Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 6 WEDNESDAY 25 MAY, 2011 Vol. 91—Part 1

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

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—Award/Agreement matters—

2011 WAIRC 00329

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 11 of 2011

APPLICATION FOR A NEW AGREEMENT ENTITLED

"SHIRE OF MURRAY COLLECTIVE AGREEMENT 2011 OPERATIONS CENTRE EMPLOYEES"

NOTICE is given that an application was made to the Commission, on 4 May 2011, by the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

3. DATE OF OPERATION

…

3.3 The Parties to this Workplace Agreement shall be:

3.3.1 Shire of Murray, (the Shire); and

3.3.2 Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union of Workers Perth (the Union) and employees eligible to be members of the Union.

8. NEXUS AND APPLICATION OF THE AWARD

…

8.2 This agreement will apply in the state of Western Australia and will cover approxiatemely 30 employees

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

6 May 2011

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2011 WAIRC 00328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TAMAS BOROS-DJEVI
	APPLICANT
	-v-
	COMMUNICARE INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 9 MAY 2011
FILE NO/S	U 37 OF 2011
CITATION NO.	2011 WAIRC 00328

Result	Application discontinued
Representation	
Applicant	Mr T Boros-Djevi
Respondent	Mr W Stevenson and Ms M Tancredi

Order

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

AND WHEREAS on 8 April 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 17 April 2011 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 00002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBYNNE JEAN BOURKE
	APPLICANT
	-v-
	ROCKY BAY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 8 JANUARY 2010
FILE NO/S	U 237 OF 2009
CITATION NO.	2010 WAIRC 00002

Result	Order
Representation	
Applicant	In Person
Respondent	Mr M Tait

Order

WHEREAS the herein application was filed on 8 December 2009 and seeks relief against the respondent arising from an alleged unfair dismissal on 9 November 2009;

AND WHEREAS on 21 December 2009 the respondent requested an extension of time for filing a Notice of Answer to the herein claim to 29 January 2010 by reason of the absences of responsible officers of the respondent over the Christmas/New Year holiday period;

AND WHEREAS the Commission, having considered the application for an extension of time is satisfied that the circumstances warrant grant of the application in the present case;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 27(1)(n) of the Industrial Relations Act 1979, hereby orders –

THAT the respondent file a Notice of Answer in respect of the herein application by no later than 29 January 2010.

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

2011 WAIRC 00303

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBYNNE JEAN BOURKE
	APPLICANT
	-v-
	ROCKY BAY INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 28 JULY 2010, MONDAY, 20 SEPTEMBER 2010, TUESDAY, 21 SEPTEMBER 2010, WEDNESDAY, 22 SEPTEMBER 2010, TUESDAY, 2 MARCH 2010, MONDAY, 9 AUGUST 2010, TUESDAY, 8 JUNE 2010, TUESDAY, 10 AUGUST 2010, WEDNESDAY, 9 JUNE 2010, THURSDAY, 10 JUNE 2010, FRIDAY, 11 JUNE 2010, WEDNESDAY, 11 AUGUST 2010, THURSDAY, 12 AUGUST 2010, FRIDAY, 13 AUGUST 2010, MONDAY, 25 OCTOBER 2010, FINAL WRITTEN SUBMISSIONS TUESDAY, 9 NOVEMBER 2010
DELIVERED	WEDNESDAY, 20 APRIL 2011
FILE NO.	U 237 OF 2009
CITATION NO.	2011 WAIRC 00303

CatchWords	Industrial Law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Applicant not summarily dismissed – Principles applied – Procedural fairness considered – dismissal not harsh, oppressive or unfair – Application dismissed – Industrial Relations Act 1979 s 29(1)(b)(i).
Result	Application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr D McKenna of counsel

Reasons for Decision

1 The applicant commenced employment with the respondent on or about 20 July 2001 as a Senior Occupational Therapist at the respondent's Peel District clinical department. The respondent is engaged in the provision of services to the disabled and is a not-for-profit organisation. During the course of 2007 the respondent significantly expanded its services in the area of School Age Therapy Services ("SATS"), the area in which the applicant was engaged. It was common ground that the expansion of the SATS program imposed some stresses on the respondent's organisation and its staff.

2 Events unfolding in early 2008 led to various complaints raised by staff of the respondent for whom the applicant was supervisor. Those complaints remained unresolved leading to a verbal warning to the applicant in or about May 2008. From that time relations between the applicant and the senior management of the respondent deteriorated significantly.

3 Other incidents involving the applicant, which will be dealt with below, took place over the period May 2008 through to late 2009. In short, there ultimately occurred a serious breakdown in working relations between the applicant and other staff of the respondent, including its senior management. The employment relationship was brought to an end by the respondent on or about 9 November 2009 by the payment to the applicant of five weeks' salary in lieu of notice.

4 The applicant now challenges the decision by the respondent to terminate her employment and brings these proceedings pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). The applicant does not seek reinstatement, given the damaged relationships between her and the respondent. Rather, the applicant seeks compensation, an apology and vindication for what she perceives to be unfair treatment at the hands of the respondent.

5 The respondent strongly denied it treated the applicant unfairly in dismissing her. In short, the respondent contended that over an extensive period of time, from about May 2008 to the latter part of 2009, the applicant displayed inappropriate attitudes and conduct towards fellow staff members and senior management of the respondent. The respondent contended that despite endeavours to address the applicant's shortcomings, which were never acknowledged by her, the relationship between the

parties became completely dysfunctional, leaving the respondent with no alternative but to terminate the employment relationship.

6 There was a very large body of evidence adduced in these proceedings through some sixteen witnesses. The evidence was heard over many sitting days spread over many months as a consequence of availability of parties and witnesses and other unavoidable delays. The transcript ran to some 849 pages and a considerable amount of documentary evidence was tendered by the applicant and the respondent in some 84 exhibits. Regrettably, due to other pressing matters, the Commission has not been able to attend to the decision in this matter as expeditiously as it would otherwise have wished to.

7 In the final analysis however, despite the significant body of evidence, both oral and documentary, adduced by the parties, the issues for consideration ultimately come down to a number of significant events, and the impact of those events on the relations between the parties to the employment contract.

8 The Commission will only focus on those portions of the evidence relevant to the specific issues leading to the ultimate decision by the respondent to dismiss the applicant.

Issues

9 The issues ultimately leading to the applicant's dismissal can be framed in terms of the following:

(a) Complaints by a therapist Ms Yates and by therapists generally at the Kim Beazley School;

(b) The applicant's attitude and conduct towards her manager Ms Chiu, the respondent's Director of Clinical Services, in various incidents and meetings and treatment of other senior staff;

(c) Various incidents involving the Community Aides and Equipment Program ("CAEP") managed by the Disability Services Commission ("the DSC"); and

(d) The applicant's attitude and conduct towards Mr Mr Tait, the respondent's Chief Executive Officer and Ms Tapper, the respondent's Director Human Resources, in various incidents and meetings.

10 Whether the applicant was summarily dismissed and thus whether the respondent bears an "evidentiary onus", featured as an issue late in the proceedings. I will deal with that issue first.

Summary Dismissal

11 It was contended by the agent for the applicant, Mr Trainer, that as the applicant was dismissed by payment of five weeks' salary in lieu of notice by letter of 8 November 2009 (exhibit A54) effective 9 November 2009, the applicant's dismissal was summary, leading to an evidentiary burden on the respondent in accordance with settled authority of this Commission: *FMWU v Cat Welfare Society Incorporated* (1991) 71 WAIG 2014.

12 This submission was made despite the concession that the contract of employment and relevant industrial instruments to which the contract refers, provide for termination of employment either by the giving of notice or the payment in lieu thereof.

13 Counsel for the respondent, Mr McKenna, contested the applicant's contentions. He submitted that it was common ground that the applicant's contract of employment, as set out in exhibit A2, referred to the Hospital Salaried Officers' (Nursing Homes) Award 1976 ("the Award") and the Rocky Bay Incorporated Salaried Officers Enterprise Agreement 2002. By clause 1.2 of the applicant's written contract of employment, reference is made to the Award and the enterprise agreement. Whilst not incorporating those instruments, it is asserted that those instruments "applied" to the employment.

14 It seems in any event that the parties conducted themselves on this basis.

15 By cl 8(1) and (2) of the Award, employees employed fortnightly, which was the applicant's circumstance, could be terminated by the giving of two weeks' notice, alternatively, by the payment or forfeiture of two week's salary. Furthermore, cl 8(3) preserved the respondent's common law right to summarily dismiss an employee without notice for serious misconduct.

16 In all the circumstances, for the following reasons I am not persuaded that this case involved a summary dismissal by the respondent.

17 The respondent exercised its award based right to terminate the contract by the payment of salary in lieu of notice, which took place at the time of the termination of the contract. Moreover, I am far from persuaded that the circumstances of the applicant's dismissal could be said to be sudden, immediate and having taken the applicant by surprise.

18 On the evidence, which will be examined in some detail further below, the applicant and respondent had been engaging in a lengthy and ongoing process involving various performance management initiatives and complaints and grievances. By about mid 2009, the applicant well appreciated the possibility that a termination of employment may be an outcome. The situation before the Commission in this matter is quite distinguishable from those before the Full Bench in the *Cat Welfare Society* case. In that case, there was no express term or term able to be implied, enabling the employer to terminate the contract by payment in lieu of notice.

19 If it be the case that where, despite a contractual or award provision enabling termination by payment in lieu of notice, such payment constitutes a summary dismissal, those contractual or award provisions would be rendered otiose.

Complaints by Ms Yates and Therapists from the Kim Beazley School

20 As already noted, the applicant commenced employment with the respondent as a Senior Occupational Therapist in July 2001. The applicant was approached by the Director Clinical Services, Ms Chiu, to become involved in the SATS program being developed by the respondent. The applicant has an extensive background in disability services, having worked in the field for a number of years prior to joining the respondent. The applicant was well regarded as a technician.

21 The SATS program was outsourced by the DSC and the respondent became responsible for the delivery of the program in the Peel District, which encompassed a broad area throughout that region. The SATS program is one of a number of programs that is managed by the respondent in the disability services field.

22 As a consequence of resignations, the applicant became one of the few senior therapists in this field. Furthermore, towards the end of 2006 and at the beginning of 2007, the SATS program expanded, with a considerable increase in caseload for the therapists at this time. It was common ground that the expansion of the SATS program placed considerable stresses upon the respondent and the therapists, including the applicant.

23 Additionally, the expansion of the SATS program required the establishment of a new office in the Peel District, and an increased supervision requirement on the applicant to around six therapy staff directly supervised.

24 As a part of the expansion, new staff were recruited, who were generally young and inexperienced therapists. One of those was Ms Yates. Another new therapist appointed at about that time was Ms Totten. Ms Totten, who also had dealings with the applicant that were controversial, was appointed as a Senior Speech Pathologist.

25 In late April 2008 Ms Totten met with the applicant and told the applicant that a number of the therapists under her supervision had concerns about aspects of the applicant's method of supervision and her communication with them. The applicant was informed by Ms Totten that therapists felt intimidated and they found it difficult to approach her.

26 The applicant made a note of the feedback she received from Ms Totten, and also sent an email to Ms Chiu, her direct superior, referring to her conversation and attaching a copy of that note. The applicant's note and email to Ms Chiu were tendered as exhibit A6. At that time, the applicant endeavoured to arrange a meeting with Ms Chiu. However Ms Chiu was unavailable until a scheduled supervision meeting on 5 May 2008.

27 The applicant testified that in the meantime, on or about 1 May 2008, she undertook a probationary employment review with Ms Yates. The applicant informed Ms Yates at the review meeting that some of the therapists in the Fremantle office had given feedback that they weren't happy with aspects of the applicant's supervision and she asked Ms Yates if she also had any issues. Ms Yates informed the applicant that she did not wish to discuss the matter with her other than acknowledging that she did have some concerns. A note of this meeting was communicated to the respondent's Human Resources Director Ms Tapper, a copy of which was exhibit A7.

28 Ms Yates, who was initially reluctant to testify in this case, gave evidence about her initial experiences with the applicant shortly after she became employed by the respondent.

29 Ms Yates said that she found the applicant to be a difficult supervisor. Her evidence was the applicant was negative towards her and often rude in her responses to her questions and her body language was also negative. Ms Yates said she felt often intimidated by the applicant's manner of dealing with her, and when she spoke with the applicant over the telephone the applicant was often abrupt and rude to her.

30 Ms Yates gave evidence that while based at the Castlereagh School, where she was often working by herself, the applicant came down to the school for her supervision. Ms Yates said "I really used to dread those visits because I felt like there was … when there was no one else around, Robynne seemed to feel freer to be more aggressive perhaps. There was an instance when she came and she was … she did sit very close to me the whole session and leaned over me to do her typing and even during this session, gripped my ankle and shook it and …" (T618)

31 When questioned about this latter statement by counsel for the respondent, Ms Yates testified that there was an occasion where the applicant was demonstrating how to use particular equipment on a wheelchair called an "ankle hugger". Ms Yates said that when demonstrating this equipment, the applicant grabbed hold of her ankles and gripped and shook them in an aggressive way.

32 Ms Yates said that she felt the applicant's conduct in that manner was uncalled for and she found it intimidating. She interpreted the applicant's conduct as a display of aggression, which was consistent with Ms Yates's impression of the applicant as being willing to display aggressive behaviour on occasions. Another incident referred to by Ms Yates in her testimony, was her observation of the applicant acting in an aggressive manner towards a carer on a bus at the school, which Ms Yates considered was inappropriate.

33 Other matters referred to by Ms Yates in her testimony included an occasion when she made a request to the applicant to participate in some professional development. Ms Yates said that when she raised this with the applicant, she felt belittled by the applicant's response which was in effect "Who do you think you are?" (T620). Ms Yates said that the professional development that she requested was consistent with her duties as a therapist.

34 A further incident referred to in Ms Yates's testimony, was a statement made by the applicant in Ms Yates's office to the effect "Oh, you'll be glad that I'm going, won't you?" (T621). Ms Yates said that she felt very uncomfortable about her supervisor making a statement like that to her to which she could not really respond to without being compromised in some way.

35 Overall, Ms Yates said that the applicant's approach and manner of dealing with her made her feel stressed and upset in the workplace and very anxious about interacting with the applicant at work. These led to her at times crying at work and taking time off.

36 The culmination of this conduct led Ms Yates to send an email to Ms Tapper on 14 April 2008 referring to the applicant's bullying behaviour. Ms Yates referred to the above incidents in her email to Ms Tapper, a copy of which was tendered as exhibit R14.

37 As a result of this communication, Ms Yates was advised to see one of the respondent's "contact officers" who are available to discuss grievances or complaints confidentially. Ms Yates spoke with Mr Bowman who suggested that she raise her concerns with Mr Tait, the respondent's Chief Executive. Mr Bowman also gave evidence, and confirmed that he met with Ms Yates and made this suggestion.

38 Subsequently, Mr Bowman testified that he spoke with Mr Tait and referred to Ms Yates's concerns. A meeting was arranged between Mr Tait and Ms Yates off the respondent's premises at a café in Cottesloe. Mr Bowman was also present. Ms Yates testified that she told Mr Tait that she was distressed by what was occurring and that she was ready to resign. Ms Yates did not however, wish to make a formal complaint through the respondent's policies, as she was concerned about the implications for the applicant.

39 Mr Tait in his testimony confirmed the approach he had from Mr Bowman about a staff member. He referred to the meeting as the café in Cottesloe, where Ms Yates relayed to him the circumstances of her interaction with the applicant. Ms Yates outlined to Mr Tait the various incidents that she referred to in her testimony. Mr Tait's evidence was that Ms Yates was extremely anxious and felt very intimidated by the applicant.

40 When Mr Tait raised with Ms Yates the laying of a formal complaint under the respondent's policies Ms Yates confirmed her reluctance to do so because she was concerned about retribution from the applicant. Mr Tait informed Ms Yates that he would need to investigate her concerns and additionally hear from the applicant as to her version of the events.

41 A few days later, Mr Tait met again with Ms Yates in his office, along with Ms Chiu the applicant's manager. During the course of that meeting, Ms Yates relayed most of the issues discussed previously with Mr Tait at the Cottesloe café. Mr Tait testified that during the course of the meeting Ms Yates was very hesitant about standing up to the applicant, because she considered the applicant was vindictive and would make life difficult for her.

42 Subsequently, supervision arrangements were changed on an interim basis, whereby Ms Yates would report to Ms Johansen instead of the applicant.

43 When she left the respondent's employment, Ms Yates completed an exit interview form, and in it, raised her concerns about the applicant's conduct towards her. A copy of the exit interview form was exhibit R17. That exit interview took place on 22 December 2008 and Ms Yates accepted in cross-examination that after May 2008 with the change in her supervision, her direct interaction with the applicant was more limited and generally confined to telephone or email communications with the occasional group meetings.

44 Both the applicant and respondent called a number of witnesses who were therapists and senior therapists, in relation to the applicant's conduct.

45 Ms Vry was an Acting Senior Occupational Therapist at the respondent and worked in the SATS programs. She worked primarily with speech therapists. The applicant was her supervisor. Ms Vry testified in relation to the growth in the program both in 2005 and in 2008. Ms Vry gave evidence that during the growth period she saw less of the applicant as she became very busy. Her evidence was that both the applicant and Ms Totten were quite stressed by this process and the applicant's supervisory load increased quite significantly.

46 In terms of her interaction with the applicant as a supervisor, it was Ms Vry's evidence that she found the applicant to be a good supervisor and she respected her. She said that the applicant shared knowledge with her and was generally honest and did not "sugar coat" matters when dealing with them.

47 In relation to the use of equipment supplies, it was Ms Vry's evidence that in relation to CAEP matters, there was an open marketplace, and the therapists could use any supply that suited the client's needs. She said that there was no specific instruction given by the applicant to use Posture Tech or to prefer them. Ms Vry recalled an occasion where the applicant sent an email to CAEP about the provision of equipment from suppliers following an issue involving another therapist Ms Rae. The applicant asked Ms Vry to look at a draft of the email before it was sent as to whether it was appropriate.

48 In her cross-examination, Ms Vry said she was aware that Posture Tech was supported by the DSC and was specifically set up to help clients in the southern corridor. Ms Vry was not told of a meeting involving the manager of Posture Tech, Ms Lockwood, where it was suggested that to support the respondent, where Posture Tech could provide the same service under the same conditions, it should be the preferred supplier.

49 Ms Vry accepted that if one is considering a free market for services, this should involve telling a client of all the service providers and what they can offer, so there is genuine choice available. Ms Vry also mentioned she is a personal friend of the applicant and has socialised with her in the past.

50 Another therapist called by the applicant was Ms Rea. Ms Rea commenced as an occupational therapist in June 2006 and was based in Mandurah. Ms Rea's evidence in relation to supervision by the applicant was generally favourable. She referred to a supervisor feedback form she did as part of her performance appraisal in July 2008 a copy of which was tendered as exhibit A20. Whilst Ms Rea described the applicant as becoming less accessible as the SATS program expanded, she said that she always generally found her dealings with the applicant to be professional and found her to be approachable.

51 Ms Rea gave evidence about the specific issue concerning a client and whether services should be obtained from CPT or Posture Tech. Ms Rea said this involved a high needs client who required particular attention. Ms Rea was aware of two suppliers, they being CPT or Posture Tech, who could have been used for the particular work. Ms Rea said that because she had used CPT before, and the client's mother chose CPT, it was that supplier that was selected for the job.

52 Subsequently, after the funding application was signed off by the applicant, but before the final approval was given by Ms Chiu, Ms Chiu telephoned Ms Rea. Ms Rea said Ms Chiu was annoyed and not happy with her selection of CPT rather than Posture Tech. Ms Rea said Ms Chiu questioned her about how the decision was made and Ms Rea said to Ms Chiu that it was the family who made the final choice. Ms Rea said she felt upset and annoyed at the telephone call from Ms Chiu as if she had done something wrong.

53 In cross-examination, Ms Rea conceded that when the client's mother asked her about service provision she recommended CPT for the job. She did not approach Posture Tech about the work or get a quote from them as to their capacity to undertake the service. Ms Rea testified that she did not recall any meeting involving the manager of Posture Tech and the senior

therapists about supporting the respondent's service with clients. Ms Rea expressed the view that she did not consider in this case that Posture Tech could give the same quality of service as other providers.

54 Ms Ashley was an occupational therapist employed at the respondent based in Success. She commenced employment with the respondent in 2007 in the SATS program. The applicant was her supervisor.

55 In about May 2008 Ms Ashley said the therapists were having lunch at the Kim Beazley School, where they were based, and comments were made about the need for greater supervision from the applicant with the expansion of the program. Therapists also raised the issue of the applicant's intimidating behaviour and her lack of approachability. There were a number of therapists present at this meeting that Ms Ashley could recall including Ms Slaughter, Ms Mearn, Ms We, Ms Huong and Ms Totten. There could have been more but Ms Ashley could not recollect.

