information supplied through PSA 2 of 2010 and any supporting evidence from Mr Giblett.

14. On 27 April 2010 the Respondent wrote to Mr Giblett and advised the unanimous view of the CRC was that he was ineligible for a personal reclassification to Level 7.

15. On 4 June 2010 Mr Giblett lodged a Notice of Discontinuance and on 17 June 2010 Acting Senior Commissioner Scott dismissed PSA 2 of 2010.

16. On 4 August 2010 the Applicant applied to the Public Service Arbitrator for a section 44 conference pursuant to sections 80E and 80G of the Industrial Relations Act 1979 (WA) advising of a dispute with the Respondent regarding the Respondent's refusal to properly classify Mr Giblett as a Level 7 officer commensurate with the classification of 4082, Assistant Superintendent Prisoner Management, at Casuarina Prison.

Contention of Parties

3 The applicant has made a number of submissions in its outline of submission as follows:

"1. The Applicant rejects the Respondent's jurisdictional arguments.

2. In particular the Applicant rejects the Respondent's arguments in relation to S 80E(7) of the Industrial Relations Act 1979 [" The IR Act"] as this matter does not pertain to a Public Sector Standard.

3. The Applicant submits that the Respondent's 'Classification Determination and Reclassification Procedures' ["the Departmental Procedures"] are inconsistent with Public Sector Commission's 'Approved Procedure 1 - Approved Classification System and Procedures ["Approved Procedure 1"]

4. The Department's Procedures state:

5.3 An employee wishing to apply for reclassification with their position must submit the following evidence with their application to the Classification Unit:

5.3.1 That they have been the substantive occupant of the position for a qualifying period of at least 12 months immediately preceding the effective date of reclassification."

5. The Public Sector Commission's 'Approved Procedure 1 - Approved Classification System and Procedures ["Approved Procedure 1"], provides that

"Whilst noting that it is the job that is reclassified not an officer, CEOs or other relevant employing authorities may approve the reclassification of the substantive occupant of a job, subject to compliance with Clause 8 (1) (b) and (c) of the PSM Act, and provided that the officer has been in the position and undertaking the higher level duties that warranted reclassification of the position, for a "continuous period" of 12 months. A continuous period, as referred to above, may include normal and / or reasonable periods of leave (i.e.: sick leave and annual leave). "

6. The Applicant contends that the Respondent's Departmental Procedures are beyond power as Approved Procedures have the status of delegated legislation having been created under s3(2) (a) of the Public Sector Management Act 1994 [" the PSMA"].

7. Pursuant to s15 of the PSMA, the powers and duties of the Minister in relation to Approved Procedures were delegated, among other things, to the Public Sector Commission on 28 November 2008.

8. The Applicant submits that in relation to both the Departmental Procedures and the application of the Departmental Procedures, the Respondent has failed to act in accordance with s8 'General Principles of Human Resource Management' of the PSMA and s6 'Objects' of the IR Act.

9. The inconsistency between the Departmental Procedures and Approved Procedure 1 places a more onerous and restrictive requirement on employees who seek to be reclassified with their substantive position.

10. Mr Giblett's employment history, in relation to the position of Assistant Superintendent Prisoner Management, Casuarina Prison (Position Number 4082) demonstrates that:

(a) he has been in Position No 4082 and undertaking the higher level duties that warranted the reclassification of the position on numerous occasions since 17 March 2003;

(b) he performed the duties of the position for a continuous period between 10 May 2004 and 13 December 2005 which is well in excess of 12 months; and

(c) he was merit selected to the position effective 19 September 2005.

11. The Applicant submits that at all material times Mr Giblett met all the requirements of Approved Procedure 1 and will call evidence to support this contention.

12. The Applicant further submits that other employees whose positions were reclassified as a consequence of the Prison Management Work Value Review were granted personal reclassifications notwithstanding that their circumstances did not meet the requirements of the Departmental Procedures."

4 In the respondent's submissions, a number of issues were advanced as follows:

"1. The Respondent submits that the claim by the Applicant does not fall within the jurisdiction of Public Service Arbitrator ("the Arbitrator") as set out at s 80E of the Industrial Relations Act 1979 ("IR Act").

2. The Respondent contends that s 80E(7) of the IR Act is a restriction on the Arbitrator's jurisdiction in that the Arbitrator should not inquire into or deal with any matter under a procedure referred to in s

97(1)(a) of the PSM Act. (see *Director General, Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244 per Wheeler and Le Miere JJ [35 - 44]).

3. The Respondent contends that s 80E(1) of the IR Act sets out the Arbitrator's jurisdiction which is "to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally." and in the exercise of jurisdiction the Arbitrator does not undertake a judicial review of the respondent's decision or of its decision making process (see *Director General, Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244 per Wheeler and Le Miere JJ [27 - 30], and Hasluck J [167].).

4. The Respondent contends that the Arbitrator cannot issue an order in the terms sought by the applicant as the consequences of such an order would to direct the Respondent to act contrary to their obligations under s 29 and s 64 of the PSM Act (see *The Minister for Education and The Director General of the Education Department of Western Australia v The Civil Service Association of Western Australian (Inc)* (1997) 77 WAIG 2185 at 2187) whereby an order for the Respondent to contravene the PSM Act was quashed by the Full Bench.

5. The Respondent contends that an industrial dispute which has similar characteristics to the current application namely, the reclassification of person with a position and the interpretation of Approved Procedure One was considered and dismissed by Commissioner Wood as Arbitrator. (see *The Civil Service Association of Western Australia Incorporated v The Director-General, Department of the Attorney General.* (2008) WAIRC 00872 [20, 22-27].)

6. The Respondent contends that the Arbitrator is prevented from enquiring into and dealing with this industrial matter on the grounds that the Notice of Application does not dispute the reclassification of the position nor does it claim that Mr Giblett has been unfairly treated. Instead, the grounds for the Application concern the decision of the Respondent to not apply the benefit of a personal reclassification which is not in keeping with the requirements of S 80E (2) (a) of the IR Act. (see *Marie-Helene Mallet v Dept. of Consumer and Employment Protection* (2009) WAIRC 00344 [7. 10])

7. The Respondent contends that it has complied with the overall intent and construction of the Public Sector Management Act 1994 and its subsidiary legislation of Approved Procedure One in making the decision not to provide the benefit of a personal reclassification to Mr Giblett. (see *The Civil Service Association of Western Australia Incorporated and Director-General, Department for Child Protection and Minister for Commerce* (2010) WAIRC 00206 [99].

8. The Respondent contends that it is not in the public interest and an inappropriate use of Public Resources to re run the same matter which was listed as PSA 2 of 2010 and discontinued. (see *WA Police Union of Workers and Western Australian Police Service* (2004) WAIRC 11803.)"

Jurisdiction

5 The respondent submitted that by reason of s 80E(7) of the Act, the Arbitrator has no jurisdiction to inquire into and deal with the present matter. There is no doubt that whilst the Arbitrator's jurisdiction is very broad, s 80E(7) is a limitation on it, such that certain matters fall outside of jurisdiction.

6 Section 80E(7) is in the following terms:

> "(7) Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act."

7 In turn, s 97(1) of the Public Sector Management Act 1994 ("the PSM Act") provides as follows:

> **"97. Functions of Commissioner concerning relief in respect of breach of public sector standards**
>
> (1) The functions of the Commissioner under this Part are —
>
> (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards;
>
> (b) to appoint persons for the purpose of implementing procedures referred to in paragraph (a); and
>
> (c) to monitor the operation of procedures referred to in paragraph (a)."

8 It is plain from the language of s 80E(7) of the Act, when read together with s 97(1)(a) of the PSM Act, that the subject matter of s 80E(7), and in turn the limitation on the Arbitrator's jurisdiction, are "matters" in relation to the breaching of public sector standards, in respect of which a procedure that may provide for an appeal, review, conciliation, arbitration, mediation or otherwise, has been prescribed. It is the general "matter" that precludes jurisdiction of the Arbitrator, not any particular allegation of breach: *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* (2005) 86 WAIG 231.

9 A public sector standard is an instrument made by the Public Service Commission under s 21(1)(a) of the PSM Act. Whilst since the decision taken by the respondent in relation to Mr Giblett the terms of s 21(1) have been amended by the Public Sector Reform Act 2010, the relevant provisions in issue have not fundamentally changed.

10 Additionally, and for the purposes of dealing with the present matter, by s 3(2) of the PSM Act prior to the recent amendments, the responsible Minister was empowered to approve in writing "any procedure or classification system". Approval was formerly defined in s 3 of the PSM Act as a procedure or classification system "for the time being approved under subsection (2)".

11 By s 15 of the PSM Act, which is now repealed, the powers of the Minister in the former s 3(2) were delegated to the Public Sector Commission by instrument of delegation dated 28 November 2008. A copy of the instrument of delegation was tab 2 in exhibit A1.

12 In my opinion, for the following reasons, in this matter the jurisdiction of the Arbitrator is not ousted by s 80E(7) of the Act.

13 The judgement of the Industrial Appeal Court in *Department of Attorney General* is distinguishable from the present case. In this matter, the substantial issue is the operation and effect of what is called the "Approved Procedure 1 – Approved Classification System and Procedures" ("Approved Procedure 1"). This instrument was made by the Public Sector Commission effective 1 February 2009 pursuant to the delegation by the responsible Minister.

14 As the relevant "matter" in this case concerns the respondent's decision to not grant a "personal reclassification" to Mr Giblett under Approved Procedure 1, and does not concern any matter of the breaching of a public sector standard, then the prohibition on the jurisdiction of the Arbitrator does not arise.

15 The next limb to the respondent's argument as to jurisdiction or power was to the effect that the jurisdiction of the Arbitrator does not extend to a form of judicial review of the action of the respondent. Whilst it was not clear on the respondent's submissions how it is that the exercise of discretion by the respondent to not reclassify Mr Giblett would involve a "judicial review", I do not disagree with the submissions made in relation to the general principles.

16 As was concluded by the Court in *Director General Department of Justice* by Wheeler and Le Meire JJ at 234-236 and by Hasluck J at 246, the Arbitrator's jurisdiction does not extend to bare declarations of right or powers in the nature of judicial review. The powers of an Arbitrator in dealing with an industrial matter are dealt with in s 80E(5) of the Act and extend to the review, nullification, modification or variation of a decision of an employer.

17 This is not to say of course, that in dealing with an industrial matter under s 80E(1) of the Act, the Arbitrator may not form a view as to whether the conduct or action of an employer or employee, is unlawful or otherwise affected by legal error, in deciding the appropriate remedy under s 80E(5). If the Arbitrator adopts this approach in the current matter that does not mean the Arbitrator is engaging in judicial review in the accepted sense.

18 I therefore see no barrier to the Arbitrator's jurisdiction or power in this matter on such a ground.

19 The respondent also contends that the grant of an order as sought by the applicant will have the effect of requiring the respondent to act contrary to its obligations under ss 29 and 64 of the PSM Act. In this regard the respondent relies on a decision of the Full Bench of the Commission in *The Minister of Education and the Director General of the Education Department of Western Australia v The Civil Service Association of Western Australia (Inc)* (1997) 77 WAIG 2185.

20 In *Minister for Education* the issue arising on the appeal was the exercise of the Arbitrator's power to order the employer to appoint employees engaged on temporary contracts, as permanent appointments, despite the terms of s 64(1) of the PSM Act. Section 64(1) enables an employing authority to appoint persons as public service officers, subject to approved procedures.

21 It was held by the Full Bench that the Arbitrator's order in that case, had the effect of compelling the employer to act contrary to its obligations under s 64 of the PSM Act and was an invalid exercise of power.

22 That is not the effect of the proposed order in this case. The applicant does not seek the appointment of Mr Giblett contrary to the terms of s 64(1) of the PSM Act. On the contrary, the applicant seeks an order, as I apprehend it, that the respondent comply with Approved Procedure 1, in granting Mr Giblett a personal reclassification.

23 I do not therefore consider the matter decided in *Minister for Education* as being applicable to the circumstances of the present case.

Approved Procedure 1 and Consistency

24 A central plank of the applicant's case was that the respondent's procedures for dealing with reclassification of positions and personal reclassifications are inconsistent with the terms of Approved Procedure 1. To this extent, the applicant submitted that the respondent's procedures are invalid, by reason of the terms of Approved Procedure 1 having the status of delegated legislation.

