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FULL BENCH—Unions—Application for Alteration of Rules—

2011 WAIRC 01058

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULE 4 - MEMBERSHIP AND RULE 25 - OFFICERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 01058
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 29 AUGUST 2011
DELIVERED	**:**	WEDNESDAY, 23 NOVEMBER 2011
FILE NO.	**:**	FBM 6 OF 2011
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	Industrial Law (WA) – Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise alterations to qualification of membership rule and to provide for each office to be held by the person who holds a corresponding office in the counterpart Federal body – Application divided – Alterations to eligibility rule authorised and granted – Other divided matter adjourned sine die pending proposed application under s 71 of the Act
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 62(2), s 62(3)(b)(i), s 62(3)(b)(ii), s 71.
Result	**:**	Order made
Representation:		
Counsel:		
Applicant	**:**	Mr S Millman
Solicitors:		
Applicant	**:**	Slater & Gordon Lawyers

Case(s) referred to in reasons:

The Electrical and Communications Association of Western Australia (Union of Employees) [2007] WAIRC 01193; (2007) 87 WAIG 2899

Case(s) also cited:

The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees [2007] WAIRC 01007

The Civil Service Association of Western Australia (Incorporated) (1995) 75 WAIG 867

The State School Teachers' Union of W.A. (Incorporated) (1993) 73 WAIG 1471

The State School Teachers' Union of W.A. (Incorporated) [2008] WAIRC 01597

The State School Teachers' Union of W.A. (Incorporated) [2009] WAIRC 00660

United Firefighters Union of Western Australia [2006] WAIRC 05131

Reasons for Decision

SMITH AP:

1 This is an application by The State School Teachers' Union of W.A. (Incorporated) made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a registered organisation under the Act, seeks the authorisation of the Full Bench for the registrar to register alterations to r 4 – Membership. The first alteration sought to r 4 is to reflect changes in the name of the employer for schools and TAFE members and to provide for future changes of the name of the department or any other authority that may employ teachers in the public system in the future. Other changes sought to r 4 are:

(a) Consequential amendments to the numbering of sub-rules;

(b) A change to the reference to the Western Australian Municipal, Administrative, Clerical and Services Union of Employees. This reflects a recent change to the structure of the organisation colloquially known as the 'ASU' following an amalgamation ((2010) 90 WAIG 596);

(c) To remove the reference to a union publication which no longer exists;

(d) Changes to enable the organisation to advertise nominations for life membership in other authorised publications; and

(e) A variation to ensure that any person proposed as a life member of the organisation is actually a member.

2 The application also seeks an alteration to r 25 by the insertion of r 25(h) as follows:

> Each office in the Union may, from such time as the Executive may determine, be held by the person who, in accordance with the rules of the Australian Education Union, Western Australian Branch, holds the corresponding office in that body.

3 The proposed amendment to r 25(h), if allowed by the Full Bench at this time, would have no force and effect as the applicant is yet to make an application under s 71 of the Act to a Full Bench of this Commission for a declaration that:

(a) The rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same; and

(b) The rules of the counterpart Federal body prescribing the offices which exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which exist in the State organisation.

Until such a declaration is made by a Full Bench, proposed r 25(h) could not have any effect as the registrar cannot issue a s 71 certificate. Following a discussion with counsel at the hearing of this matter, the applicant consented to the application being divided into two parts so that the proposed variations to r 25 can be dealt with by a Full Bench when the applicant makes an application under s 71 of the Act.

4 At the hearing of the application on 29 August 2011, the Full Bench requested information be provided to the Full Bench about a date being set by the Executive of the applicant for notice of the proposed alterations being forwarded to the General Secretary on a date to be determined and published by Executive prior to a meeting of State Council as required by r 38(a) of the rules of the applicant. In response to the request, the applicant provided information in a supplementary statutory declaration made by Patricia Byrne, Vice-President of the applicant, on 20 October 2011. Following a further request for information, on 15 November 2011 the applicant's solicitors provided additional information in a letter addressed to the Associate to the Acting President.

Proposed variations to r 4 - Membership

5 The applicant seeks the following variations to r 4 which are set out as underlined and struck out in the following current form of r 4:

4 - MEMBERSHIP

The State School Teachers' Union of W.A. (Incorporated) shall consist of an unlimited number of persons employed or usually employed in the following categories:-

(a) **FULL MEMBERS:**

(i) Teachers employed by ~~the Department of Education and Training or by any institution providing technical and further education in Western Australia and~~ or on behalf of the state of Western Australia

including teachers employed in pre-school centres in Western Australia provided that such teachers hold or are enrolled for the purpose of obtaining a teaching academic qualification.

(ii) Teachers, lecturers or trainers employed by any institution providing technical and further education in Western Australia

~~(ii)~~(iii) Any person employed by any of the employers or in any of the places referred to in sub-rule (a)(i) or (a)(ii) of this rule who is employed as an education officer, guidance officer, counsellor or demonstrator.

~~(iii)~~(iv) Teachers employed in a temporary capacity by a technical and further education institution.

~~(iv)~~(v) Teachers employed by and in a Community College in Western Australia.

~~(v)~~(vi) School teachers who are employed on a part-time (fractional) basis in the supervision and/or coordination of student teachers during their periods of practice teaching in schools provided that they are eligible for membership of the Union within one of the preceding paragraphs of this subrule.

~~(vi)~~(vii) Any person elected to an office in the State School Teachers' Union of Western Australia.

~~(vii)~~(viii) Any employee of the SSTUWA (Inc) provided that such persons are not eligible for membership of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees~~, W.A, Clerical and Administrative Branch~~.

~~(viii)~~(ix) Persons who are qualified to be and desire to be employed in any of the categories of persons specified in subrules ~~(i) (iv)~~(i) - (v) of this rule. Notwithstanding the above, any person who is not registered with the relevant employer as available for work, and has not worked as a teacher for at least two years and who no longer has a contract of employment with the relevant employer shall not be eligible for membership under this subrule.

(b) **HONORARY LIFE MEMBERS:** Any ~~teacher or any employee~~member of the Union who has rendered long and meritorious service to the Union may, upon retirement, be appointed as an Honorary Life Member. For the purpose of such an appointment it shall be necessary that nominations be received and approved by the Executive and published in ~~the W.A. Teachers' Journal or~~ The Western Teacher or other authorised publication of the Union at least three months prior to the opening of State Council.

(c) **HONORARY MEMBERS:** Exchange teachers who are members of a teachers' organisation in the State or country from which they have come may be appointed by the Executive as Honorary Members of this Union.

(d) **SPECIAL CATEGORY MEMBERSHIP:** Persons who are not trained teachers but who because of their special expertise are placed in charge of a class in any area of the educational service may become Special Category Members.

(e) **RETIRED TEACHER MEMBERS:** Teachers retired from the Department of Education and Training because of age or invalidism may be admitted as Retired Teacher Members at the discretion of the Executive.

(f) **ASSOCIATE MEMBERS:** The following persons are eligible:-

(i) Retired employees of the Union.

(ii) Former members, including all categories who are not eligible for any other form of membership.

The applicant's rules about alterations

6 Section 62(2) of the Act, requires that s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application that relates to the qualifications of persons for membership of an organisation. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation unless it is satisfied that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Pursuant to s 55(4)(a) of the Act, the Full Bench is required to refuse a rule alteration application unless it has been authorised by the organisation in accordance with its rules. This provision has the effect that the rules of an organisation which provide for the alteration must be strictly complied with and substantial compliance is not sufficient: *The Electrical and Communications Association of Western Australia (Union of Employees)* [2007] WAIRC 01193; (2007) 87 WAIG 2899 [42].

8 The facts supporting the applicant's submission that it has complied with the rules of the applicant and the statutory requirements of the Act are set out in three statutory declarations made by Ms Byrne.

9 Rule 38 – Alteration of Rules of the rules of the applicant provides:

(a) Notice of proposed alterations or amendment of, additions to or excisions from these Rules must be forwarded to the General Secretary by the close of business on a date to be determined and published by Executive prior to each State Council and copies of the same shall be published in the agenda of the relevant State Council.

(b) No clause of these Rules shall be altered, added to, amended or excised, nor shall any new clause be made, except by a majority of not less than two-thirds of the delegates voting at a properly constituted meeting or session or postal ballot of State Council.

(c) State Council may endorse an alteration to the Rules in words and form different to that which have been published in the agenda provided that the words and form do not change the original intention of the proposed alteration.

(d) Notwithstanding anything in (a), (b) or (c) above, Executive is empowered and required to re-number or re-letter paragraph, sub-rules, and rules to preserve numerical or alphabetical order provided that the order of paragraphs, sub-paragraphs, sub-rules or rules, is not altered.

(e) As soon as practicable after the completion of each State Council, all decisions made by State Council concerning Rules Amendments shall be placed in the Western Teacher or such other publication and distributed to all worksites. Such publication shall inform worksites of:

(i) the change endorsed by State Council;

(ii) the reasons for the change;

(iii) the intention of the Union to apply to the WA Industrial Relations Commission to register those proposed alterations to these Rules as decided by State Council;

(iv) their right to object to the proposed alteration by forwarding a written objection to the Registrar of the WA Industrial Relations Commission.

(f) If any Rules amendments referred to in sub-rule (f) are matters which must be referred to the Full Bench in accordance with Section 62(2) of the Industrial Relations Act 1979, members shall also be informed of their separate and additional right to object to the making of the application to the Full Bench.

10 Pursuant to this rule, State Council has the power to endorse an alteration to the rules of the applicant. However, prior to State Council considering the proposed alterations, r 38(a) requires that notice of proposed alterations or amendment of, additions to or excisions from the rules must be forwarded to the General Secretary by the close of business on a date to be determined and published by Executive prior to State Council meeting; and copies of the proposed alterations, amendments or additions must be published in State Council's agenda.

11 In Ms Byrne's statutory declaration made on 20 October 2011, she provides evidence that the Executive of the applicant met on 3 December 2010 and determined that the closing date for the State Council agenda would be 31 March 2011. At that meeting, the Executive also proposed that the State Council would meet on 11 and 12 June 2011. The proposed changes to r 4 were then put to Executive for inclusion on the State Council agenda at a meeting of Executive held on 25 March 2011.

12 Pursuant to r 23(d)(i) of the rules of the applicant, the agenda for State Council must be circulated to all State Council delegates not less than three weeks prior to the meeting of State Council. Rule 23(d)(iii) also provides that any matter for inclusion on the agenda for State Council must be received by the close of business on a date to be determined and published by Executive. The date, however, that Executive published as the deadline for State Council agenda items was 8 April 2011 and not 31 March 2011. This was published in the February 2011 edition of The Western Teacher. Ms Byrne's says in her statutory declaration made on 20 October 2011 that this was done in order to accommodate the last of the Term 1 District Council meetings which were scheduled for 6 April 2011. The deadline was purportedly further extended to 21 April 2011 by a further notice published in the March 2011 edition of The Western Teacher. In her statutory declaration made on 20 October 2011, Ms Byrne states she assumes that the variation of this date was made to allow the Fremantle District Council and Canning District Council to place items on the State Council agenda, as the office of the applicant had been advised that their District Council meetings were after 31 March 2011. Whilst the publication of these dates was inconsistent with the date set by Executive on 31 December 2010, I am satisfied that this error was not material. Rule 38(a) requires that notice of the alterations proposed in this application were to be forwarded to the General Secretary by the close of business on 31 March 2011. In a letter from the applicant's solicitors dated 15 November 2011 to the Acting President's Associate, the Full Bench was informed that the General Secretary of the applicant received notice of proposed alterations on 18 March 2011 and he was also present at the meeting of Executive on 25 March 2011, when Executive resolved to include the proposed changes to r 4 in the agenda for the meeting of State Council to be held on 11 and 12 June 2011. The statutory declaration of Ms Byrne made on 6 July 2011, evidences that the agenda for the June 2011 meeting of State Council was circulated to all delegates to State

Council more than three weeks prior to the meeting that commenced on 11 June 2011 and the agenda contained the text of the proposed amendments to r 4. In light of all of this information I am satisfied that r 38(a) of the rules of the applicant have been complied with.

13 Pursuant to r 38(b) of the rules of the applicant, an alteration to the rules of the applicant cannot be made except by a majority of not less than two-thirds of the delegates voting at a properly constituted meeting or session or postal ballot of State Council. Rule 23(e) of the rules of the applicant provides that the quorum for State Council shall be one-third of the total number of delegates who would have been permitted to attend, had they been elected in accordance with this rule. In the statutory declaration made by Ms Byrne on 15 August 2011, Ms Byrne provides evidence that 157 delegates were entitled to attend the State Council meeting of 11 and 12 June 2011 and that the sessional attendance was as follows:

Saturday morning (11 June 2011) – 142 delegates.

Saturday afternoon (11 June 2011) – 134 delegates.

Sunday morning (12 June 2011) – 124 delegates.

14 Consequently, I am satisfied a quorum of a majority of two-thirds of delegates was present on both days at the meeting of State Council.

15 The minutes of State Council are annexed to the statutory declaration made by Ms Byrne on 6 July 2011. The minutes record that the proposed variations to r 4 – Membership was put to the meeting and carried with a two-thirds majority and a quorum present.

16 As soon as practicable after the completion of each State Council meeting, r 38(e) of the rules requires all decisions made by State Council concerning rule amendments to be placed in The Western Teacher or such other publication and distributed to all worksites. In compliance with r 38(e), a faxstream was sent to all worksites, including TAFE colleges, on 14 June 2011. The notice to members sent by faxstream included copies of the proposed rule amendments to r 4, together with explanations of the purpose of those amendments. Within the notice was a request that union representatives or workplace contact persons were to draw the contents of the notice to the attention of members by distributing it to members or displaying it in an accessible place and informing members of its purpose. Included in the notice was a statement that the members were entitled to object to all or any of the proposed alterations by forwarding a written objection to the registrar of the Commission. The notice also informed members that they had a separate and additional right to object to the making of the application to the Full Bench. The notice to members was also sent by e-stream to all worksites on 4 June 2011. This was an email to all members for whom the applicant has an email contact address which at the relevant time comprised approximately 95% of its members. When regard is had to this evidence, I am satisfied that this notice complies with the requirement of s 62(3)(b)(i) of the Act which requires that reasonable steps to be taken by the organisation to adequately inform its members of the proposal for alteration and the reasons therefor. The steps taken to distribute the notice and the contents of the notice also satisfies s 62(3)(b)(ii) of the Act which requires that reasonable steps be taken to adequately inform the members that any of them may object to the proposed alteration by forwarding a written objection to the registrar.

17 Having regard to all of the evidence and material referred to in these reasons, I am satisfied that the application to alter the rules of the applicant have been authorised in accordance with its rules. I am also satisfied that the members of the applicant have been provided with a reasonable opportunity to make an objection to the alterations, and I note that no member of the applicant has objected to the making of the application or to the proposed alterations to r 4.

18 For these reasons, I am satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act have been complied with. I am also satisfied that the requirements of s 55(5) of the Act do not arise as the proposed rule changes do not change or seek to alter in any way the eligibility of persons eligible and will not produce overlapping of membership coverage with any other registered organisation.

19 Section 55(4)(e) and s 56(1) of the Act relate to procedural rules for elections for office, including secret ballots. The applicant's rules currently provide for the procedures required for these provisions of the Act and the alterations sought in this matter do not deal with the matters specified in the provisions of the Act. Consequently, no issue arises in this application in relation to the requirements of s 55(4)(e) and s 56(1) of the Act.

20 For these reasons, I am of the opinion the following orders should be made:

(a) That application FBM 6 of 2011 be divided into two parts to be numbered FBMA 6 of 2011 and FBMB 6 of 2011 respectively.

(b) That application FBMA 6 of 2011 be that part of application FBM 6 of 2011 that relates to r 4 – Membership.

(c) That application FBMB 6 of 2011 be that part of application FBM 6 of 2011 that relates to r 25 – Officers.

(d) In respect of FBMA 6 of 2011, an order be made that the registrar is hereby authorised to register the alterations to r 4 – Membership of the rules of the applicant as published in the Industrial Gazette on 27 July 2011 ((2011) 91 WAIG 1148).

(e) That application FBMB 6 of 2011 be adjourned sine die.

SCOTT ASC

21 I have read a draft of the reasons of the Acting President. I agree with those reasons and have nothing to add.

KENNER C

22 The State School Teachers' Union of Western Australia Incorporated is an organisation registered under the Act. It seeks the registration of some alterations to its registered rules. Because two proposed changes to its rules relate to qualifications for

membership of the Union and to offices held in the Union and the State branch of the federal Australian Education Union, authority of the Full Bench for these rules changes is required.

23 The proposed amendments to Rule 4 – Membership are responsive to changes in names of the employing authority of persons eligible to be members of the Union and the separation of TAFE from the Department of Education and Training, as it was then called. Other changes seek to update references to organisations; to reflect the proper name of Union publications; qualifications for life membership of the Union and consequential drafting changes.

24 The proposed amendment to Rule 25 – Officers seeks to add a new sub-rule (h) to the effect that each officer of the Union is to be held by the person who holds the corresponding office in the federal Australian Education Union. This proposed rule change is clearly directed at an application in the future for a certificate under s 71 of the Act. Following an exchange between the Full Bench and counsel for the Union Mr Millman, this aspect of the application is to be held over to a later date, when consideration can be given to both the proposed rule amendment in Rule 25 and an application to the Full Bench for a s 71 certificate at the same time. The application is to be divided for this purpose.

25 As to the proposed alteration to Rule 4 – Membership, I am satisfied from the materials filed with the application, in particular the statutory declarations of Ms Byrne, the Vice President of the Union, and the supplementary materials filed by the Union, that the procedural requirements of the legislation for the alteration of the rule is met. Accordingly, an order should be made authorising the Registrar to make the changes sought to Rule 4. The proposed alteration to Rule 25 will await another day.

2011 WAIRC 01073

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	FRIDAY, 25 NOVEMBER 2011
FILE NO/S	FBM 6 OF 2011
CITATION NO.	2011 WAIRC 01073

Result	Application divided
Appearances	
Applicant	Mr S Millman (of counsel)

Order

This matter having come on for hearing before the Full Bench on 29 August 2011, and having heard Mr S Millman of counsel on behalf of the applicant, and reasons for decision having been delivered on 23 November 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. Application FBM 6 of 2011 be divided into two parts to be numbered FBMA 6 of 2011 and FBMB 6 of 2011 respectively.
2. Application FBMA 6 of 2011 be that part of application FBM 6 of 2011 that relates to r 4 – Membership.
3. Application FBMB 6 of 2011 be that part of application FBM 6 of 2011 that relates to r 25 – Officers.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2011 WAIRC 01077

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	TUESDAY, 29 NOVEMBER 2011
FILE NO/S	FBMA 6 OF 2011
CITATION NO.	2011 WAIRC 01077

Result	Order made
Appearances	
Applicant	Mr S Millman (of counsel)

Order

This matter having come on for hearing before the Full Bench on 29 August 2011, and having heard Mr S Millman of counsel on behalf of the applicant, and reasons for decision having been delivered on 23 November 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the Registrar is hereby authorised to register the alterations to r 4 – Membership of the rules of the applicant as published in the Industrial Gazette on 27 July 2011 ((2011) 91 WAIG 1148).

By the Full Bench

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

2011 WAIRC 01078

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	TUESDAY, 29 NOVEMBER 2011
FILE NO/S	FBMB 6 OF 2011
CITATION NO.	2011 WAIRC 01078

Result	Order made
Appearances	
Applicant	Mr S Millman (of counsel)

Order

This matter having come on for hearing before the Full Bench on 29 August 2011, and having heard Mr S Millman of counsel on behalf of the applicant, and reasons for decision having been delivered on 23 November 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application be adjourned sine die.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS—Variation of—

2011 WAIRC 01114

HAIRDRESSERS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

THE MASTER LADIES' HAIRDRESSERS INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS

RESPONDENTS

CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	APPL 54 OF 2011
CITATION NO.	2011 WAIRC 01114

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondent	Mr O Moon on behalf of The Master Ladies' Hairdressers Industrial Union of Employers of Western Australia

Order

HAVING heard Mr T Pope on behalf of applicant and Mr O Moon on behalf of The Master Ladies' Hairdressers Industrial Union of Employers of Western Australia, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Hairdressers Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 12 December 2011.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 16. – Meal Money: Delete subclause (1) of clause and insert the following in lieu thereof:

(1) The meal money required to be paid to all employees pursuant to this clause shall be $12.25.