56 Ms Totten, who was a senior speech therapist at the time, volunteered to raise these matters with the applicant. Ms Ashley's evidence was that the group authorised her to do so but only insofar as a requirement for more supervision and not the other matters discussed.

57 Subsequently the applicant called a meeting of the therapists. Ms Ashley testified that it was obvious at that meeting that Ms Totten had spoken to the applicant about all issues raised by the therapists at the Kim Beazley School. This was because the applicant appeared hurt by the comments and she asked all of the therapists one by one if there were any issues that needed to be discussed with her. Ms Ashley said she found the meeting confrontational and was very uncomfortable about it.

58 Subsequent to that meeting, Ms Ashley said that her supervision schedule increased and she found the applicant more approachable in discussing things with her after that time. The applicant and Ms Ashley developed a friendship and became good friends.

59 Evidence was also adduced from Ms Johansen. Ms Johansen was a senior physiotherapist employed by the respondent and based at the North Mandurah Primary School. She testified that she came from a working background outside of disability services and felt apprehensive when she first started. She was comforted by the assistance she received from the applicant in the early stages of her employment. Ms Johansen sought the applicant's help at the suggestion of Ms Chiu.

60 Ms Johansen referred to a conversation she had with Ms Chiu very early in her employment after meeting with the applicant. She told Ms Chiu in words to the effect that "I was really kind of in awe of her experience and her knowledge and I made a comment that I … I'd better always keep on her right side." (T293).

61 Ms Johansen further said that this comment was later mentioned by Ms Chiu and Ms Johansen said it was a rather throw away comment and was meant in positive terms not negative.

62 Ms Johansen was asked about the provision of Posture Tech services to clients. She testified that she did attend a meeting with other seniors and Ms Lockwood the manager of Posture Tech. The upshot of that meeting was that Posture Tech should be given the opportunity of providing the service to a client if it can do so equally with other providers, also dependent on the wishes of the family.

63 Ms Yates was also referred to in Ms Johansen's evidence. Ms Johansen referred to difficulties Ms Yates was having with the working relationship with the applicant. Ms Chiu had advised Ms Johansen of these difficulties. As a result of this, Ms Chiu requested as a temporary measure, that Ms Johansen supervise Ms Yates. Ms Johansen did say from at least one meeting with Ms Yates, she found her a "tricky person to pin down". She had some difficulties with Ms Yates in relation to planning the setting of deadlines and getting work done. (T294).

64 Ms Johansen is also a friend of the applicant and occasionally socialises with her.

65 Ms Totten was called to give evidence. Ms Totten was employed by the respondent in 2004 as a speech therapist and was promoted to the position of Senior Speech Therapist in 2007. Ms Totten was based at the respondent's Rockingham Office.

66 In terms of her interaction with the applicant, Ms Totten testified that their relationship was satisfactory at the beginning. However once Ms Yates made her complaint to Mr Tait about the applicant's behaviour towards her, the applicant approached Ms Totten. She referred to the complaint by Ms Yates and said she had concerns about the way the matter was being dealt with by the respondent's management particularly that Ms Chiu had not supported either her or Ms Totten during the expansion of the SATS program.

67 Ms Totten said that she expressed the view to the applicant that on the contrary, she had always found Ms Chiu approachable and that she provided her with the appropriate level of support and supervision. As Ms Totten and the applicant were both seniors in their respective fields, they both separately reported to Ms Chiu but did not have direct involvement in each other's areas of specialty.

68 Ms Totten said that up until early 2008, when she had the discussion with the applicant about the Yates complaint and the role of Ms Chiu, they had a sound and friendly professional and personal relationship. Ms Totten testified however, that after her discussion with the applicant about Ms Yates, that changed. Ms Totten said that the applicant told her that she could tell that Ms Totten was not supportive of her point of view and that "it would change our relationship forever and I certainly found that comment to be true because following that, she was very distant towards me. She … she rarely ever spoke to me or greeted me or looked at me." (T553).

69 Ms Totten said she also raised concerns with Ms Chiu subsequently about aspects of the applicant's work ethic and Ms Chiu encouraged the seniors to work together cooperatively.

70 Ms Totten also gave evidence about two incidents where therapists raised concerns with her about the management style of the applicant. The first was in early 2007 when a small group of therapists approached Ms Totten regarding the applicant's behaviour towards them. The therapists informed Ms Totten that they found the applicant to be moody, unapproachable and

"mean". Ms Totten testified that she had reservations about raising these issues with Ms Chiu, because she was aware that Ms Chiu and the applicant had a longstanding professional and personal relationship and also socialised.

71 Nonetheless Ms Totten did raise these issues and her evidence was that Ms Chiu suggested to her that she speak with the applicant and raise with her directly the concerns expressed by the therapists. Ms Totten subsequently did so in general terms in one of her regular meetings with the applicant.

72 Ms Totten testified that later in 2008 a similar incident occurred with a group of therapists. Ms Totten had arranged a team meeting in the respondent's Fremantle office. The applicant had been invited but was unable to attend. Ms Totten thought there were about eight therapists present at the meeting who raised issues, not on the formal agenda, concerning the applicant and her conduct and behaviour towards them.

73 Ms Totten's evidence was that the main concerns expressed by the therapists were the applicant's general intimidating behaviour towards them, in particular, her body language and facial expressions. Some expressed the view that when they asked the applicant questions they were made to feel silly. Ms Totten recollected one therapist, Ms Slaughter, gave an example where she asked the applicant whether there would be an agenda for an upcoming meeting to which the applicant replied to her sarcastically "did she look like a formal or informal meeting person?" (T556).

74 Concerns about inadequate supervision were also raised by the therapists and particularly, they wanted to work through case studies with the applicant. Ms Totten thought that those attending the meeting were the majority of the Fremantle based staff. These included Ms Ashley, Ms Slaughter, Ms Mearn, Ms Huong and others.

75 At the end of the meeting, Ms Totten said the therapists asked that she speak to the applicant on their behalf. This was because the therapists did not feel comfortable raising these matters individually with the applicant. Ms Totten said she was absolutely clear about this, because on the prior occasion in 2007, the therapists had not wanted her to raise any issues with Ms Chiu. Ms Totten said she spoke with Ms Chiu about the therapists most recent concerns. Both agreed that she should raise them with the applicant which she did a few days later.

76 When they met, the applicant requested that Ms Totten tell her which staff in particular had raised concerns. Ms Totten replied that she should speak with them individually.

77 Other matters involving the applicant were also the subject of evidence from Ms Totten. In particular she referred to seniors' meetings after the appointment of Ms Delamere. She said they became increasingly stressful because after the applicant raised the Ms Yates matter with her in 2008, she felt the applicant was intimidating and bullying her.

78 Ms Totten's view was that this was because she was not siding with the applicant in her dispute with management. Additionally, Ms Totten said at seniors' meetings, the applicant would raise her concerns about Ms Chiu the Director, which Ms Totten felt uncomfortable about. She said that the applicant was raising matters with her that she was not involved in. She felt increasingly stressed about the situation. Ms Totten testified that she also started to feel very isolated by reason of the applicant's conduct.

79 As a result of these behaviours, Ms Totten said she raised her concerns with Ms Tapper. However, she did not wish to make a formal complaint and create further difficulties for the applicant with the respondent's management. As a result of all this, an informal meeting took place between the applicant, Ms Totten and Ms Delamere. Ms Totten said she prepared notes about the applicant's behaviours over 2008 and 2009 and how she felt threatened and bullied by her. Ms Totten also referred to incidents where the applicant raised issues with her in front of Ms Totten's own staff, which she found to be inappropriate and belittling.

80 A further example raised by Ms Totten was an incident in the Rockingham office in front of other staff, where the applicant held a piece of paper to her chest about one metre away from Ms Totten, and asked whether "it was a true account" of concerns of the therapists. (T559). The applicant gave Ms Totten no further information about this and was abrupt and aggressive.

81 Ms Totten also said that the applicant accused her of organising "secret meetings" with Ms Delamere and other staff. (T561)

82 Ms Totten referred to a further occasion in the Fremantle office where the applicant spoke to her in a very abrupt fashion about whether she had spoken to Ms Tapper about other events at Coolbellup. The issues involved were supposed to be confidential however the applicant kept pressing Ms Totten about what she had said. Ms Totten said she felt intimidated.

83 A further incident raised by Ms Totten was an induction of new staff at the Rockingham office at 2009 where both Ms Totten and the applicant were carrying out inductions. Ms Totten said she invited the applicant to have a joint induction due to the limited facilities in the office. Ms Totten's induction was due to commence at 8.30am which it did.

84 At around 9.30am the applicant arrived with her new staff member and sat at the same table as Ms Totten, which was in a small area, and began talking over Ms Totten. This made the induction process very difficult and as a result, Ms Totten and her new staff member left the room and went elsewhere.

85 Ms Totten testified that she raised all of these issues in her meeting with the applicant. She requested the applicant to alter her behaviour towards her and not seek to involve her in her dispute with management. Ms Totten told the applicant that if she did not modify her behaviour then she would make a formal complaint about it.

86 Overall, Ms Totten testified that the applicant made her working situation difficult and stressful. Matters got to the point where she was reluctant to remain alone in the office with the applicant to avoid further confrontation.

87 Since the applicant had left the respondent, Ms Totten said her working situation has improved considerably.

Investigation Meeting 9 May 2008

88 Whilst the applicant and Ms Chiu were due to meet for a regular supervision meeting on 5 May 2008, Ms Chiu contacted the applicant to arrange a meeting for Friday 9 May. On 6 May, Ms Chiu telephoned the applicant and requested that she not have any contact with Ms Yates in the meantime.

89 Subsequently on 9 May the applicant met with both Mr Tait and Ms Chiu in the presence of Ms Tapper. The applicant said that she was surprised by this meeting, as she thought it was going to be a regular supervision session with Ms Chiu. At the meeting, the applicant gave evidence that Mr Tait said to her words to the effect "This is not a counselling." and "You have a lot of unhappy people around you. What do you think your role as a supervisor is?" (T28). Mr Tait was referring to issues raised by Ms Yates and the therapists in Fremantle.

90 The applicant testified that Mr Tait informed her that staff who she supervised had difficulties with her tone of voice, body language, facial expressions and generally her rude and intimidating behaviour.

91 Mr Tait's version of this meeting was that he convened it in order to investigate the allegations that had been made. It was not his intention for the meeting to be a formal process. Mr Tait said that the applicant was generally defensive during the course of the meeting. She also raised the fact that she felt stressed and had not felt supported by management with the expansion of the SATS program.

92 Mr Tait referred to the applicant wanting mediation with Ms Yates to try and resolve the issues between them. It was Mr Tait's evidence that as the meeting progressed, the applicant became progressively more agitated and angry. He said that during the course of the meeting, the applicant often leaned forward towards him at times in an aggressive manner, and when the meeting concluded, the applicant got up and slammed the door as she left. A record of the meeting was contained in exhibit A9.

93 Ms Chiu also said that at this meeting whilst the applicant started out well in putting her position she became increasingly agitated and started criticising the SATS programme and Mr Tate. Of most concern to Ms Chiu in this meeting was a statement by the applicant to Mr Tate that Ms Chiu has not given the applicant any supervision for over seven years. It was this statement that most upset Ms Chiu who testified that given all of the support she had provided to the applicant in the past she was "gobsmacked" to hear the applicant say this in the presence of the respondent's chief executive (T678).

94 Subsequently, on 19 May 2008, the applicant prepared a letter to Mr Tait and Ms Chiu complaining about the process of the meeting of 9 May and advised them of her desire to have an independent representative at any further meetings.

Meeting of 20 May 2008

95 On 20 May a further meeting between the parties was arranged. The day before Mr Tait sent an email to the applicant indicating areas that he wished to discuss with her, specifically concerns raised by her team and the applicant's dissatisfaction as a manager and how the respondent may further support her. Mr Tait made it clear that the purpose of the meeting was to discuss and ultimately, in an informal manner, resolve how the applicant may "enjoy your role more and your team are both happy and effective in their work environment." A copy of this note was exhibit A13.

96 Mr Tait testified that the applicant arrived at the meeting on 20 May 15 minutes late, as had been the case with the previous meeting, and presented him with her letter of 19 May addressed to him and Ms Chiu. A copy of the letter was exhibit A10. Mr Tait said that he was surprised and disappointed by the content of the letter, as it was seeking to escalate what he had hoped would be an informal process, into a formal one with the applicant requesting representation. Accordingly, the meeting was subsequently rearranged to 26 May where the applicant had a solicitor present, Mr Shaan.

Meeting of 26 May 2008

97 Mr Tait described this meeting as combative. Whilst it was his intention to open the meeting with any constructive issues that the applicant may wish to raise to try and resolve the difficulties between the staff for the future, the presence of Mr Shaan made the meeting adversarial.

98 Mr Tait said Mr Shaan, on behalf of the applicant, attacked the process and referred to alleged failings by the respondent to follow its own policies in the way the matter had been handled to date. As a result of this meeting, the applicant was given written confirmation of a verbal warning relating to her poor performance and in particular, her poor attitude as a supervisor. The warning referred to a requirement for future meetings between the applicant and Ms Chiu as to improvements in the applicant's attitude and performance with a requirement that the applicant demonstrate an immediate change in her supervisory approach. A copy of the warning was exhibit A11.

99 According to Mr Tait, the applicant did not acknowledge any of the issues which he raised and made no positive contribution to how working relationships within her team could be improved for the future. The applicant in her cross-examination did not consider or could not perceive her conduct could be in any way intimidating towards staff, regardless of her intentions.

100 Additionally at this meeting Ms Chiu testified that she again asked the applicant to clarify whether she meant what she said at the meeting on 20 May that Ms Chiu had not supervised her for seven years. The applicant confirmed that this was what she believed. It was Ms Chui's evidence that this confirmation of the applicant's assertion about supervision broke her trust and confidence in the applicant.

101 Ms Chiu also testified that as a result of this, she informed Mr Tate that she did not want to meet with the applicant on her own again and she would require a third person to be present if Ms Chiu was to continue to supervise the applicant.

First Verbal Warning

102 The applicant testified that she was very upset as a result of the warning issued to her. She took some time off work. The applicant also wrote a letter to Mr Tait contesting the content of the "record of verbal warning" and requesting that it be rescinded. Mr Tait replied by letter of 22 July 2008, a copy of which was exhibit A14. Mr Tait informed the applicant that he was concerned that there was no indication in the applicant's letter of any acknowledgement on her part of some of the issues raised. Mr Tait was not prepared to rescind the warning provided.

Follow Up Sessions

103 As a part of the warning process outcome, regular meetings were to occur between the applicant, Ms Chiu and Ms Tapper. The purpose of these meetings was to provide necessary support to the applicant in order that the required improvements could take place. These meetings were consistent with the respondent's poor performance and unacceptable behaviour policy contained at exhibit A8. That policy requires initial counselling followed by adequate review and performance improvement steps.

104 I accept that the discussion of 9 May did, on all of the evidence, identify the issues to be raised with the applicant. On the evidence of both the applicant and Mr Tait, all of the concerns of the therapists were raised and put to the applicant in some detail and she was given an opportunity to respond. Importantly, these issues had been previously identified with her, certainly insofar as the therapists from the Kim Beazley School were concerned.

105 Secondly I am satisfied that it was Mr Tait's clear intent, at the meeting rescheduled for 26 May, to provide appropriate counselling. The applicant's response to that meeting, by the elevation of the issues to a degree of formality not contemplated by Mr Tait, including the presence of an advocate to argue her case, largely pre-empted that process and led to the issuance of the verbal warning confirmed in writing.

106 The Commission sees no issue with the process adopted by the respondent to that point.

107 The subsequent scheduled meetings between the applicant, Ms Chiu and Ms Tapper, on all of the evidence, were difficult and at times confrontational. It is clear from all of the evidence of the three participants, that the applicant simply refused to let the issue of the warning go and revisited it on almost every occasion that the three of them met.

108 Indeed, on the very first occasion on 16 June 2008, whilst the meeting was concerned with unrelated issues, the applicant revisited the issues with Ms Yates and expressed the view that she had been prejudged and treated unfairly. This was the theme that continued throughout the supervision meetings until events became particularly confrontational, to which reference will be made later in these reasons.

109 Furthermore, in the meeting of 21 August 2008 the notes of which were tendered as exhibit A17, the applicant advised both Ms Chiu and Ms Tapper that she considered them biased. In an earlier meeting on 11 August 2008, notes of which were exhibit A16, the appellant again revisited the issue of the verbal warning issued by Mr Tait and stated that her relationship with Ms Chiu was untenable and that Ms Tapper was not an appropriate mediator.

110 This theme generally continued as illustrated in the evidence of Ms Chiu. Ms Chiu testified that despite the applicant's participation in the supervision meetings over this period, and Ms Chiu's attempts to encourage the applicant to work as a member of the team and "just move on", the applicant continually harked back to the verbal warning and her sense of injustice and grievance as a result of that process. It was Ms Chiu's testimony that at all times she sought to treat all members of her staff equally, and there was never any intention to exclude the applicant from general communications within the therapist group or to otherwise disadvantage the applicant in any way.

111 Despite the intent of the supervision meetings being to assist the applicant, the applicant continued to raise issues concerning others' performance in particular that of Ms Chiu. For example, in the meeting of 21 August 2008, the notes of which were tendered as exhibit A17, the applicant accused Ms Chiu of not supporting her and suggesting that Ms Chiu was attempting to get rid of staff at the respondent. Ms Chiu emphatically denied this in her evidence and her position at the supervision meeting was that on the contrary, wherever she could, she set out to support the applicant.

112 Importantly, Ms Chiu at this meeting again raised the applicant's allegation in the meeting of 26 May with Mr Tait, that Ms Chiu had not supervised her for some seven years. Notably, there is no reference in the evidence of this meeting of any denial of that proposition, despite the applicant's attempts in cross-examination, to suggest that she only meant since 2008. Ms Chiu testified that this allegation by the applicant was the catalyst for her no longer maintaining any trust or confidence in the applicant despite their prior good professional and personal relationship.

113 I accept Ms Chiu's and Mr Tait's version of events, that the applicant did assert that Ms Chiu had not supervised her for seven years. Moreover, I infer, given the climate in which those remarks were made, and all of the surrounding circumstances, that it was said for the purpose of mounting an attack on Ms Chiu.

Castlereagh School Incident

114 There was a further matter about which there was considerable evidence. This involved a complaint from the Principal of Castlereagh School about the applicant's conduct towards a teacher at the school. A copy of the complaint with an attached statement from the teacher concerned was exhibit A 40. The complaint alleged that in a meeting on 13 August 2009 the applicant intimidated and bullied the teacher of a child whose family was a client of the respondent.

115 The Principal had precluded the applicant from attending the school as a result of the incident.

116 Ms Tapper investigated the compliant and found that the allegations by the teacher were unfounded and that the teacher concerned may have overreacted to the issues discussed regarding the child's needs. Ms Tapper also informed the Principal that the applicant had supported the therapists at the school and that the applicant would need access to the school re-established to continue the respondent's work there.

117 The applicant acknowledged that she could have handled the particular incident better, a point noted by Ms Tapper in her investigation. Copies of letters to the Principal and the applicant were exhibit A 42. Additionally, relevant to this issue was the evidence of Ms Yates, who testified that the applicant informed her previously that she did not have to be diplomatic when dealing with schools.

118 Whilst the applicant in her testimony criticised the respondent for referring to its Code of Conduct in dealing with others in its letter to her, given the applicant's concession that she could have approached the meeting with the teacher better, there was

nothing untoward about this in my view. Moreover, in the final analysis, contrary to the assertions of the applicant, the respondent supported the applicant and negotiated her return to the school.

Inappropriate Behaviour 12 September 2008

119 The next significant event took place on 12 September 2008 at a supervision meeting between the applicant, Ms Chiu and Ms Tapper. This meeting dealt with a number of issues. In particular, the applicant wanted responses from Ms Tapper concerning aspects of the performance appraisal conducted by Ms Chiu. It was Ms Tapper's evidence that she did not consider it appropriate for the applicant to raise and discuss these matters at the time.

120 Ms Tapper's testimony was the applicant was insistent and in response to Ms Tapper's refusal to discuss these issues further, the applicant accused Ms Tapper of being incompetent and became angry. Ms Tapper's evidence was the applicant was speaking in a loud voice and was speaking over her. Ms Tapper testified that she informed the applicant that if she did not continue to interrupt her, she would outline the process of improvement in performance appraisals that she was intending to implement.