25 The relevant parts of Approved Procedure 1 for present purposes are the "Introduction, Objective, and Reclassification of the Substantive Holder of a Reclassified Job". They provide as follows:

"Introduction:	This Approved Procedure relates to the functions of Chief Executive Officers (CEOs) or other employing authorities as provided for in sections 29(1)(h)(ii), 36(1)(c), 41(a)(i), 44(3)(b), 53(3)(a) and 64(2)(a) of the Public Sector Management Act 1994 (PSM Act). This approved procedure applies to those agencies forming part of the Public Service as defined in Part 3 section 34(a)-(c) of the PSM Act, as follows: • departments; • SES organisations, insofar as any Posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and • agencies that employ persons under Part 3 of the PSM Act.
Objective:	To provide for a classification determination system and procedures which are in accordance with the principles set out in sections 7 and 8 of the PSM Act.
Reclassification of the Substantive Holder of a Reclassified Job:	Whilst noting that it is the job that is reclassified not an officer, CEOs or other relevant employing authorities may approve the reclassification of the substantive occupant of a job, subject to compliance with Clause 8(1)(b) and (c) of the PSM Act, and provided that the officer has been in the position and undertaking the higher level duties that warranted reclassification of the position, for a "continuous period" of 12 months. A continuous period, as referred to above, may include normal and/or reasonable periods of leave (i.e.: sick leave and annual leave).

26 The respondent has adopted a Policy and Procedure in relation to reclassification set out in tabs 4 and 5 of exhibit A1. The Policy of the respondent refers to the principles of the PSM Act and Approved Procedure 1 and in particular, "without limiting and subject to meeting all of the requirements of Approved Procedure 1."

27 The relevant part of the respondent's Procedures is cl 5 dealing with "reclassification of the person with the position". It relevantly provides as follows:

"5. Applications of Reclassification of the Person with the Position

5.1. The Department's policy is that, without limiting the operation of Approved Procedure 1, reclassified positions must be filled through open merit selection after being cleared through the internal and external redeployment process in the majority of cases.

5.2. In exceptional circumstances, a business area may wish to forgo the merit selection process and submit an application for an employee to be reclassified with the position.

5.3. An employee wishing to apply for reclassification with their position must submit the following evidence with their application to the Classification Unit

5.3.1. that they have been the substantive occupant of the position for a qualifying period of at least 12 months immediately preceding the effective date of reclassification

5.3.2. that they have been continuously in the role during the qualifying period

5.3.3. that they have undertaken the increased work value duties that warranted the reclassification of the position during the qualifying period. The applying officer's manager will be required to certify that this requirement has been satisfied

5.3.4. that they attained their current substantive classification through merit selection

5.3.5. that they have performed the duties which led to the reclassification of the position in a consistent and satisfactory manner and

5.3.6. that they have not been the subject of a sub standard performance process.

5.4. The Classification Unit will perform an assessment of the application, and forward the application, with their recommendation, to the CRC for final assessment.

5.5. The CRC will assess the application, and forward the application with the CRC recommendation to the Commissioner for consideration.

5.6. Upon approval by the Commissioner, the application is returned to the Classification Unit for registration on the database and referral to appropriate officers within the HR Service Centre, Department of the Attorney General (HR Service Centre) for processing."

28 As noted in the applicant's outline of submission above, the contention put is that the respondent's Policy and Procedure puts an impermissible gloss on Approved Procedure 1, to the extent that it requires the employee seeking a personal reclassification to have been the substantive occupant of the reclassified position for a period of 12 months "immediately preceding" the effective date of reclassification. It is also contended that the requirement that the person be "in the position" does not mean the substantive position, but can include periods of acting in a position.

29 It is also the case, as a matter of interpretation, that the terms of Approved Procedure 1 and the respondent's Policy and Procedures, must be considered in the context of the relevant provisions of the PSM Act, in particular ss 8(1)(b) and (c) which require human resources management principles to be applied free of nepotism, patronage, arbitrary or capricious acts and consistently.

30 The PSM Act in s 9 also, somewhat curiously, requires public sector bodies and employers to comply with their obligations under the Act and these laws. One would have thought this to naturally follow, given all citizens of the State are subject to laws validly made by the sovereign Parliament. This provision, along with some of the terms of s 8 of the PSM Act, were considered and commented on in *Director General Department of Justice*, above.

31 A central limb to the applicant's attack on the respondent's Policy and Procedure, is that Approved Procedure 1 "is a procedure" approved under the terms of s 3(2)(a) of the PSM Act (now repealed) by the Public Sector Commission as a delegate of the responsible Minister, and has the status of delegated legislation.

32 The question as to whether a particular instrument seemingly made or given lawful effect under an Act is delegated or subordinate legislation is not entirely straight forward.

33 As a matter of general principle, delegated legislation is a convenient general description for a legislative instrument made by a body which (or a person to whom) the power to legislate has been delegated. This description necessarily involves two things: first, a form of delegation; and second, instruments that can be described as "legislation" or as being "legislative" in effect: *Pearce and Argument "Delegated Legislation in Australia"* Second Ed para 1.1.

34 The definition of "subsidiary legislation" in s 5 of the Interpretation Act 1984 is in similar terms.

35 Whether an instrument is properly described as "legislative" usually involves a consideration of whether the instrument sets out general rules as to conduct or the exercise of powers, or whether it deals within the application of such rules to particular circumstances: *Commonwealth v Grunseit* (1943) 67 CLR 58, *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260; *Lattitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209.

36 Noticeably, by s 41 of the Interpretation Act, in cases where a written law authorises the making of subsidiary legislation, all such subsidiary legislation is to be published in the Gazette and, subject to s 42 of the Interpretation Act, comes into effect on the date of publication or some later day as in the instrument. There was no suggestion that Approved Procedure 1 was gazetted.

37 By s 42 of the Interpretation Act, subsidiary legislation in the form of regulations, (which includes rules, local laws and by-laws), are to be laid before each House of the State Parliament and are subject to a disallowance motion.

38 By s 21(1) of the PSM Act, the Public Sector Commissioner may make public sector standards and codes of ethics. By s 21(3) each public sector standard and code of ethics is to be published in the Gazette. Additionally, by s 21(7) of the PSM Act, s 42 of the Interpretation Act applies to a public sector standard and a code of ethics, as if they were regulations for the purposes of that section.

39 Thus, the only instruments made under the PSM Act that seem to be subject to Part VI of the Interpretation Act dealing with subsidiary legislation, are public sector standards and code of ethics. Approved procedures or classification systems, approved under the former s 3(2) of the PSM Act, are not so classified, on a plain reading of the PSM Act and the Interpretation Act.

40 In view of this, the question therefore is can Approved Procedure 1 be properly accorded the status of delegated legislation? In my opinion, given the foregoing, this may be open to question. There are however, functional categories of subsidiary legislation in the form of "administrative quasi-legislation", constituted as notes, codes of conduct, guidelines and administrative instructions made for the purposes of the administration of statutory schema. Such delegated legislation is often not subject to Parliamentary scrutiny: *Pearce and Argument* para 1.12-1.17. Approved Procedure 1 may fall into this category.

41 Regardless as to whether the true character of Approved Procedure 1 can be regarded as legislative, by s 29(1)(h)(ii) of the PSM Act (as it was), a chief executive officer or chief employee was obliged to comply with it in relation to matters of classification and remuneration of employees of a department or organisation constituted under the PSM Act.

42 This means that it is to the terms of Approved Procedure 1 that attention must be paid, for the purposes of determining the process to apply in classifying a position and considering the exercise of discretion to grant a personal reclassification to an employee. This is because the obligation under the PSM Act, is to apply the terms of Approved Procedure 1, as made under the former s 3(2)(a) of the PSM Act.

43 It is to be noted that the respondent's Policy in relation to reclassification of a person within a position, is largely reflective of the relevant provisions of Approved Procedure 1.

44 However, an examination of the respondent's Procedure in relation to this issue, as set out above, reflects a departure from the terms of Approved Procedure 1, in requiring an applicant for a personal reclassification to have been in the reclassified position and performing the higher duties for a period of at least 12 months "immediately preceding the effective date of reclassification". The employee is also required to establish that they were continuously in the position within that 12 month period.

45 In my view, there are several difficulties with the respondent's Procedure relevant to the disposition of the present proceedings.

46 First, contrary to the terms of Approved Procedure 1, which a chief executive officer was obliged by s 29(1)(h)(ii) of the PSM Act to comply with, the respondent's Procedure requires an applicant for personal reclassification, to have been performing the higher duties for the 12 months immediately preceding the effective date of the reclassification. Nowhere in the terms of Approved Procedure 1, on its ordinary and natural meaning, is reference made to such a 12 month period or to a date of reclassification. Whilst there was some reference by the respondent to advice proved to it by the responsible government

agency about the intent of Approved Procedure 1, it is to its text that one must turn to ascertain its meaning.

47 It seems to me that the date of reclassification is an administrative matter, by which through the internal processes of a department, a decision is made to reclassify a position. However, under the terms of Approved Procedure 1 it concerns itself with an officer having been "undertaking the higher level duties that warranted the reclassification of the position, for a continuous period of 12 months".

48 As a matter of construction, from the plain language of its terms, what is an essential ingredient of Approved Procedure 1, is an assessment of the period of time over which the higher duties requirements of a position have been in place and secondly, within that period, an applicant for reclassification has been continuously (subject to leave taken) performing those duties for a least 12 months.

49 In my view, any departure from this requirement, is inconsistent with the terms of Approved Procedure 1 and inconsistent with the requirements imposed by the former s 29(1)(h)(ii) of the PSM Act.

50 Of course, assuming for present purposes that Approved Procedure 1 has the status of delegated legislation, as being a form of "quasi-legislation", then the conclusion that the terms of the respondent's Procedure is contrary to, and outside the permissible scope of Approved Procedure 1, for the purposes of assessing personal reclassification claims, is reinforced.

51 Given that the terms of Approved Procedure 1 in relation to personnel reclassifications plainly involve the exercise of discretion by a CEO of a department or organisation, the onus is on the applicant to establish that the exercise of the discretion, in this case, should be overturned.

52 With all of the foregoing in mind, I now turn to consider the evidence.

The Evidence

53 The principal witness for the applicant was Mr Giblett. Much of Mr Giblett's employment history was not contentious and was set out at tabs 5 and 6 of exhibit A1.

54 Mr Giblett commenced with the respondent in July 1990 as a prison officer. In March 2003, Mr Giblett was appointed as Acting Superintendent Prisons Incidents at Level 6. He continued to act in these senior positions until he was substantively appointed to the position of Assistant Superintendent Prisoner Management in September 2005. From that time, Mr Giblett has undertaken other roles for various periods of time including Assistant Superintendent Special Units, and Assistant Superintendent Prisoner Management (Training), where Mr Giblett was on a selection panel for the appointment of Senior Prison Officer positions across the State.

55 Late in 2006, Mr Giblett was appointed to a Project Co-ordinator position to work on female adult custodial issues. From January 2007 to January 2009 Mr Giblett occupied a secondment position in human resources. From January 2009, he returned to his substantive role as Assistant Superintendent Prisoner Management at Casuarina, but in a supernumerary position, pending resolution of reclassification appeals.

56 It was not in issue that Mr Giblett has performed very well in all positions he has occupied. This good performance in the Assistant Superintendent position was confirmed in the testimony of Ms Lehman, a former Deputy Superintendent, and Mr Lawler, the Deputy Superintendent at Casuarina Prison.

57 Evidence from Mr Giblett and Ms Lehman was to the effect that whilst the effective date of the reclassification of the Assistant Superintendent's position was January 2009, Mr Giblett has performed the higher duties associated with the role since early 2003, when he first commenced in an acting capacity. Additionally, the evidence of Ms Lehman and Mr Lawler, and also Mr Giblett himself, was that the various JDF's for the position, as set out at tab 15 in exhibit A1, has not changed fundamentally since in particular, about 2004-2005. Rather, the changes have been gradual over time, and the JDFs have reflected a refinement of the responsibilities of the position.

58 In summary, it was Mr Giblett's evidence that since mid 2004 to December 2005, he had been acting in the Assistant Superintendent's position and performing the higher duties associated with the position. He was then merit selected into the position effective 19 September 2005. Accordingly, it was Mr Giblett's evidence that he had been performing those duties and responsibilities for at least some 19 continuous months to that point.