2. Clause 22. – Tools of Trade: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Tool Allowance

In addition to the weekly wage a tool allowance of $8.00 per week shall be payable to full time Seniors, part time Seniors, indentured apprentices, and probationary apprentices.

3. Clause 32. – First Aid Allowance: Delete this clause and insert the following in lieu thereof:

An employee holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $9.70 per week in addition to the employee's ordinary rate.

2011 WAIRC 01024

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	APPL 129 OF 2010
CITATION NO.	2011 WAIRC 01024

Result	Award varied
Representation	
Applicant	Mr R Raven
Respondent	Ms J Allen-Rana

Order

HAVING heard Mr R Raven on behalf of the applicant and Ms J Allen-Rana on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the following schedules and:

1. THAT the variations in Schedule A shall have effect from the beginning of the first pay period on or after 15 July 2010.

2. THAT the variations in Schedule B shall have effect from the beginning of the first pay period on or after 1 July 2011.

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

SCHEDULE A

1. Clause 4.3. - Suburban Electric Railcar Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - SUBURBAN ELECTRIC RAILCAR ALLOWANCE

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$35.70
(2)	Thereafter	$36.00
(3)	Special Case	$36.50

(b) For the purpose of this sub-clause "driver" shall include "shed driver" provided that a shed driver in receipt of the above allowance shall be available and capable of being rostered for passenger operations.

(c) The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of Rail Car Driver of the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.1 – Shift Work: Delete this clause and insert the following in lieu thereof:

5.1. - SHIFT WORK

5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions;

(a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.38 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $2.76 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $2.38 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $2.76 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

(f) The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

SCHEDULE B

1. Clause 4.3. - Suburban Electric Railcar Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - SUBURBAN ELECTRIC RAILCAR ALLOWANCE

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$36.40
(2)	Thereafter	$36.70
(3)	Special Case	$37.20

(b) For the purpose of this sub-clause "driver" shall include "shed driver" provided that a shed driver in receipt of the above allowance shall be available and capable of being rostered for passenger operations.

(c) The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of Rail Car Driver of the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.1 – Shift Work: Delete this clause and insert the following in lieu thereof:

5.1. - SHIFT WORK

5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions;

(a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.44 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $2.83 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $2.44 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $2.83 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

(f) The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2011 WAIRC 01025

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 14 NOVEMBER 2011

FILE NO/S APPL 139 OF 2010

CITATION NO. 2011 WAIRC 01025

Result	Award varied
Representation	
Applicant	Mr R Raven
Respondent	Ms J Allen-Rana

Order

HAVING heard Mr R Raven on behalf of the applicant and Ms J Allen-Rana on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the following schedules and:

1. THAT the variations in Schedule A shall have effect from the beginning of the first pay period on or after 26 August 2010.
2. THAT the variations in Schedule B shall have effect from the beginning of the first pay period on or after 13 December 2010.
3. THAT the variations in Schedule C shall have effect from the beginning of the first pay period on or after 27 April 2011.
4. THAT the variations in Schedule D shall have effect from the beginning of the first pay period on or after 1 July 2011.

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

SCHEDULE A

1. Clause 3.3. - Meal And Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:

(b) The employer shall provide such employee a meal allowance of $11.80 to cover the cost associated with the purchase of foods associated with the taking of a second crib.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI)-Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

2. Clause 5.2. - Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of $1.48 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.

The rate referred to above will be adjusted from time to time in accordance with the Department of Transport Taxi Industry Board (as renamed or superseded) metropolitan weekday daytime taxi fare distance rate per km.

(b) When the period of relief is for one week or less the allowance of $6.45 per shift shall be paid in recognition of the disruption to the employee’s normal roster.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 5.3. - On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of $3.55 per hour for all time on call.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

SCHEDULE B

1. Clause 5.2. - Temporary Transfer Allowance: Delete paragraph (a) of subclause 5.2.1 of this clause and insert the following in lieu thereof:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of $1.55 per

kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.

The rate referred to above will be adjusted from time to time in accordance with the Department of Transport Taxi Industry Board (as renamed or superseded) metropolitan weekday daytime taxi fare distance rate per km.

SCHEDULE C

1. Clause 3.3. - Meal And Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:

(b) The employer shall provide such employee a meal allowance of $12.15 to cover the cost associated with the purchase of foods associated with the taking of a second crib.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI)-Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

SCHEDULE D

1. Clause 5.2. - Temporary Transfer Allowance: Delete paragraph (b) of subclause 5.2.1 of this clause and insert the following in lieu thereof:

(b) When the period of relief is for one week or less the allowance of $6.60 per shift shall be paid in recognition of the disruption to the employee's normal roster.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.3. - On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of $3.64 per hour for all time on call.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2011 WAIRC 01026

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	APPL 140 OF 2010
CITATION NO.	2011 WAIRC 01026

Result	Award varied
Representation	
Applicant	Mr R Raven
Respondent	Ms J Allen-Rana

Order

HAVING heard Mr R Raven on behalf of the applicant and Ms J Allen-Rana on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Public Transport Authority (Transwa) Award 2006 be varied in accordance with the following schedules and:

1. THAT the variations in Schedule A shall have effect from the beginning of the first pay period on or after 26 August 2010.
2. THAT the variations in Schedule B shall have effect from the beginning of the first pay period on or after 13 December 2010.

3. THAT the variations in Schedule C shall have effect from the beginning of the first pay period on or after 1 July 2011.

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

SCHEDULE A

1. Clause 5.1 - Shift Work: Delete this clause and insert the following in lieu thereof:

5.1 - SHIFT WORK

5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.32 an hour on all time paid at ordinary rate.

5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of $2.68 an hour on all time paid at ordinary rate.

5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of $2.32 an hour on all time paid at ordinary rate.

5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of $2.68 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

5.1.6 The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.2- Temporary Transfer Allowance: Delete this clause and insert the following in lieu thereof:

5.2 - TEMPORARY TRANSFER ALLOWANCE

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of $1.48 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:

(b) When the period of relief is for one week or less the allowance of $6.45 per shift shall be paid in recognition of the disruption to the employee's normal roster.

5.2.2 Clause 5.2.1(a) will be adjusted in accordance with changes to the Department of Transport Taxi Industry Board (as reorganised, renamed or superseded) metropolitan weekday daytime taxi fare distance rate per km.

Clause 5.2.1(b) will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of $3.85 per hour for all time on call.

That rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 - Away From Home And Meal Allowances:

A. Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:

5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of $25.40 for each 8 hour period and, where less than 8 hours is worked, at the rate of $6.35 for each 2 hour period or part thereof worked.

B. Immediately following subclause 5.5.4 of this clause insert a new subclause as per the following:

5.5.5 The rate "for each 2 hour period or part thereof worked" will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

The rate "for each 8 hour period" in 5.5.2 above will be four times the rate "for each 2 hour period or part thereof worked.

SCHEDULE B

1. Clause 5.2 - Temporary Transfer Allowance: Delete subclause 5.2.1 and paragraph (a) of that subclause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of $1.55 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:

SCHEDULE C

1. Clause 5.1 - Shift Work: Delete this clause and insert the following in lieu thereof:

5.1 - SHIFT WORK

5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.38 an hour on all time paid at ordinary rate.

5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of $2.75 an hour on all time paid at ordinary rate.

5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of $2.38 an hour on all time paid at ordinary rate.

5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of $2.75 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

5.1.6 The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.2 - Temporary Transfer Allowance:

A. Delete paragraph (b) of subclause 5.2.1 of this clause and insert the following in lieu thereof:

(b) When the period of relief is for one week or less the allowance of $6.60 per shift shall be paid in recognition of the disruption to the employee's normal roster.

B. Delete subclause 5.2.2 of this clause and insert the following in lieu thereof:

5.2.2 Clause 5.2.1(b) will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of $3.95 per hour for all time on call.

That rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 - Away From Home And Meal Allowances: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:

5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of $26.05 for each 8 hour period and, where less than 8 hours is worked, at the rate of $6.50 for each 2 hour period or part thereof worked.

2011 WAIRC 01028

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	APPL 141 OF 2010
CITATION NO.	2011 WAIRC 01028

Result	Award Varied
Representation	
Applicant	Mr R Raven
Public Transport Authority	Ms J Allen-Rana
Other Respondents	No Appearance

Order

HAVING heard Mr R Raven on behalf of the applicant and Ms J Allen-Rana on behalf of the Public Transport Authority, there being no appearance by the other respondents, and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Railway Employees' Award No. 18 of 1969 be varied in accordance with the following schedules and:

1. THAT the variations in Schedule A shall have effect from the beginning of the first pay period on or after 26 August 2010.
2. THAT the variations in Schedule B shall have effect on and from the beginning of the first pay period on or after 13 December 2010.
3. THAT the variations in Schedule C shall have effect from the beginning of the first pay period on or after 27 April 2011.
4. THAT the variations in Schedule D shall have effect from the beginning of the first pay period on or after 1 July 2011.

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

SCHEDULE A

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - $ 5.70

After 24 months service with the employer - $ 11.40

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete subclause 4.4.1 and paragraph (a) of this clause and insert the following in lieu thereof:

4.4.1 All tradespersons shall be paid a tool allowance in accordance with the following provisions:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $14.00 per week to such tradesperson/apprentice.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 - Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $26.00 extra per week

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid $39.20 extra per week

(c) Class 1

When in charge of more than twenty others, paid $50.40 extra per week

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4 6. - Electricial Licence Allowance: Delete this clause and insert the following in lieu thereof:

4 6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $18.60 per week.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 - On Call Allowance of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of $3.85 per hour.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3. - After Hours Contact: Meals And Expenses: Delete paragraph (a) of subclause 5.3.1 Meal Breaks of this clause and insert the following in lieu thereof:

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of $10.25 as provided under this Award.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI)-Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

7. 5.4. - Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of $41.85 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $31.35 per day shall be paid.

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.3 of this clause and insert the following in lieu thereof:

5.4.3 Where the employer does not provide accommodation, the employee shall be entitled to an allowance to cover accommodation, meals and incidentals as follows. The rates in this subclause shall be adjusted automatically in line with variations to Schedule I, Travelling, Transfer and Relieving Allowances in the Public Service Award 1992.

Overnight Stay at:	Employees Up to 42 days	Employees with dependants After 42 days	Employees without dependents After 42 days
Hotel/Motel Perth Suburban Area	$305.45	$152.70	$101.80
Hotel/Motel WA South of 26° Latitude	$208.55	$104.30	$69.50
Other than hotel/motel	$93.65		

C. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $11.00 per day.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6. - Travelling Time – Traffic: Delete subclauses 5.6.1., 5.6.2 and 5.6.3 of this clause and insert the following in lieu thereof:

5.6.1 When a Traffic Section employee in the suburban area is required to temporarily work at a suburban depot or station other than the depot or station at which the employee is usually stationed the following shall apply, unless the employee is compensated through an "end station" or "other line" allowance which would apply instead of this provision. -

5.6.2 When the distance the employee is required to travel from the usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employees home depot, the employee shall be paid an allowance of $1.48 per kilometre in both directions for the extra distance the employee is required to travel.

Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance travelled. It will be adjusted from time to time in accordance with changes to the Department of Transport Taxi Industry Board (as reorganised, renamed or superseded) metropolitan weekday Tariff 1 rate per km.

5.6.3 When the period of relief is for one week or less an allowance of $6.45 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7 Meal Allowance: Delete this clause and insert the following in lieu thereof:

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of $5.15 where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(a) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $10.25 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

10. Clause 5.8 - Shifts And/Or Night Work Allowance - (Six - Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $2.32 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $2.68 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $2.32 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $2.68 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $2.76 per hour.

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

SCHEDULE B

1. Clause 5.6 - TRAVELLING TIME – TRAFFIC: Delete subclause 5.6.2 of this clause and insert the following in lieu thereof:

5.6.2 When the distance the employee is required to travel from the usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employees home depot, the employee shall be paid an allowance of $1.55 per kilometre in both directions for the extra distance the employee is required to travel.

Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance travelled. It will be adjusted from time to time in accordance with changes to the Department of Transport Taxi Industry Board (as reorganised, renamed or superseded) metropolitan weekday Tariff 1 rate per km.

SCHEDULE C

1. Clause 5.3. - After Hours Contact: Meals And Expenses: Delete paragraph (a) of subclause 5.3.1 Meal Breaks of this clause and insert the following in lieu thereof:

(a) an employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of $10.55 as provided under this Award.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI)- Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics

2. Clause 5.7 Meal Allowance: Delete this clause and insert the following in lieu thereof:

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of $5.30 where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(b) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI)- Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $10.55 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI)- Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

SCHEDULE D

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - $ 5.80

After 24 months service with the employer - $ 11.70

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete subclause 4.4.1 and paragraph (a) of this clause and insert the following in lieu thereof:

4.4.1 All tradespersons shall be paid a tool allowance in accordance with the following provisions:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $14.40 per week to such tradesperson/apprentice.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 - Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $26.70 extra per week

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid $40.20 extra per week

(c) Class 1

When in charge of more than twenty others, paid $51.70 extra per week

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4 6. - Electricial Licence Allowance: Delete this clause and insert the following in lieu thereof:

4 6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $19.10 per week.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 - On Call Allowance of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of $3.95 per hour.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. 5.4. - Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of $42.95 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $32.15 per day shall be paid.

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $11.30 per day.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

7. Clause 5.6. - Travelling Time – Traffic: Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:

5.6.3 When the period of relief is for one week or less an allowance of $6.60 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.8 - Shifts And/Or Night Work Allowance - (Six - Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $2.38 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $2.75 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $2.38 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $2.75 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $2.83 per hour.

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

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

2011 WAIRC 01070

COMMERCIAL TRAVELLERS AND SALES REPRESENTATIVES' AWARD 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SALES REPRESENTATIVES' AND COMMERCIAL TRAVELLERS' GUILD W.A. INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	LEONARD INDUSTRIES PTY LTD AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2011
FILE NO/S	APPL 105 OF 2008
CITATION NO.	2011 WAIRC 01070
Result	Discontinued

Order

WHEREAS this is an application to vary the *Commercial Travellers and Sales Representatives' Award 1978*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter however, there was no response; and

WHERAS the Commission contacted the applicant on a number of occasions seeking advice as to its intentions; and

WHEREAS on 18 August 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01069

EGG PROCESSING AWARD 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS **APPLICANT**
	-v-
	GOLDEN EGG FARMS **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2011
FILE NO/S	APPL 104 OF 2008
CITATION NO.	2011 WAIRC 01069
Result	Discontinued

Order

WHEREAS this is an application to vary the *Egg Processing Award 1978*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter however, there was no response; and

WHERAS the Commission contacted the applicant on a number of occasions seeking advice as to its intentions; and

WHEREAS on 18 August 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01054

ENROLLED NURSES AND NURSING ASSISTANTS (PRIVATE) AWARD NO 8 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ST JOHN OF GOD HOSPITAL AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 21 NOVEMBER 2011
FILE NO/S	APPL 117 OF 2008
CITATION NO.	2011 WAIRC 01054

Result Discontinued

Order

WHEREAS this is an application to vary the *Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01053

HEALTH ATTENDANTS AWARD, 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	APPLICANT
	-v-
	SPORTSMAN HEALTH STUDIO AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 21 NOVEMBER 2011
FILE NO/S	APPL 120 OF 2008
CITATION NO.	2011 WAIRC 01053

Result Discontinued

Order

WHEREAS this is an application to vary the *Health Attendants Award, 1979*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01043

HOSPITAL EMPLOYEES' (BRIGHTWATER) CONSOLIDATED AWARD 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BRIGHTWATER
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 17 NOVEMBER 2011
FILE NO/S	APPL 116 OF 2008
CITATION NO.	2011 WAIRC 01043

Result Discontinued

Order

WHEREAS this is an application to vary the *Hospital Employees' (Brightwater) Consolidated Award 1981*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01039

HOSPITAL WORKERS (CLEANING CONTRACTORS - PRIVATE HOSPITALS) AWARD 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	POWERCLEAN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 16 NOVEMBER 2011
FILE NO/S	APPL 114 OF 2008
CITATION NO.	2011 WAIRC 01039

Result Discontinued

Order

WHEREAS this is an application to vary the *Hospital Workers (Cleaning Contractors – Private Hospitals) Award 1978*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01038

HOSPITAL WORKERS' (N'GALA) AWARD NO. 6A OF 1958

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	BOARD OF MANAGEMENT NGALA INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 16 NOVEMBER 2011
FILE NO/S	APPL 113 OF 2008
CITATION NO.	2011 WAIRC 01038

Result	Discontinued

Order

WHEREAS this is an application to vary the *Hospital Workers' (N'Gala) Award No. 6A of 1958*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01017

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	COMO LIQUOR STORE AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	APPL 53 OF 2011
CITATION NO.	2011 WAIRC 01017

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondent	No appearance

Order

HAVING heard Mr T Pope on behalf of applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Licensed Establishments (Retail and Wholesale) Award 1979 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 14th day of November 2011.

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

SCHEDULE

1. Clause 10. – Meal Times and Meal Allowance:

A. Delete subclause (2) of Part I of this clause and insert the following in lieu thereof:

(2) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $12.45 for the purchase of any meal required.

B. Delete subclause (3) of Part II of this clause and insert the following in lieu thereof:

(3) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $12.45 for the purchase of any meal required.

2. Clause 21. – Wages: Delete Part IV of this clause and insert the following in lieu thereof:

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable.

(1) (a) An employee required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 59 cents per hour whilst so engaged.

(b) An employee required to operate a ride-on operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 80 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade I" or a "Storeman Operator Grade II".

(2) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:

In a cold chamber in which the temperature is:

(i) Below 0 degrees Celsius to -20 degrees Celsius - 87 cents per hour.

(ii) Below -20 degrees Celsius to -25 degrees Celsius - $1.01 cents per hour.

(iii) Below -25 degrees Celsius - $1.15 per hour.

(b) Employees required to work in temperatures less than -18.9 degrees Celsius shall be medically examined at the employer's expense.

2011 WAIRC 01037

PRIVATE HOSPITAL EMPLOYEES' AWARD, 1972

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ST JOHN OF GOD HOSPITAL AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 16 NOVEMBER 2011
FILE NO/S	APPL 112 OF 2008
CITATION NO.	2011 WAIRC 01037

Result Discontinued

Order

WHEREAS this is an application to vary the *Private Hospital Employees' Award, 1972*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

2011 WAIRC 01051

QUADRIPLEGIC CENTRE AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	APPLICANT
	-v-
	BOARD OF MANAGEMENT QUADRAPLEGIC CENTRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 21 NOVEMBER 2011
FILE NO/S	APPL 123 OF 2008
CITATION NO.	2011 WAIRC 01051

Result Discontinued

Order

WHEREAS this is an application to vary the *Quadriplegic Centre Award*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or 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.) J L HARRISON,
[L.S.] Commissioner.

AGREEMENTS—Industrial—Retirement from—

2011 WAIRC 01120

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 -

ACTIVE FOUNDATION (SALARIED OFFICERS) AWARD, NO. 13 OF 1977

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 39/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

2011 WAIRC 01121

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 -

HOSPITAL SALARIED OFFICERS (AUSTRALIAN RED CROSS BLOOD SERVICE, WESTERN AUSTRALIA) AWARD, 1978

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 40/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,
[L.S.] Registrar,

2011 WAIRC 01122

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 -

HOSPITAL SALARIED OFFICERS (CEREBRAL PALSY) AWARD 1990

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 41/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

2011 WAIRC 01123

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 -

HOSPITAL SALARIED OFFICERS (GOOD SAMARITAN INDUSTRIES) AWARD 1990

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 42/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

2011 WAIRC 01124

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 -

HOSPITAL SALARIED OFFICERS (JOONDALUP HEALTH CAMPUS) AWARD, 1996

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 43/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,

[L.S.] Registrar.

2011 WAIRC 01125

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 -

HOSPITAL SALARIED OFFICERS (SILVER CHAIN) AWARD, 1980

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 44/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,

[L.S.] Registrar.

2011 WAIRC 01128

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 -

SALARIED OFFICERS (PARAPLEGIC-QUADRIPLEGIC ASSOCIATION) AWARD, 1988.

on the grounds that there are no longer any persons employed under the provisions of this 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 File No. Appl 45/2011 on all correspondence.

DATED at Perth this 23rd day of November 2011.

(Sgd.) S BASTIAN,

[L.S.] Registrar.