121 It was Ms Tapper's further evidence about this meeting that the applicant accused Ms Chiu of not being a good supervisor. In her evidence Ms Tapper said that as she was responding to the applicant, Ms Chiu did "pipe in" to the conversation. At that point, Ms Tapper's evidence was that "Robynne was sitting down. She stood up and she leant across the table and yelled at … at Linda, shaking her fist … her hand like this … like, You shut up, Linda, shut up, and then she just threw her things in the … in her bag and left the meeting and Linda Chiu, I believe … I recall Linda saying something about, That … that's just insubordination." (T457).

122 Ms Chiu's evidence of this incident was that during the meeting the applicant became very angry. She was very heated and "uptight". Ms Chiu testified that towards the end of the meeting the applicant "stood across the table and she … she just stood over me and said … and pointed a finger and go and you and you shut up. That's what she said to me, which absolutely stunned me because I was just trying to … yeah. Yes, that's exactly what it was." (T692).

123 After the applicant put her things in her bag and walked out of the meeting, Ms Chiu said she sat in stunned shock for a few moments. Both she and Ms Tapper went offsite for a cup of coffee because Ms Chiu said she was quite shaken up by the incident. Ms Tapper's said she was also shocked by the conduct and was quite speechless at the time.

124 The applicant's testimony on this issue was that she didn't shout but spoke in a firm voice and told Ms Chiu to be quiet. In cross-examination, the applicant conceded that at this point in the meeting, she was frustrated and angry. She accepted that at the time this exchange took place, she was standing up and Ms Chiu was sitting down at the conference table. She agreed that she pointed her finger at Ms Chiu. In further cross-examination, the applicant said "I believe … I believe I said, Be quiet, Linda. Be quiet." (T199)

125 As a consequence of this meeting, Ms Tapper complained about the applicant's conduct to Mr Tait. Mr Tait in turn wrote to the applicant by letter of 17 September 2008, referring to her conduct at the meeting on 12 September. Mr Tait referred to allegations that the applicant engaged in inappropriate and unacceptable conduct, including shouting aggressively, and using inappropriate language directed at her supervisor. Mr Tait informed the applicant that he was investigating the allegations and had arranged a meeting with her on 29 October 2008 to obtain her response. This letter was exhibit A27.

Meeting 31 October 2008

126 Subsequently a meeting took place on 31 October 2008 between Mr Tait, the applicant, and two witnesses. Mr Tait's evidence was that when the allegations of Ms Chiu and Ms Tapper following the meeting of 12 September were put to the applicant, she denied that she had told Ms Chiu to shut up or that she was angry and aggressive. Mr Tait testified that the applicant did accept that it was an unpleasant meeting but she said she told Ms Chiu to "be quiet".

127 A note of the meeting tendered as exhibit A28, prepared by a secretary in attendance, referred to the applicant's responses. In relation to the assertion that the applicant was loud and aggressive, the note refers to the applicant admitting she was angry "but thought that angry was a term that was open to interpretation." She reiterated that she definitely did not tell Ms Chiu to shut up.

Second Verbal Warning

128 A follow up meeting took place on 6 November 2008 involving the applicant, a contact officer Ms Coppard, Mr Tait and Ms Tapper. At that meeting Mr Tait informed the applicant that after considering all of the available evidence, he had come to the conclusion that the applicant's behaviour and conduct in the meeting of 12 September was inappropriate as alleged. A verbal warning was issued which was recorded in writing by letter of 7 November 2008. Both a note of the meeting of 6 November and the written confirmation of the verbal warning were exhibits A29 and A30 respectively.

129 I accept the respondent's evidence in relation to this issue. I do not accept the applicant's evidence that she did not shout or point aggressively at Ms Chiu. The applicant conceded in her evidence she was angry and frustrated. From several days of observing the applicant giving evidence and noting her demeanour and responses to questions whilst giving evidence, particularly in cross-examination and from evidence as to other incidents involving the applicant, I accept that the applicant had a predisposition to loud and aggressive behaviours when she did not feel she was getting her way in dealings with management.

130 Whilst undoubtedly by this time, the relationship between the applicant and Ms Chiu was severely strained, I accept that Ms Chiu was endeavouring to maintain a professional working relationship. However the cumulative effect upon the applicant of the earlier verbal warning, and attempts to modify her supervisory approach, had severely infected the applicant's attitude towards the respondent's senior management and she was resentful and angry. I have no doubt about that conclusion, in light of all of the evidence before the Commission.

Applicant's Complaint - Ms Chiu

131 In early November 2008 the applicant lodged a formal complaint against Ms Chiu. In summary, the applicant alleged that from in or about mid 2008, Ms Chiu had demonstrated a punitive and biased approach in her supervision style and in meetings with the applicant. There was also a complaint made in relation to Ms Chiu's conduct in the presence of therapists in the Fremantle office. Complaints were also made about allegations of bias of Ms Chiu in the applicant's performance appraisal process.

132 The complaint was referred to Ms Tapper for formal investigation. Ms Tapper testified that she was somewhat limited in the investigation by reason of the generalised nature of the complaints as made, save for the one specific incident in Fremantle at the Coolbellup School. Ms Tapper testified that she followed this particular allegation up and spoke with Ms Chiu and also Ms Totten, who was also present at the time. Ms Tapper also spoke with a therapist who the applicant inferred had left the respondent as a consequence of Ms Chiu's behaviour. None of these allegations were established on Ms Tapper's investigation.

133 However, Mr Tait said that in relation to the general manner of communication by Ms Chiu that she would be spoken to about improving her tone of communication with other staff.

134 It is to be noted that much of the complaints made by the applicant against Ms Chiu, related to perceived abrupt and rude communications with the applicant. None of these matters appear to have been raised prior to November 2008. On the contrary, the applicant did testify, as confirmed in Ms Chiu's evidence, that both of them enjoyed "robust" communications over many years. None of those robust communications appeared to have caused any distress to the applicant until the time of the lodgement of her complaint.

135 Mr Tait, by letter of 24 November 2008, wrote to the applicant setting out the findings of the investigation into her complaint against Ms Chiu. Mr Tait advised that there was no indication of victimisation of the applicant as a result of the performance management process.

136 Furthermore, a review of the exit interview of the particular therapist referred to by the applicant in her complaint revealed she had left the respondent for professional and clinical reasons rather than any interaction with Ms Chiu.

137 The point was also made in Mr Tait's letter, that given the generality of the allegations, it had been difficult to pinpoint any specific issues. As noted above, Mr Tait did undertake however, that Ms Chiu would be informed of the applicant's perception of her style of communication, and a request that she modify her approach.

138 Whilst the applicant denied it in cross-examination, it appeared more than a coincidence that the applicant's complaint against Ms Chiu, only arose after the respondent's first verbal warning to the applicant in May 2008 and the conduct of the formal supervision sessions thereafter. It is to be noted that at no time prior to the formal complaint, had any of the alleged shortcomings in Ms Chiu's supervisory and management style, been raised by the applicant with either Ms Chiu or any other senior officer of the respondent.

139 I was left with the overwhelming impression from all of the evidence in relation to this particular matter, that the applicant's complaint against Ms Chiu had more to do with her sense of grievance against the respondent generally, and Ms Chiu specifically, rather than any substantive allegations. This is all the more surprising, when one bears in mind that the original complaints against the applicant, came from therapists in their own team, and had little or nothing to do with Ms Chiu.

CAEP Communications

First CAEP Issue

140 The next issues that arose concerning the applicant's employment were two communications with the DSC concerning CAEP funding. The first incident related to an email sent by the applicant to Ms Yates concerning a client and a funding application in relation to his needs. The matter related to the provision of a special mattress and bed rails for the client.

141 On 17 December 2008 the applicant, whilst no longer directly supervising but still responsible for all CAEP approvals, sent an email to Ms Yates concerning the CAEP request for the client. The applicant informed Ms Yates that Mr Phillips, the manager of CAEP at the DSC, had advised her that "CAEP Advisory comm decided that the mattress would be paid for by caep as it could be considered customised however, the bed rails are part of the bed and therefore are the responsibility of Nulsen Haven."

142 Ms Yates in turn informed Ms Chiu of the applicant's advice and provided a copy of her email. This prompted Ms Chiu to query the advice given by the applicant to Ms Yates with Mr Phillips at the DSC. Mr Phillips by email response of 18 December 2008 replied to Ms Chiu and advised that he had no such discussion with the applicant. Rather, a coordinator for CAEP within the DSC, Ms Chatley spoke to the applicant about the matter.

143 Mr Phillips also advised that the CAEP Advisory Committee was not due to sit until January 2009 and had not met since at least July 2008. He also advised that the committee would not deal with a matter of that nature. Mr Phillips requested that the applicant contact him to clarify these issues and to advise Ms Yates of any inaccuracies in her original statement.

144 A copy of these emails was tendered as exhibit A44.

145 In her testimony, the applicant said there was nothing untoward about her original communication with Ms Yates. She said initially, that she mistook the reference to Mr Phillips for Ms Chatley. However, she was unable to explain, when it was put to her, the assertion by counsel for the respondent, that the reference to the CAEP Advisory Committee was false. The applicant testified that she would need to look at her paperwork to answer that question.

146 The applicant denied that she was deliberately misrepresenting the situation to Ms Yates. The applicant also said that she did not think that her comments about Mr Phillips from the DSC were in any way damaging to the respondent's relationship with its major funder.

147 The applicant said she contacted Mr Phillips to apologise over this matter. This was confirmed in Mr Phillip's evidence.

Second CAEP Issue

148 There was a second issue in relation to the applicant's communication with CAEP. This entailed an email of 7 September 2009 to Ms Chatley at the DSC regarding "clarification of all CAEP funding guidelines". The email, a copy of which was exhibit A46, referred to a "scenario" in which a client of the respondent requires a particular product which is available from a range of suppliers, including that established by the respondent, Posture Tech, and asked the question "Is there anything in CAEP policy that protects the choice of the family and therapist from being coerced into only using Rocky Bay's equipment services? [coercion in terms of refusing to sign funding application and requesting families use RB services]".

149 This email led to a response from Mr Phillips, Ms Chatley's manager, dated 10 September 2009. A copy of this email was exhibit A47. In it Mr Phillips made a number of points in reply, in particular, that any decision by the respondent to use its own internal services was a matter for it as an operational issue and not for him or his staff; that CAEP supports the development of a quality equipment service to support the southern corridor of the metropolitan area thereby increasing choice for families; and that the DSC would frown on any pressure applied by a therapist, staff member or organisation not in the best interests of an individual with a disability – this would include a situation in which an individual and their family became caught in the middle of a difference of opinion between two professional staff members.

150 Mr Phillip's email to the applicant was copied to Ms Chiu so she was aware of the DSC response to the applicant's enquiries.

151 Whilst the applicant in her testimony indicated that she sent this email to clarify a "hypothetical scenario", on close analysis, it bears a striking resemblance to an earlier communication from Ms Rae, who the applicant supervised, by email of 4 September 2009, concerning a conversation she had with Ms Chiu about supporting the respondent's Posture Tech service. A copy of that email was exhibit A45.

152 This particular matter led to an investigation being undertaken by Ms Tapper, it having been bought to her attention by Ms Chiu. A series of questions and interviews in relation to this matter were set out in exhibits A48 to A54 inclusive.

153 I do not propose to narrate the detail of all of that documentary evidence. Suffice to say, that it was the respondent's evidence, through Mr Tait, that the organisation was very concerned that the applicant had directly involved its major funder in what appeared to be, from the communication, an internal dispute between staff of the respondent.

154 It was the respondent's position that Mr Phillips' reply of 10 September 2009, by its tone, suggested that the DSC was not pleased to be involved in an internal matter of the respondent. Furthermore, the applicant made it clear in her responses to the investigation conducted by Ms Tapper that she regarded Ms Chiu as using bullying and intimidation tactics against therapists to require them to use the respondent's services, rather than other service providers.

155 Furthermore, the applicant expressed the view that Ms Chiu had a conflict of interest in so doing. It was also clear in the applicant's responses to Ms Tapper's investigation, that she had communicated this view to the therapists that she supervised. It is to be noted, that she was making these observations about the respondent's Director of Clinical Services, to whom all of the therapists ultimately are accountable.

156 At various points throughout the investigation, the applicant accused Ms Tapper of being biased in her investigation process. Moreover, in her response of 21 October 2009, to questions raised by Ms Tapper, a copy of which was exhibit A53, the applicant made the statement that "I have no confidence in Rocky Bay's internal management process to address any issues related to DCS behaviour and actions, The DCS herself refuses to reflect on her own practices." The reference to "DCS" is to the Director Clinical Services, Ms Chiu.

157 There was a considerable amount of oral testimony in relation to this issue. I propose to only refer to it in summary.

158 The applicant said in evidence in chief that she was contacted by Ms Rae, who had received the email from Ms Chiu about services to be provided. The applicant said that she was upset and angry as to the way in which Ms Rae had allegedly been spoken to by Ms Chiu about the matter. She felt that the therapists were being pressured to use Posture Tech.

159 Accordingly, she spoke with Ms Delamere, who by that time had been appointed as Manager of the SATS program. This appointment was an initiative by the respondent to provide a "circuit breaker" in the relationship between the applicant and Ms Chiu by interposing a manager to whom the applicant could report and be directly responsible. The applicant said Ms Delamere suggested that she speak with Ms Chatley at the DCS to clarify the situation.

160 The applicant said she did so and followed up her phone conversation with Ms Chatley with the "scenario" email of 7 September 2009. As to the use of the word "scenario", the applicant testified that she was unsure as to how to frame the email to Ms Chatley and whether to use the term "free marketplace". She chose however the terms that she used.

161 Ms Delamere also gave evidence. In relation to this issue she said that she did recall a conversation with the applicant about CAEP funding for this particular client. Ms Delamere confirmed that she suggested to the applicant that if the applicant wanted to clarify the matter, she could telephone the DSC but this was not a matter that should be put in writing.

162 In relation to the latter proposition, Ms Delamere, when cross-examined, commented that she did not think it would be appropriate for the applicant to raise this issue in writing with the DSC. If it was to be committed to writing, then it should be from the Director Ms Chiu and not the applicant. This was because the matter was being raised with the respondent's funding body.

163 The applicant gave evidence about receiving the reply from Mr Phillips of 10 December 2009 to her email to Ms Chatley. She said from its tone and content, she was concerned about it. She said that she felt that Mr Phillips may have misinterpreted her email to Ms Chatley.

164 Some weeks later the applicant testified that she received a text message from Ms Tapper asking to meet with her. Ms Tapper informed the applicant that she had been requested to carry out an investigation into her email to Ms Chatley regarding the

CAEP funding issue. The applicant said that by this point in time, her relationship with Ms Chiu was very poor, and she had had no direct contact with her for about one year.

165 The applicant was examined and cross-examined about the various meetings and notes of meetings that were tendered in evidence. The respondent's concerns about this issue were that the applicant had aired an internal matter with the respondent's primary funder and Mr Phillips' reply made it plain that he did not want his staff to be brought into internal matters in connection with the respondent's activities.

166 This was the tenor of Mr Phillips' evidence when called to testify about the matter. Whilst Mr Phillips did say that his response email was the end of the particular matter, it was also his evidence that the DSC expected an organisation such as the respondent to have very good internal governance. He made the point in his evidence that as part of contract renewals, the DSC would look at issues such as internal governance and the expectation was that the CEO of an organisation would properly manage internal staffing issues (T 535).

167 Mr Tait said that the issue raised in the CAEP email from the applicant, also involved the establishment of Posture Tech by the respondent. Mr Tait said that given the lack of technical support in the Perth southern corridor region, the DSC was very supportive of the respondent in establishing and developing Posture Tech and heavily invested in it. Mr Tait emphasised the importance of staff, particularly senior staff such as the applicant, being supportive of Posture Tech and he did not consider the applicant was at all supportive.

168 Mr Tait's evidence was that after requesting Ms Tapper to investigate the applicant's communications with the DSC, the reports he received caused him great concern. He said that the applicant's actions had involved the respondent's most important funder in what appeared to be an internal dispute between staff of the respondent. Mr Tait was also concerned that the email from the applicant to Ms Chatley sought to undermine Ms Chiu, as a part of the applicant's ongoing campaign against her. A number of notes of meetings and interviews were put to Mr Tait in his evidence.

6 November 2009 Meeting

169 In particular, reference was made to a meeting of 6 November 2009 between Mr Tait, Ms Tapper, the applicant and Mr Bowman, the applicant's support person.

170 Mr Tait testified that it was a difficult meeting. He said that he told the applicant that from all that he had before him and in light of all other issues involving the applicant that he did not feel that the applicant was supportive of the organisation or its senior management. He told the applicant that he felt that she was undermining both Ms Chiu and the respondent. Mr Tait said it was clear the applicant did not respect the senior management including him and Ms Chiu. She had accused both him and Ms Tapper of not being objective and had made disparaging remarks about Ms Chiu to her own staff.

171 In relation to the CAEP emails specifically, Mr Tait said he definitely considered that the incident involving Mr Scott undermined the credibility of the respondent and the Posture Tech program and also Ms Chiu as the Director of Clinical Services. Mr Tait said he was most concerned that the respondent's principal funder would take a dim view of being embroiled in what appeared to be internal disputes within the respondent. Mr Tait testified that he had no doubt that the respondent's credibility had been damaged by this and the first incident involving communications between the applicant and the DSC.

172 The applicant had a contrary view. She did not consider that there was any damage to the relationship between the respondent and the DSC and that Mr Tait was exaggerating the issue.

173 The applicant was cross-examined in relation to her views about Posture Tech. She accepted that this service had been established to correct deficiencies in service in the southern corridor, which the applicant herself was on the record as having recognised as early as 2005. The applicant made it clear in her evidence that professionally, the matter of principal importance to her is client choice of service provider.

174 The applicant said she was aware that Ms Lockwood, who also gave evidence, as the manager of Posture Tech, had sought the assistance of therapists to support Posture Tech where it was appropriate to do so. That is, all other things being equal, if Posture Tech could provide at least an equivalent service to other providers then, being a part of the respondent's organisation, it should be utilised.

175 In response to questions from the Commission, the applicant said that in discussing service providers with her therapists, she encouraged them to use the supplier who would best meet their clients' needs. The applicant was somewhat evasive when directly asked whether she would recommend her therapists use Posture Tech all other things being equal. From this passage of the evidence however, in relation to the incident involving Ms Rae, it was quite clear that the client was not given any choice, as Posture Tech were not even approached as a possible supplier of the particular equipment for the client concerned.

176 The applicant was taken in some detail to the notes of the meeting held on 6 November 2009, a copy of which was tendered as exhibit R4.

177 The applicant was asked whether she had ever spoken disparagingly about her Director Ms Chiu and she replied that she had not. She did not regard the email sent to her colleagues earlier, suggesting "Linda's tactics are a conflict of interest i.e. That being she is acting to insist all SATS clients are to use Posture Tech to boost demand and channel all CAEP funds into Rocky Bay's service" as derogatory of her Director.

178 The applicant confirmed she said that she believed the respondent had a culture of punishment. The applicant further testified that in relation to the email from Mr Phillips she did not feel that the relationship between the respondent and the DSC was in any way jeopardised and she insisted that Mr Phillips' superior, Ms Wallman, be contacted to clarify this.

179 The applicant agreed that in the meeting Mr Tait informed her that she could not speak with Mr Phillips or Ms Wallman on the matter as it was an internal issue for the respondent and it would only make matters worse. The applicant also confirmed that she replied to Mr Tait in words to the effect "that she could and would" do so.

180 The applicant also confirmed that she told Mr Tait in that meeting "that they would never agree about issues that she had worked in the sector much longer than him, she knew Ms Chiu much better than Mr Tait". She also affirmed that she was allowed to ask Ms Wallman about how CAEP money could be spent in a free marketplace.

181 The applicant was also cross-examined about the concluding remarks made at that meeting. She confirmed that Mr Tait advised that he would meet her again on the following Monday 9 November at 3pm and directed her to attend the meeting. The applicant agreed that she said in reply "she would see whether she could attend or not". The applicant confirmed that Mr Tait replied that he was giving her a directive to make herself available on Monday 9 November at 3pm "unless a life-threatening or catastrophic event meant she was unable to attend".

182 The applicant accepted that she responded that she wouldn't know whether she would be available and would not know until Monday "as anything could happen". The applicant accepted that Mr Tait repeated his directive to attend the meeting on Monday at 3pm and to confirm that she understood this directive, to which the applicant respondent "she spoke English and she understood it".