59 Thereafter, on Mr Giblett's testimony, in the other positions to which he was seconded in the period from about the end of 2005 to the middle of 2009, he was in positions that had either a direct or indirect linkage to the responsibilities of his substantive office of Assistant Superintendent Prisoner Management.

60 Additionally, it was Mr Giblett's evidence that there had been a longstanding custom and practice that senior officers seconded from prison management to head office in Perth would not be subject to disadvantage.

61 In relation to the exercise of the discretion given to a CEO under Approved Procedure 1, evidence was led from Mr Johnson, the current Superintendent at the Greenough Regional Prison, who has been in that position since 1998.

62 The position occupied by Mr Johnson was also affected by the work value review resulting in the reclassification of Assistant Superintendents and Superintendent positions. He testified that by reason of an extended period of absence from his position, he was deemed ineligible to be the subject of a personal reclassification under the respondent's Procedures. Mr Johnston lodged an internal appeal which was refused. He ultimately sought the exercise of discretion by the respondent's CEO Mr Ian Johnson, who granted him a personal reclassification.

63 Reference was also made to another case of personal reclassification involving Mr Smith, the Assistant Superintendent Prisoner Management for the Bunbury Regional Prison, who, while not satisfying the 12 month eligibility criteria, also obtained a personal reclassification.

64 The process undertaken in relation to the Prison Management Work Value Review, and the specific situation with Mr Giblett, was dealt with in the testimony of Ms Maher, a Senior Human Resources Officer within the respondent.

65 Ms Maher testified that the respondent operated in accordance with the terms of the PSM Act, and adopted the elements of Approved Procedure 1 into the respondent's Policy and Procedures regarding the classification and reclassification process. This was done in conjunction with advice from the Public Sector Commission.

66 As to the specific situation of the Assistant Superintendent Prisoner Management positions, Ms Maher outlined the starting point for the work value review was July 1998, the last time the position was assessed for work value. As a consequence of this process, there were a number of changes in work value that were assessed as warranting a reclassification of the position from Level 6 to Level 7. In summary, those changes were:

(a) Increased involvement in the strategic leadership, planning and direction of the Prison;

(b) Increased requirement to report on, monitor and review operational compliance through a recently created internal governance division and legislatively enacted external governance provisions;

(c) Reporting on benchmark and performance indicators relevant to prisoner management through service level agreements between the Department and the Prison (service level agreements were later withdrawn and replaced with a different reporting system);

(d) Increased prisoner numbers and its inherent requirement for day-to-day consideration, decision making and management as it relates to prisoner and staff safety and well being, including the specific issues of accommodation, prisoner-staff interaction, risk, availability of constructive activity and prisoner services;

(e) Heightened community sensitivity to the management of Prisons, linked to the serious incidents which lead to the Mahoney Inquiry, creating a greater need to positively represent the strategic objectives of the Prison and Department to external groups for the purpose of building community confidence;

(f) Management of prisoner grievances which has been impacted through an increased awareness by prisoners and their families of their rights and an increased availability of complaint mechanisms. The resultant requirement has been to develop formal communications addressing complaints raised, resolve conflicts and instigate remedial action such as alteration to local operational policy and procedures;

(g) Introduction and enhancement of systems to monitor prisoners and associated risks;

(h) Introduction and enhancement of an array of strategies concerning prisoner management, for example, suicide prevention, anti-bullying, unit management, sexual predators and culturally appropriate services to the over represented Aboriginal population; and

(i) Changed reporting relationships and positions controlled.

67 As a consequence of these conclusions, the effective date of the reclassification was 27 January 2009, the time at which a management initiated request was made to the classification unit.

Consideration

68 From the foregoing analysis, and for the following reasons, in my view, there are substantial departures in the respondent's Procedures from Approved Procedure 1, in relation to the process of personal reclassification.

69 The principles in relation to the interpretation of instruments are well settled. The process of interpretation, on the strength of recent High Court authority, is essentially text based, whilst having due regard to the context and purposes of the particular provisions: "*The Intolerable Wrestle: Developments in Statutory Interpretation"* Hon JJ Spigelman AC (2010) 84 ALJ 822 (See the cases cited therein). For present purposes, the focus is on the text of the requirements of Approved Procedure 1 in relation to reclassifications of employees within a position.

70 There can be no doubt from its plain language that the capacity of an employee to be granted a personal reclassification is discretionary, by the use of the word "may".

71 The exercise of that discretion is subject to the conditions as set out in the clause itself. The first of these conditions is that the employee concerned be the substantive occupant of a job. That is, that the person has been merit selected for the position. The second condition, is compliance with s 8(1)(b) and (c) of the PSM Act, which have been referred to above. The third condition is that the employee has been "in the position". The fourth is that the person has "undertaken the higher level duties … for a continuous period of 12 months". This latter condition includes any reasonable periods of leave.

72 To the extent that the respondent's Procedures impose greater restrictions upon an employee accessing a personal reclassification than the provisions as set out in Approved Procedure 1, then in my opinion, they need to be read down. This is consistent with the scheme of provisions of the PSM Act, in particular at the material time, s 29(1)(h)(ii) requiring a CEO to deal with classification and remuneration issues "in accordance with" classification systems and procedures approved by the Minister under the provisions of the former s 3(2)(a) of the PSM Act.

73 Whilst such phrases need to be interpreted in context, as a general proposition, an obligation on a decision maker to act "in accordance with" a particular thing, does not permit a departure from it, and in some contexts, may require stringent adherence: *Collins v Repatriation Commission* (1994) 33 ALD 557; *Re LA* (1993) 41 FCR 151.

74 In the present circumstances, to permit a substantial departure from the terms of Approved Procedure 1 may constitute an injustice and be contrary to the principles of human resource management that the respondent is, by s 8 of the PSM Act, required to apply.

75 In this case Mr Giblett was at the material time and is the substantive occupant of the position of Assistant Superintendent,

Prisoner Management at Casuarina Prison. In my opinion, it is imposing a gloss on the terms of Approved Procedure 1, in accordance with its plain language, to require a person seeking a personal reclassification, to establish they have been the substantive occupant of the position for the required period. This is inconsistent with the language of the provisions which only require the person to have been "in the position". On its ordinary and natural meaning the clause does not say "in the substantive position" or "the substantive occupant of the position" in relation to the undertaking of the higher level duties.

76 I see no reason in principle, consistent with the language of the clauses as a whole, to exclude a person from consideration of personal reclassification, merely because they may have been acting "in a position", in this particular case, for some years, performing the higher level duties. This is as long as the employee, at the time of seeking a personal reclassification, "is the substantive occupant of the position". Plainly, persons who have only acted in a position are not entitled to seek a personal reclassification. This approach to interpretation gives rise to no absurdity or repugnancy within the provision as a whole.

77 To adopt the more restrictive approach could mean that a person who has been acting in a position effectively for some years and performing higher level duties, and who, a few months prior to a position reclassification, is substantively appointed to a position, would be denied the opportunity for consideration of a personal reclassification. This has the potential to be unfair.

78 In this case, Mr Giblett has been "in the position" of Assistant Superintendent, Prisoner Management, in an acting capacity, over the continuous period from at least May 2004 to December 2005. Given all of the evidence, in relation to the various JDF's, the work undertaken by Mr Giblett, and the evidence of Ms Maher that the work value review took place from 1998, I am satisfied that Mr Giblett has, over this period, undertaken the higher level duties that warranted the reclassification of the position.

79 As for the evidence of the work undertaken by Mr Giblett in other positions, such as that relating to the selection panel for appointment of senior officers, the work done in relation to female custodial issues; and the project work in human resources, I am not persuaded that this can be taken into account for the purposes of Approved Procedure 1. To do so would be inconsistent with the very case put by the applicant itself, to the effect that the Procedures of the respondent cannot be inconsistent within Approved Procedure 1.

80 By this I mean that on its proper interpretation, Approved Procedure 1, in referring to "in the position", means either acting in or being the substantive occupant of the position that has been reclassified. The terms of the clause does not permit, in my view, a person to be in another "position", albeit performing some duties analogous to the reclassified position, and having that "allied" work taken into account. To do so, would be, again, to substantially depart from the terms of Approved Procedure 1, a course which was impermissible under the then s 29(1)(h)(ii) of the PSM Act.

81 However, the foregoing conclusion does not necessarily mean the applicant is entitled to succeed in its application. The applicant still needs to establish on balance that the exercise of the discretion should be in Mr Giblett's favour, consistent with s 8(1)(b) and (c) of the PSM Act, such that in accordance with s 26(1)(a) of the Act, the Arbitrator should intervene.

82 As to the issue of fairness and consistency, I have regard to the evidence in relation to Mr Johnson and Mr Smith, both of whom received personal reclassifications despite not meeting the requirements of the respondent's Policy and Procedures. In both of those cases, the uncontested evidence is that both of those senior officers did not meet the respondent's criterion of being in their respective positions for 12 months immediately preceding the reclassification effective date.

83 In all of the circumstances of the present case, I consider that it would be unfair to deny Mr Giblett the benefit of a personal classification from Level 6 to Level 7. In my opinion, not only does Mr Giblett meet the requirements of Approved Procedure 1, the evidence is that on his return to the Assistant Superintendent, Prisoner Management position at Casuarina, he has resumed the responsibilities of that position without any loss of skills and has performed well in the role.

84 Accordingly there will be an order in the applicant's favour.

2010 WAIRC 01252

DISPUTE RE CLASSIFICATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER
	DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 DECEMBER 2010
FILE NO	PSACR 25 OF 2010
CITATION NO.	2010 WAIRC 01252

Result	Application upheld. Order made
Representation	
Applicant	Ms J O'Keefe and Ms L Kennewell
Respondent	Ms T Borwick and Ms M Maher

Order

HAVING heard Ms J O'Keefe and Ms L Kennewell on behalf of the applicant and Ms T Borwick and Ms M Maher on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT Mr P Giblett receive the benefit of a personal reclassification to Level 7 commensurate with Position No. 4082 Assistant Superintendent Prisoner Management, Casuarina Prison.

(Sgd.) S J KENNER,
Commissioner,
[L.S.] Public Service Arbitrator.

2010 WAIRC 01261

DISPUTE RE LONG SERVICE LEAVE ENTITLEMENTS OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY, MISCELLANEOUS UNION, WEST AUSTRALIAN BRANCH **APPLICANT**
	-v-
	DEPARTMENT OF HEALTH **RESPONDENT**
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	CR 31 OF 2010
CITATION NO.	2010 WAIRC 01261

Result	Order issued
Representation	
Applicant	Mr M Aulfrey
Respondent	Ms T Leslie

Order

WHEREAS this is an application pursuant to section 44 of the *Industrial Relations Act 1979*;

AND WHEREAS this matter was listed for hearing on 30 September 2010;

AND WHEREAS prior to the hearing the applicant advised the Commission that it did not intend to proceed with this matter;

AND WHEREAS the Commission wrote requesting the applicant within 7 days confirm in writing its withdrawal of the application or the application would be dismissed;

AND WHEREAS the applicant failed to contact the Commission;

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

That application CR 38 of 2009 is hereby discontinued.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	The Australian Medical Association (Western Australia) Incorporated	Scott A/SC	PSAC 19/2010	N/A	Dispute re provision of after hours emergency consultant cover	Resolved

PROCEDURAL DIRECTIONS AND ORDERS—

2010 WAIRC 01262

MISCELLANEOUS GOVERNMENT CONDITIONS AND ALLOWANCES AWARD NO A 4 OF 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 29 DECEMBER 2010

FILE NO/S APPL 81 OF 2007

CITATION NO. 2010 WAIRC 01262

Result Order issued

Order

HAVING heard Ms C Holmes on behalf of the respondents to the Award and Mr T Clark on behalf of the Liquor Hospitality and Miscellaneous Union, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be divided into the following two parts:

1. APPL 81 of 2007 to be in respect of the amendments to all clauses to the award; and
2. APPL 81 A of 2007 to be in respect of Schedule B – List of Respondents.