NOTICES—Award/Agreement matters—

2011 WAIRC 01113

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 32 of 2011

APPLICATION FOR A NEW AGREEMENT TITLED

"THE GREENS (WA) INC. STAFF AGREEMENT 2011"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

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

5 APPLICATION AND COVERAGE

5.1 This Agreement shall apply to and cover:

a. The Greens (WA) Inc. (The Greens WA)

b. Employees of the Greens WA covered by the classifications set out in this Agreement and does not include volunteers or elected office holders of the Greens WA

c. The Western Australian Municipal, Administrative, Clerical and Services Union of Employees. (Also known as the Australian Services Union).

5.2 This Agreement shall operate from the date of registration until 30 June2014.

SCHEDULE 2 – RATES OF PAY

Admin Support 1.1, Admin Support 1.2, Admin Support 1.3

Admin Support 2.1, Admin Support 2.2, Admin Support 2.3, Admin Support 2.4

Admin Support 3.1, Admin Support 3.2, Admin Support 3.3

Project Support 1, Project Support 2, Project Support 3

Project Manager 1, Project Manager 2, Project Manager 3

Manager 1.1, Manager 1.2, Manager 1.3

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

28 November 2011

INDUSTRIAL MAGISTRATE—Claims before—

2011 WAIRC 01098

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	2011 WAIRC 01098
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 9 NOVEMBER 2011
DELIVERED	WEDNESDAY, 9 NOVEMBER 2011
CLAIM NO.	M 29 OF 2011
PARTIES	BRUCE LILBURNE **CLAIMANT** AND ALLSTATE PLUMBING PTY LTD **RESPONDENT**

CatchWords	:	Alleged breach of the *Plumbing and Fire Sprinklers Award 2010 [MA000036]* constituted by the failure to make redundancy payment; Meaning of "redundancy" in industry specific award; Whether service prior to the commencement of a modern award can be considered part of continuous service; Consideration of decision of Fair Work Australia in of *Master Builders Association of New South Wales* Fair Work Australia (AM2010/257); Imposition of penalty; Turns on it own facts.
Legislation	:	*Fair Work Act 2009*, s539, 545(3), 547 [MA000036]
Industrial Instruments	:	*Plumbing and Fire Sprinklers Award 2010,* [MA000036], cl 18.3
Cases Cited	:	Nil
Cases Referred to in Judgment	:	*Master Builders Association of New South Wales* (Fair Work Australia (AM2010/257))
Result	:	Claim upheld and Orders made.
Representation	:	Ms N Ireland of the *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia* appeared for the Claimant Mr R Beal, Director of the Respondent represented the Respondent

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the Hearing, extracted from the transcript and edited by His Honour)

1 The Claimant alleges that the Respondent has failed to comply with clause 18.3 of the *Plumbing and Fire Sprinklers Award 2010 [MA000036]* (the Award) by failing to pay Mr Lilburne a redundancy payment. There is no dispute about the fact that when Mr Lilburne's employment with the Respondent ended he did not receive a redundancy payment.

2 Mr Lilburne was in continuous employment with the Respondent from 7 January 2008 until 1 February 2011 when he resigned. He had also worked for the Respondent for 25 years in a previous period of employment.

3 During his last period of employment with the Respondent, Mr Lilburne worked as a plumber, in the construction of small commercial premises, schools and hospitals. He was paid an hourly rate of $40.00. That rate was well above the Award rate. Mr Lilburne and the Respondent, through its Director Mr Beal, did not at any stage contemplate the Award when reaching their agreement with respect to the hourly rate. Notwithstanding that it is obvious that the Award applied to them in their employment relationship having regard to the nature of work done by Mr Lilburne and the nature of the business carried out by the Respondent. It follows that the redundancy provision in the Award applied.

4 The definition of "redundancy", for the purposes of the Award is found in clause 18.2. Definition of the Award. It provides:

> *"…**redundancy** means a situation where an employee ceases to be employed by an employer, other than for reasons of misconduct or refusal of duty. **Redundant** has a corresponding meaning."*

5 It will be obvious that for the purpose of the industry specific redundancy scheme contained in clause 18 of the Award that Mr Lilburne's resignation led to him becoming redundant. That may well be inconsistent with what the Respondent understands. It may be inconsistent with is what is generally understood. It may also be inconsistent with other awards and further may not be in keeping with the definition given to the meaning of redundancy by other legislation. However that is its meaning for the purpose of this Award. Mr Lilburne was therefore entitled to receive a redundancy payment. His entitlement was at his current rate of pay at termination.

6 The Respondent says that it paid Mr Lilburne at a rate above that provided by the Award and therefore the over award payments made to him extinguish or set off any entitlement to a redundancy payment. In that regard although clause 7. of the Award enables a variation of certain terms of the Award by agreement between an employer and employee, it is doubtful whether on its proper construction it can apply to the redundancy provision in clause 18. Even if it does, an express agreement between the parties is required to enliven it. The Claimant and Respondent would have necessarily had to turn their mind to the fact that the over award payment was being made with a view to extinguishing or setting off the redundancy entitlement. Clearly that was not the case in this instance. Neither party turned their mind to the matter. I accept that there was payment made in excess of that required by the Award however that payment was not in contemplation of the redundancy entitlement. The parties did not turn their mind to it because they did not even contemplate the Award. It follows that there was no agreement extinguishing the Respondent's liability with respect to redundancy.

7 In his submissions, Mr Beal for the Respondent raised an issue of whether service prior to 1 January 2010 (when the Award commenced) could be counted when calculating an employee's continuous service. His internet research revealed that there was ambiguity about that issue which was the subject of proceedings before Fair Work Australia. The Claimant did not respond to that submission given that he was taken by surprise in relation to it. Following the receipt of submissions I had the opportunity to research the matter and found that on 9 May 2011, Senior Deputy President Acton, delivered a decision in *Master Builders Association of New South Wales* (AM2010/257), in which he concluded that:

> *"Continuous service is not restricted to service from 1 January 2010 and can include prior service."*

8 There is now no ambiguity. Mr Lilburne's service prior to January 2010 is to be included in my consideration for the purposes of this Industry Award.

9 Finally, for Mr Beal's benefit I point out that any prior conduct or lack thereof by Mr Lilburne with respect to his previous employment with the Respondent is immaterial to my considerations and cannot be taken into account. His alleged previous failures to invoke award provisions are an irrelevant consideration.

10 There has been a clear failure by the Respondent to comply with the Award in that it failed to pay the redundancy payment prescribed by the Award. It follows that the Claim has been made out and that orders will be made.

11 For the reasons given I make the following Orders:

1) That the Respondent pay to the Claimant $10,640.00.

2) That the Respondent shall also pay to the Claimant interest on $10,640.00, calculated from 2 February 2011 to Judgment on the 9 November 2011, at the rate of six per cent per annum, which is calculated to be, and fixed at $491.48; and

3) The Respondent shall also pay the Claimant Disbursements in bringing the Claim fixed at $40.00.

(After having heard from Mr Beal in mitigation His Honour said :)

12 The final issue that I am required to address is that of penalty. The Respondent could have paid $10,640.00 but failed to do so. The need for strict compliance with awards has been often repeated. It is important that this Court impose sufficient a penalty to indicate, not only to the Respondent but also to others the importance of strict compliance with the award.

13 In arriving at the appropriate penalty I must and do take into account the circumstances of the Respondent company. Mr Beal has told me that the company is in a situation where it will cease to operate. It does not have any new jobs. It has debts and its capacity to pay any significant penalty is significantly diminished. I must take those factors into account in imposing a penalty.

14 The maximum penalty in this matter is $6,600.00. I take into account that the Respondent's failure to pay has not resulted from a wilful defiance of the law but rather a misunderstanding of the Award. I also take into account the Respondent's limited capacity to pay a substantial penalty. Taking those matters into account I conclude that an appropriate penalty is $400.00. I Order that the Respondent shall also pay a penalty which shall be payable to the CEPU Western Australian Branch fixed at $400.00.

G. CICCHINI
INDUSTRIAL MAGISTRATE

2011 WAIRC 01065

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	UNITED VOICE WA
	CLAIMANT
	-v-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 3 NOVEMBER 2011
DELIVERED	WEDNESDAY, 23 NOVEMBER 2011
CLAIM NOS.	M 33 OF 2011, M 34 OF 2011 AND M 35 OF 2011
CITATION NO.	2011 WAIRC 01065

CatchWords	**:**	Alleged failure to comply with the *WA Health – LHMU – Support Workers Industrial Agreement 2007* (the 2007 Agreement); Applications by the Respondent to dismiss Claims because they disclose no reasonable cause of action; Whether terms should be implied in the 2007 Agreement; Whether the alleged implied terms disclose causes of action; Whether the 2007 Agreement created an obligation on the Respondent to take all reasonable steps to prevent contracting out or privatisation; Whether the Claimant should be granted leave to plead other grounds not already pleaded
Legislation	**:**	*Industrial Relations Act 1979*, sections 42, 42B, 81A, 81AA, 81CA, 83(1), 83(2), 83(4), 83(5) and 83(7) *Hospitals and Health Services Act 1927*, sections 5A, 7, 15(2) and 18 *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005*, regulations 5 and 7

Industrial Instruments	:	*WA Health – LHMU – Support Workers Industrial Agreement 2007,* clauses 3, 4.1(a)(ii), 5.2(b), 5.2(c) and 11.13 *LHMU – Union Recognition and Job Security Agreement – Department of Health Support Workers 2004*
Cases Cited	:	*Quinlivan v Austal Ships Pty Ltd (2003) 83 WAIG 3684* *General Steel Industries Inc v Commissioner for Railways (NSW) and Others (1964) 112 CLR 125* *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited [2009] AIRC 268* *Jackson Nominees Pty Ltd v Hanson Building Product Pty Ltd [2006] QCA 126* *Construction Forestry, Mining and Energy Union v Henry Walker Eltin Contracting Pty Ltd [2001] FCA 1009* *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337* *Colliers Jardine (NSW) Pty Ltd v Balog Investments Pty Ltd (1996) Federal Court of Australia BC 94 00 247* *Riverwood International Australia Pty Ltd v McCormick [2000] FCA 889* *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226* *General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125* *Fancourt v Mercantile Credits (1983) 154 CLR 87* *Green v Daly [2002] WADC 109* *Hospitals Contribution Fund of Australia v Hunt (1983) 44 ALR 365* *Talbot & Olivier (a firm) v Glenys June Whitcombe and Another [2006] WASCA 87* *Bride v Peat Marwich Mitchell [1989] WAR 383* *Kucks v CSR Ltd (1996) 66 IR 182* *Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1*
Cases Referred to in Decision	:	*Liquor Hospitality and Miscellaneous Union, Western Australian Branch v the Minister for Health (2010) 90 WAIG 1868.* *Liquor Hospitality and Miscellaneous Union, Western Australian v The Minister for Health (2011) 91 WAIG 291* *B.P. Refinery (Western Port) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266* *Byrne v Australian Airlines Ltd (1995) 1985 CLR 410* *Farrell v Royal King's Park Tennis Club (INC) [2006] WASC 51).* *Amcor Ltd v Construction, Forestry, Mining and Energy Union and Others (2005) 222 CLR 241* *Actew Corporation Ltd v Pangallo (2002) 127 CLR 1*
Result	:	Applications granted
Representation	:	Mr T.J. Hammond (Counsel) appeared for the Claimant Mr G.T.W. Tannin, SC (Counsel) with Mr R. Bathurst (Counsel), appeared for the Respondent

REASONS FOR DECISION

BACKGROUND

The Capacity of the Minister for Health (Western Australia)

1 The Minister for Health (the Minister) is, by force of various statutory instruments, deemed to be the Board of the Peel Health Services Board, the Metropolitan Health Services Board and the WA Country Health Service. He is responsible for the management and control of various public hospitals within those Boards including Royal Perth Hospital, Fremantle Hospital and Swan Districts Hospital.

2 The Minister has delegated his functions in his incorporated capacity as the Boards of the hospitals formerly comprised in the Metropolitan Health Services Board, the Peel Health Services Board and the WA Country Health Service to the Director General of the Department of Health.

The 2007 Agreement

3 In early October 2007 United Voice WA which was then known as the Liquor Hospitality and Miscellaneous Union, Western Australian Branch (LHMU) and the Minister, by his delegate, entered into an industrial agreement. That agreement was registered by the West Australian Industrial Relations Commission (WAIRC) on 12 October 2007 and is known as the *WA Health – LHMU – Support Workers Industrial Agreement 2007* (the 2007 Agreement). It replaced the *LHMU – Union Recognition and Job Security Agreement – Department of Health Support Workers 2004*.

4 One of the aims of the 2007 Agreement was to enable the parties to develop and implement strategies which "*enhance job satisfaction, security and remuneration*" (clause 4.1(a)(ii)).

5 Clauses 11.13(a) and (b) of the 2007 Agreement set out the terms of the Agreement with respect to "contracting out" and "privatisation", which provides:

> "*11.13 Contracting Out and Privatisation*
>
> *(a) The parties recognise the importance of promoting long term job security and career development for employees subject to this Agreement.*
>
> *(b) With the exception of those contracts for services currently in existence, there will be no contracting out or privatisation of functions or duties performed by directly employed workers during the life of this Agreement.*"

6 The 2007 Agreement expired on 31 July 2010. Upon its expiration the parties entered into negotiations for a replacement industrial agreement but were unable to agree on terms. On 24 October 2010, in the absence of agreeable terms for a replacement agreement, the parties agreed to the following interim arrangement:

(a) That no new industrial agreement would (at that stage) be made; and

(b) The 2007 Agreement would continue in its current form as an expired agreement which would continue to apply unless cancelled or replaced; and

(c) The Director General of Health confirm in writing that the Department of Health had no plans to withdraw from the 2007 Agreement; and

(d) A consent order would issue from the Western Australian Industrial Relations Commission providing for wage increases for employees covered by the 2007 Agreement; and

(e) Negotiations for a new agreement would commence no later than 1 February 2012.

Construction of New Hospitals

7 In 2009 the State of Western Australia (the State) commenced building the new Fiona Stanley Hospital at Murdoch which is due to be completed in about May 2014. The State has entered into a contract with Serco Australia Pty Ltd (Serco) for the provision of most of the facilities management services at that hospital. It is not in dispute that the functions or duties performed by employees covered by the 2007 Agreement at Royal Perth Hospital and at Fremantle Hospital will be performed by employees of Serco at Fiona Stanley Hospital.

8 When complete, the Fiona Stanley Hospital will be run by a new hospital Board. That Board, a separate legal entity which is yet to be created, will be responsible for employing employees to perform various functions not already contracted out. It will be independent of other existing hospital Boards.

9 The State has also recently announced the closure of the Swan Districts Hospital and the opening of a new hospital to be known as the Midland Health Campus. Those events are scheduled to occur in 2015. The Midland Health Campus will be considerably larger than Swan Districts Hospital and will provide additional services to those currently available at the Swan Districts Hospital.

10 Marshall Kingsley Warner, Director, Health Industrial Relations Services in the West Australian Department of Health deposed in his affidavit sworn 15 September 2011 that the State is yet to make a decision as to whether the Midland Health Campus will be a public hospital, or a private hospital that accepts private patients operated by a private corporation under Part IIIA – Private hospitals of the *Hospitals and Health Services Act 1927*.

11 If the Midland Health Campus is opened as a public hospital it will be run by a new Board. That Board will be a separate legal entity to that of the existing board of the Swan Districts Hospital. If it is opened as a private hospital which accepts private patients then the corporation conducting it will be separate. Either way, the legal entity which will run the Midland Health Campus will be separate to the Board of the Swan Districts Hospital.

These Claims

12 On 28 June 2011 United Voice WA lodged three claims in this Court, being M 33, M 34 and M 35 of 2011.

13 The allegation made in Claim M 33 of 2011 is that the transfer of certain medical services provided at Fremantle Hospital (which includes Kayeela Hospital) to Fiona Stanley Hospital constitutes both an express and implied breach of clause 11.13 of the 2007 Agreement.

14 The allegation made in Claim M 34 of 2011 is almost identical to that in M 33 of 2011, save that it relates to the transfer of medical services currently provided at Royal Perth Hospital (which includes Shenton Park Rehabilitation Centre) to Fiona Stanley Hospital.

15 The allegation made in claim M 35 of 2011 is that the planned closure of Swan Districts Hospital and the opening of the new Midland Health Campus constitute both an express and implied breach of clause 11.13 of the 2007 Agreement.

16 In each Claim, United Voice WA seeks the following relief:

> *"(a) An order pursuant to section 83(4) of the Act that the respondent pay a penalty, to be determined by the Court, for the contravention of the Agreement, to be paid to the Applicant;*
>
> *(b) An order pursuant to section 83(5) of the Act that the respondent be prevented from any further contravention or failure to comply with Clause 11.13 of the Industrial Agreement. Further particulars will be provided as to the suggested form of such an order prior to the pre-trial conference of this matter.*
>
> *(c) Any further order that the Court deems fit.*"

History of Litigation

17 There is a history of litigation between the parties in relation to the construction of the Fiona Stanley Hospital.

18 On 19 November 2010, the LHMU lodged Claim M 117 of 2010 with this Court seeking interim and substantive relief. The nature of the substantive relief sought in that matter is similar to that which is sought in these matters. The interim relief sought was an Order, pursuant to subsections 83(5) and 83(7) of the Industrial Relations Act (the IR Act), that pending the outcome of the substantive Claim, the Minister for Health be restrained from entering into any contract with Serco in relation to the Fiona Stanley Hospital.

19 The application for interim relief was heard on 1 December 2010, and subsequently dismissed on 7 December 2010 for reasons outlined in *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v the Minister for Health* (2010) 90 WAIG 1868.

20 The LHMU appealed that decision to the Full Bench of the WAIRC. That appeal was subsequently dismissed on 11 March 2011 (see *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (2011) 91 WAIG 291).

21 In dismissing the appeal Her Honour Smith AP, with whom Scott ASC agreed, considered the issue of the privatisation of services at Royal Perth Hospital and Swan Districts Hospital and said at paragraph 85 of the decision of the Full Bench:

> "*The evidence about the statements Mr Warner is said to have made about what is planned to occur at Royal Perth Hospital is vague and does not without further information, disclose a privatisation or contracting out of the functions or duties of persons whose employment is covered by the Industrial Agreement. Statements that the Shenton Park Campus will be closed and there will be job losses at the Wellington Street site of Royal Perth Hospital because those services will be transferred to Fiona Stanley Hospital does not establish a contracting out or privatisation of functions and duties of employees at Royal Perth Hospital as the services will in the future be transferred to a separate legal entity, that is to the future board of Fiona Stanley Hospital.*"

APPLICATIONS FOR ORDERS

22 On 15 September 2011 the Minister lodged Applications with this Court seeking that these Claims be summarily dismissed because, in each instance, they do not disclose a reasonable cause of action.

23 United Voice WA opposed the Applications.

24 It is not in issue that this Court has power to dismiss a Claim in a circumstance where the Claim is hopeless or otherwise does not disclose a cause of action.

25 This Court's duties in dealing with cases is set out in regulation 5 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (the Regulations) which provides:

> "*5. Court's duties in dealing with cases*
>
> *(1) A Court is to ensure that cases are dealt with justly.*
>
> *(2) Ensuring that cases are dealt with justly includes ensuring –*
>
> *that cases are dealt with efficiently, economically and expeditiously;*
>
> *so far as is practicable, that the parties are on an equal footing; and*
>
> *that a Court's judicial and administrative resources are used as efficiently as possible.*"

26 Regulation 7 of the Regulations sets out what this Court may do for the purpose of controlling and managing cases and trials. Those powers are extensive as is evident in sub-regulation 7(1)® which provides that this Court may, in addition to the powers specified, "*take any other action or make any other order for the purpose of complying with regulation 5*".

27 This Court has the power to make the orders sought if it concludes that the Claims are so clearly untenable that they could not possibly succeed. If that circumstance exists then it will be incumbent for this Court to dismiss the Claims so as to avoid further costs and to prevent a waste of the Court's resources.

28 The power to order summary judgment should be exercised with great care and should not be exercised unless it is clear there is no real question of fact or law to be tried. A Court at first instance should not risk stifling the development of law by summarily disposing of an action where there is a reasonable possibility that a cause of action does lie. Only in cases in which it can be seen from the outset that there is no basis for the legal conclusion being contended should summary judgment be entered.