183 Ms Tapper was also examined in relation to this particular meeting. Ms Tapper confirmed the content of exhibit R4, the notes of the meeting held on 6 November 2009. Ms Tapper described the meeting as unpleasant, with the applicant making a number of personal remarks derogatory of Mr Tait. In particular, Ms Tapper referred to statements made by the applicant to Mr Tait in words to the effect that "He may have been a good manager of the Hilton, but you're not of Rocky Bay" (T 481). She also referred to the applicant's statement about her long background with CAEP and the DSC, and that she would be following up the issues with Mr Phillips' manager Ms Wallman, despite Mr Tait's direction that she not do so.

184 Ms Tapper also gave evidence about what occurred immediately after the meeting. She testified that she left the room and was going back to her office via the respondent's reception and said goodbye to the applicant and that she would see her on the following Monday. Ms Tapper said that the applicant "came right up to my face and spoke to me, I think saying that I was definitely not a colleague of hers. I'd been no support whatsoever and words to that effect." (T 482).

185 Ms Tapper said that she made a note of this encounter with the applicant immediately after, a copy of which was tendered as exhibit R19. The note read "I was about to say goodbye to Robynne in the reception area when she aggressively and loudly spoke to me advising that "I was not a colleague and that I was no help to her whatsoever as an HR Director." Ms Tapper said that the receptionist Ms Wood was present at the time of this incident.

186 Ms Wood was called to testify about this matter. She was in the reception at the time. She referred to a meeting taking place in the boardroom. She said that after the meeting the applicant came out and she was "agitated and … and sort of angry. She seemed angry and agitated; came out and stayed in the reception area and within a minute or so, Wendy came out … Wendy Tapper came out of the boardroom and was crossing to go to her office and Robynne stepped in front of Wendy and said something to her, but I never heard what she said because Robynne's face was right up against Wendy's … Right up against Wendy's face in a … a threatening manner and I … I didn't hear … there was something said and I don't know what was said. I couldn't hear it. It was very muted, so I didn't hear and… " (T 596)

187 Ms Wood further said that the applicant's face looked very angry and clenched.

188 When cross-examined about this matter, the applicant denied she was aggressive or put her face close to Ms Tapper's and spoke loudly to her. She accepted she was upset.

Denigration of Senior Management

189 In terms of denigration of staff, Ms Totten referred to an incident at a Christmas party in December 2008 which was the Rockingham and Mandurah staff Christmas party. Ms Totten said about half of the staff, probably around 12, were in attendance. Ms Totten testified that over the lunch table, the applicant made a comment that Mr Tait "was a turd", in front of the staff, most of whom were young and impressionable.

190 When cross-examined about her attitude towards the senior management of the respondent, the applicant accepted that after the verbal warning in May 2008, her attitude towards the management deteriorated. Whilst as previously noted, the applicant denied telling Ms Chiu to shut up in the meeting of 12 September 2008 she accepted that such conduct was not conducive to collegial team work. The applicant also accepted that she became angry and frustrated when she received the second verbal warning from Mr Tait but denied that this had poisoned her relationship with the management of the respondent.

191 The applicant also accepted that her respect for Mr Tait was diminished but denied calling him a turd in front of staff at the Peel Christmas party. The applicant then said this was a social occasion and she could not recall saying this.

192 The applicant accepted that if she had said this during working hours it would be unacceptable but seemed to equivocate as to whether it would unacceptable at a social event. After some questioning from the Commission the applicant accepted that such statements derogatory of a chief executive in any circumstance, work or social, would not be acceptable but did not consider that it would be divisive.

193 The applicant did not agree that speaking of Mr Tait in such a way in front of junior staff, as a senior staff member, would not affect them as "the women are adults and they are professional people and they have their own relationships" (T 165).

194 I do not accept the applicant's denials of this conduct. I found Ms Totten to be a reliable and truthful witness. Given the entire context of the relationship between the applicant and the respondent's management, in particular Mr Tait and Ms Chiu, I accept that the applicant did call Mr Tait "a turd" at the Christmas function in December 2008 in the presence of junior professional staff.

195 I also accept that the applicant spoke in derogatory terms of both Ms Chiu and Mr Tait in the various communications to which reference has been made in the evidence.

9 November Meeting

196 As previously foreshadowed, a further meeting was held on 9 November 2009 between the applicant, Mr Tait, Ms Tapper and Mr Bowman. At that meeting, Mr Tait informed the applicant that he had considered the CAEP email issue and did not think that was an appropriate communication. Having regard to the previous warnings and the complete breakdown in the relationship between the applicant and the respondent's senior management, the applicant's services were terminated by payment of salary in lieu of notice on the basis of unsatisfactory conduct. The applicant's employment ended on that day 9 November 2009.

197 The letter of termination dated 8 November 2009, was tendered as exhibit A54. It referred to a range of issues including the inappropriate conduct in communications with the DSC and the previous warnings in relation to attitude and behaviour of 26 May and 7 November 2008. The letter of termination also referred to the ongoing conflict between the applicant and senior management of the respondent including Ms Chiu, Ms Tapper and Mr Tait. Additionally, reference was made to the aggressive and intimidating behaviour towards Ms Tapper on 6 November 2008 and concluded that there had been "a serious breakdown of the employer and employee relationship."

198 It was common ground that the applicant left the respondent's premises on that day and was paid all entitlements, including five weeks' salary in lieu of notice.

Conclusions

199 The law in this area is well settled. The test is whether the respondent as the employer has abused its lawful right to terminate the contract of employment: *Undercliffe Case* (1985) 65 WAIG 385. In cases such as these, whether an employee has received a fair go all round, involves a consideration of all of the circumstances of the particular case: *Garbett v Midland Brick* (2003) 83 WAIG 893. Furthermore, it is not always the case that matters of procedural and substantive fairness should be separated. A global approach can be applied: *Hotcopper v Saab* (2002) 82 WAIG 2020. In cases of poor performance or conduct, an employee should generally be afforded an opportunity to respond to allegations: *Bogunovich v Bayside WA Pty Ltd* (1998) 78 WAIG 3635. This includes the employer informing the employee of the possible consequences of a failure to address shortcomings in conduct or performance.

200 To the extent that it is necessary or relevant to separate out issues of procedural fairness, I am not at all persuaded that the applicant was denied a fair procedure in this case. On the contrary, the period of time from the first verbal warning given to the applicant in May 2008 to her ultimate dismissal in November 2009, involved a period of almost 18 months.

201 Over that time a broad range of issues were canvassed with the applicant. On each occasion where there was either an investigation process undertaken or a more formal warning process invoked, the applicant was given the opportunity of having a support person or representative present with her. On almost all occasions, issues raised with the applicant were committed to writing and she was given a full opportunity to respond over a reasonable time frame.

202 Whilst the applicant was critical of the initial meeting with Mr Tait in May 2008 as being an "ambush", I am not persuaded that this was so. Whilst prior to that particular meeting, neither Mr Tait nor Ms Tapper set out in writing to the applicant what the issues were which were to be raised, the applicant was already aware of concerns expressed by the therapists at the Kim Beazley School because she had communicated these issues to Ms Chiu. She was also aware that there may be issues with Ms Yates because Ms Chiu contacted the applicant shortly after Ms Yates had raised concerns, advised the applicant a complaint had been made and requested that she not have any direct contact with her.

203 Furthermore, the initial meeting with Mr Tait was an informal one. I accept the respondent's submissions that it was a relatively "low key" meeting whereby the general issue of employee discontent was raised with a view to endeavouring to resolve matters on an informal level. However, perhaps regrettably in hindsight, the applicant elected to escalate the matter significantly by invoking formal processes and seeking representation and assistance at the next meeting.

204 I have the overwhelming impression, from all of the evidence and the issues raised, that had the applicant chosen to engage positively with the respondent at that early stage, then many of the subsequent events and difficulties may not have unfolded and the employee/employer relationship may have been maintained intact.

205 As the applicant herself admitted in cross-examination, after the issuance of the verbal warning in May 2008 by Mr Tait, the applicant's relationship and attitude to the respondent's management changed fundamentally. From that point on in my view, from the tenor of the applicant's evidence throughout the proceedings, she was clearly against the respondent's management, in particular Ms Chiu and Mr Tait. All subsequent dealings that the applicant had with the respondent's management after these initial events, seemed to be infected with this resentment and anger.

206 My overall impression of the demeanour of the applicant during the course of her testimony was of a person most reluctant to make any concessions or admissions against her interests. I have no doubt on the basis of all of the evidence from the applicant and the therapists to whom she reported, in particular the evidence of Ms Totten and Ms Yates, that the applicant had sound working relationships with those whom were supportive of her in the workplace, however, those who appeared to not be so, were isolated.

207 I accept the description by counsel for the respondent that the applicant saw members of staff as being "either with her or against her". A graphic illustration of this tendency was her interaction with Ms Totten. When Ms Totten indicated she did not want to become involved in the applicant's issues with the senior management of the respondent, the applicant informed Ms Ms Totten that their relationship was "changed forever".

208 From her evidence, I have no doubt that Ms Chiu could be a forceful personality and at times her communications with staff could be considered to be blunt. The distinct impression I formed from considering her evidence carefully, was that she is a person who could at times "call a spade a spade".

209 However, Ms Chiu was the applicant's superior in the workplace and the person to whom the applicant reported. Whilst their interactions were at times described by both the applicant and Ms Chiu as "robust", she and the applicant had a good professional and personal relationship for some years, until the events of 2008.

210 I do not accept that Ms Chiu had any deliberate intent to remove the applicant from the organisation or to cause the applicant distress. I also do not accept that the process of performance appraisal undertaken by Ms Chiu was inappropriate or undertaken with a view to denigrate the applicant. On the contrary, whilst the applicant seemed not prepared to accept it, there were many positive remarks in performance appraisals performed by Ms Chiu.

211 Whilst these matters were not central to the respondent's decision to ultimately terminate the applicant's employment, the considerable body of evidence about performance appraisals led through Ms Chiu, Ms Delamere and the applicant herself, left me with the impression that there were some legitimate issues which the respondent sought to raise with the applicant in an appropriate way. The applicant never accepted the validity of any of these issues and interpreted them as an attack upon her, particularly by Ms Chiu. These issues only further served to compound the complete breakdown in the relationship between the two of them.

212 A further example of the applicant's attitude to the respondent's management was the appointment of Ms Delamere as her manager. The applicant was reluctant to see this as a positive gesture by the respondent to build a more constructive working relationship between the applicant and others, in particular Ms Chiu.

213 Furthermore, a number of the issues identified in the evidence lead me to conclude that the applicant had no real conception of the proper bounds of conduct of an employee towards senior management of her employer. There were a number of examples on the evidence where the applicant seemed not to appreciate how her conduct in the workplace could be seen to be divisive, derogatory or indeed insubordinate.

214 As to the latter, the criticisms of her director Ms Chiu to other staff and the conduct of the applicant towards Ms Chiu at the meeting of 12 September 2008 were plainly insubordination. Furthermore, the applicant's treatment of Mr Tait bordered on contemptuous. As a senior employee, referring to the Chief Executive at a social function in the presence of junior employees as "a turd" and in meetings generally making derogatory and offensive remarks about the head of an organisation, is in my view, without doubt, insubordination and of itself grounds for dismissal.

215 The applicant sought to significantly downplay the implications of the CAEP emails and the involvement of the DSC through Mr Phillips. However, in subsequent meetings to discuss the issue, the applicant's insistence that she go to Mr Phillips' superior to challenge Mr Tait's conclusions, showed a fundamental lack of appreciation for the sensitivities of the matter from the respondent's perspective. This was in addition to the applicant's challenge to Mr Tait to go back to the DSC senior management, which of itself, was further insubordinate conduct toward her employer.

216 Ultimately, it was very clear on all of the evidence, indeed as she admitted in her testimony, that the applicant had lost all faith in the respondent's management. The working relationships were clearly completely dysfunctional. An enormous amount of time and resources was spent in dealing with issues concerning the applicant in the workplace.

217 In my view, given all that preceded it, the respondent's decision taken in November 2009 to bring the employment relationship to an end, was the only real option open to it in all of the circumstances. Looking at it from the perspective of the practical realities of the workplace, which the Commission must do, there was little or no prospect of a repair of the employment relationship which had entirely broken down.

218 For all of the foregoing reasons, the Commission is not satisfied that the dismissal of the applicant was harsh, oppressive or unfair. The application is dismissed.

2011 WAIRC 00304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBYNNE JEAN BOURKE
	APPLICANT
	-v-
	ROCKY BAY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 20 APRIL 2011
FILE NO/S	U 237 OF 2009
CITATION NO.	2011 WAIRC 00304

Result	Application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr D McKenna of counsel

Order

HAVING heard the Mr K Trainer as agent of the applicant and Mr D McKenna of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2011 WAIRC 00289

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEN JOHN ALWYN CARTER
	APPLICANT
	-v-
	JOHN FENTON TRADING AS COASTWAY TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 15 APRIL 2011
FILE NO/S	U 162 OF 2010
CITATION NO.	2011 WAIRC 00289

Result	Application Discontinued
Representation	
Applicant	Ms N Leedman
Respondent	Mr R Kerferd

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.

2011 WAIRC 00327

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLOTTE (LOTTIE) CHAPMAN
	APPLICANT
	-v-
	PETER WATSON : HUMAN RESOURCES THE LEUKAEMIA FOUNDATION OF AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 9 MAY 2011
FILE NO/S	U 46 OF 2011
CITATION NO.	2011 WAIRC 00327

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 14 April 2011 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 00301

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TALIA FREEMAN
	APPLICANT
	-v-
	ANDREA CHASE T/A 'UNVEIL'
	(ABN 844 075 797 44)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	U 169 OF 2010
CITATION NO.	2011 WAIRC 00301

Result	Discontinued
Representation	
Applicant	Mrs M Gates (as agent)
Respondent	Ms J Alilovic (of counsel)

Order

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

WHEREAS the application was lodged out of time; and

WHEREAS on 6, 20 and 21 December 2010, and with the consent of the respondent, the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS on 23 December 2010 the respondent's representative advised the Commission that the parties had reached an agreement to settle the matter; and

WHEREAS on 29 December 2010 the applicant's representative advised the Commission that the applicant required further time to review the settlement offer; and

WHEREAS on 9 February 2011 the applicant's representative wrote to the Commission to advise that the applicant wished the matter to proceed to arbitration; and

WHEREAS on 14 February 2011 the Commission contacted the applicant's representative by telephone about the settlement offer and was advised that the offer was initially accepted but on reflection the applicant was not happy with what was offered; and

FURTHER the applicant was informed that the parties would be notified in due course about how the matter was to proceed; and

WHEREAS on 16 February 2011 the respondent's representative wrote to the Commission stating that the respondent was of the view that a settlement had been reached and that it would press this point if the matter proceeded to hearing; and

WHEREAS on 22 February 2011 the applicant's representative contacted the Commission to advise that in view of what was stated in the respondent's letter dated 16 February 2011 the applicant wanted time to see if the matter could be resolved; and

WHEREAS on 21 March 2011 the applicant's representative informed the Commission that the parties had reached an agreement to settle the matter and a Notice of Withdrawal or Discontinuance would be lodged in the Commission once the terms of settlement had been finalised; and

WHEREAS on 7 April 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 8 April 2011 the respondent consented to the matter being discontinued;

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

2011 WAIRC 00299

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEATHER HALL
	APPLICANT
	-v-
	ESSENTIAL PERSONELL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 19 ARPIL 2011
FILE NO/S	U 190 OF 2010
CITATION NO.	2011 WAIRC 00299

Result	Application discontinued
Representation	
Applicant	Mr G Sturman (as agent)
Respondent	Mr D Jones (as agent)

Order

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

AND WHEREAS on 245 January 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 1 April 2011 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 00296

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BETH HOLLETT
	APPLICANT
	-v-
	VENUES WEST CHALLENGE STADIUM
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	U 187 OF 2010
CITATION NO.	2011 WAIRC 00296

Result	Application discontinued
Representation	
Applicant	Mr R C Hollett
Respondent	Ms N Eastman

Order

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

AND WHEREAS on 25 January 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 8 February 2011 the Commission convened a further conference;

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

AND WHEREAS on 30 March 2011 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 00319

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TENNIELE JACKSON
	APPLICANT
	-v-
	KALGOORLIE KASHMART
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 5 MAY 2011
FILE NO/S	U 33 OF 2011
CITATION NO.	2011 WAIRC 00319

Result	Application discontinued

Order

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

AND WHEREAS on the 1st day of April 2011 the Commission convened a telephone conference for the purpose of conciliating between the parties;

AND WHEREAS following the conference the parties agreed to a full and final settlement of all matters arising from the termination of Ms Jackson's employment;

NOW THEREFORE, I, the undersigned, pursuant to the powers conferred on me under s 27(1)(a) of the Act, hereby order:

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00305

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	"K"
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION EMPLOYMENT AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 23 MARCH 2011, WEDNESDAY, 22 DECEMBER 2010
DELIVERED	WEDNESDAY, 20 APRIL 2011
FILE NO.	U 123 OF 2010
CITATION NO.	2011 WAIRC 00305

CatchWords	Industrial law - termination of employment - harsh, oppressive and unfair dismissal - Application referred outside 28 day time limit - relevant principles applied - Commission not satisfied discretion to accept application out of time shold be exercised - Appilcation dismissed - Industrial Relations Act 1979 ss 29(1)(b)(i), 29(2), 29(3).
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D J Matthews of counsel

Reasons for Decision

1 The substantive claim in this matter is one brought by the applicant under s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that on or about 1 January 2007 his employment as a classroom teacher was unfairly terminated by the respondent.

2 Given that the application was not filed until 5 August 2010, self evidently, the application is very significantly outside of the 28 day time limit prescribed by s 29(2) of the Act. The application was listed for hearing as to whether the Commission should accept the applicant's application out of time, exercising the powers conferred on the Commission under s 29(3) of the Act.

3 The application was opposed by the respondent.

Factual Background

4 Evidence was adduced through the applicant and also through Ms Rinaldi on behalf of the respondent. The following is a brief summary of that evidence insofar as it is relevant for the purposes of determining whether the power conferred on the Commission under s 29(3) of the Act, to accept the applicant's application out of time, should be exercised.

5 The applicant testified that he first started teaching in January 1991 at Armadale High School. The applicant also worked in private education. Some time after that the applicant undertook further tertiary studies which he completed in 2006.

6 For present purposes, between 2004 and 2007, the applicant was engaged as a relief teacher whilst completing his studies. On the evidence, the applicant seemed to have taught principally at the Gladys Newton School. The applicant testified as to how he received teaching appointments. He said that the school became familiar with him and where a teacher was absent, on leave or away because of illness, the casual engagement was offered.

7 On the applicant's testimony, supported by the terms of exhibit R1, which was a summary of the dates of engagement of the applicant in the period September 2004 to April 2007, it would appear that the applicant undertook casual teaching work fairly continuously, up to 2 to 3 times per week, over that period of time. There were breaks in the engagements, which may have correlated with school holidays.

8 The applicant testified that some time after his last teaching engagement on 3 April 2007, in about July 2007, he received a telephone call from someone at the school to say he was not to return to the school premises. Later that month, the applicant received a letter dated 27 July 2007, tendered as exhibit R2, from the respondent's Director-General, referring to proceedings in the Family Court of Western Australia in May 1997, in which allegations were made against the applicant of inappropriate physical contact with children.

9 The letter stated that given the nature of the allegations, the Director-General considered that the applicant was no longer suitable to perform work in the public education system in this State. Accordingly, the applicant was advised that the respondent would not offer the applicant "any further opportunities for employment in any capacity." Furthermore, the letter informed the applicant that it intended to "cancel your personal payroll number with the Department and mark your records not suitable for re-employment".

10 By letter of the same date, tendered as exhibit A1, the applicant replied to the Director-General of the respondent, contesting the allegations raised by her in her letter. The applicant objected to the respondent's proposed course, and referred to an earlier attempt in December 2004 by his ex-wife to, in his view, improperly influence the respondent.

11 By letter of 17 September 2007, tendered as exhibit A2, the Director-General of the respondent replied to the applicant's letter of 27 July 2007, and affirmed her decision that the applicant's "personal payroll number will now be cancelled and you [sic] records marked not suitable for re-employment. This action will mean that you will not be able to seek any further work with the Department and should you do so, the Department will not be responsible for any claims for payment that you make."

12 The applicant testified that he felt aggrieved by this decision and wrote to the then Premier of the State and others. Seemingly, as a consequence of these steps, the applicant lodged a complaint with the Western Australian Ombudsman on 20 January 2008. The applicant testified that at all times he was endeavouring to properly understand the reasons for the respondent's decision to no longer continue his employment.

13 The Ombudsman's inquiry, for various reasons, took a considerable period of time. Ultimately, by letter dated 23 October 2009, tendered as exhibit A3, the Ombudsman advised the applicant that two of the three allegations contained in his complaint had been upheld.