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

2010 WAIRC 01237

HOSPITAL SALARIED OFFICERS' AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

HON MINISTER FOR HEALTH AND OTHERS

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 20 DECEMBER 2010

FILE NO P 18 OF 2003

CITATION NO. 2010 WAIRC 01237

Result Order issued

Order

WHEREAS this is an application pursuant to Section 40 of the *Industrial Relations Act 1979* to vary the Hospital Salaried Officers' Award 1968; and

WHEREAS on the 16th day of December 2010 the Public Service Arbitrator convened a conference as part of the process of dealing with the classification of a number of the positions the subject of the application; and

WHEREAS at the conference the parties reported that they had reached agreement for a process of resolving the positions concerned and requested that an order issue to give effect to the Memorandum of Agreement; and

WHEREAS the Commission is of the opinion that the issuing of the order to give effect to the Memorandum of Agreement will assist in the resolution of the application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT the attached Memorandum of Agreement and Attachments shall be recorded in the files of the Commission as the agreement between the parties as to the process of review for those Groups 5 and 6 "out of scope" positions recommended by the Public Service Arbitrator in 2007 for current date review.

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

SCHEDULE

MEMORANDUM OF AGREEMENT

Preamble

This memorandum reflects the agreement reached between the Health Services Union and the Department of Health ("the Parties") to finalise a process of review for those "out of scope" positions recommended by the Public Service Arbitrator (PSA) in 2007 for current date review. The relevant positions are identified in correspondence to the parties from the PSA dated 25 October 2007 and 19 November 2007 (see Attachment 1). These are referred to as Group 5 and Group 6 positions.

The DOH confirmed agreement, by correspondence to the HSU dated 16 March 2008 (see Attachment 2), to review the positions.

By letter dated 27 July 2010 the DOH advised the HSU that the review had been concluded and that the DOH had determined that the positions remained out of scope of the Health Professionals Review (P18 of 2003). The DOH provided the HSU with a copy of the external consultant's report that formed the basis of the employer's determination.

At a Conference held before the PSA on 28 July 2010 the HSU raised concerns about the nature of the review undertaken by the Employer. Specifically that no consideration was given to the appropriate classification levels for the positions. This being the HSU's expectation arising from the 2007 recommendations by the PSA.

Notwithstanding the parties' differences in interpretation in respect of the DOH 16 March 2008 commitments, the DOH proposed to review the classification of the positions both as at 2007 and at a current date. Following further discussions the parties advised the PSA at a report back conference on 22 September 2010 that a process to review the positions had been agreed. This memorandum reflects that agreement.

Group 5 Positions

1st Stage

1. The DOH will review and determine the classification for these positions within the General Division salary table based on the information and registered JDFs provided in the 2007 documentation.
2. The effective date for any positions reclassified as part of this process will be 25 October 2007.
3. This will conclude that part of the Order in P18 of 2003(B) relevant to these positions. There will be no appeal rights arising from this 1st Stage.

2nd Stage

1. The DOH will conduct an employer initiated classification assessment of the positions as at current date.
2. Revised JDFs will be determined in consultation with local management. The HSU will also be consulted in this process.
3. Occupants of positions will be able to provide further particulars in respect to work value changes that may have occurred.
4. Classifications will be determined within either the General or Professional Division salary tables depending on the current date requirements of the position as reflected in the JDF. The HSU will be consulted during the review process.
5. The effective date for any positions reclassified will be 16 December 2010.
6. Occupants of positions will have right of appeal to the PSA against the determination made by the employer in this 2nd Stage.

Group 6 Positions

1st Stage

1. The HSU will provide DOH with any specific concerns with the external consultants report relating to the assessment of these positions. These will be considered by the DOH.
2. The DOH will identify the registered JDFs as at 2007 for the positions. Based on these JDFs and the information provided in 2007 the DOH will review and determine the classification for these positions within either the General or Professional Division salary table. The DOH will consult with the HSU during this process.
3. The effective date for any positions reclassified as part of this process will be 19 November 2007.
4. This will conclude that part of the Order in P18 of 2003(B) relevant to these positions. There will be no appeal rights arising from this 1st Stage.

2nd Stage

PATHWEST SCIENTIFIC INFORMATION TECHNOLOGY POSITIONS

1. Pathwest is to conduct a structural review of all laboratory based information technology positions. This will include but not be limited to those positions identified in Group 6 as out of scope.
2. The revised JDFs will be determined by Pathwest management. The HSU will also be consulted in this process.
3. Following completion of the revised structures and JDFs the employer shall determine classification levels for each affected position. This may be either within the General or Professional Division salary tables depending on the requirements of the position. No employee shall suffer a reduction in classification as a result of the review. The HSU shall be consulted during this process.
4. The effective date for any positions reclassified will be 16 December 2010.
5. Occupants of positions will have right of appeal to the PSA against the classification determination made by the employer in this 2nd Stage.

POSITION 600768, MANAGER PICTURE ARCHIVING AND COMMUNICATIONS SYSTEM/RADIOLOGY INFORMATION SYSTEMS (PACS/RIS)

1. The DOH will conduct an employer initiated classification assessment of this position as at current date.
2. A revised JDF will be determined in consultation with local management. The HSU will also be consulted in this process.
3. The occupant of the position will be able to provide further particulars in respect to any work value changes that may have occurred.
4. A classification will be determined within either the General or Professional Division salary tables depending on the current date requirements of the position as reflected in the JDF. The HSU will be consulted during the review process.
5. The effective date for any reclassification will be 16 December 2010.
6. The occupant of the position will have right of appeal to the PSA against the determination made by the employer in this 2nd Stage.

AH 1

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION
111 St. George's Terrace Perth Western Australia 6000
Phone: (08) 9420 4444 Fax General: (08) 9420 4500 Fax Chambers: (08) 9420 4502
Freecall: 1800 624 263 Freefax: 1800 804 987 Internet: www.wairc.wa.gov.au

25 October 2007

The Secretary
Hospital Salaried Officers Association
of Western Australia (Union of Workers)
Attn: Mr D Hill
8 Coolgardie Terrace
PERTH WA 6000

RECEIVED
25 OCT 2007

Dear Sir

APPLICATION NO. P 18 of 2003(B)

HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)
- and -
HON MINISTER FOR HEALTH IN HIS CAPACITY AS THE HOSPITAL BOARD FOR METROPOLITAN HEALTH SERVICES, WA COUNTRY HEALTH SERVICE AND OTHERS

On Thursday 25 October 2007 a conference was convened by the Public Service Arbitrator ("the Arbitrator") to deal with those positions which were not agreed by the parties as being in scope.

Group Five is composed of the following positions:

1. Appeal No. 115 – Positions No. 109983 and 110510 – Positions Title: "Manual Handling Coordinator".

2. Appeal No. 116 – Positions No. 400545/000723 and 400545/4511 – Positions Title: "Ergonomics Coordinator".

3. Appeal No. 119 – Positions No. 545/3841 and 400545/4320 – Positions Titles: "Injury Management Officer" and "Senior Injury Management Officer".

4. Appeal No. 120 – Positions No. 104391 – Positions Titles: "Rehabilitation Coordinator" and "Injury Management Coordinator".

5. Appeal No. 121 – Position No. 400545/0002 – Position Title: "Senior Scientific Officer".

6. Appeal No. 122 – Positions No. 400631/2539 – Positions Titles: "Coordinator, Manual Handling Education Programme" and "Education & Development Consultant – Manual Handling".

WESTERN AUSTRALIAN
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During the course of the conference the Arbitrator recommended that the Group Five positions:

1. Not be included in the scope of the present review.
2. Be reviewed in a separate process as at the current time.

If you have any questions please do not hesitate to call me on 9420 4484.

Yours faithfully

Ms Tamara Leslie
ASSOCIATE TO COMMISSIONER P E SCOTT

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION
111 St. George's Terrace Perth Western Australia 6000
Phone: (08) 9420 4444 Fax General: (08) 9420 4500 Fax Chambers: (08) 9420 4502
Freecall: 1800 624 263 Freefax: 1800 804 987 Internet: www.wairc.wa.gov.au

19 November 2007

The Secretary
Hospital Salaried Officers Association
of Western Australia (Union of Workers)
Attn: Mr D Hill
8 Coolgardie Terrace
PERTH WA 6000

Dear Sir

APPLICATION NO. P 18 of 2003(B)

HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS)
- and -
HON MINISTER FOR HEALTH IN HIS CAPACITY AS THE HOSPITAL BOARD FOR METROPOLITAN HEALTH SERVICES, WA COUNTRY HEALTH SERVICE AND OTHERS

RE: Confirmation of Outcome of Conference
Groups Two, Seven, Eight and Six of the Health Professionals "Not In Scope" Appeals 2007

On Monday 19 November 2007 a conference was convened by the Public Service Arbitrator ("the Arbitrator") to deal with those positions which were not agreed by the parties as being in scope.

During the course of the conference and with further consideration the Arbitrator has made the following recommendations as to whether the Groups 2, 7 and 8 positions be included in the scope of the review and be reclassified accordingly:

1. Appeal No. 103 – Position No. 405687/005283 – Position Title: "Coordinator Child Development Centres" – Not Recommended.

2. Appeal No. 123 – Position No. OS652 – Position Title: "State Coordinator" – Not Recommended.

3. Appeal No. 127 – Position No. 000013 – Position Title: "Manager, Medical Technology Management Unit" – Not Recommended.

4. Appeal No. 128 – Position No. 001974 – Position Title: "Manager Marketing & Medical Liaison" – Not Recommended.

9618 94204503 # 27 2

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION
111 St. George's Terrace Perth Western Australia 6000
Phone: (08) 9420 4444 Fax General: (08) 9420 4500 Fax Chambers: (08) 9420 4502
Freecall: 1800 624 263 Freefax: 1800 804 987 Internet: www.wairc.wa.gov.au

5. Appeal No. 108 – Position No. 001571 – Position Title: "Forensic Anthropologist" – Recommended.

6. Appeal No. 130 – Position No. 256107 – Position Title: "Clinical Research Associate" – Not Recommended.

7. Appeal No. 129 – Position No. 103994 – Position Title: "Scientific Officer (JRAC)" – Recommended.

At the previous conference on Thursday 8 November 2007 the parties put their respective positions regarding the Group 6 positions. The Arbitrator reserved her recommendations and undertook to advise the parties as soon as practicable. The appeals have since been reviewed in light of the parties' comments.

Group 6 is composed of:

1. Appeal No. 112 – Position No. 600768 – Position Title: "Manager Picture Archiving and Communication System/Radiology Information Systems (PACS/RIS)".

2. Appeal No. 113 – Position No. 002103 – Position Title: "Laboratory Information Systems Manager".

3. Appeal No. 117 – Position No. 1666 – Position Title: "Scientific Officer".

4. Appeal No. 118 – Position No. 103120 – Position Title: "Laboratory Information Services Officer".

5. Appeal No. 125 – Position No. 600923 – Position Title: "Senior Laboratory Information Services Specialist".

6. Appeal No. 126 – Position No. 103117 – Position Title: "Principal Scientist".

The Arbitrator recommends that the Group 6 positions:

1. Not be included in the scope of the present review.

2. Be reviewed in a separate process as at the current time.

If you have any questions please do not hesitate to call me on 9420 4484.

Yours faithfully

Ms Tamara Leslie
ASSOCIATE TO COMMISSIONER P E SCOTT

HH 2

Department of Health
Government of Western Australia

Health Industrial Relations Service

Your Ref:
Our Ref:
Enquiries:

Mr Dan Hill
Health Services Union of WA
8 Coolgardie St
PERTH WA 6000

Dear Mr Hill

Re: GROUP 5 AND GROUP 6 OUT OF SCOPE

I refer to our meeting of 5 March 2003 and detail WA Health's commitments in respect to the above matters.

1. The Group 5 positions excluded by the Arbitrator on 25 October 2007 will be reviewed at current date by a separate process yet to determined. Should any of these positions be reclassified as a result of that process the effective date of those reclassifications will be 25 October 2007.

2. The Group 6 positions excluded by the Arbitrator on 19 November 2007 will be reviewed at current date by a separate process yet to determined. Should any of these positions be reclassified as a result of that process the effective date of those reclassifications will be 19 November 2007

Attached please find a schedule of the positions referred to above.

Mr Steve Gregory and Mr John Ross will have carriage of these matters. Should you have any queries in this regard please contact Mr John Ross on 9489 2804.

Yours sincerely

Marshall Warner
DIRECTOR

16 March 2008

First Floor, 1 Centro Avenue, Subiaco WA 6008
PO BOX 8172 Perth Business Centre WA 6849
Telephone (08) 9489 2800 Fax (08) 9489 2877

SCHEDULE OF POSITIONS

GROUP FIVE
Composed of the following positions:

1. Appeal No. 115 – Positions No. 109983 and 110510 – Positions Title: "Manual Handling Coordinator".

2. Appeal No. 116 – Positions No. 400545/000723 and 400545/4511 – Positions Title: "Ergonomics Coordinator".

3. Appeal No. 119 – Positions No. 545/3841 and 400545/4320 – Positions Title: "Injury Management Officer" and "Senior Injury Management Officer".