The Minister's Submissions

29 For the purpose of these Applications the Minister accepts that it can be assumed for current purposes that, as alleged by United Voice WA and in part denied by the Minister, that the Minister is:

> *" (a) constructing Fiona Stanley Hospital;*
>
> *(b) transferring the medical services in question from Royal Perth Hospital and Fremantle Hospital to Fiona Stanley Hospital; and*
>
> *(c) constructing the Midland Health Campus."*

Decision of the Full Bench

30 The Minister argues that in view of what Her Honour Smith AP, with whom Scott ASC agreed, said at paragraph 85 of the decision of the Full Bench of the WAIRC in *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (supra) the proper interpretation of clause 11.13(b) of the 2007 Agreement is that it prevents the contracting out, or privatisation, at existing hospitals of functions or duties performed by employees of the Respondent at those hospitals.

31 The transfer of medical services from Royal Perth Hospital and Fremantle Hospital to a separate legal entity that is the future Board of Fiona Stanley Hospital cannot be a contracting out or privatisation prohibited by clause 11.13 of the 2007 Agreement. Similarly, the transfer of services from the Swan Districts Hospital to a separate legal entity, whether it be the future Board of the Midland Health Campus or a private corporation appointed under Part IIIA - Private hospitals of the *Hospitals and Health Services Act 1927*, cannot be a contracting out or privatisation prohibited by the 2007 Agreement.

32 The Minister contends that irrespective of any evidence that may be lead at trial the primary allegation that there has been a breach of an express term of the 2007 Agreement has no reasonable prospect of success.

Alleged Implied Terms

33 The Minister also says there is no basis for United Voice WA's contention that there has been a breach of the terms which it says ought to be implied into the 2007 Agreement.

34 United Voice WA suggests that the following three terms are implied into the 2007 Agreement:

> *"1) Even if the functions and duties of directly employed workers are transferred to another location, clause 11.13 of the 2007 Agreement will continue to bind the parties.*
>
> *2) Bargaining would be undertaken in good faith in accordance with the employer's duties at common law and/or pursuant to section 42B of the Industrial Relations Act.*
>
> *3) Where any transfer of functions and duties of directly employed workers would be transferred to another site, they would continue to covered by the 2007 Agreement because they would continue to be directly employed by the Minister, given the prohibition on contracting out or privatisation explicit in clause 11.13 of the 2007 Agreement.*"

35 The Minister points out that an industrial agreement is a creature of statute having statutory force. Accordingly, private law importing contractual principles does not apply to it. The Minister says that given the nature of the industrial agreements and the scheme of the IR Act, terms cannot be implied into the 2007 Agreement.

36 The Minister argues that even if terms could be implied into an industrial agreement, which is denied, the grounds for the implication of terms into the 2007 Agreement, whether based in fact or in law do not exist in any event.

37 Firstly, with respect to the implication of terms based on fact the Minister says that United Voice WA has failed to satisfy all of the five conditions required (see *BP Refinery (Western Port) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266).

38 Secondly, with respect to the implication of terms based in law the Minister says that such cannot apply to a singular agreement as terms implied in law are implied in all agreements of a particular class, or which answer a particular description (see *Byrne v Australian Airline Ltd* (1995) 185 CLR 410 at 448). Further, and in any event, the terms sought to be implied are both unnecessary and inconsistent with the express terms of the 2007 Agreement.

Minister's Alleged Breach of Fiduciary Duty and Common Law Duty of Good Faith

39 In its submissions in opposition to these Applications, United Voice WA introduced a new and as yet unpleaded proposition, that the 2007 Agreement placed an obligation on the Minister for Health in his incorporated capacity under section 7 of the *Hospitals and Health Services Act 1927* to take all reasonable steps to prevent the contracting out of functions and duties covered by clause 11.13(b). It says that the Minister failed to comply with that obligation and therefore is in breach of the 2007 Agreement.

40 The Minister says that this ground has no reasonable prospects of success because it is the duty of the State and the Minister for Health in his capacity as a Minster of State, to decide how hospital accommodation and services are to be provided. A hospital Board cannot, and has no duty to, override a decision of the State as to how hospitals will be organised. Whatever the knowledge of the Minister in his incorporated capacity, clause 11.13(b) of the 2007 Agreement does not prevent the transfer of medical services from an existing hospital to a new hospital not covered by the Agreement.

41 Further, and in any event the Minister in his incorporated capacity under section 7 of the *Hospitals and Health Services Act 1927* cannot be said to owe a fiduciary duty to employees.

42 The Minister argues also that in any event a claim based on an alleged breach of common law or fiduciary duty is outside this Court's jurisdiction (refer sections 81A and 81AA of the IR Act).

43 It is submitted that this new and unpleaded proposition is not reasonably arguable and that United Voice WA should not be given leave to plead it.

United Voice WA's Submissions

Decision of the Full Bench

44 United Voice WA argues that what Her Honour Smith AP said at paragraph 85 of *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (supra) must be read in its entirety. Her Honour's remarks in the second sentence of that paragraph must be read in conjunction with what she said in the first sentence concerning the evidence that was then before the Full Bench. United Voice WA submits that the evidence which is now before this Court, found in the affidavits of Elyane Palmer, identifies specific functions and duties that will be affected by the transfer of services. The existence of that new evidence has the effect of distinguishing these Claims from the matter decided by the Full Bench because more is now known about the specific duties and functions being transferred to other locations.

45 United Voice WA says that the substance of the Full Bench's decision in *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (supra) is not at paragraph 85, but rather found at paragraph 76 of the decision where it held that the Claimant failed because it attempted to assert that the Minister for Health, in his capacity as the principal of the contract between the State and Serco in relation to administering services to Fiona Stanley Hospital, should be bound by the Agreement.

46 United Voice WA accepts having regard to the reasons of the Full Bench in *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (supra) that the Minister's conduct in relation to which administrative functions are implemented at Fiona Stanley Hospital has no direct bearing on United Voice WA's ability to enforce the 2007 Agreement at Royal Perth Hospital, Fremantle Hospital and Swan Districts Hospital. However, that is not what is being put in these matters. These matters are different in that there is, in each instance, an allegation of express and implied breach of the 2007 Agreement.

47 With respect to the express breach United Voice WA says that the evidence dictates that the functions and duties currently undertaken by directly employed workers will be contracted to a private entity. The functions and duties covered by the 2007 Agreement have not disappeared. They have been transferred. They have been contracted out or privatised and the Minister for Health has allowed it to happen. The breach could not be clearer.

Alleged Implied Terms

48 Turning to the alleged breach of implied terms United Voice WA says that those terms are capable of being read into the 2007 Agreement. That is particularly so having regard to the agreement reached in 2010 extending the terms of the 2007 Agreement.

49 Although it is accepted that the decision *Byrne v Australian Airline Ltd* (supra) appeared to reject the notion that one could treat a provision of an agreement as a crystallised custom and imply a term to its effect into a contract of employment, the facts of *Byrne v Australian Airline Ltd* (supra) were different. Further, it was accepted in that case that it was possible to imply a term into a contract of employment where it was reasonable to assume the parties contracted on the basis of custom.

50 More specifically, with respect to the first implied term United Voice WA says that it is quite clear that the 2007 Agreement would be continue to bind directly employed workers irrespective of the location in which they work.

51 With respect to the second implied term United Voice WA says that it was within the contemplation of the parties to the 2007 Agreement that the functions and duties captured by clause 11.13(b) were to be transferred to the private sector. Therefore even if the Minister was not acting in his capacity as employer when transferring functions and duties to a private contractor, his knowledge of the transfer gave rise to an obligation to disclose in accordance with section 42B of the IR Act. Instead, the Minister agreed to terms knowing full well that functions and duties covered by the 2007 Agreement were going to be privatised.

52 As to the final implied term, United Voice WA says that it is necessary to ensure that the Minister lives up to his obligations agreed under the 2007 Agreement. Without the existence of the implied term nothing would prevent the Minister from creating mirror hospitals and transferring functions, thereby avoiding obligations created by the Agreement.

53 United Voice WA submits that where existing functions and duties previously covered by the 2007 Agreement are being relocated elsewhere but otherwise remain unchanged, the terms of the 2007 Agreement ought to prevail as it applies to current directly employed workers performing their functions and duties.

Minister's Alleged Breach of Fiduciary Duty and Common Law Duty of Good Faith

54 The final ground upon which United Voice WA resists these Applications is the yet unpleaded proposition that there is an obligation on the part of the Minister to take all reasonable steps to prevent the contracting out of functions and duties covered by clause 11.13(b) of the 2007 Agreement.

55 The aim of 2007 Agreement is to enhance job security as is specifically recognised in clause 11.13(a) of the 2007 Agreement. Clause 11.13 of the 2007 Agreement created an express obligation to protect employees from job insecurity. Clause 11.13(b) obliged the Minister to take all reasonable steps to prevent functions and duties being contracted out. A failure to take all reasonable steps to prevent contracting out amounts to a failure to comply with the 2007 Agreement which "triggers" section 83 of the IR Act.

56 United Voice WA seeks to amend the pleadings to incorporate this fresh ground and says that the ground has sufficient merit so as to defeat the Minister's contention that it has no reasonable cause of action.

CONCLUSIONS

57 The issue to be determined with respect to each of these applications is whether the Minister has succeeded in establishing that there is no basis for the legal conclusion contended by United Voice WA and that in each instance the Claim is completely untenable.

58 The power to order summary judgment must be exercised with great care and should never be exercised unless it is clear that there is no real issue of fact or law to be tried.

59 For the purpose of these Applications there is no dispute as to the facts. The facts are assumed on the basis most favourable to United Voice WA.

60 Having regard to the undisputed facts, are the Claims tenable? The answer to that question is no.

61 The proper interpretation of clause 11.13(b) of the 2007 Agreement is that it prevents the contracting out or privatisation, at existing hospitals, of functions or duties performed by employees of the Minister in his incorporated capacity at those hospitals.

62 The transfer of medical services from Royal Perth Hospital and Fremantle Hospital to a separate legal entity that is the future Board of Fiona Stanley Hospital is not and cannot be a contracting out or privatisation prohibited by clause 11.13 of the 2007 Agreement. Her Honour Smith AP (with whom Scott ASC agreed) made that explicitly clear in *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (supra).

63 The same reasoning applies with respect to the transfer of services from Swan Districts Hospital to Midland Health Campus. Irrespective of whether the services are to be transferred to a future board of the Midland Health Campus or a private corporation, the transfer will be to another separate legal entity.

64 In my view Her Honour Smith AP's comments are unequivocal. They cause insurmountable difficulty for United Voice WA in these Claims.

65 Clause 11.13(b) of the 2007 Agreement does not apply to the transfer of services to a separate legal entity. It only prevents the contracting out of or privatisation at existing hospitals, of functions or duties performed by employees at those hospitals.

66 In view of what was said by the Full Bench in *Liquor Hospitality and Miscellaneous Union, Western Australian Branch v Minister for Health* (supra) United Voice WA cannot succeed and that is irrespective of any evidence that it might lead at trial.

67 I now move to consider the alleged existence of implied terms in the 2007 Agreement. The existence of alleged implied terms was not raised before the Full Bench and therefore was not considered.

68 Industrial agreements exist independently of contract and operate with statutory force (see *Amcor Ltd v Construction, Forestry, Mining and Energy Union and Others* (2005) 222 CLR 241). Private law contractual principles do not apply to them (see *Actew Corporation Ltd v Pangallo* (2002) 127 CLR 1). I accept the Minister's submission that given the statutory nature of industrial agreements and the scheme of the IR Act, terms cannot be implied into industrial agreements on the basis of fact or law.

69 Even if I am wrong in that regard, I find that in these matters the necessary foundation for the implication of the alleged terms based either in fact, or law or a combination of both does not exist. Further, there is nothing in the evidence which suggests that the terms should be implied by custom as permitted by *Byrne v Australian Airline Ltd* (supra).

70 United Voice WA alleges that the first and third terms are to be implied on the basis of fact and that the second term is to be implied on the basis of both fact and law.

71 If a term is to be implied on the basis of fact then all five of the following conditions must be satisfied:

> *"(a) the term must be reasonable and equitable;*
>
> *(b) the term must be necessary to give business efficacy to the agreement, so that no term will be implied if the agreement is effective without it;*
>
> *(c) the term must be so obvious that "it goes without saying";*
>
> *(d) the term must be capable of clear expression; and*
>
> *(e) the term must not contradict any express term of the agreement."*
>
> (See *BP Refinery (Western Port) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 at 283 and *Farrell v Royal King's Park Tennis Club (INC)* [2006] WASC 51.)

72 The first alleged implied term is:

> "*Even if the functions and duties of directly employed workers are transferred to another location, clause 11.13 of the 2007 Agreement will continue to bind the parties.*"

73 It appears that United Voice WA is attempting to expand the prohibition on contracting out or privatisation at existing hospitals to include the transfer of medical services to new hospitals. That implied term is not so obvious that it goes without saying. It cannot be said that the Minister would have consented to such a term that would remove from the State and the Minister the

option of having some or all of the services transferred to new hospitals whether it be public or private. Indeed, the Minister's involvement in the creation of new hospitals and the transfer of services contra-indicates that.

74 Further, the alleged implied term is not necessary to give business efficacy to the 2007 Agreement. The 2007 Agreement is a comprehensive agreement effective without the alleged first implied term. Clause 11.13 prohibits the contracting out or privatisation of the functions or duties performed by employees covered by the 2007 Agreement at those existing hospitals. The Full Bench of the WAIRC has clearly found that the express terms of the 2007 Agreement do not apply to a transfer of services to separate legal entities. The alleged implied first term would therefore be in conflict with the express terms of the 2007 Agreement as construed by the Full Bench. It is impermissible to imply a term which is in conflict with the express terms of the Agreement.

75 The third alleged implied term is:

> "*Where any transfer of functions and duties of directly employed workers would be transferred to another site, they would continue to covered by the 2007 Agreement because they would continue to be directly employed by the Minister, given the prohibition on contracting out or privatisation explicit in clause 11.13 of the 2007 Agreement."*

76 The same reasoning as is discussed in paragraph 74 above also applies to this third alleged implied term. Like the first alleged implied term it appears to attempt to contradict the legal position that a transfer of services to a new hospital (i.e. a separate legal entity) is not covered by the 2007 Agreement. It cannot be said that the implied term goes without saying. Given the current situation with respect to the creation of new hospitals it could not possibly be reasonably argued that the Minister has consented to the term. In any event the 2007 Agreement is effective without it.

77 Neither the first or third alleged implied terms meet the requirements for the implication of a term based on fact.

78 The second alleged implied term is:

> "*Bargaining would be undertaken in good faith in accordance with the employer's duties at common law and/or pursuant to section 42B of the Industrial Relations Act.*"

79 This second alleged implied term which is said to be implied in law and fact, is in my view difficult to understand. If it relates to the conduct of the Minister with respect to the 2010 interim arrangement I fail to see how that has any bearing on the 2007 Agreement. I do not know what the alleged bargaining relates to. If it is meant to relate to future bargaining then it will be of no assistance. In any event there is a statutory scheme for good faith in bargaining. There is no need for the alleged implied term in those circumstances. The term is not so obvious that it goes without saying. In so far as its implication is based in law its necessity (being one of the prerequisites required) has not been demonstrated. There is no reasonable argument for its implication.

80 Finally, in dealing with the unpleaded proposition made by United Voice WA that the 2007 Agreement puts an obligation on the Minister to take all reasonable steps to prevent the contracting out of functions and duties covered by clause 11.13(b) it is obvious that whatever the knowledge of the Minister (in his incorporated capacity under section 7 of the *Hospitals and Health Services Act 1927*) was in 2009, that knowledge does not prevent the transfer of medical services from an existing hospital to a new hospital.

81 A hospital Board has no duty to override a decision of the State or the Minister for Health as to how hospitals will be organised (refer section 18 of the *Hospitals and Health Services Act 1927*). Even if it could be said that the Minister owed fiduciary duty to employees (which I do not accept) it cannot alter the meaning of clause 11.13(b) of the 2007 Agreement, nor the statutory provisions of the *Hospitals and Health Services Act 1927*, as has been found by the Full Bench of the WAIRC.

82 The Minister's further submission is that sections 81A and 81AA of the IR Act prevent this Court from making findings that a party has an obligation either at common law or by fiduciary relationship in relation to the enforcement of an industrial agreement under section 83 of the IR Act.

83 In view of the reasons already given it will not be necessary for me at this time to determine whether sections 81A and 81AA of the IR Act prevent this Court from making findings relating to the alleged obligations of the Minister. I observe however that this Court does not have an equitable jurisdiction. Insofar as United Voice WA argues its case in equity in this jurisdiction, it cannot succeed.

84 The new as yet unpleaded proposition is not reasonably arguable. I would not give leave to plead it.

85 The difficulties with United Voice WA's Claims are in my view, insurmountable. There is no basis for the legal conclusions being contended. There is in each instance no reasonable cause of action.

86 To allow these Claims to proceed would not be in keeping with the requirements of regulation 5 of the Regulations. It follows that each of the Applications succeed and Claims M 33, M 34 and M 35 of 2011 will be dismissed.

G. CICCHINI
INDUSTRIAL MAGISTRATE

POWER OF ENTRY—Matters pertaining to—

2011 WAIRC 01045

APPLICATION FOR AUTHORITY TO BE ISSUED TO MR JOSEPH MCDONALD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 01045
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
		ACTING SENIOR COMMISSIONER P E SCOTT
		COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 9 AUGUST 2011, THURSDAY, 1 SEPTEMBER 2011, MONDAY, 17 OCTOBER 2011, TUESDAY, 18 OCTOBER 2011, WEDNESDAY, 19 OCTOBER 2011
DELIVERED	**:**	THURSDAY, 17 NOVEMBER 2011
FILE NO.	**:**	APPL 31 OF 2011
BETWEEN	**:**	MR KEVIN REYNOLDS
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	**:**	Right of entry - application for another right of entry authority following revocation of previous authority - Principles discussed - Intervention
Legislation	**:**	Industrial Relations Act 1979 s 26(1)(a), (c), s 28(1)(k), s 49J(2), s 47J(5)
Result	**:**	Application Dismissed
Representation:		
Applicant	**:**	Mr J Nicholas (of counsel) and with him, Ms S Walker (of counsel)
Interveners	**:**	Mr R Andretich (of counsel) on behalf of the Hon Minister for Commerce
		Mr K Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)
		Mr J Blackburn (of counsel) on behalf of the Chamber of Commerce and Industry of WA Inc
		Mr AJ Power (of counsel) on behalf of the Australian Building and Construction Commissioner, opportunity to be heard

Case(s) referred to in reasons:

Amalgamated Clothing and Allied Trades Union v Arnall & Sons (1928) 26 CAR 76

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No. 2) [2010] FCA 977; (2010) 199 IR 373

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2009] FCA 1092

Australian Building and Construction Commissioner v Construction, Forestry, Mining & Energy Union [2011] FCA 810

Australian Building and Construction Commissioner v McDonald and Construction, Forestry, Mining & Energy Union [2011] FCA 1040, WAD 266 of 2011

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Transfield Services (Australia) Pty Ltd and Another (2002) 83 WAIG 376; [2002] WAIRC 07206

Construction, Forestry, Mining and Energy Union (PR 964419)

Jeff Radisich v Michael Buchan, Doug Heath, Walter Molina and Construction, Forestry, Mining and Energy Union [2008] AIRC 896

Joseph Lee of the Building Industry and Special Projects Inspectorate v Joseph McDonald and Michael Buchan (2004) 84 WAIG 2587; [2004] WAIRC 12071

Joseph Lee of the Building Industry and Special Projects Inspectorate v Joseph McDonald (2006) 86 WAIG 1094; [2006] WAIRC 04220

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

Office of the Employment Advocate v Joseph McDonald (PR 906747)

Re Real Estate Association of NSW (1985) 13 IR 146

Wilson v McDonald [2009] WASCA 39; (2009) 253 ALR 560

Woodside Burrup Pty Ltd v Construction, Forestry, Mining & Energy Union and Joseph McDonald and Australian Building and Construction Commissioner [2011] FCA 949

Reasons for Decision

COMMISSION IN COURT SESSION:

1 The applicant, Kevin Noel Reynolds who is the Secretary of The Construction, Forestry, Mining and Energy Union of Workers (CFMEUW), seeks an order from the Commission in Court Session under s 49J(2) of the *Industrial Relations Act 1979* (the Act) directing the Registrar to issue a right of entry authority to Joseph McDonald. The Act in s 49J(1) obliges the Registrar to issue a right of entry authority to a person nominated by the Secretary of a union and in 2002 Mr McDonald was issued a right of entry authority pursuant to that provision. However, in 2006 the Commission revoked Mr McDonald's right of entry authority and by s 49J(2), the Registrar is not to issue an authority to a person whose authority has been revoked unless so ordered by the Commission in Court Session.