14 The two allegations upheld were firstly, that the applicant had not been properly informed of the nature of the allegations against him, other than that they arose in Family Court proceedings in 1997, and thus the applicant was not provided with an adequate opportunity of reply.

15 Secondly, the respondent did not, in the circumstances of the case, properly identify the source of the information considered in arriving at its decision to cancel his payroll number, and the applicant was not afforded procedural fairness.

16 The third allegation in relation to a prior review of the applicant's suitability to teach in 2005 was not upheld.

17 The conclusion of the Ombudsman in his letter was that the respondent had informed it that the "flag" against the applicant's name in the respondent's payroll system, precluding the applicant from consideration for further employment, could be the subject of a review by the respondent's "Employee Suitability Committee".

18 The letter went on to state that should the applicant not be satisfied with this internal review process, then "you could then take that decision as an employment issue before the Industrial Relations Committee." It seems clear enough that the reference to the "Industrial Relations Committee" in the letter from the Ombudsman's office is a reference to the Commission.

19 According to the applicant, whilst these matters were proceeding, he was from time to time, resident and teaching overseas.

20 The applicant testified that he accordingly sought a review of the "flag" against his employment, by the Employee Suitability Committee. By email to the respondent of 4 January 2010, tendered as exhibit R4, the applicant requested a formal review by the respondent.

21 This occurred, and by letter of 4 March 2010, tendered as exhibit A4, the respondent's Executive Director Workforce informed the applicant that the "Employment Suitability Assessment Committee" had considered the circumstances of the applicant's case, in light of evidence adduced in the Family Court proceedings to which I have referred above.

22 The Committee, on the basis of the material considered by it, declined to alter the respondent's former assessment. The applicant was given a further opportunityby the respondent to make a submission which the applicant did by letter of 31 March 2010.

23 The respondent replied by letter of 21 April 2010, again from the Executive Director Workforce, advising that the respondent had maintained its decision to not offer the applicant further employment.

24 Ms Rinaldi is the Manager of Labour Relations for the respondent and has been responsible for the management of the applicant's case. Ms Rinaldi generally confirmed the applicant's evidence in relation to the nature of casual employment as a teacher. Ms Rinaldi testified that once a teacher becomes known to a school, the school will usually contact the teacher directly, to request coverage for an absence for example, due to sick leave or other leave, or for other reasons.

25 Such appointments are generally day by day with a maximum engagement of four consecutive weeks of casual employment under the relevant Award as thereafter a fixed term appointment is required.

26 The applicant's more recent employment history between 2004 and 2007, as contained in exhibit R1, was confirmed by Ms Rinaldi. Her evidence was that over this period from September 2004 to April 2007, there were 136 separate engagements totalling 145 days.

27 Ms Rinaldi confirmed in her testimony, which appears not to have been controversial, that the applicant did not work between his last engagement on 3 April 2007, to the time he received the respondent's first letter dated 27 July 2007. Ms Rinaldi said that on the basis of the respondent's system, between those periods there was no evidence that the applicant had applied for work through a "placement request" and nor did the respondent at any time in that period give the applicant one hours' notice as a casual employee as prescribed under the Teachers (Public Sector Primary and Secondary Education) Award 1993 ("the Award").

28 From the time of the letter from the Director-General of the respondent to the applicant in September 2007, Ms Rinaldi said the next the respondent heard about these events was contact from the Ombudsman either in March or May 2008, to the effect that a complaint had been received from the applicant and information was sought to assist the Ombudsman in its investigation.

29 As a part of her responsibilities in assessing the applicant's claim, Ms Rinaldi said she had performed some calculations as to the time frames in this matter. From September 2007, the time of the letter from the Director-General to the applicant, there had elapsed some 1075 days to the filing of this application on 5 August 2010. The application was not however served on the respondent until 17 December 2010.

30 Furthermore, Ms Rinaldi referred to the applicant's assertion in an email of 10 May 2010, a copy of which was exhibit R10, that given the respondent's refusal to review the matter, "I now intend to have this matter listed before the Industrial Relations Committee". This was also the applicant's testimony.

31 I find accordingly.

Consideration

32 The Commission has an undoubted discretionary power under s 29(3) of the Act to extend the time within which the present application may be referred to the Commission, if it would be unfair not to do so.

33 The relevant principles in relation to consideration by the Commission as to whether the power in s 29(3) of the Act should be exercised were dealt with by the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683. In that case, the court adopted and applied principles applicable to consideration of extension of time applications for unfair dismissal matters in the Commonwealth jurisdiction determined in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. Those principles were expressed by the court at 299-300:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

34 In this matter if one adopts the date of September 2007 as being the time at which the applicant was advised by the respondent that he would no longer be employed by it, a period of some three years has elapsed from then to the commencement of these proceedings. On any view, prima facie at least, this is an inordinate delay.

35 However, whilst at first blush this seems to be so, the applicant plainly has contested the respondent's decision and sought to invoke what on the applicant's testimony, he regarded as proper procedures to prompt a review. This included direct discussions, the complaint to the Ombudsman and other steps. Of course, those other steps taken by the applicant since that time did not preclude his prompt commencement, simultaneously, of proceedings in this Commission to challenge the respondent's decision regarding his employment.

36 Putting the most favourable interpretation on the events to the applicant, it is plain, that certainly from May 2010, the applicant was aware of his right to commence proceedings in this jurisdiction to challenge the respondent's decision. He did not do so, however, until some three months later in August 2010.

37 Whilst the applicant testified that during these periods of time he was travelling overseas and carefully reflecting on what steps he should take to further challenge the respondent's decision, this is of itself a significant delay. In my view, having reached the point in May 2010, where it was clear that the respondent's ultimate decision to not reengage the applicant was final, it was then imperative on the applicant to commence these proceedings without further delay, given the nature of this aspect of the Commission's jurisdiction.

38 It is well settled that applicants in matters such as these, where a challenge to a termination of employment is brought, must do so expeditiously and without unreasonable delay.

39 Thus, whilst aspects of the very lengthy period of time from the respondent's decision to no longer employ the applicant, to the commencement of these proceedings, can at least in part be explained, there have been unreasonable and unexplained delays in the applicant taking further necessary steps.

40 Furthermore, the applicant faces other hurdles in his application. It is the case of course, that a casual employee may be "dismissed" and hence, may bring proceedings for relief under s 29(b)(i) of the Act (See *Swan Yacht Club (Inc) v Leanne Bramwell* (1997) 78 WAIG 579 and the cases therein cited). In each case, however, it will be a matter of fact as to whether the casual engagement is in the nature of continuous employment such that the employee could be characterised as dismissed from their employment.

41 For example, an employee who is described as casual, but who is regularly and continuously employed each and every week albeit for varying hours, with an expectation by both the employer and the employee that the employment will so continue, can be unfairly dismissed and reinstated: *Ryde-Eastwood Leagues Club v Taylor* (1994) 56 IR 385.

42 Whilst on one view in this matter, the applicant's casual engagements in the period September 2004 to April 2007 were quite regular, in that work was performed seemingly at least every fortnight or thereabouts, it is open to question whether the engagements were sufficiently regular and systematic to be characterised as ongoing employment. This is so when regard is had to the evidence as to how the casual engagements come about.

43 That is, it seems on the evidence that the conclusion is reasonably open that there would not, in each and every case, be an expectation by the applicant and the respondent of ongoing engagements. This is because the engagements themselves are

dependent upon the absence of a permanent teacher for various periods of time, depending upon the particular circumstances at hand.

44 In any event, the terms of cl 10 – Casual Employment of the Award would tend to confirm that this was the intended operation of casual teaching employment in the education sector.

45 The applicant also has a further difficulty. That is, it is common ground that he ceased any teaching appointments in April 2007 however he was not informed by the respondent that he would not be considered for further engagements until later that year in September 2007.

46 The applicant confirmed in his evidence that he did not undertake any teaching duties in that period of time. In these circumstances, particularly where the respondent did not take any steps to terminate as prescribed by cl 10.2 of the Award, an issue arises as to how it could be reasonably concluded that there had been in this case, a "dismissal" in the sense that the applicant was sent away from his employment.

47 Whilst the merits of a claim are to be considered by the Commission in a "rough and ready way" in determining whether an extension of time should be granted, on my assessment of the evidence, the prospects of success of the applicant, even if his application were accepted out of time, are weak. It is very doubtful whether the applicant could establish as a matter of fact and law, that he was dismissed to attract the Commission's jurisdiction under s 29(1)(b)(i) of the Act.

48 Whilst aspects of this matter have been quite unfortunate, in terms of the lengthy and protracted processes that the applicant has gone through, the Commission cannot conclude on what is before it, that it would be unfair to not accept the applicant's claim out of time.

49 Accordingly the application is dismissed.

2011 WAIRC 00306

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	K
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION EMPLOYMENT AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 20 APRIL 2011
FILE NO/S	U 123 OF 2010
CITATION NO.	2011 WAIRC 00306

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D J Matthews of counsel

Order

HAVING heard the applicant in person and Mr D J Matthews of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2011 WAIRC 00300

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLISON KELLY
	APPLICANT
	-v-
	VINUS VITA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	B 147 OF 2009
CITATION NO.	2011 WAIRC 00300

Result	Dismissed
Representation	
Applicant	Mr S Kemp (of counsel) and Ms R Seabrook (of counsel)
Respondent	Mr C Garvey (of counsel)

Order

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

WHEREAS on 21 September 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the respondent was given time to get further instructions and to provide documentation to the applicant; and

WHEREAS on 9 November 2009 the Commission wrote to the applicant about the status of the matter and the applicant's intentions with respect to the application; and

WHEREAS on 13 November 2009 the applicant wrote to the Commission requesting further time for the parties to have discussions in relation to the matter and the matter was adjourned for a further four weeks; and

WHEREAS on 16 December 2009, at the request of the applicant and with the consent of the respondent, the Commission adjourned the matter pending the outcome of proceedings in the Supreme Court; and

WHEREAS between 16 December 2009 and 13 August 2010 the parties provided updates to the Commission on the progress of the Supreme Court matter; and

WHEREAS on 8 November 2010 the applicant wrote to the Commission to advise that the issues the subject of this application were not resolved and requested that a directions hearing be listed to progress the matter; and

WHEREAS on 13 January 2011 the Commission convened a directions conference; and

WHEREAS following the conference the application was set down for hearing and determination on 2, 3, 4 and 5 May 2011; and

WHEREAS on 6 April 2011 the respondent's representative advised the Commission that the parties had reached an agreement to settle the matter; and

WHEREAS on 11 April 2011 the parties filed a Minute of Consent Orders in respect of the application seeking that the application be dismissed with no order as to costs and for the hearing to be vacated;

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

1. THAT the hearing of application B 147 of 2009 scheduled for 2, 3, 4 and 5 May 2011 is vacated.
2. THAT the summonses to witness to Alison Noakes, Justin Bishop, William Crappsley, Karen Galloway and Elizabeth Dawson lodged in the Commission on 29 March 2011 by the respondent be and are hereby set aside.
3. THAT this application otherwise be, and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2011 WAIRC 00298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL DANIEL KELLY
	APPLICANT
	-v-
	VINUS VITA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	B 148 OF 2009
CITATION NO.	2011 WAIRC 00298

Result	Dismissed
Representation	
Applicant	Mr S Kemp (of counsel) and Ms R Seabrook (of counsel)
Respondent	Mr C Garvey (of counsel)

Order

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

WHEREAS on 21 September 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the respondent was given time to get further instructions and to provide documentation to the applicant; and

WHEREAS by letter dated 15 October 2009 the respondent raised an issue about the Commission's jurisdiction to deal with this matter as it claimed that the applicant's salary was above the prescribed amount for the purposes of the Act; and

WHEREAS on 9 November 2009 the Commission wrote to the applicant about the status of the matter and the applicant's intentions with respect to the application; and

WHEREAS on 13 November 2009 the applicant wrote to the Commission requesting further time for the parties to have discussions in relation to the matter and the matter was adjourned for a further four weeks; and

WHEREAS on 16 December 2009, at the request of the applicant and with the consent of the respondent, the Commission adjourned the matter pending the outcome of proceedings in the Supreme Court; and

WHEREAS between 16 December 2009 and 13 August 2010 the parties provided updates to the Commission on the progress of the Supreme Court matter; and

WHEREAS on 8 November 2010 the applicant wrote to the Commission to advise that the issues the subject of this application were not resolved and requested that a directions hearing be listed to progress the matter; and

WHEREAS on 13 January 2011 the Commission convened a directions conference; and

WHEREAS at the conference the respondent advised the Commission that it was no longer pursuing the issue of jurisdiction raised in its letter dated 15 October 2009; and

WHEREAS following the conference the application was set down for hearing and determination on 2, 3, 4 and 5 May 2011; and

WHEREAS on 6 April 2011 the respondent's representative advised the Commission that the parties had reached an agreement to settle the matter; and

WHEREAS on 11 April 2011 the parties filed a Minute of Consent Orders in respect of the application seeking that the application be dismissed with no order as to costs and for the hearing to be vacated;

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

1. THAT the hearing of application B 148 of 2009 scheduled for 2, 3, 4 and 5 May 2011 is vacated.
2. THAT the summonses to witness to Alison Noakes, Justin Bishop, William Crappsley, Karen Galloway and Elizabeth Dawson lodged in the Commission on 29 March 2011 by the respondent be and are hereby set aside.
3. THAT this application otherwise be, and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2011 WAIRC 00294

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DYLAN MADDAMS
	APPLICANT
	-v-
	KELVIN A PARKER
	PRESTIGE SUNROOFS (WA)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	U 205 OF 2010
CITATION NO.	2011 WAIRC 00294

Result	Application discontinued
Representation	
Applicant	Ms D Maddams
Respondent	Mr K Parker

Order

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

AND WHEREAS on 17 February 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 28 March 2011 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 00324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR KELVIN JOHN MATTHEWS
	APPLICANT
	-v-
	SHIRE OF SHARK BAY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 5 MAY 2011
FILE NO/S	B 20 OF 2011
CITATION NO.	2011 WAIRC 00324

Result	Discontinued
Representation	
Applicant	Ms P Byrne (as agent)
Respondent	Mr M Fitz Gerald (as agent)

Order

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

WHEREAS on 11 March 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS the respondent does not object to the matter being discontinued;

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

2011 WAIRC 00302

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE POMERY
	APPLICANT
	-v-
	GUMALA ABORIGINAL COPORATION (GAC)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	U 25 OF 2011
CITATION NO.	2011 WAIRC 00302

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Mr R Grayden

Order

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

WHEREAS on 8 April 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 11 April 2011 the respondent consented to the matter being discontinued;

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

2011 WAIRC 00295

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EILEEN TAYLOR
	APPLICANT
	-v-
	DERBAL YERRIGAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 APRIL 2011
FILE NO/S	U 28 OF 2011
CITATION NO.	2011 WAIRC 00295

Result	Discontinued

Order

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

WHEREAS the application was lodged out of time; and

WHEREAS on 14 April 2011 the Commission set down a conference for the purpose of scheduling a hearing with respect to the application being lodged out of time and/or conciliation if the respondent consented; and

WHEREAS on 8 April 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 13 April 2011 the respondent consented to the matter being discontinued; and

WHEREAS on 13 April 2011 the conference was vacated;

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

CONFERENCES—Matters arising out of—

2011 WAIRC 00288

DISPUTE RE CONDITIONS OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY (PTA)
	APPLICANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 15 APRIL 2011
FILE NO/S	C 11 OF 2011
CITATION NO.	2011 WAIRC 00288

Result	Application Discontinued
Representation	
Applicant	Mr R Farrell
Respondent	Mr G Ferguson

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.

PROCEDURAL DIRECTIONS AND ORDERS—

2010 WAIRC 00055

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLIE MARSHALL
	APPLICANT
	-v-
	CITY OF WANNEROO
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 10 FEBRUARY 2010
FILE NO.	U 6 OF 2010
CITATION NO.	2010 WAIRC 00055

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr S White as agent

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr S White as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT evidence in this matter the adduced by way of signed witness statements which will stand as the evidence of the maker. Evidence other than that contained in the witness statements may only be adduced by leave of the Commission.

(2) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 7 days prior to the date of hearing.

(3) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 3 days prior to the date of hearing.

(4) 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 3 days prior to the date of hearing.

(5) THAT the parties have liberty to apply on short notice.

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

2011 WAIRC 00325

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICKY MARIA MOORE
	APPLICANT
	-v-
	THE LIBERAL PARTY OF AUSTRALIA (WA DIVISION) INC
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 5 MAY 2011
FILE NO/S	U 29 OF 2011
CITATION NO.	2011 WAIRC 00325

Result	Extension of time granted for respondent to file answering statement

Order

WHEREAS an application was lodged in the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* on 25 February 2011;

AND WHEREAS service of this application was effected on 13 April 2011;

AND WHEREAS on 2 May 2011 the respondent requested an extension of 14 days in which to file its answering statement;

AND WHEREAS on 4 May 2011 the applicant advised she neither consents nor objects to this request;

AND WHEREAS the Commission considers it is fair and just to grant this request;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under Regulation 36 of the *Industrial Relations Commission Regulations 2005* hereby order –

THAT the time for the respondent to file an answering statement in this application be extended to Monday, 16 May 2011.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority (Transwa) Enterprise Agreement 2011 AG 7/2011	(Not applicable)	the Public Transport Authority of Western Australia	Australian Rail Tram and Bus Industry Union of Employees Western Australian Branch	Commissioner S J Kenner	Agreement registered
Regent College Inc (Enterprise Bargaining) Agreement 2010 AG 8/2011	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees, Regent College Inc. and The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Rangers (National Parks) General Agreement 2011 AG 9/2011	(Not applicable)	The Director General of the Department of Environment and Conservation	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner S M Mayman	Agreement registered
WA - LHMU - Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2011 AG 10/2011	(Not applicable)	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals fomerly comprised in the Metropolitan Health Service Board, the Peel	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner J L Harrison	Agreeement registered

NOTICES—Appointments—

2011 WAIRC 00318

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner JL Harrison to be an additional Public Service Arbitrator for a period of one year from the 2nd day of May, 2011.

Dated the 20th day of April, 2011.

CHIEF COMMISSIONER A.R. BEECH

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2011 WAIRC 00317

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act 1979, intends, by order, to cancel the following award, namely the -

Graylands Selby-Lemnos and Special Care Health Services Award 1999

on the grounds that there are no longer any persons employed under the award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote APPL 154/2010 on all correspondence.

Dated this 29th day of April 2011

(Sgd.) J SPURLING,
Registrar.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2010 WAIRC 00256

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNA COLLARD
	APPELLANT
	-v-
	DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G TOWNSING - BOARD MEMBER
	MR P WISHART - BOARD MEMBER
DATE	MONDAY, 10 MAY 2010
FILE NO	PSAB 2 OF 2010
CITATION NO.	2010 WAIRC 00256

Result	Order and directions issued
Representation	
Appellant	In person
Respondent	Ms M Rinaldi

Order

HAVING heard Ms D Collard in person and Ms M Rinaldi on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby:

1. ORDERS that the notice of application be amended to delete the named respondent and insert in lieu thereof the name "Department of Education".
2. DIRECTS that the respondent file and serve upon the appellant any signed witness statements upon which it intends to rely no later than 14 days prior to the date of hearing.
3. DIRECTS that the respondent file and serve upon the appellant an outline of submissions no later than three days prior to the date of hearing.

(Sgd.) S J KENNER,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2011 WAIRC 00311

APPEAL AGAINST THE DECISION MADE ON 30 MARCH 2010 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR RAFIC SAID
	APPELLANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS A DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS HEALTH SERVICES ACT 1972 FOR THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS A SPAZIANI - BOARD MEMBER
	MR M SWINBOURN - BOARD MEMBER
HEARD	WEDNESDAY, 24 NOVEMBER 2010, TUESDAY, 8 FEBRUARY 2011, WEDNESDAY, 9 FEBRUARY 2011
WRITTEN SUBMISSIONS	23 FEBRUARY 2011, 9 MARCH 2011 AND 15 MARCH 2011
DELIVERED	THURSDAY, 28 APRIL 2011
FILE NO.	PSAB 6 OF 2010
CITATION NO.	2011 WAIRC 00311

CatchWords	Industrial Law (WA) – Appeal to Public Service Appeal Board – Determination to terminate employment – Misconduct – Salary packaging – Meal Entertainment Benefits – Duplication of receipts – Whether employee incurred the expenses claimed – Whether allegations required specific questions – Denial of natural justice – Comparative treatment of other employees
Result	Appeal dismissed
Representation	
Appellant	Mr K Trainer as agent
Respondent	Mr D Matthews of counsel

Reasons for Decision

ACTING SENIOR COMMISSIONER P E SCOTT AND MS A SPAZIANI:

1 Mr Rafic Said, the appellant, appeals against the respondent's decision of 26 March 2010 to dismiss him, with four weeks' pay in lieu of notice.