4. Appeal No. 120 – Positions No. 104391 – Positions Title: "Rehabilitation Coordinator" and "Injury Management Coordinator".

5. Appeal No. 121 – Position No. 400545/0002 – Position Title: "Senior Scientific Officer".

6. Appeal No. 122 – Positions No. 400631/2539 – Positions Title: "Coordinator Manual Handling Education Programme" and "Education & Development Consultant – Manual Handling".

GROUP SIX
Composed of the following positions:

1. Appeal No. 112 – Positions No. 600768 – Positions Title: "Manager Picture Archiving and Communication System/Radiology Information Systems (PACS/RIS)".

2. Appeal No. 113 – Positions No. 002103 – Positions Title: "Laboratory Information Systems Manager".

3. Appeal No. 117 – Position No. 1666 – Position Title: "Scientific Officer".

4. Appeal No. 118 – Position No. 103120 – Position Title: "Laboratory Information Services Officer".

5. Appeal No. 125 – Position No. 600923 – Positions Title: "Senior Laboratory Information Services Specialist".

6. Appeal No. 126 – Position No. 103117 – Positions Title: "Principal Scientist".

2010 WAIRC 01226

APPEAL AGAINST THE DECISION MADE ON 12 OCTOBER 2010 OF THE EMPLOYER TO TERMINATE EMPLOYMENT CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUBEN SANZANA
	APPELLANT
	-v-
	DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS M McHUGH - BOARD MEMBER
	MR K TRENT - BOARD MEMBER
DATE	WEDNESDAY, 15 DECEMBER 2010
FILE NO	PSAB 23 OF 2010
CITATION NO.	2010 WAIRC 01226

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 10th day of December 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 "Director General, Disability Services Commission";

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 "Director General, Disability Services Commission".

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 01228

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURA MCCARD
	APPLICANT
	-v-
	PARNNGURR COMMUNITY SCHOOL ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 16 DECEMBER 2010
FILE NO/S	U 160 OF 2010
CITATION NO.	2010 WAIRC 01228

Result	Directions issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr R Eagle (of counsel)

Order

WHEREAS this matter was listed for a Directions hearing on 9 December 2010;

AND WHEREAS having considered it necessary to give directions for the expeditious and just hearing and determination of this matter;

AND WHEREAS having heard from Mr K Trainer (as agent) on behalf of the applicant and Mr R Eagle (of counsel) on behalf of the respondent;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and with the consent of the parties, hereby directs;

1. That discovery is to be informal. Agent for the applicant and counsel for the respondent are to provide a list of discoverable documents to the other by close of business on 17 December 2010.
2. That the respondent is to submit an amended notice of answer and counter proposal to the Commission, with a copy to the applicant, by close of business on 17 December 2010.
3. That there be liberty to apply on short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers' Union (Western Australian Public Sector) General Agreement 2010 AG 33/2010	23/12/2010	Director General of the Department of Agriculture and Food, the Director General of Environment and Conservation, the Director General of the Department of Education, the Chief Executive Officer of th	(Not applicable)	Commissioner S M Mayman	Agreement registered
Botanic Gardens and Parks Authority (Operations) General Agreement 2010 AG 30/2010	10/12/2010	Botanic Gardens and Parks Authority	The Western Australian Municipal, Road Boards, parks and Racecourse Employees' Union of Workers, Perth	Commissioner S M Mayman	Agreement registered
Combined Metal Industries Agreement November 2010 AG 29/2010	20/12/2010	Combined Metal Industries AND The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch	(Not applicable)	Commissioner S M Mayman	Agreement registered
Metropolitan Cemeteries Board (Western Australian) Cemetery Employees Enterprise Agreement 2010 AG 31/2010	10/12/2010	Metropolitan Cemeteries Board	The Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Commissioner S M Mayman	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
WA Health Engineering and Building Services Industrial Agreement 2010 AG 32/2010	17/12/2010	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel	Construction, Forestry, Mining and Energy Union (WA Branch), Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (WA Branch), Communications, Electrical, Electronic	Commissioner S M Mayman	Agreement registered
Zoological Parks Authority (Operations) Agreement 2010 AG 34/2010	23/12/2010	Zoological Parks Authority	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner S M Mayman	Agreement registered

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 21/2008	Mark Harold Higham	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott A/SC	Dismissed	17/11/2010
PSA 37/2008	Amanda Morgan	Royal Perth Hospital	Scott A/SC	Dismissed	3/11/2010
PSA 38/2008	Sally Vindedzis	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott A/SC	Dismissed	3/11/2010

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2010 WAIRC 01263

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	CHRIS BEASLEY
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	OSHT 5 OF 2010
CITATION NO.	2010 WAIRC 01263

Result	Order issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01265

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	PATRICIA BOYLE
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY 29 DECEMBER 2010
FILE NO/S	OSHT 85 OF 2010
CITATION NO.	2010 WAIRC 01265

Result	Order issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01233

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW DEMPSEY
	APPLICANT
	-v-
	ELECTRICAL CONSTRUCTION AND MAINTENANCE AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 20 DECEMBER 2010
FILE NO/S	OSHT 4 OF 2009
CITATION NO.	2010 WAIRC 01233

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 5 May 2009 the Occupational Safety and Health Tribunal (the Tribunal) convened a conference for the purpose of conciliating between the parties;

AND WHEREAS no agreement was able to be reached and the conference was adjourned for inspections and a further conference to take place on site at the respondent's premises in Collie;

AND WHEREAS inspections followed by a conference on site was held on 6 May 2009;

AND WHEREAS a further conference was held on 14 May 2009;

AND WHEREAS a hearing regarding preliminary issues was held on 27 May 2009;

AND WHEREAS at that hearing the respondent raised the jurisdiction of the Tribunal to deal with the claim;

AND WHEREAS on 2 June 2009 the Tribunal issued directions listing the matter for a jurisdictional hearing on 29 June 2009;

AND WHEREAS a further directions hearing was held on 25 June 2009;

AND WHEREAS a jurisdictional hearing was held on 30 June 2009;

AND WHEREAS on 17 August 2009 the Tribunal issued a declaration dismissing the jurisdictional challenge;

AND WHEREAS a hearing regarding preliminary issues was held on 17 August 2009;

AND WHEREAS a directions hearing was held on 25 August 2009;

AND WHEREAS the Tribunal issued directions listing the substantive matter for hearing on 26-29 October 2009 in Collie and 17–20 November 2009 in Perth;

AND WHEREAS a hearing was held on 26-29 October 2009 in Collie and 17–19 November 2009 in Perth;

AND WHEREAS on 19 November 2009 the hearing, with the consent of the parties, was adjourned;

AND WHEREAS the Tribunal convened conferences on 19 November 2009, 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01235

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 20 DECEMBER 2010
FILE NO/S	OSHT 2 OF 2009
CITATION NO.	2010 WAIRC 01235

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 5 May 2009 the Occupational Safety and Health Tribunal (the Tribunal) convened a conference for the purpose of conciliating between the parties;

AND WHEREAS no agreement was able to be reached and the conference was adjourned for inspections and a further conference to take place on site at the respondent's premises in Collie;

AND WHEREAS inspections followed by a conference on site was held on 6 May 2009;

AND WHEREAS a further conference was held on 14 May 2009;

AND WHEREAS a hearing regarding preliminary issues was held on 27 May 2009;

AND WHEREAS at that hearing the respondent raised the jurisdiction of the Tribunal to deal with the claim;

AND WHEREAS on 2 June 2009 the Tribunal issued directions listing the matter for a jurisdictional hearing on 29 June 2009;

AND WHEREAS a further directions hearing was held on 25 June 2009;

AND WHEREAS a jurisdictional hearing was held on 30 June 2009;

AND WHEREAS on 17 August 2009 the Tribunal issued a declaration dismissing the jurisdictional challenge;

AND WHEREAS a hearing regarding preliminary issues was held on 17 August 2009;

AND WHEREAS a directions hearing was held on 25 August 2009;

AND WHEREAS the Tribunal issued directions listing the substantive matter for hearing on 26-29 October 2009 in Collie and 17–20 November 2009 in Perth;

AND WHEREAS a hearing was held on 26-29 October 2009 in Collie and 17–19 November 2009 in Perth;

AND WHEREAS on 19 November 2009 the hearing, with the consent of the parties, was adjourned;

AND WHEREAS the Tribunal convened conferences on 19 November 2009, 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01234

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	COLIN JONES
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 20 DECEMBER 2010
FILE NO/S	OSHT 27 OF 2009
CITATION NO.	2010 WAIRC 01234

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS a hearing was held on 26-29 October 2009 in Collie and 17–19 November 2009 in Perth;

AND WHEREAS on 19 November 2009 the hearing, with the consent of the parties, was adjourned;

AND WHEREAS the Tribunal convened conferences on 19 November 2009, 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01236

REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	DEAN LLOYD
	APPLICANT
	-v-
	K & K ELECTRICAL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 20 DECEMBER 2010
FILE NO/S	OSHT 6 OF 2009
CITATION NO.	2010 WAIRC 01236

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 5 May 2009 the Occupational Safety and Health Tribunal (the Tribunal) convened a conference for the purpose of conciliating between the parties;

AND WHEREAS no agreement was able to be reached and the conference was adjourned for inspections and a further conference to take place on site at the respondent's premises in Collie;

AND WHEREAS inspections followed by a conference on site was held on 6 May 2009;

AND WHEREAS a further conference was held on 14 May 2009;

AND WHEREAS a hearing regarding preliminary issues was held on 27 May 2009;

AND WHEREAS at that hearing the respondent raised the jurisdiction of the Tribunal to deal with the claim;

AND WHEREAS on 2 June 2009 the Tribunal issued directions listing the matter for a jurisdictional hearing on 29 June 2009;

AND WHEREAS a further directions hearing was held on 25 June 2009;

AND WHEREAS a jurisdictional hearing was held on 30 June 2009;

AND WHEREAS on 17 August 2009 the Tribunal issued a declaration dismissing the jurisdictional challenge;

AND WHEREAS a hearing regarding preliminary issues was held on 17 August 2009;

AND WHEREAS a directions hearing was held on 25 August 2009;

AND WHEREAS the Tribunal issued directions listing the substantive matter for hearing on 26-29 October 2009 in Collie and 17–20 November 2009 in Perth;

AND WHEREAS a hearing was held on 26-29 October 2009 in Collie and 17–19 November 2009 in Perth;

AND WHEREAS on 19 November 2009 the hearing, with the consent of the parties, was adjourned;

AND WHEREAS the Tribunal convened conferences on 19 November 2009, 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01266

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ELIZABETH PRENDERGAST
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	OSHT 100 OF 2010
CITATION NO.	2010 WAIRC 01266

Result	Order issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2010 WAIRC 01264

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	BEN SMITH
	APPLICANT
	-v-
	JOHN HOLLAND PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 29 DECEMBER 2010
FILE NO/S	OSHT 32 OF 2010
CITATION NO.	2010 WAIRC 01264

Result	Order issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS there was an agreement that the application was to be dismissed by consent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2011 WAIRC 00001

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	KAART ENTERPRISES P/L
	APPLICANT
	-v-
	MR BILL CASSELLS
	CASSELL LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 7 JANUARY 2011
FILE NO/S	RFT 7 OF 2010
CITATION NO.	2011 WAIRC 00001

Result	Order varied
Representation	
Applicant	No appearance
Respondent	No appearance

Variation Order

WHEREAS the Tribunal made an order dated 30 August 2010 requiring the respondent to pay a fine pursuant to the Owner-Drivers (Contracts and Disputes) Act 2007 by reason of the respondent's failure to comply with a summons issued under s 45 of the Act ("the Order");

AND WHEREAS as a result of an administrative error the Order was sent to the respondent at the incorrect address for service;

AND WHEREAS in consideration of this matter and the date for compliance with the terms of the Order, pursuant to s 27(1)(k) of the Industrial Relations Act 1979, the Tribunal hereby extends the time fixed by the Order for compliance with its terms;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 and the Industrial Relations Act 1979, hereby orders –

THAT the respondent pay to the consolidated revenue through the office of the Registrar of the Western Australian Industrial Relations Commission the sum of $400.00 within 14 days.