Intervention

2 The application was listed for mention and the Registrar was directed to publish a notice of the application on the Commission's website ((2011) 91 WAIG 1913; [2011] WAIRC 00820). The application was further listed for mention to deal with any applications to intervene and to programme the hearing. The Hon Minister sought leave to appear under s 30 of the Act. We considered the Minister's interest in the operation of the Act and his broader interest in the importance of the construction industry to the economic well-being of the State to warrant granting leave to intervene. By s 27(1)(k) of the Act, the Commission may permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter. We considered the exercise of any right of entry authority issued to Mr McDonald as a result of this application would have the potential to directly affect the members of both the Chamber of Commerce and Industry of WA (Inc) (CCIWA) and the Master Builders' Association of Western Australia (Union of Employers) Perth (MBA WA) and they therefore showed sufficient interest for them to be granted leave to intervene.

3 We did not consider the Australian Building and Construction Commissioner (ABCC) would be directly affected by the exercise of any right of entry authority issued to Mr McDonald as a result of this application, and indeed that was the tenor of the approach of the ABCC in the hearing before us. Therefore we considered that the ABCC did not have sufficient interest and we refused leave to intervene; however, we expressed the wish to be informed of the matters referred to in the ABCC's outline of submissions and we therefore granted him an opportunity to be heard.

The Applicant's case

4 Mr McDonald is an Assistant Secretary of the CFMEUW. (We note that the CFMEUW is the name of the organisation registered under the Act. During the hearing, no-one sought to differentiate in a practical sense between the CFMEUW and the federally-recognised organisation referred to as the CFMEU. Given the way the matter proceeded before us, we have not differentiated between the two organisations and have referred to the CFMEUW only where the evidence was directed to that entity.)

5 The grounds for the application are that a right of entry authority ought be given to Mr McDonald to allow him to assist Mr Reynolds to achieve the objects of the CFMEUW in Rule 3 of its Rules. It is said that employees who are members or eligible to be members of the CFMEUW seek for Mr McDonald to be able to enter premises for the purposes of ss 49H and 49I of the Act. Further, a considerable period of time has now elapsed since the events which led to the revocation in 2006. It is said that Mr McDonald has received training in relation to the rights and obligations conferred by Division 2G of the Act and Mr Reynolds has counselled Mr McDonald that he must not act in an improper manner or intentionally and unduly hinder an employee or employees during their working time in the exercise of any powers conferred under Division 2G of the Act. Further, Mr McDonald has indicated that he will not act in that manner. Lastly, it is submitted that the order sought will promote the objects of the Act.

6 In support of the application, the applicant submitted that Division 2G provides a strong theme of promoting the interests of organisations of employees registered under the Act, a theme underpinned by one of the principal objects of the Act being (in s 6(ab)) "to promote the principles of freedom of association and the right to organise", principles which are recognised in international treaties to which Australia is a party. Division 2G intends that registered employee organisations should be able to communicate with, and service, existing members, recruit new members and play a role in the enforcement of awards and agreements and industrial legislation.

7 Further, when a right of entry authority is first issued, the Act does not require that the proposed authorised representative be tested for qualification, conduct or character: the Act simply requires the Registrar to issue the authority on the application of the Secretary of an organisation of employees. As 49J(2) contemplates a person being able to regain a right of entry authority which has been revoked, the absence of any qualification, conduct or character test for the purposes of the issuance of an initial right of entry authority means that the conduct to which the Commission in Court Session should have regard should be limited to the matters contained in s 49J(5), that is not acting in an improper manner, or intentionally and unduly hindering an employee or employees during their working time. Therefore, as a matter of fairness and equity, the Commission in Court Session should not admit evidence of, or place any weight on, conduct said to have occurred prior to the revocation of Mr McDonald's authority in 2006.

8 Mr McDonald gave evidence that the CFMEU in WA has about 12,000 members. As Assistant Secretary he plays a role with the organisers and safety representatives in what they do day-to-day, together with recruiting and increasing the membership of the CFMEU. His motivation is to ensure that the union's members work safely and can return home after work and be paid properly for the work that they do.

9 Mr McDonald was asked how he viewed his conduct in 2004 which resulted in the suspension of his authority. He stated that it was made clear to him by Kevin Reynolds "and a couple of lawyers" that "it was getting to the stage where we had to try and operate a bit differently". Mr Reynolds had said to him "Mate, you want to be a bit careful, it's getting close to the wire" (transcript p 71). Mr McDonald stated that he thinks he did change his way of operating from the revocation of his authority in 2006, but he could only change from that day forward. He stated that what he had been trying to do was right, but "the way that I've operated in the past, yes, it will be different and they'll see that it's different" (transcript p 71).

10 Mr McDonald was asked what was his understanding of the expectations of his standards of behaviour and he replied: "[t]o play within the guidelines" (transcript p 72). He would "operate in a professional manner" and insisted that the way he would have to operate would be different to any other union official in this country "because I will be watch (sic) from afar" (transcript p 74). He would do what he had to do in a way that he would keep the right of entry authority (transcript p 75).

11 Mr McDonald was cross-examined on his evidence.

Objections to the application

The Hon Minister for Commerce

12 The Hon Minister for Commerce canvassed the circumstances giving rise to the 2006 revocation and the improper behaviour in which Mr McDonald had been engaged. The Minister noted the history of Mr McDonald's previous misbehaviour which indicated he was not prepared to observe the limits imposed upon him by the Act and that Gregor SC had stated that Mr McDonald was "a recidivist in this type of behaviour". (*Joseph Lee v Joseph McDonald* (2006) 86 WAIG 1094; [2006] WAIRC 04220)

13 The Hon Minister noted the 2001 decision of the Full Bench of the Australian Industrial Relations Commission revoking Mr McDonald's federal right of entry permit (*Office of the Employment Advocate v Joseph McDonald* PR 906747) on the ground that he had acted in an improper manner in exercising the rights conferred by the permit. A 2005 decision of the AIRC refused to issue a further permit to Mr McDonald (PR 964419) with Ross VP stating he was not satisfied that Mr McDonald would act in conformity with the conditions attaching to a right of entry permit.

14 The Hon Minister referred to decisions of other courts and tribunals and submitted that the record shows Mr McDonald has been convicted of having committed criminal trespass contrary to s 70A(2) of the Criminal Code on four occasions in 2009, most recently in relation to his entry to premises in Osborne Park on 11 March 2011 for which he was convicted on 5 October 2011. All of these convictions arise out of his entry to worksites in the discharge of his union duties.

15 Further, notwithstanding the revocation of Mr McDonald's right of entry permit under federal legislation, he has continued to operate as if he still had it. Over a period of almost a decade, Mr McDonald has demonstrated a propensity not to comply with legislation, both State and federal, which regulates his activities as a union official, and in particular he has not been prepared to observe the limits applying to right of entry to work sites under the relevant legislation. Therefore, the Hon Minister is of the view that the Commission cannot be satisfied that Mr McDonald will observe the limits imposed by the Act and there can be no reasonable expectation that Mr McDonald will do so in the future.

The Chamber of Commerce and Industry of WA (Inc)

16 CCIWA submitted that s 49J(5) indicates that the Parliament was concerned to protect employers and employees from abuse of rights of entry. The discretion of the Commission in s 49J(5) should be exercised in a way which furthers that protective purpose. The minimum prerequisite to the granting of an application such as this is that the Commission should be satisfied on the evidence that the person will not again abuse the powers which the Act confers on authority holders.

17 CCIWA addressed the Commission in Court Session on the relevance of prior conduct and of contrition. In deciding whether to issue a further right of entry authority, general deterrence is a relevant and important consideration which the Commission in Court Session is bound to consider because the ramifications of the Commission in Court Session's decision in this matter will extend well beyond the building and construction industry. CCIWA stressed the size and importance to the economy of the building and construction industry. It noted that it is not suggesting that Mr McDonald requires a right of entry authority in order to keep his employment.

18 CCIWA submitted that a person seeking an authority under s 49J(2) bears a heavy onus and the application should not be granted without, at the very least, compelling evidence that the person has reformed their character to the point where the Commission could be confident that if an authority is issued they will not again abuse the powers conferred on them: the mere passage of time is not sufficient to indicate a change of character.

19 In this case, CCIWA pointed to Mr McDonald having a long history of unlawful and improper conduct on building sites extending over at least 17 years, much of which is characterised by abusive and aggressive behaviour and which has included threats, the use of violence and damage to property. CCIWA submits that on many occasions Mr McDonald has been found to have raised safety and health issues without justification to stop the performance of work or to press industrial demands. Neither the revocation of his federal permit, nor of his State right of entry authority, have had any effect on his behaviour and Mr McDonald has purported to exercise rights which he does not have any longer.

20 CCIWA submitted there is no evidence of contrition on Mr McDonald's part. While the CFMEU and Mr McDonald have in some recent cases admitted liability and cooperated in the preparation of agreed Statements of Facts, in no case has there been any expression of contrition or remorse. In regard to any training and counselling that Mr McDonald says he has received, CCIWA submitted that it is apparent from Mr McDonald's subsequent conduct that this has had no effect upon him. In

CCIWA's submission not only is it not possible to be confident that, if granted a right of entry authority, Mr McDonald will not abuse the powers conferred on him; it is almost certain that Mr McDonald will re-offend.

The Master Builders' Association of Western Australia (Union of Employers) Perth

21 The MBA WA contended that a heavy onus rests on the applicant to demonstrate to the Commission in Court Session's satisfaction that Mr McDonald should be issued with a right of entry authority. The Commission in Court Session is entitled and able to assess the conduct of Mr McDonald as a union official since having his right of entry authority revoked in 2006.

22 In the view of the MBA WA, the 2006 decision which revoked Mr McDonald's right of entry authority was "well considered and deliberate" and Gregor SC had intended that it be a permanent revocation, not a revocation for a period of time; that is, Mr McDonald's right of entry authority was to be revoked and he would not be issued again with another State authority. This conclusion is because of the strength of Gregor SC's decision and the Commission in Court Session now could only approve the application when it is totally satisfied of the intention of Mr McDonald never again to conduct himself in a manner that is improper and/or unlawful whilst carrying out duties as a union official. MBA WA submits that that is a test Mr McDonald will fail on any reasonable assessment by any reasonable person.

23 The MBA WA submitted that some 28 persons are shown as holding a right of entry authority on behalf of the CFMEUW and therefore it can effectively conduct its affairs as a union, and has done so for the past six years during which Mr McDonald has not held a right of entry authority.

24 In relation to the training said to have been provided to Mr McDonald, the MBA WA noted that the applicant in this matter has provided no support for this contention. In the absence of evidence of the training provided to Mr McDonald, the type of training provided, what training organisation provided it and the content of that training, the Commission can place no reliance on the simple assertion that training has been provided. In the MBA WA's submission, Mr McDonald has failed to take heed of the counselling he has received, as well as failed to comply with the applicant's express instructions to strictly comply with union right of entry and to conduct himself in a professional manner when dealing with employers; this is evidenced by his many convictions since 2005 whilst acting as a union official.

25 The MBA WA sees Mr McDonald as having a "track record" of providing undertakings to a tribunal in connection with how he will conduct himself in a prospective sense and subsequently breaking those undertakings. MBA referred to various cases in support of this submission.

26 The MBA WA submitted that there is a public interest test which the Commission in Court Session should observe which applies to and extends beyond this application. The MBA WA submitted that the applicant has not provided any cogent or reliable evidence to show how Mr McDonald has learned the lessons from the past, or on what basis Mr McDonald will not transgress the Act in the future. Absent any credible evidence in support of the grounds, the application must fail.

The Australian Building and Construction Commissioner

27 The ABCC made no submissions as to the appropriate test to be applied in determining whether or not, and in what circumstances, the Commission in Court Session should make an order under s 49J(2) and the ABCC neither supported nor opposed the application. Rather, the purpose of the ABCC's appearance was to inform of the Commission in Court Session's discretion under the Act in relation to the matters described in a detailed chronology of Mr McDonald's prior relevant conduct which has been subject to findings and/or proceedings in the relevant jurisdictions.

Consideration

28 This is the first occasion such an application has been brought to the Commission. Section 49(J)(2) does not provide any criteria to be applied by the Commission in Court Session when considering the application. Guidance regarding the approach to be adopted can be gained from the judgment of Mason J, with whom Gibbs CJ and Dawson J generally agree, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40:

> "If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act."

29 This approach has the endorsement of the applicant in this matter and also CCIWA, and we agree that it is appropriate in this case. Applying that approach in the context of whether another right of entry authority should be issued to a union official, the subject matter, scope and purpose of the Act are determined from the following. Firstly, the Act by its long title is an Act to consolidate and amend the law relating to the prevention and resolution of conflict in respect of industrial matters, the mutual rights and duties of employers and employees, the rights and duties of organisations and employers and employees, and for related purposes.

30 Secondly, the principal objects of the Act, relevant to this application are:

(a) to promote goodwill in industry and in enterprises within the industry;

(ab) to promote the principles of freedom of association and the right to organise;

(af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;

(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes;

(e) to encourage the formation of representative organisations of employers and employees and their registration under this Act…

31 Thirdly, the provision for right of entry is found within Division 2G of the Act which establishes a code for the provision of right of entry of premises where relevant employees work for the purpose of holding discussions at the premises with any relevant employees who wish to participate in those discussions, and for the purpose of investigating any suspected breach of the Act, the *Long Service Leave Act 1958*, the *Minimum Conditions of Employment Act 1993*, the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award, order or industrial agreement or employer/employee agreement that applies to any such employee (*AFMEPKIU v Transfield Services (Australia) Pty Ltd* (2002) 83 WAIG 376; [2002] WAIRC 07206, per Kenner C at [13-14]). Division 2G overrides the common law of trespass and in the absence of a person holding a right of entry authorisation, the person has no right to enter a workplace uninvited.

32 Fourthly, the Act in s 49J(5) sets out the grounds upon which the Commission may revoke or suspend a right of entry authority, namely if the Commission is satisfied that the person to whom the authority was issued has:

(a) acted in an improper manner in the exercise of any power conferred on the person by this Division; or

(b) intentionally and unduly hindered an employer or employees during their working time.

33 Having regard to the above, the following may be said with some confidence. A right of entry authority is a part of the State's industrial relations system and it contributes to the purpose and objects of the Act by permitting a union official to lawfully enter a workplace to hold discussions with any relevant employees who wish to participate in those discussions, and to investigate any suspected breach of employment legislation, awards, orders or agreement. The exercise of this right of entry for those purposes is integral to, or consistent with, the purpose and the principal objects of the Act. Right of entry of union officials has a long history in industrial relations, as the 1928 case on the issue to which the Hon Minister referred attests (*Amalgamated Clothing and Allied Trades Union v Arnall & Sons* (1928) 26 CAR 76 at 91).

34 The applicant pointed out that under s 49J(1) a right of entry authority is issued initially without the person needing to establish any qualification, conduct or character; even if the person had a history to that time of unacceptable conduct, the permit must be issued to the person. The applicant's submission that the issuing of an initial right of entry authority draws a line under that history is, in our view, correct. But the issuing of a right of entry authority carries with it an obligation – an obligation from that time forward not to act in an improper manner or to intentionally and unduly hinder an employer or employee during their working time. Whatever may have been the person's conduct or character prior to the issuing of the initial right of entry authority, from that point forward, the person must not do either of those things or the permit will be revoked.

35 This obligation is not difficult to meet. The significant majority of State right of entry authority holders are having no difficulty meeting it, a conclusion reached from the fact that Mr McDonald is the only such authority holder to have had his authority suspended or revoked since s 49J was introduced in 2002. Mr McDonald's conduct is not representative of the conduct of the vast majority of union officials who hold such an authority and who do not conduct themselves in the same manner.

36 The MBA WA sought to persuade the Commission that the language used by Gregor SC in the 2006 revocation shows that he intended that Mr McDonald's right of entry authority should be revoked permanently. In one sense, the MBA WA is correctly observing that a revocation of a right of entry authority under s 49J(6) does permanently revoke that particular authority. However, irrespective of any presumed intention on the part of Gregor SC, the Act provides in s 49J(2) that the Commission in Court Session is able to direct that another authority be issued to the person. That brings into focus the matters which are relevant to the exercise of the Commission in Court Session's discretion under s 49J(2).

37 We conclude from the fact that a person's conduct prior to the issuing of an initial right of entry authority is not relevant to its issuing, conduct prior to the issuing of an initial right of entry authority is not directly relevant when consideration is to be given to whether another can be issued. What is directly relevant is:

1. the conduct of the person which gave rise to the revocation of the person's right of entry authority;
2. the reasons why the Commission revoked the authority;
3. the evidence presented now in support of the making of the order to the Registrar, including the length of time since the revocation and any undertakings regarding future behaviour given by the person;
4. any conduct of the person since the revocation which indicates a likelihood the person will, or will not, act in an improper manner if he/she is issued with another authority, or will intentionally and unduly hinder an employer or employee during their work time;
5. The interests of the applicant and also the interests of employees who are members of, or are eligible to be members of the organisation and the employers of those employees or the proprietors of the premises where they work;
6. The public interest, having regard to the promotion of goodwill in industry and in enterprises within it, as well as recognising the principles of freedom of association and the right to organise which are recognised within the Act.

38 We consider these in turn.

The conduct of the person and the Commission's reasons for the revocation

39 The conduct for which Mr McDonald's right of entry authority was revoked in 2006 (*Lee v Mc Donald*, cited above) had occurred in November 2002. Proceedings seeking the revoking of his authority had been brought to the Commission but they had been adjourned by consent to allow criminal charges against Mr McDonald arising from that conduct, to be heard. This did not occur until August 2005 when Mr McDonald (and another CFMEU official) was convicted of assault and Mr McDonald was fined $800.00.

40 When the proceedings seeking the revoking of his authority resumed before the Commission, Gregor SC found that in exercising what Mr McDonald viewed to be his right of entry, Mr McDonald committed an assault against an employee of BGC. He noted there was evidence of abusive language by Mr McDonald early in the proceedings on site and that Mr McDonald had urged the union official accompanying him to "thump" the BGC managers. Mr McDonald had charged with considerable force into the men standing outside the doorway and his conduct continued for some 15 to 20 minutes.

41 Gregor SC found that Mr McDonald's conduct had been violent and could have resulted in injury. It was conduct which would be unsafe anywhere, but was completely unacceptable on a building site which is inherently unsafe, and that "[i]t is worse when done by a person who represents an organisation that professes building safety as a fundamental reason for its existence" (at [29]). It was conduct which had led to the criminal charges of assault for which he had been convicted.

42 Gregor SC found (at [31]) that Mr McDonald's continual physical assaults and the use of bad language was "at the least unseemly, some of the language was indecent and in any interpretation was not in accordance with accepted rules of behaviour. His conduct was wrong at the time and was most certainly improper".

43 Gregor SC also took into account (at [26]) that previous convictions of Mr McDonald showed that he was prepared to use force and commit offences in order to pursue what he saw as the interests of his members. The first occasion noted by the then Senior Commissioner was in March 1996 when Mr McDonald was convicted of a threat relating to a demand to pay wages. He was convicted for causing damage in June 1998 when he was found guilty of breaking a lock on a crane. Gregor SC concluded that this made clear that Mr McDonald had been well aware of the potential implications of his conduct on the continuation of his right of entry authority. Gregor SC found that Mr McDonald's behaviour was improper.

44 In deciding what the penalty should be for this improper conduct, Gregor SC noted at [33] that in 2004 Mr McDonald had had his right of entry authority suspended for three months for having intentionally and unduly hindered an employer/employee during their working time *(Lee v McDonald and Buchan* (2004) 84 WAIG 2587; 2004 WAIC 12071). Gregor SC concluded that there had been a period of similar behaviour over a long period of time and therefore he revoked Mr McDonald's authorisation.

The evidence presented in support of the making of the order

45 In summary, it has been five and a half years since Mr McDonald's permit was revoked. Mr McDonald has undertaken to act differently, to "play within the guidelines" and to operate in a professional manner. On his evidence he has received some counselling about his past behaviour and how he is to behave in the future. Mr McDonald's evidence that he has received some counselling was not broken down in cross-examination, although there is little detail about it or the extent of it, and we accept that Mr McDonald has received it. Some counselling was from the CFMEU's Secretary and that which occurred in February 2011 was from some of its solicitors.