2 The Public Service Appeal Board (the Board) heard evidence from Tamara Jade Leslie, the respondent's Senior Industrial Relations Consultant for Health Industrial Relations Service, who was the industrial relations liaison with corporate governance personnel conducting investigations into alleged misconduct by a number of the respondent's employees including Mr Said, and from Mr Said.

Background

3 Until his dismissal, Mr Said had been employed by the respondent for 18 years and had an unblemished record. At the time of dismissal he was a Senior Reporting Officer, Health Corporate Network, Level 7. The role he performed was part of a "cross-functional reporting team" dealing with "complex HR reporting activities" (exhibit 1, 144). Mr Said's dismissal was due to his having been found to have "committed acts of serious misconduct in that (he) made improper use of the meal entertainment reimbursement process" (exhibit 1, 112).

The Meals Entertainment Reimbursement Process

4 In 1998, the respondent made available to certain of his staff a salary sacrifice arrangement whereby employees could arrange, through a service provider engaged by the respondent, to have a portion of salary set aside from which expenses could be deducted from pre-tax income, thus increasing the employee's benefits from salary. Mr Said participated in that scheme from its inception, when he used the arrangement for, amongst other things, mortgage payments and a car lease.

5 In 2004, the scheme was expanded to include what is referred to as meal entertainment expenses, whereby an employee could spend salary on restaurant meals and similar expenses and be reimbursed for that expenditure from pre-tax salary. The arrangement allowed for the employee to participate in the system by signing up with one of the two employer-engaged service providers, SmartSalary or Paradigm. The employee would have a certain amount of salary set aside for the scheme and make claims against it by submitting a claim form supported by receipts for expenses incurred such as for a meal at a restaurant. The scheme required that the employee actually incur the expense (exhibit 1, 140).

6 Claims could be lodged electronically. This meant that original receipts were photocopied or scanned by the employee and forwarded with the claim form via email or facsimile transmission to the provider. The employee retained the original receipt and claim form.

7 The evidence demonstrates that at the height of the scheme's usage, up to 8,000 employees were utilising it and setting aside $2.5 million each fortnight. There was no cross-checking of claims made to ensure that more than one employee was not claiming the same expenditure or making a claim utilising the same receipt. The difficulty in checking the validity of claims was increased by the fact that there were two providers and employees could be members of either scheme.

8 In October 2008, an employee of SmartSalary received a faxed claim from an employee and within a short time received another claim from a different employee. The person happened to notice that the same receipt was used to support the claims of the two separate employees, each claiming to have made the expenditure the subject of the receipt. The two employees concerned were interviewed and they claimed that the practice of employees claiming the same expenditure or sharing receipts was not limited to them.

9 An investigation was then conducted in respect of a sample of employees for a three month period of claims. This disclosed a number of irregular claims and a further investigation was then conducted.

10 As a consequence, a total of 253 employees faced allegations of improper use of the system by a number of different means.

11 When it became evident that there had been abuse of the system, by letter dated 20 November 2008, the Director General wrote to staff advising, amongst other things, that:

> "It has become evident that some WA Health employees have been making improper, fraudulent or dishonest claims to obtain meal entertainment benefits. These claims involve the alteration, duplication, exchange or collection of meal receipts to claim reimbursement for meals that were not purchased by the employee.
>
> Following the detection of this dishonest practice by both the WA Health salary packaging providers (SmartSalary and Paradigm), a new requirement to provide original receipts was introduced at the Department of Health's direction with effect from 31 October 2008. Additional measures will shortly be introduced to increase integrity in the claims and reimbursement process and to make the detection of fraudulent claims easier.
>
> Given the serious nature of this conduct, a number of external agencies including the Corruption and Crime Commission ("the CCC"), the Australian Taxation Office ("the ATO") and the WA Police have been informed. A thorough audit and investigation of suspect claims is underway.
>
> I would caution all staff that making fraudulent claims to avoid paying tax is a serious offence, and will result in penalties and possible criminal prosecution. This behaviour (when related to an employer provided benefit) is also a breach of the Public Sector Code of Ethics and the WA Health Code of Conduct and will result in disciplinary action.
>
> You are also reminded of the need to retain all of your relevant records for tax purposes (including receipts). If you are unable to provide documents in support of amounts you have claimed to the ATO, you may be required to pay additional tax. As meal receipts must now be forwarded to Paradigm or SmartSalary, you should make a copy before submitting them" (exhibit 1, 2).

Allegations Against Mr Said

12 By letter dated 19 May 2009, the respondent wrote to Mr Said notifying him that the respondent suspected he may have misconducted himself in his use of the salary packaging arrangements. The particular misconduct was alleged as being:

> "1. On or about the dates set out in column 1 of **Table 1 (attached)**, you claimed reimbursement for meals entertainment expenses when you had already claimed reimbursement for these expenses. Column 2 shows a previous occasion when you claimed reimbursement for these expenses.

It is alleged that each claim made by you listed in Column 1 of Table 1 is a separate act of misconduct.

A copy of each claim with receipts attached listed in Table 1 is attached (**Attachment 1**).

2. In relation to the claims set out in **Table 2 (attached)**, you made improper use of the meals entertainment reimbursement process in that you made a claim where more than one person made a claim using the same receipt or a copy thereof.

It is alleged that each claim made by you listed in Column 1 of Table 2 is a separate act of misconduct.

A copy of each of your claims with receipts attached, together with copies of receipts from the claims submitted by the other employees listed in Table 2, is attached **(Attachment 2)**."

13 The letter then advised Mr Said that he had an "opportunity to submit an explanation in relation to the suspected acts of misconduct", and of what options were then available to the respondent including to take no further action, to propose to take disciplinary action including termination, in which case Mr Said would have an opportunity to comment, or to further investigate (exhibit 1, 4).

14 Attached to the letter were two tables setting out the incidents concerned:

TABLE 1

RAFIC SAID

Duplicates

Date of claim	Date of Previous Claim	SmartSalary Claim Reference No.	Establishment	Date of Receipt	Time of Receipt	Value of Receipt
	23/09/2008	383360	Sassellas Tavern City Arcade	07/08/2008	12:23:00	$29.90
02/10/2008		390077	Sassellas Tavern City Arcade	07/08/2008	12:23:00	$29.90

TABLE 2

RAFIC SAID

Sharing with Nathan Maher

Date of Your Claim	Date of Other Claim	SmartSalary Claim Reference No.	Establishment	Date of Receipt	Time of Receipt	Value of Receipt	Claim Ref.	Claimant's Name
20/08/2008		367157	The Greenwood	11/08/2008	21:08:00	$205.30	Debit card	Rafic Said
	01/10/2008	386284	The Greenwood	11/08/2008	21:05:00	$205.30		Nathan Maher

15 Also attached were copies of the Meal Entertainment Application and Claim Forms used by Mr Said along with copies of the receipts which he had submitted in respect of those claims, as well as copies of the corresponding receipts of other employees.

16 Mr Said provided a response to the respondent in a letter dated 27 May 2009, in the following terms, formal parts omitted:

"PRIVATE AND CONFIDENTIAL

RE: NOTIFICATION OF MISCONDUCT

I refer to your letter to me dated 19 May 2009. I respectfully deny the allegations made against me for the following reasons.

Allegation 1: Claim smart salary reference 383360 and 390077 Duplicate claim

In relation to the duplicate claims above, although the venue (Sassellas) was listed on claim 833360, a $0 amount was claimed against it. Having realised that at a later date the amount on the receipt ($29.90) was claimed with the next claim (390077). At no stage (sic) I claimed twice, nor (sic) I received more than one reimbursement against that claim. A simple check by the auditing person would have cleared the matter.

Allegation 2: Claim smart salary reference 367157 double up with Nathan Maher

In relation to the duplicate claim with Mr Nathan Maher I can confirm that I am in possession of an original receipt provided by the venue attended, plus the credit card statement confirming the payment. To the best of my knowledge I was the only person making a claim.

The receipt that I have in my possession is original and does not carry an indication that it is a copy nor is it a replica of another receipt. The document lodged by Mr Maher, which you gave me a copy of, carry (sic) a different time stamp and it is a different document than the one presented by me.

Mr Maher and I are work colleagues and have attended many eligible meal entertainment venues in the company of others. Greenwood Hotel is one of the venues we frequent often. I am aware that Mr Maher and I utilise the services of

the same salary packaging provider and I am fully aware that the submission of a previously claimed receipt would easily have been identified by the packaging provider and would also jeopardise my own claim.

I can think of many reasons why we had 2 original receipts with 2 different time stamp (sic), these could include, but may not be limited to, such circumstances such as:

a) Greenwood Hotel, when splitting the bill, will give each member the same copy of the receipt with different percentage, eg 50% each. In this case The Greenwood might've given a 100% receipt to each one of us. I can present receipts from other functions supporting this theory.

b) We both genuinely believed, when lodging the claim, that we have paid for this function.

The two documents in question are not the same and certainly are not the "same receipt" as alleged. Look at them carefully. The document shown on the page under my name is a receipt: it shows an amount paid with a time stamp 9:08PM. Whereas, the document shown on the page under the name of "Nathan Maher" is not a receipt it is a bill with a time stamp 9:05PM: it is designed completely differently. They are different and in no way could be said to be the "same". The differences are I suggest, sufficient to call into question the quality of the allegation against me.

The main issue is whether I, duplicated, reproduced or exchanged the receipt, and as far as I am concerned, I dined at a venue, I paid the bill using my credit card and then submitted a salary packaging claim. Not at any stage (sic) an impropriety or attempt to defraud has been committed.

Conclusion

I tried to maintain a very detailed and accurate record keeping system for my salary packaging claims. I have at all times ensured that, to the best of my knowledge, any claim for meal entertainment reimbursement is true and correct.

At no stage, knowingly, (sic) submitted a claim that I am not entitled for or shared, exchanged or duplicated my receipts.

What was submitted by other people, I have no knowledge or control over.

Being dragged from my desk in front of my work colleagues, and escorted off the premises was the most humiliating and degrading thing I ever went through in my life. Presumed guilty until proven innocent is the new world order I have to get use to.

I hope I have been able to provide sufficient information to address the 2 allegations levelled against me, and permit you to make an informed decision about how to proceed.

I would respectfully request that a matter be dealt with swiftly, and if you require more information or you like to arrange a meeting to present further evidence, I can be contacted on 0404894104" (exhibit 1, 23).

17 The respondent investigated the situation and was satisfied with Mr Said's response. Accordingly a letter dated 4 June 2009 was sent to Mr Said to the effect that the respondent found no misconduct on his part and no further action would be taken in relation to the allegations put to him (exhibit 1, 33).

18 Subsequently, by letter dated 8 January 2010, the respondent again alleged that Mr Said had committed acts of misconduct (exhibit 1, 34). This letter was, for present purposes, in almost identical terms as the previous letter dated 19 May 2009, and required a response within five working days.

19 Attached to this letter were two tables setting out the incidents concerned, in the following terms:

TABLE 1

RAFIC SAID

Duplicates

Date of claim	Date of Previous Claim	SmartSalary Claim Reference No.	Establishment	Date of Receipt	Value of Receipt
	10/12/2007	236743	Perth Noodle Wok	18/11/2007	$17.60
21/12/2007		243978	Perth Noodle Wok	18/11/2007	$17.60
	04/02/2008	263234	Red Rooster	26/10/2007	$26.75
21/04/2008		308656	Red Rooster	26/10/2007	$26.75
	23/09/2008	383360	Sassellas Tavern City Arcade	07/08/2008	$29.90
02/10/2008		390077	Sassellas Tavern City Arcade	07/08/2008	$29.90

TABLE 2

RAFIC SAID

Sharing

Date of Your Claim	Date of Other Claim	Claimant's Name	SmartSalary Claim Ref No.	Establishment	Date of Receipt	Value of Receipt
10/09/2007		Rafic Said	199531	Sizzler	09/09/2007	$76.70
	03/03/2008	Nathan Maher	281197	Sizzler	09/09/2007	$76.70
19/11/2007		Rafic Said	226275	Wild Fig Cafe	11/11/2007	$271.40
	12/12/2007	Ian Male	237623	Wild Fig Cafe	11/11/2007	$271.40
21/12/2007		Rafic Said	243978	Miss Maud	19/12/2007	$180.00
	18/01/2008	Kevin Knighton	255151	Miss Maud	19/12/2007	$180.00
	04/03/2008	Kevin Knighton	280951	Miss Maud	01/03/2008	$160.00
	10/03/2008	John Morris		Miss Maud		$160.00
19/03/2008		Rafic Said	290023	Miss Maud	01/03/2008	$160.00
	03/04/2008	Natalie Aukim		Miss Maud	01/03/2008	$160.00
19/05/2008		Rafic Said	321333	Miss Maud	02/05/2008	$67.75
	05/09/2008	Glenn Garbin		Miss Maud	02/05/2008	$67.75
19/05/2008		Rafic Said	321333	Miss Maud	02/05/2008	$73.20
	09/07/2008	Glenn Garbin		Miss Maud	02/05/2008	$73.20
	02/05/2008	Natalie Aukim		Miss Maud	02/05/2008	$73.20
17/06/2008		Rafic Said	335639	Red Rooster	27/01/2008	$159.00
	13/06/2008	Nathan Maher	334223	Red Rooster	27/01/2008	$159.00

20 Also attached were Attachments 1 and 2 which contained copies of various invoices and claim forms the subject of those claims along with copies of the corresponding receipts of other employees.

21 In response to these allegations, Mr Said forwarded the following letter to the Director General dated 14 January 2010, formal parts omitted:

RE: NOTIFICATION OF MISCONDUCT

I refer to your letter to me dated 8 Jan 2010. I respectfully deny the allegations made against me for the following reasons.

Allegation 1: Duplicates (3 separate items)

Perth Noodle Wok and Red Rooster: Those 2 claims were a genuine mistake. The mistake is mine.. (sic) It appears I have inadvertently claimed twice and I apologise for that. The claims were short period of time apart (11 days and 6 weeks) and they are for a small amount of money ($17.60 and $26.75) and constitute only one erroneous claim made out of many hundreds of valid claims. I apologise for this oversight.

This error is no different to the error made by your investigative team with Sassellas below.

Sassellas: This allegation was presented to me in May 2009, and I responded to it in my letter to the Director General dated 27 May 2009, who subsequently cleared me of any misconduct in his letter to me dated 4th June 2009. My response was: "although the venue (Sassellas) was listed on claim 383360, a $0 amount was claimed against it. Having realised that at a later date the amount on the receipt ($29.90) was claimed with the next claim (390077). At no stage I claimed twice, nor I received more than one reimbursement against that claim. A simple check by the auditing person would have cleared the matter.. (sic)" Please see Attachment 1.

Allegation 2: Sharing (7 separate items)

Sizzler duplicate claim with Mr Nathan Maher I can confirm that I am in possession of an original receipt provided by the venue attended, plus the credit card statement confirming the payment (Please see Attachment 2). To the best of my knowledge I was the only person making a claim.

The receipt that I have in my possession, although faded and almost unreadable, is original and does not carry an indication that it is a copy nor is it a replica of another receipt.

Mr Maher and I are work colleagues and have attended many eligible meal entertainment venues in the company of others. Sizzler is one of the venues we frequent often. I am aware that Mr Maher and I utilise the services of the same salary packaging provider and I am fully aware that that (sic) the submission of a previously claimed receipt would easily have been identified by the packaging provider and would also jeopardise my own claim.

Wild Fig Café Claim duplicate with Mr Ian Male I can confirm (and prove further if required 1 (sic)) that on that date I dined with Mr Male at the venue and paid my money at that venue. I remember the Breakfast, on a hot day with 1000's of flies. Many people were present, the venue full (we had to wait for our table). That wasn't a fictitious

event. However, I cannot find the original receipt, which I might have sent in with my claim. As far as I am concerned I was the only one claiming. One thing I can confirm that no illegal, fraudulent or deceitful activities took place.

Miss Maud (All allegations) I can confirm that I dined at the venue, I paid my money at the venue and I'm in possession of all original receipts (not a photocopy or a duplicate). As to the explanation why others claimed the same receipt the answer could be very simple. At Miss Maud if 10 people dined there, and the total bill was $1000, and they wish to split the bill, Miss Maud will print 10 copies of $100 to each one of their patrons. Some of whom might go ahead and claim it with their salary packaging. The receipts are the same, but it is only for the portion paid by the patron. This practice is common and available right now at Miss Maud and other venues, and I can prove it at a date and time of your choosing. There is no intention to defraud, mislead or to claim what I am not rightly entitled to claim. At no stage did I copy, duplicate, pass on, and or shared my receipt with anyone, nor did I receive original or copied receipts from anyone. In particular you will notice that claims I made were in most cases first in time.

Red Rooster duplicate claim with Mr Nathan Maher I can confirm that I am in possession of an original receipt (not a photocopy or a duplicate) provided by the venue attended, to the best of my knowledge I was the only person making the claim.

The main issue is whether I, duplicated, reproduced, fabricated or exchanged the receipt, and as far as I am concerned, I dined at venues, I paid the bill (sometimes using my credit card) and then submitted a salary packaging claim, complying with all the requirements in place at the time. Not at any stage an impropriety or attempt to defraud has been committed. As you can see from the spread of allegations above there is no evidence of systematic of deliberate attempt to commit an illegal act. If you have any doubts on anyone of those events, it cannot be seen other than an honest and genuine mistake or oversight (sic)

Conclusion

I tried to maintain a very detailed and accurate record keeping system for my salary packaging claims. I have at all times ensured that, to the best of my knowledge, any claim for meal entertainment reimbursement is true and correct.

At no stage, (sic) knowingly, submitted a claim that I am not entitled for or shared, exchanged or duplicated my receipts.

What was submitted by other people, I have no knowledge of or control over.

Once again I am presumed guilty until I prove my innocence which goes against natural justice principles.

I hope I have been able to provide sufficient information to address the allegations levelled against me, and permit you to make an informed decision about how to proceed.

I would respectfully request that a matter be dealt with swiftly, and if you require more information or you like to arrange a meeting to present further evidence, I Can (sic) be contacted on 0404894104" (exhibit 1, 103).

22 By letter dated 13 March 2010 the Director General notified Mr Said that he had considered the evidence and had found that Mr Said had committed acts of serious misconduct in respect of each claim made by him in Table 2 and indicated his provisional decision to terminate Mr Said's employment. He invited Mr Said to make a written representation on that provisional decision including whether any termination ought to be with or without notice.

23 Table 2, representing those claims which resulted in the finding of misconduct was in the same terms as Table 2 attached to the letter of 8 January 2010 which set out the allegations of misconduct.

24 Due to issues associated with his health, Mr Said sought and was granted extensions of time for his response. He provided two responses. The first advised the respondent of an application made by the Health Services Union to the Commission seeking a conference and stating that accordingly it would be inappropriate for him to respond until the application had been determined (exhibit 1, 119).

25 Mr Said subsequently provided the following undated response:

"RE: DISCIPLINARY ACTION

I refer to previous correspondence and in particular your letter to me dated 13 March 2010. Your letter and subsequent correspondence invited me to respond to you on the matters raised in your l3 March letter.

In my original reply to you dated 13 January 2010 in regards to the allegations levelled against me, I stated that at no stage have I duplicated, reproduced, passed on, fabricated, altered or exchanged any receipts.

I restate my position and maintain that at no stage did I knowingly or intently commit any act which can be classified as illegal or fraudulent. I may have done a few things which now, with the benefit of hindsight, I would not do again. However, I can assure you that what others would perceive as misconduct and intent to defraud is nothing more than bad judgement, sloppy clerical work, bad quality assurance on my behalf and I regret that these instances to have ever occurred and I apologise for it.

I have sought to refund the value of any benefit gained to the Australian Taxation Office for the few specific instances where it is clear that an unintentional duplication has occurred.

In making your decision I urge that you consider my eighteen years of exemplary service to the Department of Health and to the public service, capped with letters of recognition and selfless acts towards my employer and colleagues. I have always maintained a professional and honest approach to my work where ever that has been and can honestly say that

these acts are honest mistakes with absolute (sic) no intention to defraud the system. I urge you to consider the impact of whichever decision you take and the effect this will have on me personally, to my family and to my work colleagues.

On that basis I respectfully leave the decision in your hands, and seek your compassion, and your understanding when making this decision" (exhibit 1, 120).

26 On 26 March 2010 the Director General wrote to Mr Said notifying him that he had considered Mr Said's submission and had decided to terminate his employment with four weeks' pay in lieu of notice (exhibit 1, 121).