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

2011 WAIRC 00015

DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	JEFFREY DANIEL MATTHEWS
	APPLICANT
	-v-
	WEBB FREIGHT SERVICES PTY LTD
	ACN 009 122 187
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 JANUARY 2011
FILE NO/S	RFT 15 OF 2010
CITATION NO	2011 WAIRC 00015

Catchwords	Referral to Road Freight Transport Industry Tribunal – Application for costs – Whether order made interlocutory or final – Relevant principles applied – Application dismissed – Industrial Relations Act 1979 ss 27(1)(c) and (o) – Owner-Drivers (Contracts and Disputes) Act 2007 ss 43(1).
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr I Carija of counsel

Reasons for Decision

1 By order of 11 November 2010, the Tribunal dismissed the applicant's claim on the basis that he was not an owner-driver for the purposes of s 4(2) the Owner-Drivers (Contracts and Disputes) Act 2007 ("the OD Act") and thus the claim was beyond the Tribunal's jurisdiction.

2 By request dated 11 November 2010 the respondent's solicitor sought the re-listing of the application for the purposes of pursuing an application for costs against the applicant. Written submissions from the respondent were filed with its request for the re-listing of the matter.

3 The costs application was listed for hearing by the Tribunal on 7 December 2010. On 6 December 2010, another copy of the earlier written submissions of the respondent was filed, along with a further outline of submissions. This second outline appears not to have been served on the applicant. The Tribunal directed the service by the respondent on the applicant, of the earlier submissions. Proof of service of these submissions was duly filed by the respondent. All of the written and oral submissions have been considered and taken into account in the following reasons.

Contentions

4 At the hearing on 7 December 2010, the respondent made a number of submissions in connection with its application for costs.

5 Whilst counsel for the respondent referred to ss 27(1)(c) and (o) of the Industrial Relations Act 1979 ("the IR Act"), made applicable by s 43(1) of the OD Act, the submissions generally referred to and relied upon costs principles applying to proceedings in the civil courts, and not those before the Industrial Commission.

6 It was contended by counsel for the respondent that the proceedings before the Tribunal leading to the order dismissing the applicant's claim, which proceedings only dealt with jurisdiction, were interlocutory in nature. On this basis, it was submitted that s 27(1)(o) of the IR Act had application, which on its proper construction, does not exclude costs for legal practitioners and agents, as opposed to s 27(1)(c) of the IR Act, which does.

7 Applying this principle, it was submitted by counsel for the respondent that there was no barrier to costs following the event, as in civil litigation. Furthermore, the respondent contended in the alternative, in response to the Tribunal raising with it principles applicable to costs applications in the Industrial Commission, established by authorities such as *Brailey v Mendex* (1992) 73 WAIG 26, that there were extreme circumstances associated with the conduct of the applicant's case in this matter.

8 The extreme circumstances asserted by the respondent related to the fact that the applicant originally had on foot proceedings in the District Court in relation to his claims; that allegations of fraud were made against the respondent without proper foundation; and the conduct of the applicant in putting his case before the Tribunal unnecessarily enlarged the issues, causing the respondent to incur additional time and expense in defending the proceedings.

9 During the course of the hearing, counsel seemed to expand on the scope of the costs sought against the applicant, to also incorporate costs for earlier interlocutory hearings before the Tribunal, relating to production and discovery of documents, and applications by the applicant for the joinder of parties and other matters.

10 By reason of the expanded scope of the application, and the lack of particularity by the respondent as to the interlocutory proceedings in respect of which costs were sought, both parties were granted leave to file further written submissions in relation to costs within seven days, that being by 14 December 2010.

11 The respondent filed further written submissions in relation to costs on 14 December 2010 as did the applicant. However, the applicant informed the Tribunal that some of the respondent's earlier written submissions had not been served upon him. Accordingly, on 21 December 2010, the Tribunal directed the respondent to serve the applicant with any outstanding written submissions and to file a declaration of service accordingly. The applicant was given a period of fourteen days from receipt of the respondent's further written submissions to file any written submissions in reply.

12 In its further written submissions, the respondent expanded upon its earlier submissions in relation to whether the proceedings of the Tribunal on 4 October 2010, leading to the order of dismissal of the claim on 11 November 2010, were interlocutory or final.

13 As the Tribunal understood the respondent's contentions on this point, it was submitted that the hearing as to the Tribunal's jurisdiction, specifically whether the applicant was an owner-driver for the purposes of the OD Act, did not determine the broader substance of the applicant's claim. It was submitted that the order of the Tribunal, dismissing the applicant's claim for want of jurisdiction, is not final as to all of the allegations between the parties in another court of competent jurisdiction.

14 Reference was made to a number of authorities as to whether a decision is properly characterised as interlocutory or final, for the purposes of an appeal to an appellate court as of right. Reference was made to *Waller v Waller* [2009] WASCA 61 where Pullin JA said at pars 26-27:

"**Was the order interlocutory or final?**

26 The word 'interlocutory' has different meanings. An interlocutory order may be one 'given in the course of an action', *Shorter Oxford English Dictionary*, (vol 1, 5th ed) or it may mean, as it has been held to mean when used in a provision like s 60(l)(f) of the *Supreme Court Act 1935* (WA), that it is an order which does not finally dispose of the rights of the parties. Whether an order finally disposes of the rights of the parties will be determined by examining the order itself and not by examining the nature of the application. If despite the order a further application seeking the same relief is possible, then it will be interlocutory. If not, it will be final. See ***Hall v The Nominal Defendant*** (1966) 117 CLR 423, 441 (Taylor J); ***Licul v Corney*** (1976) 180 CLR 213, 225 (Gibbs J) and ***Carr v Finance Corporation of Australia Ltd (No 1)*** (1981) 147 CLR 246. These judgments of the High Court however raise a further question; namely, what is meant by the 'rights of the parties'. Does it mean the rights of the parties in the action or suit in which the order was made; or does it mean the rights of the parties in some broader sense.

27 If the reference to the rights of the parties is used in a broad sense, and one can step outside the proceedings, that is outside the action or the suit in which the order was made, to identify the 'rights of the parties', then it can be argued that the rights of the parties are those which may be determined in a later action and a pre-action discovery order is merely an adjunct to those contemplated in other proceedings. If that reasoning is correct then the pre-action discovery order does not determine the foreshadowed rights of the parties in those other proposed proceedings."

15 Furthermore, reference was made to the observations of Le Miere AJA in the same case at pars 113-115 as follows:

"113 In ***Licul v Corney*** (1976) 180 CLR 213 Gibbs J said:

The distinction between final and interlocutory judgments is not always easy to draw and there has been disagreement as to the test by which the question whether a judgment is final or interlocutory is to be determined. One view ... is that the test depends on the nature of the application made to the court. The other view which, since ***Hall v Nominal Defendant*** ..., should, I think, be regarded as established in Australia, depends on the nature of the order made; the test is: does the judgment or order, as made, final dispose of the rights of the parties (225)?

114 In ***Carr v Finance Corporation of Australia Ltd (No 1)***: (1981) 147 CLR 246 the High Court considered an appeal from a decision of the New South Wales Court of Appeal determining an appeal from an order declining to set aside a judgment by default. Gibbs J said:

The question whether a judgment is final or interlocutory for the purpose of the rules relating to appeals is one productive of much difficulty. The test now applied in this court for determining whether a judgment is final or not is whether the judgment or order appealed from, as made, finally determines the rights of the parties: ***Licul v Corney*** [1976] HCA 6; (1976) 180 CLR 213. An order refusing to set aside a default judgment does not as a matter of law finally dispose of the rights of the parties, for it is open to the disappointed defendant to apply again to have the judgment set aside: ***Hall v Nominal Defendant*** [1966] HCA 36; (1966) 117 CLR 423. In practice, in some cases a second application of that kind might be successful, for example, when the first application had been dismissed on a technicality. In other cases, however, the second application would be doomed to failure because the issues of substance which it raised would have been decided adversely to the defendant in the first application. The appellants here submit that their right to make a further application is purely theoretical, since any such application must necessarily fail, and urge that in these circumstances the judgment should be regarded as a final one.

In my opinion the test in ***Licul v Corney*** requires the court to have regard to the legal rather than the practical effect of the judgment. If this were not so, the question whether a judgment is final or interlocutory would be even more uncertain that it is at present. In some cases it would be necessary for the court, for the purpose of determining the practical effect of an order refusing to set aside a default judgment, to embark on a detailed inquiry as to the facts of the matter and the course of the proceedings already taken - - an inquiry quite inappropriate when the only issue is whether a right of appeal exists. As will be seen, it would be necessary to make an inquiry of that kind in the present case if the practical test were to be adopted. The rigour of the rule that the legal effect of the judgment is decisive may of course be mitigated by the exercise of the court's power to grant special leave to appeal (248).

115 In ***Malouf v Malouf*** (1999) 86 FCR 134, 42 - 143 Beaumont, Lee and Dowsett JJ considered whether an order dismissing an application for pre-trial discovery was interlocutory or final. The court reviewed relevant authorities and concluded:

> For present purposes, we need only consider ***Hall***. That decision has been followed consistently in Australia and appears to be materially indistinguishable from the present case in that it involved an application in advance of the commencement of substantive proceedings. It establishes that for the purposes of determining whether there is an appeal as a right, itself dependent upon whether the decision in question was final or interlocutory, the test is whether or not the order in question precludes a further application. There is nothing in the rule currently under consideration which would preclude an applicant from making more than one application thereunder. No doubt, an application based on the same grounds

> as a previous application would be unsuccessful, but for the reasons advanced by the High Court, that is not relevant. The order is interlocutory. There is no appeal as of right [36]."

16 It was contended, in reliance upon these authorities, that for the purposes of s 27(1)(o) of the IR Act, the order of the Tribunal of 11 November 2010 was not a final order but was truly interlocutory. There was no determination by the Tribunal as to the merits of the applicant's claim or as to quantum, as the submission went.

17 In referring to s 27(1)(o) of the IR Act, counsel submitted that the words "to be taken before the hearing of any matter" for the purposes of this paragraph, can only properly refer to the hearing of the applicant's substantive claim as reflected in the notice of application or "pleadings", being for damages, profits and losses. It is on this basis that the respondent contended that the hearing before the Tribunal on 4 October 2010, leading to the order of dismissal for want of jurisdiction, was properly characterised as interlocutory in character and decided the question of jurisdiction only.

18 If this submission was accepted, the respondent then contended that there was no impediment to granting an order for costs, including costs of legal practitioners and agents by reason of the plain language of s 27(1)(o). Furthermore, given the way in which the applicant conducted its case, the respondent submitted that costs should be awarded on an indemnity basis, in reliance upon relevant principles in relation to the grant of costs orders on an indemnity basis in civil litigation and expressly referred to the observations of Pullin J in *Flotilla Nominees Pty Ltd v Western Australian Land Authority* (2003) 28 WAR 95.

19 In reliance upon these submissions, counsel for the respondent sought costs in the total sum of $15,600 under various heads as set out in a brief schedule annexed to its final written submissions.

20 The applicant in its written submissions filed on 14 December 2010, strongly opposed any order for costs being made against him. The applicant submitted that it has been held already by the Commission that there is no material distinction between ss 27(1)(c) and (o) of the IR Act in relation to the powers of the Commission to make costs orders and that s 27(1)(o) should be interpreted in the same way as s 27(1)(c) i.e. that costs are not to be awarded in relation to the services of any legal practitioner or agent: *Bernard Roy Worthington v Falkirk Nominees T/A Ross Hughes and Co* (2003) 83 WAIG 1831; *Bradley Mitchem v Parkfeeds (WA) Pty Ltd* (2002) 83 WAIG 1232.

21 Reference was made to *Brailey* and also the decision of Kenner C in *Lorraine Rose Allen v Aboriginal Legal Service* (2007) 87 WAIG 1353.

22 The applicant submitted there were no extreme or special circumstances to warrant making a costs order in this case. It was contended that the applicant had conducted his case in a genuine and proper fashion and pursued his claim on the basis of legal advice. It was submitted that at all material times the applicant conducted the proceedings in good faith without any intended abuse of process of the Tribunal. Simply because the applicant's case failed, is no warrant for a costs order to be made against him.