46 Mr McDonald's evidence is the only evidence in support of the application. No other person or organisation gave evidence in support of Mr McDonald being issued with another right of entry authority.

Any conduct of the person since the revocation

47 On 21 March 2011, Mr McDonald trespassed on a BGC building site in Osborne Park. He was asked to leave the site and eventually did so, but was abusive and intimidating throughout the conversation. He was subsequently convicted and fined $500.00 (Minister 1, tab 18).

48 As a result of encouraging employees in November and December 2009 to take industrial action in support of their demands, which led to industrial action being taken, Mr McDonald was fined $14,300 and was permanently restrained from engaging in or threatening any industrial action on or in connection with the Pluto LNG Project, and others (*Woodside Burrup Pty Ltd v CFMEU and Joseph McDonald and ABCC* [2011] FCA 949).

49 Mr McDonald was fined $8,000 for conduct on 15 July 2009 when, after he spoke at a meeting of employees on site and exhorted them to "stand up for themselves", he encouraged the majority of attendees to support strike action (*ABCC v CFMEU (No.2)* [2010] FCA 977; (2010) 199 IR 373).

50 As a result of his conduct in June 2009, Mr McDonald was the subject of an interlocutory injunction granted to restrain him from being engaged in or involved with any employee of Diploma Constructions and from attending within 100 metres of any entrance to the construction site (*ABCC v CFMEU* [2009] FCA 1092). He subsequently was fined $17,000. In the reasons for judgment in the interlocutory decision, Gilmour J stated:

> It is of particular concern that the CFMEU, Mr McDonald and Mr Buchan have, as I have found on a *prima facie* basis, hidden behind spurious concerns as to the health and safety of employees to advance, as I infer, their own unspecified industrial aims. It is the very behaviour which the Commonwealth Parliament has made clear should be eradicated from the building industry in this country. It is conduct that directly undermines the main object of the BCII Act (s 3(1)) which is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
>
> [2009] FCA 1092 at [145]

51 In the reasons for judgment in the substantive matter, when considering the nature and extent of the conduct involved, Gilmour J noted the submission of the ABCC about the use of safety issues as a guise for the industrial action "when the respondents [ie the CFMEU, Mr McDonald and Mr Buchan] now admit that there was no reasonable concern by employees about an imminent risk to their health or safety at the Project for the period of the Industrial Action" ([2011] FCA 810 at [38(g)]).

52 Mr McDonald's conduct in February and April 2007 came before the Australian Industrial Relations Commission (*Radisich v Buchanan and Others* [2008] AIRC 896). The decision in that matter shows at [8] and [15] that the CFMEU admitted that on 14 February 2007 Mr McDonald had:

- purported to exercise a right under Part 15 of the *Workplace Relations Act, 1996* (Cth), namely an OHS right, which he did not have;
- failed to exercise the purported rights with due diligence, reasonable civility and avoidance of unnecessary obstruction by behaving in an abusive manner toward site personnel;
- threatened to disrupt the site;
- untruthfully asserted to police that he had a right to be on site when he knew that he had no such right and was unlawfully on the site.

53 The CFMEU admitted also that on 22 February 2007 and 24 April 2007, in company with other CFMEU organisers, Mr McDonald had entered the Pindan and Q-Con construction sites purporting to exercise rights he did not have. Orders were made, by consent, that included:

- the requirement of permits issued to the CFMEU in the following two years to contain a condition that the permit holder not enter or remain on any premises in the company of or in concert with Mr McDonald;
- the requirement that a CFMEU officer to give a written direction to Mr McDonald that he not purport to rely on a right of entry when he did not hold one; and
- the prevention of the CFMEU from applying for the issue of a permit to Mr McDonald for two years.

In separate proceedings relating to this conduct, Mr McDonald was convicted of trespass on four occasions and fined a total of $11,500.00.

54 Also in 2007 Mr McDonald trespassed on a Doric Constructions building site and remained there after being requested to leave. The WA Court of Appeal convicted Mr McDonald for this in February 2009 (*Wilson v McDonald* [2009] WASCA 39; (2009) 253 ALR 560).

The interests of the applicant, employees and their employers

55 This application demonstrates that the applicant, who is the Secretary of the CFMEUW, has an obvious interest in the Assistant Secretary being able to enter workplaces. There is no direct evidence, however, of any effect on the CFMEUW of Mr McDonald not having had a right of entry authority since 2006. Correspondingly, there is evidence that between 10 and 20 persons in the CFMEU in WA do have a right of entry authority and it is possible for them to do the work that otherwise would be done by Mr McDonald, as he himself conceded (transcript p 138). There is no suggestion that Mr McDonald not having a right of entry authority has prevented or hindered the CFMEUW from servicing its membership, nor that Mr McDonald's own employment is in jeopardy.

56 There is no direct evidence of the interests of the members of the CFMEU, who are likely to be employees, in whether or not Mr McDonald should have another right of entry authority.

57 Conversely, the interveners' presence in these proceedings indicates that the employers in the industries represented by them are implacably opposed to Mr McDonald having another right of entry authority.

The public interest

58 Although the application deals specifically with the circumstances of Mr McDonald, it is relevant to take account of the public interest, having regard to the promotion of goodwill in industry and in enterprises within it as well as recognising the principles of freedom of association and the right to organise, which are recognised within the Act.

59 The provision in the Act for persons to be given the right to enter workplaces and interview employees, and to monitor or even investigate the application of legislation, awards, orders and agreements to those employees and those workplaces is most important. Right of entry provides:

> "…an essential link in the process of investigation and enforcement of such laws. Such permits are issued every bit as much in the public interest as they are in the interest of the particular union or officials" (*Re Real Estate Association of NSW* (1985) 13 IR 146 at 150).

60 As noted by Gilmour J in the reasons for judgment in the interlocutory decision in *ABCC v CFMEU* at [22] (ABCC tab 4, p 164) it is trite that responsible union involvement in health and safety matters is in the interests of employees and in the public interest.

61 Equally in the interest of employees and in the public interest is the sanction of revoking the permit where the person acts in an improper manner or intentionally and unduly hinders an employer or employees during their working time. Possession and use of a right of entry authority carries with it a responsibility not to act improperly, which must require the person not only to observe the law of the land, but also to observe a minimum standard of behaviour towards others. We recognise that standards of conduct, courtesy and politeness vary from industry to industry and from workplace to workplace. Communications in the context of industrial relations negotiations can be robust and challenging, and it is not necessarily one-sided. However, there is simply no place for physical aggression and abuse in the exercise of the right of entry conferred by the Act. Mr McDonald's improper behaviour meant that it was in the public interest that his right of entry authority be revoked; it will not be in the public interest for another authority to be issued if such behaviour is likely to be repeated.

Conclusion

62 The power given to the Commission to revoke a right of entry authority has an element of imposing a penalty but it also serves to protect employers and their employees in the future from such improper conduct. The Act does not provide that another right of entry authority must be issued after a particular period of time has elapsed; rather, the Commission in Court Session is to exercise a judgment about whether another should be issued. Therefore the fact that five and a half years have passed is not

sufficient in itself to warrant the issuing of another right of entry authority. The question is what has happened during that time and whether the Commission in Court Session can be confident that there is little likelihood that the conduct will be repeated if another authority is issued.

63 It states the obvious to say that each case will depend upon its own circumstances. Mr McDonald knows that in 2006 he was considered to be a recidivist in the type of behaviour which led to his right of entry authority being revoked. Continuing that behaviour after 2006 will merely confirm that description. The decision whether he is to be issued with another turns upon his conduct since 2006, conduct for which he alone is responsible. It is up to Mr McDonald to help create the environment for another right of entry authority to be issued to him. If during the time since his right of entry authority was revoked, Mr McDonald has not behaved improperly, in other words, if he shows by actions rather than words that he has "played within the guidelines" and operated in a professional manner, and perhaps can bring supporting evidence to that effect, then it will be easier for the Commission in Court Session to conclude that another right of entry authority should be issued to him. If he has not conducted himself in that manner, it will be his own conduct which will prevent the Commission in Court Session reaching that conclusion.

64 By any reasonable standard of judgment, Mr McDonald has continued to behave improperly. Only one month after receiving his most recent counselling on 9 February 2011 about the rights and responsibilities of a federal permit holder and of State right of entry (transcript p 154) he trespassed on a BGC building site and was convicted and fined $500.00.

65 Mr McDonald says that he did not have a right of entry authority at that time, and that he will "play within the guidelines" when another is issued to him, but this cannot be an acceptable explanation for his behaviour now because he knew he had no right to enter the building site but did so anyway.

66 Mr McDonald attempted to explain during the hearing that it had been found to be "absolutely the lowest end of the scale of trespass possible" (transcript p 128, however the fact is that Mr McDonald had entered the site when he did not have permission. It was improper conduct which shows a disregard for the law as recently as the beginning of this year.

67 It is telling too that Mr McDonald was abusive and intimidating in his conduct on that building site because this is the same kind of conduct, even if not to the same degree, as his conduct which, in 2006, led to Gregor SC revoking his right of entry authority. His own behaviour has cast doubt upon Mr McDonald's undertaking to abide by the rules if another right of entry authority is issued to him.

68 It is not as if this improper conduct was only one, perhaps relatively minor, event since the 2006 revocation. Other conduct since the 2006 revocation is referred to above. It includes the finding by the Federal Court of Australia that Mr McDonald, together with the CFMEU and another official, hid behind spurious concerns as to the health and safety of employees to advance unspecified industrial aims (*ABCC v CFMEU*, cited above). That too is improper conduct. In the hearing in this matter, Mr McDonald denied having done so (transcript p 148) but that cannot be accepted. The finding of the Federal Court stands, and the agreed facts in that matter subsequent to that finding included that there were no grounds for any of the construction employees to hold a reasonable belief that there was an imminent risk to their health or safety on the project during the relevant period (ABCC 1, tab 4, p 214).

69 Mr McDonald's evidence is that he thinks he did change his way of operating from the time he lost his right of entry in March 2006 (transcript p 71), however he was convicted of trespass on four occasions between February and April 2007, for which he was fined a total of $11,500.00 (Minister 1, Law Breaches timeline). On two of those occasions he refused to leave sites when requested by management and was abusive (Minister 1, Material facts re the Pindan site, 21 February 2007 (tab 16) and the Q-Con site, 24 April 2007 (tab 15)).

70 In fairness, there is no evidence of Mr McDonald behaving in this manner for the two years from May 2007 to May 2009 (Minister 1, Law Breaches timeline). However, there is no positive evidence either that Mr McDonald had changed his way of behaviour during this time; it is merely that there is no evidence that he had breached the law during that period. Events post-May 2009, including his conviction for trespass in 2011, show that the May 2007 – May 2009 period was an exception and that he has not changed his way of operating since his authority was revoked in 2006.

71 Although a submission was made that Mr McDonald regrets the conduct which led to his authority being revoked, when he gave evidence Mr McDonald himself did not express any regret at all. The basis upon which Mr McDonald says he will "play within the guidelines" is not because he recognises any past conduct was improper or regrets any past conduct, it is in part because the penalties for that conduct are greater than they used to be.

72 Ultimately, the decision in this application is to be made according to equity, good conscience and the substantial merits of the case, and having regard for the interests of the persons immediately concerned whether directly affected or not, together with the interests of the community as a whole. We think Mr McDonald's conduct since 2006, and including as recently as this year, suggests that if another right of entry authority is issued to him, it is likely that Mr McDonald will again act in an improper manner or intentionally and unduly hinder an employer or employee during their working time. We would dismiss the application.

2011 WAIRC 01046

APPLICATION FOR AUTHORITY TO BE ISSUED TO MR JOSEPH MCDONALD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR KEVIN REYNOLDS
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	THURSDAY, 17 NOVEMBER 2011
FILE NO/S	APPL 31 OF 2011
CITATION NO.	2011 WAIRC 01046

Result	Application dismissed

Order

The Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be dismissed.

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

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2011 WAIRC 01022

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLINT NATHAN WHALLEY
	APPLICANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	APPL 46 OF 2011
CITATION NO.	2011 WAIRC 01022

Result	Application discontinued
Representation	
Applicant	Ms L Zinenko (of counsel)
Respondent	Ms D Scaddan (of counsel)

Order

WHEREAS the Western Australian Police Commissioner initiated action against the appellant pursuant to Part IIB — Removal of members of the *Police Act 1892;*

AND WHEREAS the appellant lodged an appeal against his removal in the Western Australian Industrial Relations Commission (the Commission) pursuant to s 33P of the *Police Act 1892*;

AND WHEREAS the Chief Commissioner allocated the appeal to a Commissioner pursuant to s 33S for conciliation:

AND WHEREAS the Commission listed the matter for conciliation on 13 September 2011 and on 17 October 2011;

AND WHEREAS a confidential settlement was reached between the parties at that conference;

AND WHEREAS on 25 October 2011 the appellant filed a Notice of Discontinuance in respect of the appeal; and

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

THAT the appeal be, and is hereby, discontinued.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2011 WAIRC 01126

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHERYN BEDFORD

APPLICANT

-v-

DEBRA BEST (INNOVATIVE HAIR LOSS SOLUTIONS PTY LTD)

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 12 DECEMBER 2011
FILE NO/S B 93 OF 2011
CITATION NO. 2011 WAIRC 01126

Result Application discontinued
Representation
Applicant Ms S L Bedford
Respondent Ms D Best

Order

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

AND WHEREAS on 5 July, 15 September and 28 September 2011 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 28 September 2011 agreement was reached between the parties;

AND WHEREAS on 30 November 2011 the applicant advised the Commission to file the 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 01020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SARAH TONI BURKE

APPLICANT

-v-

THE PATIO GUYS (WA) PTY LTD AS TRUSTEE FOR THE KEOWN FAMILY TRUST T/A THE PATIO GUYS

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE MONDAY, 14 NOVEMBER 2011
FILE NO/S U 19 OF 2011
CITATION NO. 2011 WAIRC 01020

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Ms M Ivanovski (of counsel)

Order

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

WHEREAS on 13 May 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given time for further discussions; and

WHEREAS on 24 May 2011 the Commission was advised that the parties had reached an agreement in principle in respect of the application; and

WHEREAS on 24 June 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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 01087

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLEN ALEXANDER CUNNINGHAM
	APPLICANT
	-v-
	WRIGHT'S BRICK CARTAGE CONTRACTORS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 5 DECEMBER 2011
FILE NO/S	U 114 OF 2011
CITATION NO.	2011 WAIRC 01087

Result	Discontinued by leave
Representation	
Applicant	Ms D Wood
Respondent	Mr K Chilvers

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 01100

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE MARION DEVENISH
	APPLICANT
	-v-
	METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 8 DECEMBER 2011
FILE NO/S	U 186 OF 2009
CITATION NO.	2011 WAIRC 01100

Result Application dismissed

Order

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

WHEREAS on the 12th day of October 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and

WHEREAS on the 29th day of November 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 dismissed.

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

2011 WAIRC 01148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 01148
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 29 NOVEMBER 2011, FRIDAY, 22 JULY 2011
DELIVERED	**:**	TUESDAY, 13 DECEMBER 2011
FILE NO.	**:**	B 91 OF 2011
BETWEEN	**:**	BRYN EDWARDS
		Applicant
		AND
		TURNER & TOWNSEND PTY LIMITED
		Respondent

CatchWords	**:**	Industrial law (WA) - Contractual benefits claim - Application for costs - Relevant principles applied - Application dismissed.
Legislation	**:**	Industrial Relations Act 1979 s 27(1)(c)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Ms C Bahemia of counsel
Respondent	**:**	Mr D Todd

Case(s) referred to in reasons:

Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands (1992) 73 WAIG 26

Reasons for Decision

1 On 27 September 2011 Mr Edwards discontinued his claim for contractual benefits. His claim was for benefits said to arise under terms and conditions of his contract with the United Kingdom operations of Turner and Townsend, prior to Mr Edward's employment by the Australian business. The claim was listed for hearing before the Commission on 29 September 2011. As a consequence of the discontinuance, Turner and Townsend Pty Ltd, the respondent to these proceedings, has made an application for costs. The costs claimed are in relation to airfares and accommodation for Mr Todd, Turner and Townsend's Managing Director, and Mr Rokesky, the Human Resources Director, to travel to Perth from Brisbane for the hearing. The total costs claimed are $3,431.98. Mr Todd contended that when his Brisbane office was notified on Wednesday 28 September 2011 of Mr Edwards' discontinuance of these proceedings he and Mr Rokesky were in transit to Perth to appear before the Commission the next day.

2 At the direction of the Commission during the course of the hearing, Turner and Townsend filed copies of invoices in relation to the travel and accommodation costs claimed. Mr Todd submitted that whilst, as a result of the discontinuance of Mr Edwards' claim, he and Mr Rokesky were able to usefully spend time in Perth on other matters in relation to the company's business, nonetheless, given the vexatious nature of Mr Edwards' claim, a costs order should be made.

3 In an affidavit filed for the purposes of these proceedings, Mr Edwards testified that when he commenced his claim, based as it was on terms and conditions of contract with the United Kingdom operations of Turner and Townsend, he considered that there was merit in his application. Mr Edwards said that he spoke to an officer at Turner and Townsend regarding his final salary payments and was encouraged in his view.

4 Mr Edwards testified that it was only a few days before the date listed for the hearing of the matter that he accepted that one potential interpretation of his former employment contract with Turner and Townsend in the United Kingdom may not support his claim. It was on the strength of this recognition that he decided to discontinue the proceedings by filing a notice of discontinuance. Mr Edwards said he understood from the Registry of the Commission that once his discontinuance had been filed, Turner and Townsend would be duly notified. A copy of the notice of discontinuance was then posted to Turner and Townsend and a declaration of service to this effect was filed on 29 September 2011. The declaration of service refers to the service by post of the notice of discontinuance on 28 September 2011, the day after it was filed.

5 Counsel for Mr Edwards submitted that there were live issues for determination in these proceedings, including whether a claim under Mr Edwards' United Kingdom conditions of employment fell within the Commission's jurisdiction. Further, there were live issues in relation to the interpretation of those terms and conditions of employment, along with matters of fact which had to be determined. On this basis, it was contended by counsel that the circumstances of the discontinuance did not warrant an order for costs.

6 The capacity for the Commission to order costs to a party to proceedings under the Act is very limited. By s 27(1)(c) the Commission may make an order as to costs other than for the costs of a legal practitioner or agent. It is however only in extreme cases that a costs order will be made: *Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26. What is an extreme case will depend entirely on the circumstances of the matter at hand.

7 Whilst it is regrettable that Mr Todd and his colleague were in transit to Perth when they were notified that Mr Edwards had discontinued his claim, I am not persuaded the circumstances before me are extreme. The nature of the claim filed by Mr Edwards raises issues which were required to be determined by the Commission based upon the evidence which may have been led before it. Questions of jurisdiction and contractual interpretation were anticipated. These matters were arguable even though Turner and Townsend regarded the claim as vexatious. On my assessment, the claim advanced by Mr Edwards was not completely untenable such that it had no prospects of success at all. It is important to note that the Commission has not had the benefit of any evidence before it in relation to Mr Edwards' claim and can therefore only make an assessment on the basis of the papers filed in the application and the defence to the claim.

8 Furthermore, but perhaps incidentally, it does seem that on Mr Todd's submissions, both he and Mr Rokesky were able to usefully engage their time on company business whilst in Perth and in that sense at least, whilst there may no doubt have been inconvenience, their time in this State was not entirely wasted.

9 For these brief reasons, whilst I have some sympathy for the position of Turner and Townsend, having regard to all of the circumstances of this case, the application for costs must be dismissed.

2011 WAIRC 01147

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRYN EDWARDS
	APPLICANT
	-v-
	TURNER & TOWNSEND PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	B 91 OF 2011
CITATION NO.	2011 WAIRC 01147

Result	Application for costs dismissed
Representation	
Applicant	Ms C Bahemia of counsel
Respondent	Mr D Todd

Order

HAVING heard Ms C Bahemia of counsel on behalf of the applicant and Mr D Todd on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the application by the respondent for costs be and is hereby dismissed.