27 Mr Said was one of the 17 employees whose employment was terminated by the respondent. Mr Said is not subject to the disciplinary processes set out in the *Public Sector Management Act 1994* (WA) (the Act) and so the penalties available to the employer were those set out in the Award being limited to either a reprimand or dismissal.

28 As at 4 February 2011, of the 253 employees who had faced allegations of improper use of the system, a total of 126 employees had no further action taken against them; 20 employees had their benefits removed and a warning issued; 23 had a warning issued; 17 were dismissed and 66 cases were unresolved due to employees' employment ceasing in circumstances which included the employee resigning during the investigation process or their contracts having expired (exhibit 1, 141).

The Decision-Making Process Regarding Penalty

29 Ms Leslie gave evidence that the process of decision-making about what was to happen in respect of each employee found to have misconducted themselves by abuse of the system involved a consideration of each case on its merits including:

- The seriousness of the conduct including the number of claims and the amount of money involved in the breaches.
- The amount of money was not an issue of absolute dollar value, but was considered by reference to factors such as whether it was a small or large portion of salary.
- Whether the expenditure was part of a pattern, for example a higher income earner who regularly claimed for meals at a range of high cost restaurants would not be considered more culpable than a lower income earner utilising lower cost restaurants.
- The explanations for the breaches including whether it was a genuine mistake, whether the employee had made enquiries of superior officers or of the provider and been reassured that what they were doing was correct.
- The openness and frankness with which the explanation was made.
- Whether the employee admitted to the misconduct, and at what stage the admission was made.
- Whether the employee volunteered to rectify the situation.
- Whether the employee expressed an apology and the nature of the apology.
- Whether the employee appeared to be genuinely attempting to rebuild the trust in the employment relationship which had been damaged by the breach.

Grounds of Appeal

30 The first issue raised by Mr Said is that he has admitted that the claims referred to in Table 1 were made in error, he acknowledged this in his explanation, apologised for the error and the respondent appears to have accepted this.

31 However Mr Said claims that the respondent did not at any time put to him that he had not actually incurred the expenses claimed by reference to Table 2 even though that was what it found. He says that the issue put to him was whether he had "claimed where more than one person made a claim using the same receipt", and that this is what he answered. He says the question ought to have been put to him about whether he had actually incurred the expense claimed.

32 Alternatively, Mr Said claims that he was entitled to construe the allegations in Table 2 as being of fraudulent receipt duplication, as this is the way he had treated the allegations of the same nature in the first round of allegations made against him, when his explanation was accepted. A fair process would have provided him with an opportunity to answer the question of whether he had incurred the expenditure claimed.

33 In closing submissions, Mr Said also says that it is appropriate to examine the general approach taken by the respondent when putting allegations to employees. That approach was that there were generally three types of allegations. The first, as in Mr Said's case, set out in Table 1, that certain expenses were claimed more than once. The second, set out in Table 2, were claims where more than one person made a claim using the same receipt. This also applied to Mr Said. The third type, set out in Table 3, included allegations which did not fall within the first two categories, and in particular, where it was alleged that the employee did not incur the expenses. No such allegation was put to Mr Said. Accordingly the appellant says he answered the allegations put to him in Tables 1 and 2, but it was not put to him that he had not incurred the expenditure claimed. As it was not put, he was not required to specifically address that question, he was disadvantaged and the process denied him natural justice.

Consideration

Misconduct and Whether Allegations Properly Put

34 Hearings before the Board are *de novo*. Therefore, it is important to examine what was put to Mr Said by the respondent in the allegations put to him, his response and his further explanations to the Board. The Board is then to decide the issue.

35 In respect of those claims made by Mr Said which resulted in the respondent finding him to have misconducted himself the issue was put to Mr Said in the introductory paragraph of the letter of 8 January 2010 that he "may have committed acts of

misconduct in connection with (his) salary packaging arrangement with (his) employer", and in particular, in respect of Table 2, that:

> "… you made improper use of the meal entertainment reimbursement process in that you made a claim where more than one person made a claim using the same receipt" (exhibit 1, 34).

36 Mr Said was invited to provide an explanation. No specific questions were asked, except for him to explain how this had come about. Mr Said's explanations were that:

1. He had the original receipt provided by the venue;
2. He had the credit card statement confirming payment was made by him;
3. In respect of the Wild Fig Café:
   a) he dined there on the date of the receipt with Mr Male;
   b) he "paid (his) money at that venue";
   c) he gave a description of the circumstances;
   d) he asserted that it was not a fictitious event;
   e) he cannot find the original receipt;
   f) he believed he was the only one claiming; and
   g) he had done nothing illegal, fraudulent or deceitful.
4. In respect of the various Miss Maud claims:
   a) he dined at the venue;
   b) he paid his money at the venue;
   c) he was in possession of all original receipts; and
   d) he offered conjecture as to why others might have claimed the same receipts by way of them splitting the bill. The example he gave was of 10 people dining, the bill of $1,000 being split between the 10, and Miss Maud printing out 10 receipts for $100 each. Each receipt "is only for the portion paid by the patron".
5. In respect of the Red Rooster duplicate claim:
   a) he was in possession of the original receipt provided by the venue attended;
   b) to the best of his knowledge he was the only one making this claim.

37 He then reframed the issue, put to him in the terms set out above, to be whether he had duplicated, reproduced, fabricated or exchanged the receipt. He claimed again to have dined at the venues, paid the bill, and then submitted a claim. Although the question of whether he had actually incurred the expense claimed was not asked, he gave a variety of explanations which included answering that question.

38 Mr Said's explanation did not limit itself to the issue as he had reframed it, or whether he had duplicated, reproduced, fabricated or exchanged receipts. He addressed other issues such as whether the event itself occurred, that he dined at the venue, "paid (his) money at the venue" and "I dined at the venues, I paid the bill". The inference was that he had personally expended all of the money he claimed. He did not make any such assertion regarding the Red Rooster receipt.

39 We do not accept the appellant's suggestion that there were two distinct contentions and that it was necessary that the respondent specifically put the other contention of not having incurred the expenditure for Mr Said to answer. In any event, Mr Said answered that issue. As it turns out, he answered dishonestly.

40 In his evidence before the Board, Mr Said explained his and other employees' practices in making claims.

41 In respect of a claim for expenditure at the Wild Fig Café, Mr Said said that he and Mr Ian Male took it in turns to claim for meals when they went out together. It did not matter which of them had actually paid. The cost of the meals was usually around the same amount and they would take it in turns as to who claimed the amount. In this case, he and Mr Male each claimed on the same receipt, each thinking that it was his turn to claim (ts 77).

42 Mr Said agreed that he knew when he put in a claim on 19 November 2007 for a meal at the Wild Fig Café on 11 November 2007 that he had not himself incurred the expense. When asked why his explanation to the allegation had been that he said he had paid his money at the venue and put in a claim he said "I never said I paid the whole amount" (ts 78).

43 Mr Said also gave evidence of what occurred on other occasions where a larger group had gone to a restaurant for a meal. In respect of the claim for $180 for a meal at Miss Maud on 19 December 2009, Mr Said gave evidence that he did not incur the whole amount himself. His explanation was that he believed that there were likely to have been about 70 people in his group on that occasion and if, for example, three or four members of that group were going to be claiming expenses, Mr Kevin Knighton would collect the contributions of all of the participants, pay the bill, have it divided into three or four shares for the purpose of receipts being issued, the cashier would divide the total bill accordingly and issue three or four receipts to make up the total amount received. Mr Knighton would then distribute the receipts to those who were going to make their claims (ts 81 – 82). In light of this explanation it is clear that the hypothetical example given by Mr Said in his explanation to the respondent in his letter of 14 January 2010 (exhibit 1, 104) of a $1,000 bill shared amongst 10 people who each expended $100

getting a receipt for $100 each that "(t)he receipts are the same, but it is only for the portion paid by the patron", together with his assertion that "I paid my money at the venue", was designed to mislead the respondent into believing that he claimed that money which he personally expended, when what he claimed was money expended by himself and others.

44 In respect of a claim for 25 chickens purchased from Red Rooster, Mr Said said in evidence that this was for a function with friends and family, some associated with the football club of which Mr Said's and Mr Maher's sons are members, at Carine Open Space for an Australia Day celebration. Under cross-examination, Mr Said said on a number of occasions that he paid the $159 recorded on the invoice, which invoice was also submitted by Mr Maher. He cannot explain how Mr Maher came to have a copy of the invoice, which he also claimed. He was asked whether he was swearing that he paid $159, to which he responded "I am under oath and I did say I had paid $159" (ts 84). He does not believe he went to collect the chickens, but gave someone else the money (ts 85). He then said "[A]nd I believe I didn't pay for it myself, but I paid for the chicken". When asked to clarify this he said "[M]eaning other people contributed to it, but I claimed the lot" … "I paid the $159, but not from my own pocket". The transcript goes on to record the following exchange between Mr Matthews for the respondent and Mr Said:

> "Okay. Well, that's ridiculous?---Okay.
>
> What are you trying to say? Did you pay the 159 or did you not pay the 159?---Yes, I did pay the 159.
>
> You're maintaining that answer?---I'm … that's what I'm saying. I paid 159 but the - - -
>
> So even though - - - ?--- - - - money collected - - -
>
> Even though you didn't go to Red Rooster and hand over any money and even though that money was other people's money, you say you paid. In what sense did you pay, Mr Said?---Okay. The money handed over to Red Rooster was … came from me. The money I gave to - - -
>
> Well, you might have been the last person in the chain, but you didn't pay it, did you?---I paid … it's no different than any other … like Miss Maud and things … things we're talking about. It's basically money collected. I'm not shouting people 25 chickens. I don't have that sort of money.
>
> Okay?---So it's collected, $20 each or $10 each, or whatever it is, and the money given to them … the receipt came back, I claimed it is. It is clear as that. I'm not denying anything, Mr Matthews.
>
> Okay. But you didn't admit that in your letter of explanation, did you?---You didn't ask me who paid for … that wasn't allegation to me, Mr Matthews.
>
> Okay. So insofar as the allegation was that you'd misused the salary packaging system, you didn't understand that it wasn't being alleged against you that you had claimed for receipts when you hadn't incurred the expense. You didn't understand that?---My belief at the time was … and that's probably supported by SmartSalary advertisement … is you submit the tax receipt and that's what you get paid for it and that's what I … my understanding at the time; no proof of payment required to keep, nothing … as long as you claim it once, you don't pass it on, you don't copy it, you don't … things like that. I wasn't fully aware until all this … it's not something we live and die for, salary packaging, before all this came to light. It's something you do, another thing. Now, it became central stage of everything and everybody is aware of it."

45 In this case, too, Mr Said's evidence demonstrates that he claimed money expended by himself and others.

46 We note that although at this point Mr Said claimed he was not fully aware of the conditions for making a claim, at ts 76 he agreed that he knew that he was only entitled to claim a receipt if he incurred the expense relating to it.

47 When Mr Said, through his accountant, rectified the issue with the Australian Taxation Office, he told the Australian Taxation Office that he made no expenditure on any of those meals and he paid all of the money back. In his evidence he acknowledged that at the time he made the claims through SmartSalary, he told SmartSalary that he had incurred the whole expense on each of the meals.

48 It is clear then that Mr Said has done a number of things in claiming under the salary sacrifice arrangements. Firstly, he has claimed on receipts where he and another person have each claimed to have expended the amount. Secondly, he has claimed expenditure as being his own when other people, including many others, have made contributions to that expenditure, such as the meals at Miss Maud and the purchase of the chickens from Red Rooster. Thirdly, he has submitted claims on the basis that he and Mr Maher regularly shared meals whereby one or the other of them would pay for the meal but they would take it in turns to claim the expenditure, regardless of who had actually paid for the meal. In this case he could not be sure that he had actually incurred the expense which he claimed.

49 The information available on the SmartSalary website at around the time of Mr Said's claims makes clear that the employee needs to incur the expense (exhibit 1, 143). In submitting claims purporting to represent expenditure he had incurred when he had not done so, Mr Said committed misconduct. His misconduct was exacerbated by his deliberately misleading response to his employer's investigation.

50 The allegation put to him was not that the simple fact of a number of people claiming by using the same receipt was of itself misconduct. Rather, it was a statement of fact that suggested something was amiss and he was invited to provide an explanation. There could be any number of explanations for this factual scenario of a number of people claiming on the same receipts. Those explanations could have included error. In Mr Said's case, his explanations were only fully given before the Board, when his explanations to his employer were aimed at misleading, and were not honest and truthful. His explanations to his employer when his employer put allegations to him, contained obfuscation and created deliberately misleading scenarios to convey a false impression that he had incurred the expenditure which he had claimed. His evidence demonstrates that Mr Said

understood quite clearly what was being put to him in the allegations, notwithstanding that explicit questions were not put (ts 74).

51 Mr Said avoided the obvious issue of whether he made a claim he was entitled to make. He reframed the issue to be:

> "the main issue is whether I, duplicated, reproduced, fabricated or exchanged the receipt, and as far as I am concerned, I dined at venues, I paid the bill (sometimes using my credit card) and then submitted a salary packaging claim, complying with all the requirements in place at the time" (exhibit 1, 104).

52 No allegation was made that he had duplicated, reproduced, fabricated or exchanged receipts. It may be that Mr Said took some of this terminology from the Director General's letter to all staff of 20 November 2008 where reference was made to "the alteration, duplication, exchange or collection of meal receipts" (exhibit 1, 2).

53 In his conclusion he said "at no stage, knowingly, submitted a claim that I am not entitled for or shared, exchanged or duplicated my receipts" (sic).

54 Contrary to this explanation, the explanations given in cross-examination make clear that in fact a number of the practices engaged in by Mr Said, whether at his own instigation or coordinated by others, meant that there was abuse of the system such that Mr Said shared receipts with other employees and each of them made claims for the same expenditure. On other occasions he made claims for expenditure which he had not incurred and further when he was asked for an explanation by his employer he deliberately obfuscated and gave misleading responses.

55 We conclude that Mr Said knew that he could only claim what he had expended (ts 75) and that his explanations were not reasonable, open or honest.

Comparative Treatment

56 Mr Said also claims he was not given equal treatment with other employees. Mr Said made reference to the cases of a number of other employees reflected in exhibits 2 - 13 inclusive each of whom received a warning, and some of whom also had their access to the scheme withdrawn.

57 Ms Leslie gave evidence that the question of penalty was considered according to the particular circumstances of the employee including what penalties were available to the employer. In some cases the relevant award limited the penalty to either a reprimand or dismissal whereas in respect of employees subject to the Act there was a broader range of penalties available to the employer. Considerations of the particular cases included the number of incidents of misconduct, the amounts of money involved, whether there was a pattern of claims or amounts, the explanation of the employee, acknowledgment of wrongdoing and the stage at which that acknowledgment was made, any apology and the stage at which that apology was made, and undertakings to rectify the situation.

58 It is not our intention to examine in any detail in these Reasons the explanations given by each of the employees covered by exhibits 2 – 13 but to provide an assessment of a number of them and to make some general comments.

59 In respect of exhibit 2, the employee provided a brief explanation of claims having been submitted twice, acknowledged the error and undertook to reimburse the funds immediately. The person sincerely apologised. There was no attempt to obfuscate or mislead but an open explanation was provided. This person received a formal warning.

60 In exhibit 3, the employee provided an explanation of the circumstances of claims having been submitted twice, that this was a failure in the employee's own claim control process and this employee accepted full responsibility for the error. Where the employee had claimed the full amount of an invoice and they had paid only a portion of the invoice, the employee explained the circumstances under which the situation arose but said that they had no explanation for why the error was made. The employee undertook to rectify the error. They apologised, accepted their wrongdoing and failure. A formal warning was issued.

61 In exhibit 4, the employee's legal representative advised the respondent that the employee was "embarrassed to conclude that each of the matters raised … identify matters for which my client accepts no proper or valid claim should have been made …". The explanation was of the employee's living arrangements and how this affected record keeping and the making of claims. The employee accepted that insufficient care was taken, provided an explanation of inadvertence "probably related to periods of work induced fatigue". The employee denied that there was any systematic misconduct but "episodic human error". The employee undertook to rectify the situation. They also set out the steps which they had now taken to overcome the circumstances and ensure future proper practice. This explanation was open and frank. A formal warning was issued.

62 In exhibit 5, the employee gave explanations for expenses incurred by family members, and claimed that the promotional information regarding the scheme had misled them. However the employee accepted fault and pleaded long service and an exemplary record in employment. The respondent accepted that there may have been confusion about eligibility to claim for expenses incurred by family members when the employee was not present. This person also received a formal warning.

63 In exhibit 6 the employee provided an explanation of their conduct, said that their actions were naïve and had caused them a great deal of anguish and had adversely affected their health. They expressed sincere remorse and sought a compassionate response. This employee was given a formal warning and their access to the scheme was removed.

64 The other exhibits also relate to employees who had acknowledged error or wrongdoing, naivety or stupidity. They had been open and frank in their explanations, apologised and undertaken to rectify the situation. As Ms Leslie said, they set about attempting to repair the trust in the employment relationship which their actions had fractured. They were each issued with a warning and some of them had their access to the scheme removed. Except in one case, the employee's open and frank explanation, expression of remorse and undertaking to rectify the situation is contained within the employee's response to first having the allegations put in the Notification of Suspected Misconduct, that is, they acted at the earliest opportunity. The

exception is where the date of the notification is 8 January 2010 and the response refers to a letter of 30 March 2010, and there is no explanation for that discrepancy.

65 We note also that one of the employees who received the benefit of a warning rather than termination was Mr Knighton. His letter of explanation of what occurred in respect of receipts from Miss Maud was not as described by Mr Said in cross-examination. Mr Knighton's explanation to the respondent was that "I arranged and paid for a group", and it was also supported by a letter from a senior restaurant manager of Miss Maud which confirmed his payment of the particular account. It does not make any mention of Mr Knighton having collected contributions from others.

66 The responses of other employees are to be compared with Mr Said's responses to the allegations put to him in the letter of 8 June 2010. We do not refer to his explanation in response to the first set of allegations made on 19 May 2009 because they were not the subject of findings of misconduct.

67 The second letter of allegations contained two groups of allegations. Mr Said's explanation for two of the first group of three claims was that he had made a genuine mistake and he took responsibility for the mistake and he apologised for it.

68 In respect of the third claim of the first group of allegations, this was a repetition of one of the allegations previously made and his response was also accepted by the respondent.

69 The second group of allegations in the letter of 8 June 2009 related to claims made for meals at Sizzler, the Wild Fig Café, Miss Maud and Red Rooster. Mr Said's explanations attempted to reframe the issue, to narrow the allegation to a point where he might be able to meet it, they contained denials of wrongdoing, provision of some information which skirted the issue or deliberately sought to mislead. Those explanations have been set out earlier.

70 His explanation also contained a comment in passing that if there was any doubt then it must have been an honest and genuine mistake or oversight. As noted above, these explanations are at odds with the evidence Mr Said has given to the Board. That evidence demonstrated systematic and repeated abuse of the system by claiming expenditure which had not occurred. There was no acknowledgment of wrongdoing rather there was a denial of it.

71 In those circumstances, in terms of the considerations which the respondent gave to the penalty, whilst the number of incidents was not high, it was a significant number. The amounts of money were not insignificant. There were patterns of wrongdoing. There was no real acknowledgment of wrongdoing and no apology.

72 It was only after Mr Said was advised by letter dated 13 March 2010 that the respondent found that he had misconducted himself and provisionally determined to terminate his employment that Mr Said provided firstly an explanation saying that he was challenging the claim and seeking "an order for an interim injunction restraining you from further disciplinary action against me" (exhibit 1, 119) and then later he said in an undated letter that he had not knowingly or intentionally committed any act which can be classified as illegal or fraudulent. He said:

> "I may have done a few things which now, with the benefit of hindsight, I would not do again. However, I can assure you that what others would perceive as misconduct and intent to defraud is nothing more than bad judgment, sloppy clerical work, bad quality assurance on my behalf and I regret that these instances to have occurred and I apologise for it". (exhibit 1, 120)

73 He advised that he had sought to rectify the situation with the Australian Taxation Office. He asked for his lengthy service to be taken into account and that he had conducted his employment in a professional and honest way. He again asserted that his actions had been honest mistakes.

74 In these circumstances it can be seen that it was only when he had been found to have committed misconduct that Mr Said gave a partial admission of fault but claimed that they were honest mistakes when the evidence demonstrates that they constituted a pattern of misconduct with deliberate attempts to gain benefit to which he was not entitled, and then to provide misleading responses to allegations. Mr Said's actions both in the misconduct and in his explanations did not attempt to overcome the breach of trust and rebuild the relationship with the respondent. Therefore the respondent was entitled to treat him differently to those others referred to who were not dismissed.

75 Compared with the other cases reflected in exhibits 2 – 13, we do not find that Mr Said has been treated unequally or unfairly.