23 In relation to the District Court action, the applicant submitted those proceedings were discontinued when it was determined by the applicant that the Tribunal was the more appropriate forum. It was further contended by the applicant that the allegations of fraudulent conduct were never made against the respondent "knowing them to be false" and the applicant maintained that the evidence before the Tribunal disclosed an element of fraud perpetrated by the respondent on the applicant.

24 Whilst there were extensive submissions made by the applicant in relation to this issue, including those relating to turnover figures for the respondent's business, that material was not in evidence before the Tribunal for the purposes of the hearing on jurisdiction and cannot be relied upon in the context of this costs application.

25 Moreover, the applicant submitted that this was not a situation where the applicant had a hopeless case which was bound to fail. He submitted that the case was put as well as he could do so by an unqualified agent and at all material times, both he and his agent, acted in good faith and pursued the claim before the Tribunal in the genuine belief that this was the appropriate jurisdiction in which to ventilate his claims.

26 The applicant also contended that by the respondent's conduct, the circumstances are such that costs should be awarded against it in the applicant's favour. It was contended that the respondent by its conduct and through its solicitor, has led to significant delays and expense being incurred by the applicant. Referred to in this regard, were failures by the respondent to comply with obligations to discover relevant documents; the making of spurious applications such as to have Ms Marr, the agent for the applicant, disqualified from acting as agent; being late for directions hearings, and to generally having been uncooperative and disingenuous in the conduct of the respondent's defence to the applicant's claim.

Consideration

27 For the following reasons in my opinion, no costs order should be made in these proceedings against either party to the claim before the Tribunal.

28 As noted above, by s 43(1) of the OD Act, ss 27(1)(c) and (o) of the IR Act apply to the exercise of the jurisdiction of the Tribunal under the OD Act. Relevantly, these provisions of the IR Act provide as follows:

> **"27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> …
>
> (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent;
>
> …

(o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings, the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing;"

29 It is well settled in the jurisdiction of the Industrial Commission and as a matter of general policy in industrial jurisdictions more broadly, that costs should not be awarded except in extreme cases: *Brailey.* Whether this general approach should continue is an open question in my opinion, but is one ultimately for the Parliament in this State.

30 Whilst in *Brailey*, the Full Bench considered the terms of s 27(1)(c) of the IR Act, in my opinion, the same principles ought to apply to s 27(1)(o) of the IR Act. In s 27(1)(o), dealing with interlocutory proceedings, there is no express exclusion for the costs of a legal practitioner or agent, as appears in s 27(1)(c). However, it is trite to observe that a statutory provision should be interpreted in context, in particular, different parts of the same section of an Act.

31 It is plain that the main source of power to award costs by the Commission and in turn, the Tribunal, is s 27(1)(c). This provision expressly excludes costs of the services of a legal practitioner and agent, and reflects the general policy position applying to proceedings before industrial courts and tribunals, noted above.

32 With such a clear statement of Parliamentary intent reflected in the main empowering provision, it would be surprising, in my opinion, that Parliament would contemplate that s 27(1)(o) of the IR Act should be interpreted differently, such that in interlocutory proceedings, before a hearing of a matter, costs of legal practitioners and agents could be recovered, when in the main hearing of a claim, they could not. Such a construction of the statute would be completely at odds with the stated principle as expressed in s 27(1)(c) of the IR Act, and one that in my view, would require plain words to make such an intention manifest.

33 In any event, even if I am in error in that conclusion, in my view, the authorities relied upon by the respondent as to the distinction between interlocutory and final orders do not support the respondent's argument for costs. The guiding principle, as to whether a judgement is final or interlocutory, is whether the judgement or order finally determines the rights of the parties: *Licul v Corney* (1976) 180 CLR 213; *Hall v Nominal Defendant* (1966) 117 CLR 423.

34 In this case, there is no doubt in my view, that the order of the Tribunal on 11 November 2010, to the effect that the application be dismissed for want of jurisdiction, finally determined the rights of the parties in the proceedings before the Tribunal. No further application could be made to the Tribunal, in relation to the merits of the applicant's claim, because the Tribunal determined that the applicant was not able to establish an essential ingredient to bring a claim before the Tribunal, that being that he was an owner-driver for the purposes of the OD Act. No further application for relief in respect of the applicant's contentions can be made to the Tribunal.

35 Whether the applicant may be able to recommence proceedings in the District Court, or elsewhere, such as the Industrial Commission alleging a denial of contractual benefits for example, is an entirely different question. That does not mean that the Tribunal's order dismissing the applicant's claim was other than final. It finally determined the rights of the parties in the proceedings before the Tribunal and insofar as the respondent is concerned, no further proceedings could be commenced against it in the Tribunal, by reason of the Tribunal's order.

36 Furthermore, in my opinion, the terms of s 27(1)(o) of the IR Act, when referring to "proceedings to be taken before the hearing of any matter," do not include proceedings in the nature of a hearing as to the jurisdiction of either the Commission or the Tribunal to entertain a claim. The question of jurisdiction is fundamental to any proceedings. The question of jurisdiction is integral to "the hearing of any matter" and is a part of any such hearing before the Commission or the Tribunal. In my view, what s 27(1)(o) is directed towards, are proceedings of the kind referred to in the paragraph and such other proceedings as may be preparatory to the hearing of any claim.

37 In this case, adopting the construction of ss 27(1)(c) and (o) of the IR Act as above, I am not persuaded that there are extreme circumstances in the conduct of either the applicant's or the respondent's cases, to warrant the making of a costs order by the Tribunal. Simply because the applicant's claim failed on the basis of jurisdiction, does not mean that the case was hopeless at the outset or was otherwise instituted for improper or ulterior purposes.

38 There is no doubt that the applicant had a genuine albeit, ultimately, a misguided belief that he was an owner-driver for the purposes of the OD Act. The applicant pursued his claim on the basis of that genuine belief, seemingly having taken some legal advice as to the appropriate jurisdiction to commence a claim. I am not satisfied that the applicant's claim was manifestly groundless or so hopeless as to warrant an abuse of process of the Tribunal.

39 Nor am I persuaded that the allegations of fraud, such as they were, were made knowingly falsely. There was no evidence to support such a contention. The applicant had, and no doubt still has, a deep seated belief that he was wronged by the respondent and monies which he thought were going towards the ultimate purchase of the respondent's business have not been thus far, returned to him, by an order of a competent court or tribunal.

40 The Tribunal has no grounds to conclude that that belief was not genuinely held at the time of the commencement of the proceedings or that the applicant, in commencing the proceedings before the Tribunal, had some ulterior motive or wilfully disregarded the established facts or the law.

41 Likewise, insofar as the applicant's claim for costs is concerned, I am not persuaded that the circumstances are extreme such that an order should be made in the applicant's favour.

42 The proceedings before the Tribunal have been vigorously contested by the respondent at each stage of the matter, as it is entitled to do. Whilst the respondent did delay in providing some documents to the applicant at an earlier stage of the proceedings and made a somewhat misguided application to disqualify Ms Marr as the agent for the applicant, such a situation does not constitute in my view, an extreme circumstance.

43 The respondent was entitled to and indeed did ultimately successfully defend the applicant's claim on the ground that the claim fell outside of the jurisdiction of the Tribunal. It may equally be said that some of the applications brought by the applicant were misconceived and also caused some additional time and expense to be incurred by the respondent.

44 In my view neither the applicant nor the respondent has satisfied the accepted tests for costs and the orders sought by both parties are refused.

2011 WAIRC 00016

DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	JEFFREY DANIEL MATTHEWS
	APPLICANT
	-v-
	WEBB FREIGHT SERVICES PTY LTD
	ACN 009 122 187
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 JANUARY 2011
FILE NO/S	RFT 15 OF 2010
CITATION NO.	2011 WAIRC 00016

Result	Applications dismissed
Representation	
Applicant	In person
Respondent	Mr I Carija of counsel

Order

HAVING heard the applicant in person and Mr I Carija of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

THAT the applicant's and respondent's applications for costs be and are hereby dismissed.

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

2010 WAIRC 00332

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS', WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	KELAIR HOLDINGS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 9 JUNE 2010
FILE NO/S	RFT 9 OF 2010
CITATION NO.	2010 WAIRC 00332

Result	Direction issued
Representation	
Applicant	Ms M Papa
Respondent	Mr J Green

Directions

HAVING heard Ms M Papa on behalf of the applicant and Mr J Green on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it by the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs -

1. THAT the applicant file further and better particulars of its claim by 18 June 2010.
2. THAT the respondent file and serve particulars of its answer by 2 July 2010.
3. THAT the claim be referred for hearing and determination by the Tribunal.
4. THAT the parties have liberty to apply.

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

2010 WAIRC 01253

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS', WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	KELAIR HOLDINGS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 DECEMBER 2010
FILE NO/S	RFT 9 OF 2010
CITATION NO	2010 WAIRC 01253

Catchwords	Owner-Driver Contract – Jurisdiction of Tribunal – Requirement under s40(a)(ii) Owner-Drivers (Contracts and Disputes) Act 2007 that a party to the contract be eligible to be enrolled as a member of the applicant – Referral of dispute regarding payment of claim and damages – No provision in contract for set-off – General indemnity provision in contract to be read with terms and conditions of contract between the respondent and its customers – Contract terminated for serious misconduct – Application granted in part, Order issued – Owner-Drivers (Contracts and Disputes) Act 2007 s4, s5, s40(a).
Result	Application granted in part, order issued.
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr J Green

Reasons for Decision

1 The applicant has referred this matter to the Tribunal pursuant to s 40(a) of the Owner-Drivers (Contracts and Disputes) Act 2007 ("the Act") on behalf of J & Z Bins Pty Ltd. The applicant makes payment claims against the respondent for work performed and also claims damages under various heads, including arising from an alleged breach of contract by the respondent.

Preliminary Issue

2 Since this matter was heard by the Tribunal, on 30 November 2010, in application RFT 19 of 2010, the Tribunal upheld an objection to the jurisdiction of the Tribunal to hear an application before it, on the ground that the party to the relevant owner-

driver contract in those proceedings was not eligible to be enrolled as a member of the applicant, for the purposes of a referral to the Tribunal pursuant to s 40(a)(ii) of the Act.

3 Given the issues arising in application RFT 19 of 2010, the Tribunal invited further written submissions from the parties to these proceedings, as to whether any similar jurisdictional hurdles arose in this matter.

4 A written submission was received from the applicant however no submission was received from the respondent, despite an extension of time being afforded to it to do so.

5 The applicant submitted that on the evidence in this matter, the owner-driver contract is exhibit A2. The parties to the contract are the respondent, J & Z Bins Pty Ltd, referred to as the Contractor and Mr John Babic, referred to in the contract as the Guarantor.

6 The applicant contended that there is no dispute that J & Z Bins Pty Ltd is a corporation, incorporated pursuant to the terms of the Corporations Act 2001 (Cth). Mr Babic is a director of J & Z Bins Pty Ltd and is a member of the applicant. It was on this basis that Mr Babic sought the assistance of and representation by the applicant for the purposes of commencing the present proceedings before the Tribunal.

7 The relevant provision of the Act is s 40(a) which is in the following terms:

> **"40. Persons who may refer disputes and matters to the Tribunal**
>
> A dispute or matter may be referred to the Tribunal —
>
> (a) in the case of a dispute arising under or in relation to an owner-driver contract, by —
>
> (i) a person who is a party to the owner-driver contract; or
>
> (ii) a transport association in which a party to the owner-driver contract is eligible to be enrolled as a member; or
>
> (iii) an inspector; or
>
> (iv) the Minister;
>
> and …"

8 Relevantly, cl 29 of the contract provides that Mr Babic, as the Guarantor, guaranteed the performance of J & Z Bins Pty Ltd's obligations under the contract with the respondent. The relevant provision of the Guarantee, as set out in cl 29 of the contract is as follows:

> "… the Guarantor hereby … guarantees … the payment of all monies payable to [the Respondent] … and the due and punctual performance by the Contractor of the terms, covenants, conditions and provisions on the part of the Contractor under this Deed of Contract …"

9 On the strength of this provision, when read with the terms of s 40(a)(ii) of the Act, it was submitted that Mr Babic, as Guarantor, had a substantial role to play in the discharge of J & Z Bins Pty Ltd's obligations under the contract. On this basis, it was contended that Mr Babic was thereby "a party to the owner-driver contract" for the purposes of s 40(a)(ii), because in addition to being named, Mr Babic had substantive obligations upon him as a party.