(2) THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 01110

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK PETER ELSING
	APPLICANT
	-v-
	PRINCIE PTY LTD TRADING AS SIGN-A-RAMA BURSWOOD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	B 146 OF 2011
CITATION NO.	2011 WAIRC 01110

Result	Application discontinued
Representation	
Applicant	Mr M Elsing
Respondent	Mr D Fletcher (of counsel)

Order

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

AND WHEREAS on 1 November 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 25 November 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.

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

2011 WAIRC 01059

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRANDON COLIN GRAY
	APPLICANT
	-v-
	MARRA WORRA WORRA ABORGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 23 NOVEMBER 2011
FILE NO/S	U 188 OF 2010
CITATION NO.	2011 WAIRC 01059

Result	Discontinued
Representation	
Applicant	On his own behalf
Respondent	Mr S White (as Agent)

Order

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

WHEREAS the application was set down for hearing on 31 March 2011 with respect to a preliminary issue of jurisdiction; and

WHEREAS on 23 March 2011 the applicant advised the Commission that the parties had reached an agreement to settle the matter and the hearing was vacated; and

WHEREAS on 17 August 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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 01104

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL HADWIGER
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 9 DECEMBER 2011
FILE NO/S	U 147 OF 2011
CITATION NO.	2011 WAIRC 01104

Result	Application discontinued by leave
Representation	
Applicant	Mr C Fogliani as agent
Respondent	Mr D Matthews of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinued 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 01047

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MADISON TATE HAMMOND
	APPLICANT
	-v-
	LIGHT AESTHETICS SKIN AND BODY CLINIC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 NOVEMBER 2011
FILE NO/S	B 133 OF 2011
CITATION NO.	2011 WAIRC 01047

Result	Application discontinued
Representation	
Applicant	Ms M T Hammond
Respondent	Mr R O'Hara

Order

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

AND WHEREAS on 18 October 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 November 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 01105

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD KEITH HAWKINS
	APPLICANT
	-v-
	KALPANA MANSUR TRADING AS C M AUTO & GAS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	U 40 OF 2011
CITATION NO.	2011 WAIRC 01105

Result	Application dismissed
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 this matter was listed for conference on 14 April 2011;

AND WHEREAS an in-principle agreement was reached between the parties at that conference;

AND WHEREAS the matter was listed for hearing on 14 November 2011 for the applicant to show cause why his application should not be dismissed;

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

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

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CANDICE HODGE
	APPLICANT
	-v-
	KELLY PAPLAUSKAS
	STEVEN PAPLAUSKAS
	(TRADING AS BP ROADHOUSE RAVENSTHORPE)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	B 134 OF 2011
CITATION NO.	2011 WAIRC 01021

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 25 October 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 01107

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LISA MARTIEN HYATT
	APPLICANT
	-v-
	HOT COTTON
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	U 122 OF 2011
CITATION NO.	2011 WAIRC 01107

Result	Application discontinued
Representation	
Applicant	Ms L M Hyatt
Respondent	Ms R Bowler and Mr J Grossman

Order

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

AND WHEREAS on 28 September 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 10 November 2011 the applicant advised the Commission to file the 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 01090

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTONINO IPSARO-PASSIONE
	APPLICANT
	-v-
	MORRIS CORPORATION (AUST) PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 DECEMBER 2011
FILE NO/S	B 166 OF 2011
CITATION NO.	2011 WAIRC 01090

Result	Application dismissed

Order

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

WHEREAS on the 22nd day of November 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 dismissed.

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

2011 WAIRC 01044

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER JAYATILAKE
	APPLICANT
	-v-
	DR ALEXANDRA TAYLOR
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 NOVEMBER 2011
FILE NO/S	U 137 OF 2011
CITATION NO.	2011 WAIRC 01044

Result	Appication discontinued
Representation	
Applicant	Ms J Jayatilake
Respondent	Mr G Bucknall

Order

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

AND WHEREAS on 18 October 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 10 November 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 01127

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NANCY ELIZABETH JONES
	APPLICANT
	-v-
	LIFELINE WA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	U 157 OF 2011
CITATION NO.	2011 WAIRC 01127

Result	Application discontinued
Representation	
Applicant	Ms N E Jones
Respondent	Ms J Knoth (of counsel)

Order

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

AND WHEREAS on 1 November 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 30 November 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 01060

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER LEACH
	APPLICANT
	-v-
	GAVIN TREASURE C,E,O, SHIRE OF MORAWA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 23 NOVEMBER 2011
FILE NO/S	U 102 OF 2011
CITATION NO.	2011 WAIRC 01060

Result	Discontinued
Representation	
Applicant	On his own behalf
Respondent	Mr M Fitz Gerald (as Agent)

Order

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

WHEREAS on 26 August 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given time for further discussions; and

WHEREAS on 14 September 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 20 September 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 00995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 4 NOVEMBER 2011
FILE NO/S	U 110 OF 2010, B 110 OF 2010
CITATION NO.	2011 WAIRC 00995

Result Order issued

Order

WHEREAS these applications were lodged in the Commission pursuant to sections 29(1)(b)(i) and 29(1)(b)(ii) of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for hearing on 27 May 2011;

AND WHEREAS the Commission formed the view on the basis of documentation tendered at that hearing that the respondent had been incorrectly named in the applications;

AND WHEREAS the Commission found in the Reasons for Decision that the respondent had been voluntarily wound up pursuant to the *Associations Incorporation Act 1987* (WA);

AND WHEREAS the Commission is satisfied that at all times there was an intention on behalf of the applicant to commence these proceedings against her employer;

AND WHEREAS the applicant and the respondent submitted the respondent had ceased to exist;

AND WHEREAS the Commission formed the view that it was appropriate to amend the name of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me, hereby order:

THAT the respondent's name Midwest Life Education in U 110 of 2010 and B 110 of 2010 be deleted and Mid-West Life Education Centre (Incorporated) (as wound up) be inserted in lieu thereof.

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

2011 WAIRC 00999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00999
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	FRIDAY, 27 MAY 2011
DELIVERED	**:**	MONDAY, 7 NOVEMBER 2011
FILE NO.	**:**	B 110 OF 2010 AND U 110 OF 2010
BETWEEN	**:**	FIONA MCDOUGALL
		Applicant
		AND
		MID-WEST LIFE EDUCATION CENTRE (INCORPORATED) (AS WOUND UP)
		Respondent

CatchWords	**:**	Unfair dismissal claim - denied contractual benefit claim - remedy s 23A - respondent voluntarily wound up - *Associations Incorporation Act 1987* (WA)
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Applications dismissed
Representation:		
Applicant	**:**	Mr N Marouchak (of counsel)
Respondent	**:**	No appearance

Case(s) referred to in reasons:

Snelgove v Great Southern Managers Australia Ltd (in liquidation) (Receiver and Manager Appointed) [2010] WASC 51

Hywood v Subiaco Wine Room (2001) 81 WAIG 2443

Case(s) also cited:

Gregory R Hutchinson v Cable Sands (WA) Pty Ltd (1999) 79 WAIG 951

Reasons for Decision

1 The applications before the Commission are lodged pursuant to s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act) whereby Ms McDougall (the applicant) claims she has been harshly, oppressively or unfairly dismissed from her employment effective 8 June 2010. In particular the applicant seeks:

> a written apology from the chairperson and treasurer;
>
> a letter of reference;
>
> a pay out of the applicant's contract from the date of termination through to December 2010 (approximately 27 weeks at 22.5 hours per week at $36.11 per hour);
>
> pay out of accrued time off in lieu (150 hours) at $36.11 per hour;
>
> pay out of outstanding leave and leave loading; and
>
> any other matters.

2 Further, the applicant claims she has been denied a benefit under her contract of service. In particular the applicant seeks 150 hours payment of time off in lieu and 21 hours from her final payment. The applicant's hourly rate of pay at the time of termination was $36.11 per hour, a total of $6174.80.

3 The Mid-West Life Education Centre (Incorporated) (as wound up) (the respondent) claimed in the written notice of answer and counter proposal to the unfair dismissal claim that the termination of the applicant was fair and just and that the action taken by the applicant was vexatious in nature. On 8 June 2010 the respondent was required to terminate the services of the applicant. The respondent claimed all outstanding leave entitlements were fully paid and at the time of the applicant's termination she was paid four weeks in lieu of notice as per the terms of her contract. All time off in lieu was cleared during the four week period and outstanding leave entitlements were fully paid out as per the statutory requirements.

4 Considerable delays and adjournments were sought by the applicant and the respondent prior to the first conference held on 18 October 2010. No objection was taken to the contractual entitlements and the unfair dismissal matters being dealt with together. Both matters were then adjourned by consent to enable discussions to occur with an eastern states associate of the respondent. A further conference was re-listed for 31 March 2011. Mr Tim Frost (of counsel) by telephone link advised the respondent had been wound up by the Western Australian Department of Commerce and as such had ceased to exist. Accordingly no-one associated with the organisation would be able to take part in this conference or any subsequent hearing if the matter was referred. Mr Tim Frost then withdrew from proceedings.

5 Several adjournments were sought by the applicant and granted by the Commission prior to the hearing being listed on 27 May 2011. The Western Australian Industrial Relations Commission (the Commission) requested by correspondence the parties address the issue of why the applications should not be dismissed given the respondent had ceased to exist. Attached to the Commission's correspondence was a copy of material dated 13 September 2010 that had been forwarded to the Commission by the respondents purporting to reflect the views of the Department of Commerce as addressed to Mr Nairn, the chairperson of the respondent's committee:

> Dear Mr Nairn,
>
> ASSOCIATIONS INCORPORATION ACT (1987)
>
> MID –WEST LIFE EDUCATION CENTRE (INCORPORATED) – A1001335R
>
> I refer to the Notice of Special Resolution received by this office on 24 August 2010 in respect to the winding up of the above-named association.
>
> I also acknowledge receipt of the committee's Distribution Plan and your remittance of the fee.
>
> The Distribution Plan has been approved for implementation. However, the Act provides that you may not commence the distribution of the surplus property until 23 September 2010.
>
> The distribution must then be completed by 25 October 2010. The beneficiary should then provide either an official receipt or complete the attached advice, thereby confirming the distribution of the property has been completed in accordance with the approved Distribution Plan.
>
> In accordance with section 30(3) of the Act, formal dissolution of the association cannot occur until 7 days after the distribution of the surplus property has been completed, and it is therefore important that either an official receipt or the completed confirmatory advice is forwarded to this office as soon as possible to ensure the windup process is completed. If you are unable to complete the distribution by 25 October 2010, you must notify this office as soon as possible.

> Should you require any further information or assistance in relation to this matter please contact the Associations Registration staff on 9282 0764 or 1300 30 40 74 (country callers).
>
> Yours sincerely
>
> Signed
>
> for
>
> Commissioner for Consumer Protection
>
> 13 September 2010

6 The applicant was initially represented by Mr Andrew Lynn (of counsel) and subsequently Mr Nicholas Marouchak (of counsel). The respondent failed to attend the hearing. My Associate was instructed to call for the respondent's attendance in the waiting areas of the 18th floor. I am satisfied that this occurred and my Associate reported back there was no representative of the respondent in either area. The respondent was notified at the last known address both in electronic format and by post. At no stage did the Commission receive a notice of return to sender and accordingly I determined to proceed in the absence of the respondent.

Applicant

7 Mr Marouchak in addressing the preliminary question advised that as of Monday, 24 May 2011 the respondent was not officially wound up. It was submitted the dissolution became official as of 25 May 2011 and the events followed by the respondent were deliberate and orchestrated by committee members to deny the applicant the right to seek recourse to the Commission. It was submitted the only reason that the respondent was wound up was simply so as to avoid paying the applicant her employment entitlements.

8 Mr Marouchak submitted there was a process of winding-up of the respondent's organisation and the correspondence attached to the letter from the Commission was evidence that the respondent was in the process of being wound up but was not conclusive. Mr Marouchak tabled before the Commission a notice of special resolution from the government of Western Australia (exhibit A1). Additionally a form was tabled purporting to be an ASIC document (exhibit A2).

9 Mr Marouchak submitted the respondent no longer existed. However Mr Marouchak submitted it was necessary for the Commission to proceed to the merit issues to ensure that a debt existed. Such evidence could then be brought to the Supreme Court pursuant to the *Corporations Act 2001* (Cth) to have payment of the debt enforced.

10 It was submitted that there were two initial questions to be determined as to whether the applicant had been unfairly dismissed and whether she had been denied contractual entitlements. Mr Marouchak submitted clearly the Commission is the best jurisdiction to determine that. Alternatively if the Commission was of a mind not to proceed today on the merit questions in each of the applications then Mr Marouchak submitted the matter be adjourned to allow further time to consider making an application to the Supreme Court or adjourning to allow for further submissions in writing to be made to the Commission.

11 A question was asked by the Commission as to who the organisation the Commission would be making orders against in the event the applications were found to have been made out. Mr Marouchak submitted that the applicant would seek to recover the monies against the respondent's parent organisation which continues to trade. It was submitted that the orders would be proof that the debt exists.

12 The applicant gave evidence that the respondent as of 24 May 2011 was still in existence. The witness identified an Australian Securities and Investments Commission internet search carried out by herself (exhibit McDougall 1). The applicant gave evidence she worked for the respondent from December 2008 until June 2010. The applicant sought to table a number of newspaper clippings to demonstrate that in her view the organisation still existed. In an excerpt from the Yamaji News dated 18 April 2011 (exhibit McDougall 2) the following information was included identifying a similarly named organisation as a current sponsorship recipient:

> **The recipients for the first round of the Resourcing the Region Sponsorship Programme for 2011 include:**
>
> …
>
> Midwest Life Education
>
> (exhibit McDougall 2)

13 Additionally, the applicant provided a bundle of newspaper documents dated 5 November 2010, 12 and 14 January 2011 and 28 January 2011. The witness submitted that each of the advertisements reflected excerpts from newspapers demonstrating a similarly named organisation to the respondent was advertising for a health educator part-time (exhibit McDougall 3). The witness was asked whether the organisation referred to in each of the advertisements namely, Mid-West Region Life Education WA (Inc) was the same entity as the respondent, the organisation named in each of the applications before the Commission. In answer, the witness replied she did not know.

14 Mr Marouchak submitted the organisation referred to in each of the advertisements was the parent organisation that was still trading, and that the respondent had deregistered their organisation, failed to pay out the applicant's entitlements and commenced trading under different names. Two items of correspondence were submitted which Mr Marouchak suggested provided evidence to that effect. The witness gave evidence that copies of these two letters were given to her by the authors. The first item of correspondence was purportedly from Mr Des Brick dated 11 May, 2011. The letter was marked for information and read as follows:

> To whom it may concern,
>
> In October 2009 I nominated and was accepted on the Committee of Midwest Life Education. On the 05th of June 2010 I tendered my resignation as other commitments prevented me from attending many of the committee meetings and I felt I did not have the time available to dedicate to the role. During the period between October 2009 and May 2010 I attended the Midwest Life Education AGM in October 2009, the MWLE Fundraising Gala and was only able to attend one or two committee meetings.
>
> At the AGM Mrs McDougall was praised for her efforts in fundraising and raising the profile of MWLE and I found the Fundraising Gala I attended was well organised and successful in raising awareness of MWLE. Following a MWLE committee meeting (I think in early February) Mrs McDougall mentioned to me in conversation her concern over some late payment of salary.
>
> Des Brick

Further correspondence purportedly from Mr Shane Hill dated 9 May 2011 was marked for information. As the correspondence was marked 'Without Prejudice' I take the matter no further.

15 Ms McConkey gave evidence that she was an honorary member of the governing committee of the respondent from 2005 until late in 2010. Ms McConkey gave evidence that at the time the applicant was dismissed she made a recommendation to the committee that the respondent try and reconcile with the applicant through mediation without having to go any further. The witness gave evidence as a committee member she recommended that representatives of the respondent should meet with the applicant to examine her claims and discuss the merit of what had occurred thereby avoiding and finalising the matters without causing any further duress. Ms McConkey gave evidence that the recommendation was actually rejected by the committee. The respondent was very concerned about the financial situation and the impost that a claim by the applicant could make on the organisation. One of the options discussed was to actually wind up the association so there could be no claims on the respondent. The witness gave evidence that this was the statement of Mr Greg Nairn the chair of the committee.

16 Mr Marouchak sought an adjournment until 17 June 2011 to consider the law and possibly make an application to have additional parties joined to the application. It was submitted by counsel that the submissions could be concluded in writing. Further, it was submitted that the written submissions would be to conclude the preliminary question given the applicant had conceded that the respondent is no longer in existence. The applicant's request was granted and the hearing was adjourned pending receipt of written submissions.

17 In summary those submissions sought leave be granted by the Commission to pursue the applicant's merit case against the respondent, to enable the applicant to have a decision of facts made as to whether she has a debt due and payable. In the event the determinations were made in the applicant's favour the debt would be able to be enforced through the Supreme Court of Western Australia. In support of the applicant's position a decision of the Supreme Court was relied upon *Snelgove v Great Southern Managers Australia Ltd (in liquidation) (Receiver and Manager Appointed)* [2010] WASC 51. In these proceedings the defendant was voluntarily wound up and the plaintiffs sought to commence proceedings pursuant to s 500(2) of the *Corporations Act 2001* (Cth) against the defendant and directors of the defendant for damages or compensation arising from the conduct of the proposed defendants resulting in the plaintiffs exchanging their interest in the scheme for shares in Great Southern Ltd. At [38] of the decision Le Miere J stated that 'I find that the amounts and seriousness of the plaintiffs' claims and the degree of complexity of the legal and factual issues involved makes it appropriate for their claims to proceed by action rather than proof of debt.'

18 The applicant submitted the question of whether or not she is entitled to damages for unfair dismissal and denied contractual benefits was a complex factual issue best decided by the Commission. Having regard for s 27 of the Act a decision by the Commission is not trivial or moot as it will allow the applicant the right to make application to the Supreme Court for enforcement of a debt by the respondent.

19 The applicant submitted in allowing the applications to proceed and having the Commission decide the matter is in the public interest as it will ensure cooperation between the Supreme Court of Western Australia and the Commission in determining the validity of the debt allegedly payable by the respondent to the applicant for unfair dismissal. Further, it will reduce the time the Supreme Court of Western Australia will require in determining the validity of the debt. It was clear the respondent had assets and was solvent at the time it was wound up as stated on Form 6 and Form 7 (exhibit A1).

20 The applicant submitted the Commission have regard for the evidence of Ms McConkey in that the winding-up of the respondent's organisation was a deliberate action to avoid paying entitlements due to the applicant. Based on the evidence of the applicant, the respondent appears now to be continuing its business under a different name using the same key people in its management.

21 The applicant sought leave from the Commission to continue to have a trial on the facts. The applicant does not intend to join any parties to the action at this time.

Conclusion

22 The correspondence forwarded by the Commission to the applicant and the respondent at their last known address sought:

> The Western Australian Industrial Relations Commission has received correspondence confirming the Mid-West Life Education Centre (Incorporated) has been dissolved by the Western Australian Department of Commerce and, as such, has ceased to exist. For your information attached is a copy of a letter dated 13 September 2010 from the Department of Commerce to the respondent.

Accordingly, the Commission requests as a preliminary issue for the proceedings tomorrow Commissioner Mayman will require the parties to address her on the question of why the applications ought not be dismissed.

Yours faithfully

Rayma Allison

ASSOCIATE TO COMMISSIONER S.M. MAYMAN

Attached to the letter from the Commission was a copy of correspondence from the Commissioner for Consumer Protection referred to in [6] of these Reasons for Decision.

23 The Commission has taken into account the terms of the Act and other relevant legislation, the views of the respondent as expressed in their notice of answer and counter proposals and the applicant's written and verbal submissions inclusive of the evidence given. The Commission has made the following findings with respect to each of the applications.

24 The applicant and Ms McConkey, a former member of the respondent's committee both gave evidence. I found the witnesses to be credible. The applications before the Commission are matters pursuant to s 29 of the Act whereby an employee is claiming she has been unfairly dismissed and has been denied a contractual benefit under her contract of service. The applicant had, before the winding up of the respondent, lodged her claims in the Commission. Assertions were made during proceedings by the applicant's representative that the respondent went through the voluntary wind up process to avoid paying the applicant her outstanding entitlements. Ms McConkey asserted in evidence that Mr Greg Nairn as chair of the committee had suggested to wind up the respondent's operations was an option to avoid paying a debt. The Commission finds such evidence to be hearsay and insufficient to make a finding.