Conclusion

76 We find that Mr Said misconducted himself in his use of the meal entertainment expenses benefits scheme. He was given a reasonable opportunity to explain what had occurred. He understood what was being asked of him and his response included answering the question which he claims was not explicitly put to him. However his answer and explanations were not open, honest or frank. He deliberately obfuscated and attempted to mislead his employer. We also find that he was not treated unfairly in comparison with other employees.

77 We would dismiss the appeal.

MR SWINBOURN:

78 I have had the advantage of reading in draft the reasons for decision of Acting Senior Commissioner Scott.

79 Whilst I agree in a large part with her findings I have come to a different conclusion on the matter and therefore do not agree that the appeal should be dismissed.

The Board's jurisdiction

80 The matter before the Board is by way of a hearing de novo. That is, in exercising its jurisdiction the Board is not confined to the evidence or materials that were available to the Respondent when it made its decision. In effect, the Board stands in the shoes of the Respondent and makes the decision again.

81 In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at 203 [13] per Gleeson CJ, Gaudron and Hayne JJ.

82 The appeal is pointedly not an unfair dismissal hearing and the role of the Board is not to determine whether the Respondents decision to dismiss was harsh, oppressive or unfair. Nor is it the role of the Board to determine whether the Respondent has acted reasonably in making the decision to dismiss the Appellant, Mr Rafic Said.

83 However, in exercising its jurisdiction, the Board is still bound to act in accordance with s 26 of the Industrial Relations Act 1979 (IR Act). That is, in the exercise of its jurisdiction under the Act, the Board must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form.

84 Therefore the Board itself must act fairly and reasonably, ensuring that the outcome is neither harsh nor oppressive.

Did Mr Said commit an act or acts of misconduct?

85 It was apparent to me upon hearing the evidence of Mr Said at the hearing that he had in fact committed a number of acts of misconduct.

86 Mr Said made claims under the salary sacrifice scheme offered by the Respondent when he was not entitled to make such claims.

87 This amounted to misconduct because it involved the abuse of a benefit provided to him under his employment with the Respondent.

88 In effect what Mr Said did was when making a salary packaging claim for meal expenses he claimed the total amount of a receipt when he had only personally incurred part of that amount.

89 I base my findings on the admissions made by Mr Said through the course of the hearing. Quite simply Mr Said admitted that he did not always pay the full amount that was represented on the receipts that he claimed.

90 In my view there were six specific acts of misconduct, which were:

- Claiming an amount of $271.40 when dining at the Wild Fig Cafe on 11 November 2007, when such amount did not represent the actual cost of the meal to Mr Said;
- Claiming the amounts of $180.00; $160.00; $67.75; and $73.20 when dining at Miss Mauds on 19 December 2007; 1 March 2008; 2 May 2008 and 2 May 2008 respectively, when such amounts did not represent the actual cost of the meals Mr Said had incurred personally; and
- Claiming the amount of $159.00 when purchasing cooked chickens from Red Rooster, when such amount did not represent the contribution Mr Said made to the purchase of the cooked chickens.

91 Ms Leslie, on behalf of the Respondent, effectively conceded that the matters contained in table 1 attached to the correspondence dated 8 January 2010 from the Respondent to Mr Said would not have formed the basis of the decision to terminate Mr Said. The reason for this is that in the case of the first two entries (Perth Noodle Wok and Red Rooster) Mr Said admitted that he had erroneously claimed for the same meal twice and apologised for the error and that in relation to the third entry (Sassellas) this had been erroneously included in the table by the Respondent.

92 The matters in table 1 did not form misconduct, they were plainly errors and this was accepted by the Respondent. I accept that they were not acts of misconduct.

93 I do not find that Mr Said has either admitted, or the Respondent has proved, that he committed an act of misconduct with respect to the receipts associated with the Sizzler meal of 9 September 2007.

94 Mr Said was asked under cross examination why Mr Maher, the other employee that had claimed the Sizzler meal, had been able to provide a copy of the receipt and therefore also claim the expense. Mr Said stated he did not know why or how Mr Maher had also claimed the meal. Of note is the fact that Mr Maher's claim (3 March 2008) is almost six months after Mr Said made his claim (10 September 2007). This suggests to me that there was no collusion between Mr Said and Mr Maher.

95 Mr Maher was not called to give evidence and on the evidence provided to the Board there is nothing that directly contradicts Mr Said's version of events. On this basis it is not open to the Board to speculate on why Mr Maher was able to produce a copy of the receipt and claim for it, nor is it my view open to the Board to find against Mr Said with respect to this particular allegation.

96 Mr Said had both the original receipt and the credit card invoice showing he had made the payment. Evidence of this kind had previously satisfied the Respondent that no misconduct had occurred. In my view there is no reason why it should not also satisfy the Board.

97 In the absence of a direct admission by Mr Said, the onus is on the Respondent to prove that he committed an act of misconduct. It has failed to do so.

Were the allegations properly put?

98 Mr Said has claimed that in responding to the allegations of misconduct he only answered the matters that were specifically put to him. During the course of the hearing he said on a number of occasion words to the effect that he only answered the allegations put to him and that those allegations did not include one that he did not incur the entire expense of what he claimed.

99 Whether the allegations were properly put to Mr Said is unfortunately not the point. Because the matter is a hearing de novo, the Board is not bound by the evidence or matters that were before the Respondent when it made its decision. Whilst this would not go so far as to include an unrelated allegation of misconduct, it is clear to me that when regard is had to the entirety of the matters put to Mr Said by the Respondent, the misconduct that Mr Said has committed comes within it.

100 I do not agree with the broad submission of the Respondent (at paragraph 13 and 14 of its final submissions) that in a matter before the Board it could rely upon grounds on which it did not act and of which it was not aware when the employee was dismissed.

101 The Boards jurisdiction is an appeal of a decision and if additional grounds arise that are completely unrelated to the decision that is being appealed, then the employee concerned is entitled to procedural fairness before the employer ahead of the Board exercising its appeal de novo jurisdiction. There is no right of appeal from a decision of the Board. In my view this alone would justify the Board not assuming the identity of the employer by dealing at first and only instance with a matter that has not properly been dealt with by the employer. In such circumstances, if the appeal of the decision before the Board was successful, such additional unrelated grounds would need to be remitted back to the employer to deal with at first instance. If there was an appealable decision only then would the Board's jurisdiction be enlivened to deal with the new ground.

102 Whilst it would have been far more beneficial for all concerned if the Respondent had put the specific allegation to Mr Said that he was claiming expenses he had not personally incurred, it cannot be said that a reasonable employee in Mr Said's position would not have comprehended that his practices were the kind of conduct the Respondent was contemplating when it accused him of misconduct.

2. Mr Said worked in a professional and senior position within the Respondents payroll, employment services, finance, processing and procurement body, known as the Health Corporate Network. His position was as a Senior Reporting Officer which involved performing, *"...a range of complex Corporate Systems (HR, Finance, Supply) reporting activities which contribute to the provision of corporate services reporting and advice to agencies.*" [cited from Mr Said's JDF].

How serious is the misconduct?

103 In terms of the seriousness of the misconduct I cannot agree with the Respondent's characterisation of it as being a systematic and organised abuse of the salary packaging scheme.

104 Whilst there was collusion between employees in the way that receipts were used, there was no evidence that Mr Said was involved in the organisation and orchestration of this. He was, however, a participant that should have known better.

105 It was incumbent on Mr Said as a user of the system to ensure he understood its terms and conditions, and what he could and could not claim. His position and status within the Respondent does not leave it open to him to claim that he did not have the capacity to understand the rules of the salary packaging scheme.

106 The Respondent's claim is also not sustainable when regard is had to the fact that Mr Said was an extremely heavy user of the system. If he had been engaged in a systematic and organised abuse of the system there surely would have been much greater evidence of it than the incidents that were put before the Board. In this regard the Respondent has overstated the seriousness of the matter.

107 I am reinforced in my view when regard is had to the other materials provided to us relating to the 'abuse' of the system by other employees who were not dismissed. That is, the Respondent has not accused other employees with a very similar pattern of behaviour as Mr Said of engaging in a systematic and organised abuse of the salary packaging scheme.

108 How then is the misconduct to be regarded? In my view the misconduct committed by Mr Said was of a significant kind, particularly given that matters of probity and integrity in relation to accounting and financial matters is central to Mr Said's employment contract with the Respondent. It is also the case that these were not simply isolated or single instances of misconduct. There were a number of acts. Nor can it be said that they were committed inadvertently or carelessly.

109 In my view if the acts of misconduct are viewed alone, they are serious enough to justify the termination of Mr Said's employment with notice from the Respondent.

Matters of mitigation

110 There are a number of mitigating matters that lead me to the view that, notwithstanding my view that the acts of misconduct alone would justify termination with notice, the termination of Mr Said's employment with the Respondent would not be reasonable.

111 It is common between the parties that, outside of the acts of misconduct, Mr Said was an excellent and highly regarded employee. He had, outside of the matters giving rise to this appeal, 18 years of unblemished service with the Respondent in which he had not been subject to any disciplinary allegations or action, nor had he ever been accused of poor performance. This weighs significantly in Mr Said's favour.

112 It is also apparent to me that the salary sacrifice system itself lent itself to abuse. This does not justify the actions of any employee who abused it, rather it simply provides for a context in which to understand what happened.

113 The Respondent appears to have completely deferred all responsibility for the management and accountability of the salary sacrifice scheme to the individual employees and its nominated providers. There was no evidence before the Board of any effort on the part of the Respondent to ensure that employees understood the limits of what could and could not be claimed. Nor could it be said that the materials provided by the providers was clear and unambiguous when viewed as a whole.

114 Given the seriousness with which it has treated abuses of the salary packaging scheme, the Respondent at least should have been ensuring that it was taking all reasonable steps to ensure its employees understood how the system worked, what could and could not be claimed, and that misuse of the system could result in termination of employment. The fact that it had not done this in my view mitigates to a small degree the conduct of Mr Said.

115 I am also of the view that the Respondent has treated Mr Said more harshly than other employees who committed similar acts of misconduct. In this regard I disagree with Acting Senior Commissioners Scott's conclusion on the issue of comparable treatment.

116 On my examination of the relevant exhibits (exhibits 2 to 13) it strikes me that some employees who have acted in a substantially similar way to Mr Said did not lose their employment with the Respondent.

117 With respect to the employee that is associated with exhibit 5, it appears to me that the employee was found by the Respondent to have committed misconduct with respect to 3 claims where another employee also made the same claim. The employee in that matter rejects outright the finding of misconduct and there is no evidence of any sign of contrition or an apology. This employee was issued with a formal warning and had the salary packaging benefit removed.

118 With respect to the employee associated with exhibit 6, it appears to me that the employee made 9 claims where another employee also made the same claim. The employee was certainly contrite although they have committed a greater number of acts of misconduct than Mr Said. This employee was issued with a formal warning and had the salary packaging benefit removed.

119 In relation to the employee associated with exhibit 8 the employee had over 30 instances where they claimed for an expense that somebody else also claimed. Whilst the Respondent was willing to draw the conclusion that Mr Said was engaged in a systematic and organised abuse of the salary packaging scheme on the basis of the seven instances where it alleged he had claimed for an expense that somebody else also claimed, it does not appear to have drawn a similar conclusion with respect to the employee associated with exhibit 8. This employee was issued with a formal warning and had the salary packaging benefit removed.

120 Finally, in relation to the employee associated with exhibit 9, there were 3 instances of the employee claiming expenses that were also claimed by another employee, which included the $160.00 claimed by Mr Said for meals at Miss Mauds on 1 March 2008 (the record shows it was the 1 March 2008, however the date of the meal was actually 29 February 2008). This employee was found by the Respondent to have:

> *1. Made a claim where more than one person made a claim using the same receipt or a copy thereof.*
> *2. Made a claim using a receipt for a meal which you did not purchase or otherwise incur the expense*
>
> [From exhibit 9 – Misconduct letter dated 1 April 2010]

121 On the evidence before the Board, this employee does not appear to have accepted that they committed any wrong doing, nor do they express any contrition. However, unlike Mr Said, this employee's employment was not terminated. Rather, the Respondent issued the employee with a formal warning and curiously did not have the salary packaging benefit removed.

122 If, as the Respondent claimed, that a significant factor in determining whether to terminate or issue a warning was whether the employee showed remorse and accepted that they had done something wrong, it is not demonstrated by all of the examples provided to the Board of where employees did not lose their jobs.

123 Whilst the Respondent may have had more information available to it in relation to these particular employees when it made its decision, this was not put before the Board. Consequently, I can only make my judgment on the evidence that is before the Board.

124 It is my view that the Respondent has not treated all employees in a comparable manner. Specifically, it appears to me that Mr Said has been treated more harshly than other employees who committed substantially similar acts of misconduct and who were neither contrite nor apologetic in relation to the allegations of the Respondent. This mitigates in favour of Mr Said.

125 Finally, whilst I agree with Acting Senior Commissioner Scott that Mr Said's answers and explanations were not always open, honest or frank I do not agree that he deliberately obfuscated and attempted to mislead the Respondent. It would have been far better for him to have been completely open with how he was using the salary packaging scheme. However, it would have also been far better if the Respondent had been more direct in the allegations it was making to ensure there was no possibility of misunderstanding over exactly what was being alleged.

126 In the end I am of the view that Mr Said engaged in acts that he ought to have known better than to have engaged in and he did so not with an intent to do anything that was unlawful but rather in a deluded and foolish manner in which he thought it was acceptable - mostly because other people were doing it. In this regard he was no different to most of the employees who did not get dismissed.

Conclusion

127 When regard is had to all relevant matters, that is:

- The nature and number of acts of misconduct;
- The entirety of Mr Said's employment history with the Respondent; and
- the manner in which the Respondent has treated other employees who have committed similar acts of misconduct;

it is my view that the termination of Mr Said's employment is manifestly harsh and therefore an unreasonable course of action in the circumstances.

128 Whilst the relevant industrial instrument provides only for a reprimand or dismissal for a serious breach of discipline, it is evident from the manner in which the Respondent has dealt with other employees covered by the same industrial instrument that it has also taken the view that it is entitled to withdraw the benefit of the salary packaging scheme as an additional punishment.

129 In my view the decision of Respondent to dismiss ought to be quashed and in lieu Mr Said should receive a formal reprimand for the acts of misconduct that he has committed with the removal of the salary packaging benefit until such time as the Respondent can be reasonably confident he is able to correctly and lawfully use the salary packaging scheme.

130 I would therefore uphold the appeal.

2011 WAIRC 00312

APPEAL AGAINST THE DECISION MADE ON 30 MARCH 2010 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR RAFIC SAID
	APPELLANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS A DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS HEALTH SERVICES ACT 1972 FOR THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS A SPAZIANI - BOARD MEMBER
	MR M SWINBOURN - BOARD MEMBER
DATE	THURSDAY, 28 APRIL 2011
FILE NO	PSAB 6 OF 2010
CITATION NO.	2011 WAIRC 00312

Result	Appeal dismissed

Order

HAVING heard Mr K Trainer as agent on behalf of the appellant and Mr D Matthews of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2011 WAIRC 00316

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAWRENCE CLIVE GREED
	APPLICANT
	-v-
	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
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 29 APRIL 2011
FILE NO	PSA 65 OF 2008
CITATION NO.	2011 WAIRC 00316

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 29th day of April 2011 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2011 WAIRC 00313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROLINE GREEN
	APPLICANT
	-v-
	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 EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 29 APRIL 2011
FILE NO	PSA 40 OF 2010
CITATION NO.	2011 WAIRC 00313
Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 27th day of April 2011 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2011 WAIRC 00292

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-
	BULLDOG HAULAGE SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 7 APRIL 2011
FILE NO/S	RFT 1 OF 2011
CITATION NO	2011 WAIRC 00292

Catchwords	Owner-driver contract - referral of dispute regarding payment of claim - failure of respondent to appear - claim for interest on outstanding sum - Owner-Drivers (Contracts and Disputes) Act 2007 ss 4, 5, 40
Result	Order issued
Representation	
Applicant	Ms M Papa
Respondent	No appearance

Reasons for Decision

Ex tempore

1 I have before me application RFT 1 of 2011. By it, the applicant Union brings a dispute before the Tribunal pursuant to ss 40(a), (b) and (c) of the Owner-Drivers (Contracts and Disputes) Act 2007 ("the Act"). Whilst the referral refers to ss 40(a), (b) and (c), as Ms Papa referred in her submissions, the application is brought by an organisation on behalf of an owner driver, the owner driver being eligible to be a member, so therefore it is a referral under s 40(a) the Act.

2 The application claims that the applicant's member, Mr Lawson, who was an owner driver, is owed the sum of $2200 including GST for work performed in or about August 2009.

3 The Tribunal has before it evidence from Mr Lawson. His testimony is as follows. In or about August 2009, he agreed with the respondent, which seems to be titled Bulldog Haulage Services Pty Ltd, through the principal of the respondent, Mr Gangell, to conduct work by way of an oral contract. That contract was for the cartage of goods from the Cloudbreak Mine in the North-West of the State to Wangara in Perth. The load to be carted, as the Tribunal understands it, was scaffolding and other items.

4 The evidence of Mr Lawson was that it was a term of the agreement that Mr Lawson would be paid by the respondent the sum of $2000 plus GST for the work.

5 Mr Lawson gave evidence that he is an owner and driver and has been such since 1984. He drives a truck with two trailers and a dolly. The vehicle which Mr Lawson uses for his business and which he used in the contract with the respondent in August of 2009 is a 1996 Ford prime mover with a gross vehicle mass of 81 tonnes.

6 Mr Lawson testified that on the conclusion of the work, he provided an invoice to the respondent, which is exhibit A1. That invoice refers to the cartage of goods from the Cloudbreak Mine to Wangara and it is dated 10 August 2009.

7 Despite repeated requests from Mr Lawson, the respondent has failed to pay the debt due arising under the oral agreement.

8 The Tribunal is satisfied and it finds that for the purposes of s 4 of the Act, Mr Lawson is an owner driver, that being a natural person who carries on the business of transporting goods in one or more heavy vehicles supplied by that person. The Tribunal notes that the definition of heavy vehicle means, "a vehicle as defined in the Road Traffic Act 1974, with a gross vehicle mass of more than 4.5 tonnes." On the evidence, clearly, Mr Lawson's vehicle is a heavy vehicle. The Tribunal is also satisfied that Mr Lawson drives the heavy vehicle as his principal occupation as a heavy vehicle operator.

9 I am also satisfied and I find on the basis of the evidence of Mr Lawson, which of course is not contested, that in or about August 2009 an owner driver contract was entered into for the purposes of s 5 of the Act, that being an oral contract for the transport of heavy goods in a heavy vehicle by the owner driver.

10 I am satisfied that in accordance with the terms of the agreement, Mr Lawson transported the goods, as agreed, on or about 8 August 2009 from the Cloudbreak Mine to Perth for the agreed sum of $2000 plus GST.

11 I am also satisfied on the evidence and I find that Mr Lawson duly served upon the respondent by post an invoice pursuant to the contract which he entered into with the respondent. That invoice referred to the haulage from the Cloudbreak Mine to Wangara and claimed payment of the agreed sum of $2000 plus GST, that being the total sum of $2200. Mr Lawson testified that despite repeated requests and various undertakings given by the respondent to make payment, the debt remains due and owing.

12 On the basis of the evidence before the Tribunal, I am satisfied therefore that the claim relates to a debt due by the respondent to Mr Lawson through the applicant which has not been satisfied. In accordance with the terms of the Act, interest accrues from when the debt falls due.

13 In this case, given the invoice was dated 10 August 2009, the Tribunal will take the effective date of the falling due of the debt from the end of August 2009 and, accordingly, I am satisfied that an order should be made in the applicant's favour in this case that the respondent pay to the applicant the sum of $2200.

14 Furthermore, there will be an order that the respondent pay to the applicant interest at the rate of 6 per cent, which is the current rate of interest, pursuant to the terms of Schedule 1 to the Act. Accordingly, total interest accrued in the period from the end of August to the end of March for present purposes is $209. Therefore, the order will include payment of interest of that amount, and those sums to be payable within 21 days of today.

2011 WAIRC 00293

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-
	BULLDOG HAULAGE SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 18 APRIL 2011
FILE NO/S	RFT 1 OF 2011
CITATION NO.	2011 WAIRC 00293

Result	Order issued
Representation	
Applicant	Ms M Papa
Respondent	No appearance

Order

Having heard Ms M Papa on behalf of the applicant and there being no appearance on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby:

(1) DECLARES the respondent is indebted to the applicant in the sum of $2200.00

(2) ORDERS the respondent pay to the applicant the total sum of $2409.00 inclusive of interest within 21 days.

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