10 Therefore, the submission of the applicant was that the error as found in application RFT 19 of 2010, which was fatal to those proceedings, has no application to the present matter before the Tribunal.

11 On an examination of the terms of the contract in the context of the evidence as a whole, the Tribunal accepts the applicant's submissions in this regard. It is plain that Mr Babic, as a member of the applicant, was a party to the contract at the material times for the purposes of the present claims. The terms of the contract between the respondent and J & Z Bins Pty Ltd and Mr Babic, required Mr Babic to play an active role in the discharge of the obligations of J & Z Bins Pty Ltd and his inclusion as a party was not a matter of mere formality.

12 Accordingly, the Tribunal finds that the present referral is properly before it and within its jurisdiction.

13 I now turn to consider the merits of the applicant's claim.

Factual Background

14 Mr Babic testified that he entered into the contract with the respondent through his company J & Z Bins Pty Ltd, to provide waste collection and disposal within Western Australia. It was a term of the contract that J & Z Bins Pty Ltd was required to purchase a motor vehicle being a 2005 Hino truck together with a power take-off and pump. J & Z Bins Pty Ltd also paid the respondent an agreed sum in relation to goodwill in consideration for the respondent providing J & Z Bins Pty Ltd with ongoing services for the term of the contract.

15 In accordance with the terms of the contract, a "skip lifter" was fitted onto the chassis of the truck which lifter remained the property of the respondent and was to be returned to it on termination of the contract.

16 The contract commenced on 27 January 2006. Mr Babic testified that he commenced the performance of services for the respondent in accordance with the terms of the contract. This involved the dropping off and picking up of steel waste disposal bins to and from customers.

17 Mr Babic gave evidence that he performed services under the contract between 25 January 2010 and 8 February 2010 in relation to which he invoiced the respondent. Copies of invoices for work performed, at the agreed cartage rates, were tendered as exhibit A3. Mr Babic testified that the respondent has not paid J & Z Bins Pty Ltd for the work performed.

18 Furthermore, sometime on or around 8 February 2010, Mr Babic said that he received a telephone call from Mr Green of the respondent to inform him that the respondent was terminating its contract with J & Z Bins Pty Ltd because of allegations that there had been misappropriation of the respondent's property. This was denied by Mr Babic.

19 Mr Babic said that when the skip lifter was removed from the chassis of his truck, other equipment, including the rear lights and a hydraulic pump were also taken away. Mr Babic says these items were his property.

20 Tendered as exhibit A4, were details of the replacement cost of the pump and its installation. The total cost being some $1029.90 plus GST. Also tendered, as exhibit A5, were quotes provided for the replacement cost and installation of the rear lights for Mr Babic's truck. The total sum being $314.20.

21 Furthermore, Mr Babic testified that on two occasions, the respondent made deductions from his earnings in respect of alleged damage caused by him at a customer's premises. These deductions, evidenced by exhibit A6, involved damages allegedly charged to the respondent by Collier Homes in July 2006 in the amount of $225.00 and the cost of repairing damage to an awning in Malaga in August 2006, in the sum of $770.00.

22 In relation to the termination of the contract, Mr Babic testified that on average he was earning around $4,500.00 per month and tendered as exhibit A8, were remittance advices from the respondent in the period 25 September 2008 to 27 February 2009, to this effect.

23 In total, including the payment for work performed, the loss of earnings for one month, damages to his truck and the deductions from the contract sums made by the respondent, the applicant claims a total of $11,132.27 plus interest.

24 As to the claims for payment for work performed, the respondent did not dispute that the work was performed and that the payments claimed were due and payable. The respondent contended that Mr Babic, through J & Z Bins Pty Ltd, had misappropriated the respondent's property and the monies owed were withheld on this basis.

25 In relation to this issue, Ms Dow gave evidence on behalf of the respondent. Ms Dow is a yard supervisor and gate attendant at the respondent. Ms Dow testified that when trucks enter the yard with bins, the drivers are required to provide a relevant identification number or truck number for each bin delivery. The information is entered into a computer so that it can be verified. She testified that the rule was "no task number, no bins in".

26 After the computerised system was introduced, Ms Dow testified that Mr Babic approached her and offered to pay her $40 cash to bring the bins in without going through this process. She said that she informed him that "no, it's not worth my job. It's not worth yours". Ms Dow said she was upset and offended that Mr Babic would make such a request of her.

27 After this conversation, she reported the matter to the senior management of the respondent who requested her to agree to this arrangement, on the basis that it was done for the purposes of obtaining evidence against Mr Babic. From about late October 2009 to early February 2010, Ms Dow said she kept a written record of every occasion over this time when Mr Babic entered through the gate with a bin and paid her $40 cash. She recorded each incident in a journal, and put the money in an envelope and attached it to her journal entry for that particular day.

28 Tendered as exhibit R1 was a list of days over this period, with the bin sizes, when Mr Babic entered the premises on this basis. When cross examined on this document, Ms Dow says it was not prepared by her and she could not recall each and every incident set out in it, and had not bought her journal with her. It was Ms Dow's evidence that she was in no doubt that the $40 cash payment per bin was intended for her personally as this was how Mr Babic put the proposal to her.

Consideration

29 There is no dispute by the respondent that the payment claim is in relation to work performed by J & Z Bins Pty Ltd in accordance with the terms of the contract. The Tribunal is satisfied and finds that for the purposes of s 4 of the Act, J & Z Bins Pty Ltd was an owner-driver as a body corporate which carried on the business of transporting goods in accordance with an owner-driver contract which I find to exist for the purposes of s 5 of the Act.

30 On the evidence of Mr Babic, I am satisfied and I find that J & Z Bins Pty Ltd performed services in accordance with the terms of the owner-driver contract for the period between 25 January 2010 and 8 February 2010, as referred to in the invoices at exhibit A3 in the total sum of $4,450.64. There was no basis under the terms of the contract for the respondent to withhold the payment claim sum and the Tribunal will make an order that that sum plus interest, be paid.

31 In relation to the claim of loss of earnings in the sum of $4000.00, by reason of damages for an alleged breach of the contract by its summary termination, I am not persuaded to grant that claim.

32 Clause 16 – Termination of the contract, at sub-par (b)(iv) enabled the respondent to terminate the contract without notice to J & Z Bins Pty Ltd if it, its employees or agents, wilfully or negligently damaged any property of the respondent or misappropriated any property, or was guilty of any dishonesty, serious misconduct, serious neglect or failure to carry out the services.

33 The respondent alleged that Mr Babic, through J & Z Bins Pty Ltd, stole revenue from the respondent by engaging in the practice of bringing into the respondent bins without task numbers, and paying Ms Dow $40 in cash per bin. This was also denied by Mr Babic. On the evidence before the Tribunal, I am not able to draw any such conclusions in relation to the

allegation of stealing of the respondent's property. The state of the evidence simply does not enable the Tribunal to make any positive findings to this effect.

34 However, it is clear that an inference is open to be drawn, and I do draw such an inference, that the payment of $40 cash to Ms Dow was for a purpose inconsistent with the proper practices and procedures of the respondent for receiving waste bins into its premises. I further infer that it was done for the purpose of deliberately avoiding any proper record of receipt of the bins. Not only was this done, but it was done in an attempt to engage the assistance of another employee of the respondent. Ms Dow only did so, on the authority of the respondent, to obtain evidence of the conduct. I have no reason to doubt the evidence of Ms Dow, who I found to be a credible witness.

35 To that extent, I am satisfied that Mr Babic and J & Z Bins Pty Ltd engaged in serious misconduct such that the respondent was entitled to terminate the contract without notice. In my opinion therefore, the claim for loss of earnings following the termination of the contract must fail.

36 In relation to the damage and loss to Mr Babic's truck, as the respondent undertook to the Tribunal to return the pump to Mr Babic in accordance with the evidence through exhibit A4, there will be an award of $240.00 in relation to labour costs for its installation, inclusive of GST, as damages.

37 In relation to the rear left and right tail lights removed from Mr Babic's truck, it was accepted that the left and right tail lights have been replaced at a cost of $553.74, including parts, delivery and fitting costs. There was no contractual basis to remove them. That amount will be awarded in full.

38 Finally, the Tribunal considers the claim alleging unlawful deductions for damage allegedly caused by J & Z Bins Pty Ltd in the total sum of $925.00.

39 It is to be noted that by exhibit A7, which is a copy of a tax invoice delivery document of the respondent, the attached terms of conditions of contract with a customer provide at par 3, that "Instant Waste Management shall not be responsible or liable for any damage caused to the customer's property in delivering or removing the container to and from the customer's property."

40 There was no evidence adduced by the respondent in relation to the damage alleged to have been caused by J & Z Bins Pty Ltd at the respondent's customer's premises. Mr Babic in his evidence denied that he caused any such damage.

41 In the absence of any cogent evidence being led by the respondent, the burden of which falls on it, the Tribunal cannot make any positive findings in this regard. Furthermore, even if there was such evidence before the Tribunal, it is open to question as to whether there would be any contractual capacity for the respondent to recover in respect of such matters.

42 At cl 19 – Indemnity of the contract, there is a general indemnity such that the contractor is responsible for and indemnifies the respondent against liability for all loss, damage or injury to persons or property caused by the contractor with the contractor being obliged to make good any such claims. In the event that the contractor fails to make good such claims, the respondent had the capacity to deduct such amount from any monies owing to the contractor under the contract.

43 Whilst on the face of it, this general indemnity may cover the circumstance of the damage as alleged, it must also be read with the terms and conditions of contract entered into between the respondent and its customers, as referred to above in exhibit A7.

44 In my opinion, it would be open to argue persuasively, that the general indemnity in the contract must be read with the terms and conditions of contract between the respondent and its customers, such that the respondent is not liable for damage caused as a consequence of delivery of bins to the customer's property. If that is so, it is difficult to see how any "liability" can arise in order to bring into effect the general indemnity as against a contractor, imposed by cl 19 of the contract.

45 Accordingly, the amount of these deductions will be ordered to be paid to the applicant.

Conclusion

46 Whilst the respondent has resisted paying to J & Z Bins Pty Ltd any monies by reason of its allegation of misappropriation by J & Z Bins Pty Ltd, there was no basis in the contract for any general set-off of that kind. If the respondent considers that it has claims against either or both of J & Z Bins Pty Ltd and Mr Babic in relation to these matters that will have to be pursued independently of these particular proceedings before the Tribunal.

47 For the foregoing reasons, there will be an order that the respondent pay to J & Z Bins Pty Ltd the sum of $6,169.38. Additionally, interest pursuant to Schedule 1 of the Act will be awarded on the payment claims under the contract for the $4,450.00 not paid, at the rate of six percent from 1 February 2010, being about seven days from the date of the first payment claim of 25 January 2010, in accordance with cl 7(a)(i) of the contract. The total interest amount is $231.07 leading to a total amount of $6,400.25.

48 The Tribunal orders accordingly.

2010 WAIRC 01254

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS', WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	KELAIR HOLDINGS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 DECEMBER 2010
FILE NO/S	RFT 9 OF 2010
CITATION NO.	2010 WAIRC 01254

Result	Order issued
Representation	
Applicant	Mr A Dzieicol of counsel
Respondent	Mr J Green

Order

Having heard Mr A Dzieciol, of counsel, on behalf of the applicant and Mr Green on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby:

ORDERS the respondent to pay to the applicant the total sum of $6,400.25 inclusive of interest within 21 days of the date of this order.

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

2010 WAIRC 01216

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	GREEN & GOLD HIAB SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 10 DECEMBER 2010
FILE NO/S	RFT 10 OF 2010
CITATION NO.	2010 WAIRC 01216

Result	Discontinued by Leave
Representation	
Applicant	Mr D Cain, Mr A Dzieciol of counsel
Respondent	Mr French

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2010 WAIRC 01217

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	GREEN & GOLD HIAB SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 10 DECEMBER 2010
FILE NO/S	RFT 11 OF 2010
CITATION NO.	2010 WAIRC 01217

Result	Discontinued by leave
Representation	
Applicant	Mr D Cain, Mr A Dzieciol of counsel
Respondent	Mr French

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2010 WAIRC 01218

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	GREEN & GOLD HIAB SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 10 DECEMBER 2010
FILE NO/S	RFT 12 OF 2010
CITATION NO.	2010 WAIRC 01218

Result	Discontinued by leave
Representation	
Applicant	Mr D Cain, Mr A Dzieciol of counsel
Respondent	Mr French

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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