25 The applicant has conceded in submissions before the Commission that the respondent was formally dissolved on 26 May 2011 and no longer existed (ts 2). The notice of special resolution (Form 6) to voluntarily wind up the respondent, an incorporated association was passed at a general meeting on 2 August 2010 (exhibit A1) and received in the office of the Commissioner for Consumer Protection on 24 August 2010. Attached to the Form 6 was a Form 7 (Distribution Plan) outlining the date on which the distribution was expected to be completed namely 24 September 2010 (exhibit A1). The Commission finds based on the Distribution Plan (exhibit A1), in particular Form 7, the surplus property (following the payment of the organisations debts and liabilities) of the respondent at the time of voluntary windup to be $46,037.38. The special resolution to wind up the organisation was passed pursuant to s 30 of the *Associations Incorporation Act 1987* (WA) which specifies:

> **30. Voluntary winding up**
>
> (1) An incorporated association may be wound up voluntarily if the association is solvent and resolves by special resolution that it be wound up voluntarily.
>
> (2) The incorporated association shall cause a copy of a special resolution passed under subsection (1) to be lodged with the Commissioner within 14 days after the passing of the resolution.
>
> (3) Dissolution pursuant to the voluntary winding up of incorporated association shall take effect –
>
> (a) 7 days after the distribution of the surplus property is completed; or
>
> (b) if there is no surplus property, 14 days after a copy of the resolution is lodged with the Commissioner.
>
> (4) the regulations may declare the winding up of an incorporated association under this section to be an applied Corporations legislation matter for the purposes of Part 3 of the *Corporations (Ancillary Provisions) Act 2001* in relation to one or more of Parts 5.4 to 5.8 (winding up) of the *Corporations Act 2001* of the Commonwealth, with any modifications that are specified in the declaration.

26 The Commission finds that the respondent sometime after 24 August 2010 was officially dissolved. The applicant gave evidence that on 25 May 2011 the respondent was still in operation. The Commission accepts the applicant carried out an internet search on 24 May 2011. The Commission rejects such a search to be sufficient evidence the respondent was still in operation on that day. The legislative framework pursuant to s 30(3)(a) of the *Associations Incorporation Act 1987* (WA) specifies a mandatory provision for dissolution to take effect some seven days after completion of the distribution of the surplus property. Based on the evidence provided within formal documentation (exhibit A1) the Commission finds the respondent was formally wound up sometime on or about September 2010.

27 The Commission finds there to be insufficient evidence to determine the respondent is continuing its business under a different name using the same key people in its management. The Commission notes also there has been no application by the applicant to join parties to either application or application to amend the name of the respondent.

28 The applicant's representative foreshadowed that on the preliminary question, whether the Commission ought proceed given the respondent is no longer in existence, they intend to proceed to the Supreme Court to have the orders enforced. The Commission now turns to the question of remedy.

29 Having regard for s 23A of the Act in particular s 23A(1):

> The Commission may make an order under this section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair.

30 The Act outlines reinstatement or re-employment to be the primary remedy in such circumstances where it is considered by the Commission that the dismissal of the employee concerned is considered to be harsh, oppressive or unfair. Having regard for s 23A (6) to (8):

(6) If, and only if, the Commission considers reinstatement or re–employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.

(7) In deciding an amount of compensation for the purposes of making an order under subsection (6), the Commission is to have regard to —

(a) the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal;

(b) any redress the employee has obtained under another enactment where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish the claim before the Commission; and

(c) any other matter that the Commission considers relevant.

(8) The amount ordered to be paid under subsection (6) is not to exceed 6 months' remuneration of the employee.

31 The Commission finds that the scope of powers of the Commission on claims of unfair dismissal are limited to reinstatement, re-employment and in the event the primary remedies of reinstatement or re-employment are impracticable, then and only then compensation may be relied upon. By way of s 23A and s 29(1)(b)(i) the Commission has been provided with the jurisdiction and power to remedy an injustice arising from the unfair dismissal of an employee. It has been said in previous decisions of this Commission such provisions must be interpreted beneficially. The provisions of s 23A as a whole need to be interpreted consistent with granting relief to an unfairly dismissed employee.

32 The principal submission of the applicant in relation to the preliminary question is that the applicant needed to be granted leave to pursue its case against the respondent to enable a decision to be made as to whether the applicant has a debt due and payable. Once such a determination has been made the applicant would then be able to enforce the state through the Supreme Court of Western Australia. The applicant submitted having regard for s 27 of the Act a decision by the Commission is not trivial or moot as it will allow the applicant the right to make application to the Supreme Court for enforcement of the debt by the respondent.

33 The applicant relied on the decision of Le Miere J in *Snelgrove v Great Southern Managers Australia Ltd (in liquidation) (Receiver and Manager Appointed)* [2010] WASC 51. Given associations such as the respondent, when in existence, were incorporated pursuant to the *Associations Incorporation Act 1987* (WA) it seems that pursuant to s 3A of that legislation incorporated associations are excluded (with some exceptions) from the operation of corporations legislation. Accordingly, the relief sought by counsel for the applicant appeared to be unachievable through the Supreme Court.

34 It was said by the then Scott C in *Hywood v Subiaco Wine Room* (2001) 81 WAIG 2443 of issues relating to remedy:

> I have considered whether the applicant is entitled to have the Commission examine his case more widely, such as a claim for a declaration that the dismissal was unfair, although no such remedy was sought. I note the reasons for decision of His Honour the President and Chief Commissioner Coleman in *Gregory R Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951 at 953. In that matter, the Full Bench noted "in our opinion, proceeding to make a mere declaration in a s.23A application, without granting a remedy would, in some cases not be in the public interest". In the case before the Full Bench however, the appellant sought reinstatement and in those circumstances the question was not merely academic.

35 Given the respondent has dissolved its operations it is the view of the Commission it is not in the public interest for the application to proceed to further hearing and determination. Such proceedings are not necessary or desirable in the public interest. The respondent no longer engages in the business which formerly employed the applicant on whose behalf claims of unfair dismissal and of denied contractual benefits were originally sought. To prescribe the orders sought would be incapable of both operation and/or enforcement having regard to the that the respondent's organisation has been dissolved. Therefore to proceed with the claims to hear the merit submissions would be a nullity. The applications for unfair dismissal and denied contractual benefits are therefore dismissed. Minutes of order will accordingly issue.

2011 WAIRC 01031

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FIONA MCDOUGALL
	APPLICANT
	-v-
	MID-WEST LIFE EDUCATION CENTRE (INCORPORATED) (AS WIOUND UP)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 NOVEMBER 2011
FILE NO/S	B 110 OF 2010
CITATION NO.	2011 WAIRC 01031

Result	Application dismissed
Representation	
Applicant	Mr N Marouchak (of counsel)
Respondent	No appearance

Order

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

AND WHEREAS the matter was listed for hearing on 27 May 2011;

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

THAT this application be, and is hereby, dismissed.

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

2011 WAIRC 01032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FIONA MCDOUGALL
	APPLICANT
	-v-
	MID-WEST LIFE EDUCATION CENTRE (INCORPORATED) (AS WOUND UP)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 NOVEMBER 2011
FILE NO/S	U 110 OF 2010
CITATION NO.	2011 WAIRC 01032

Result	Application dismissed
Representation	
Applicant	Mr N Marouchak (of counsel)
Respondent	No appearance

Order

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

AND WHEREAS the matter was listed for hearing on 27 May 2011;

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

THAT this application be, and is hereby, dismissed.

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

2011 WAIRC 01062

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAREE MCILWAINE
	APPLICANT
	-v-
	R.A.A.F.A
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 23 NOVEMBER 2011
FILE NO/S	U 175 OF 2010
CITATION NO.	2011 WAIRC 01062

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Ms K Scoble (of counsel)

Order

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

WHEREAS on 6 January 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 26 August 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 29 August 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 01149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA MARGARET MORRIS
	APPLICANT
	-v-
	MR HANH NGUYEN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	B 15 OF 2011
CITATION NO.	2011 WAIRC 01149

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Mr P Brunner (of counsel)

Order

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

WHEREAS on 12 May 2011 the Commission convened a conference for the purpose of conciliating between the parties and the respondent did not appear in person; and

WHEREAS at the conclusion of the conference the applicant was given further time to obtain advice about the named respondent and a further conference was to be listed with the respondent attending in person; and

WHEREAS the Commission contacted the respondent's representative on a number of occasions with respect to the availability of the respondent to attend a further conference however, this information was not provided; and

WHEREAS on 3 August 2011 the parties were advised that it was the Commission's view that further conciliation in relation to this matter would not assist and the matter was to be listed for hearing; and

FURTHER the applicant was given until 18 August 2011 to file and serve an amended application if she wished to do so; and

WHEREAS the matter was listed for hearing on 11 October 2011; and

WHEREAS on 3 October 2011 the respondent lodged an application for an order for discovery of documents; and

WHEREAS the Commission convened a conference on 6 October 2011 to deal with the respondent's application for discovery of documents and there was no appearance by the applicant; and

FURTHER the Commission issued directions with respect to the discovery of documents, which were to be complied with by 4.00 pm on 7 October 2011, and the parties were advised that failure to comply with the directions would result in the hearing listed for 11 October 2011 being vacated; and

WHEREAS on 10 October 2011 the respondent advised the Commission that the applicant had failed to comply with the directions and the hearing listed for 11 October 2011 was vacated; and

WHEREAS by letter dated 19 October 2011, received in the Commission on 31 October 2011, the applicant advised that she no longer wished to proceed with the matter; and

WHEREAS on 28 November 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 01088

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR VICK LAZAROV
	APPLICANT
	-v-
	QUINNS BAPTIST COLLEGE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 5 DECEMBER 2011
FILE NO/S	U 116 OF 2011
CITATION NO.	2011 WAIRC 01088

Result	Discontinued by leave
Representation	
Applicant	Mr S Millman
Respondent	Mr M Jensen

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 01084

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS SANDRA HELEN RAJECKI
	APPLICANT
	-v-
	EAST KENWICK PRIMARY SCHOOL PARENTS & CITIZENS INCORPORATED ASSOCIATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 2 DECEMBER 2011
FILE NO/S	U 106 OF 2011
CITATION NO.	2011 WAIRC 01084

Result	Application dismissed

Order

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

WHEREAS on the 4th day of November 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and

WHEREAS on the 16th day of November 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 dismissed.

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

2011 WAIRC 01057

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS LYNNE GAME-BOWKER
	APPLICANT
	-v-
	THE WATER CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 22 NOVEMBER 2011
FILE NO/S	U 179 OF 2011
CITATION NO.	2011 WAIRC 01057

Result	Discontinued by Leave
Representation	
Applicant	Mr A Skinner
Respondent	No appearance

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 01061

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATHLEEN JEAN PARKER
	APPLICANT
	-v-
	DALEFIN HOLDINGS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 23 NOVEMBER 2011
FILE NO/S	B 157 OF 2010
CITATION NO.	2011 WAIRC 01061

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms K Scoble (of counsel)

Order

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

WHEREAS the Commission set down a conference on 12 November 2010 to deal with scheduling issues in relation to a preliminary issue of jurisdiction raised by the respondent; and

WHEREAS on 8 November 2010 the applicant's representative advised the Commission that the parties had reached an agreement in respect of the application and the conference was vacated; and

WHEREAS on 18 August 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 19 August 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 01052

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 01052
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 5 OCTOBER 2011, WEDNESDAY, 6 JULY 2011
DELIVERED	**:**	TUESDAY, 22 NOVEMBER 2011
FILE NO.	**:**	B 92 OF 2011
BETWEEN	**:**	SHERYL LIANNE PRATT
		APPLICANT
		AND
		MLG REALTY - (MG PROPERTY MANAGEMENT PTY LTD ATF THE BELMONDE TRUS)
		RESPONDENT

CatchWords	:	Industrial law (WA) - Contractual benefits claim - Payment of sick leave - Deductions made by employer - Principles applied - Order issued
Legislation	:	Minimum Conditions of Employment Act 1993 ss 5, 17C, 17D, 20(2)
Result	:	Order issued
Representation:		
Applicant	:	In person
Respondent	:	Ms T Gulliver

Case(s) referred to in reasons:

Case(s) also cited:

Reasons for Decision

1 The applicant Ms Pratt was employed as a Property Manager by MLG Realty, the respondent in this matter. Ms Pratt started work in March 2009 and as a result of a direction given by MLG to Ms Pratt on 20 April 2011, she left the premises of MLG whilst MLG investigated allegations that Ms Pratt had committed various acts of misconduct as an employee. These allegations included that she had actively assisted another property management company in relation to the securing of a tenant for rental premises. Whilst absent, Ms Pratt visited a doctor and provided medical certificates which declared her unfit for work until 6 May 2011. On this date, Ms Pratt resigned from her employment, with immediate effect.

2 As a result of these events, Ms Pratt says she was not paid monies owing to her under her former contract of employment. This includes salary from 20 April to 6 May 2011, whilst claiming sick leave, and also, some $1,400 in incentive payments due under an incentive scheme operated by MLG.

3 MLG says it does not owe Ms Pratt for any salary whilst on sick leave, because her absence arose from her misconduct in the workplace. As to the claim for incentive payments, whilst MLG accepts that $1,350 is owing to Ms Pratt, MLG says Ms Pratt owes the business $450, which should be deducted from the incentive payment.

4 At issue in this case is whether MLG has the right to withhold payment of salary to Ms Pratt whilst she was absent on sick leave in the circumstances as they arose. This involves consideration of the relevant provisions of Ms Pratt's written contract of employment and the effect of ss 19 and 20 of the Minimum Conditions of Employment Act 1993. Further, is the question of whether MLG was entitled to withhold incentive monies owed to Ms Pratt.

Claim for Salary

5 Ms Pratt testified that as she was directed to leave MLG's premises she should be paid her salary from 20 April to 6 May 2011, when she tendered her resignation. Over this period, despite requests by MLG for Ms Pratt to attend the office to discuss the allegations against her, Ms Pratt said she was unwell and suffering stress from the allegations and being requested to leave the office in the manner described. Medical certificates were tendered by Ms Pratt to support her claim for sick leave. The two medical certificates refer to Ms Pratt as "being unwell and unfit for work." They cover the period of Ms Pratt's absence from 21 April to 6 May 2011.

6 As to the allegation of misconduct, Ms Pratt admitted to assisting another real estate firm, a competitor of MLG, with a property transaction involving a client of MLG. MLG's client's property was let to a tenant with the competitor agency being listed as the agent. Documentary evidence, in the form of an "exclusive authority" from the client appointing MLG as its managing agent, and a "tenancy agreement" between MLG's client and the competitor agency, were in evidence. Ms Pratt admitted that she undertook this work in MLG's time and using MLG's resources. While she said at the time she did not think about what she was doing, Ms Pratt admitted that her conduct involved a clear conflict of interest.

7 An investigation by the Consumer Protection Division of the Department of Commerce of Western Australia concluded that Ms Pratt was in breach of the Real Estate and Business Agents Act 1978, by acting in the service of the competitor real estate agent, whilst employed by MLG. It was open to the Commissioner of Consumer Protection to make an application to the State Administrative Tribunal to have disciplinary action taken against Ms Pratt. However, the Department concluded that in the circumstances of the case, a warning was the most appropriate response.

8 It would appear that MLG relied on cl 9 of Ms Pratt's letter of appointment to direct her not to attend its premises in view of the allegations of misconduct against her. Of course, consistent with the common law position, such a direction must be accompanied by the continuation of the employee's salary, as least as long as the employee remains ready, willing and able to perform services under the contract of employment. This is reflected in cl 9 of Ms Pratt's contract.

9 In this case, however, the initial direction by MLG was overtaken by Ms Pratt's claim for sick leave over the period from 21 April to 6 May, the date of her resignation. This was the reason Ms Pratt did not comply with what were plainly lawful and reasonable requests by MLG for Ms Pratt to return to the workplace to discuss the allegations against her. In the circumstances, therefore, it is to the sick leave provisions of Ms Pratt's contract that attention should be directed. Clause 8.3 of Ms Pratt's contract provides that she was entitled to ten days of sick leave per annum. Sick leave accrued from year to year. The terms of Ms Pratt's contract must be read with the relevant provisions of the Minimum Conditions of Employment Act 1993. By s 5, the minimum conditions of employment are implied into a contract of employment. Section 20(2) provides that if an employee's illness or injury is "attributable" to an employee's serious and wilful misconduct, the employee has no entitlement to be paid sick leave. In my view, this applied to the circumstances of this case. Ms Pratt's sick leave claim directly arose from her conduct in relation to the letting incident. The conduct was serious. It led to an investigation by the

Department of Commerce that could have resulted in the loss of Ms Pratt's licence. It was plainly wilful in that Ms Pratt's actions were deliberate and not accidental.

10 In these circumstances, therefore, in my view, Ms Pratt is not entitled to be paid sick leave for this period.

Incentive payment

11 It is common ground that an incentive payment scheme operated at MLG such that a sales consultant obtaining new business was entitled to a payment equal to one week's rental of the property concerned. I am satisfied that such a scheme was a benefit under Ms Pratt's contract of employment. MLG admitted that in respect of two properties, they being 11/389 Hay Street and 2/1 Royal Street, rental incentives of $550 and $800 are due to Ms Pratt.

12 However, in this case, Ms Gulliver testified on behalf of MLG that Ms Pratt, in accordance with her contract, owes MLG $450 in respect of a tenant refund. Ms Gulliver said that contrary to MLG policy, Ms Pratt authorised the repayment of a deposit from a tenant in relation to a tenancy at 304/251 Hay Street that did not proceed. Ms Pratt failed to undertake proper checks and the deposit had not been paid by the prospective tenant. This entailed a loss to MLG. According to Ms Gulliver, Ms Pratt had done this before and had been counselled without penalty.

13 Under cl 10.5 of Ms Pratt's contract, MLG is authorised to deduct from any monies payable to Ms Pratt on termination of her employment, any monies that are due to MLG.

14 Sections 17C and 17D of the MCE Act, which are also implied into Ms Pratt's contract as minimum conditions, are relevant. By s 17C(1), an employee is entitled to be paid "in full" monies owed to them under a contract. This is subject to s 17D which sets out authorised deductions from pay that may be made. I am satisfied that the terms of cl 10.5 entitle MLG to deduct from Ms Pratt's entitlements on termination, monies owed by her to MLG. I am also satisfied that the $450 amount claimed by MLG is so authorised.

15 Accordingly, there will be an order that MLG pay to Ms Pratt the sum of $900. Furthermore, whilst it is not a matter that can be the subject of an order in favour of MLG, to the extent that Ms Pratt still has in her possession any property of MLG, including uniforms, this property should be returned to MLG in accordance with her contract of employment.

2011 WAIRC 01071

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHERYL LIANNE PRATT
	APPLICANT
	-v-
	MLG REALTY - (MG PROPERTY MANAGEMENT BELMONDE TRUS)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 25 NOVEMBER 2011
FILE NO/S	B 92 OF 2011
CITATION NO.	2011 WAIRC 01071

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms T Gulliver

Order

HAVING heard the applicant on her own behalf and Ms T Gulliver on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the Notice of Application be amended to delete the named respondent "MLG Realty – (MG Property Management Belmonde Trus)" and insert in lieu thereof the name "MLG Realty – (MG Property Management Belmonde Trust)".

(2) THAT the respondent pay to the applicant as a denied contractual benefit the sum of $900 within 14 days of the date of this order.

(2) THAT otherwise the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2011 WAIRC 01067

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDSAY ROUND
	APPLICANT
	-v-
	SHIRE OF HALLS CREEK
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2011
FILE NO/S	U 84 OF 2011
CITATION NO.	2011 WAIRC 01067

Result	Discontinued
Representation	
Applicant	On his own behalf
Respondent	Mr M Fitz Gerald (as agent)

Order

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

WHEREAS on 16 June 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 16 August 2011 the Commission wrote to the applicant about the status of the settlement of the matter and lodging a Notice of Withdrawal or Discontinuance form; and

WHEREAS on 1 September 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 2 September 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 01092

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK SHOOTER
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF HEALTH IN HIS INCORPORATED CAPACITY FOR THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 7 DECEMBER 2011
FILE NO/S	U 51 OF 2010
CITATION NO.	2011 WAIRC 01092

Result	Discontinued
Representation	
Applicant	Mr M Clancy
Respondent	Ms T Sweeney

Order

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

WHEREAS on 14 June 2010 and 22 July 2010 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the second conference the parties were given time to consider a proposal to settle the matter; and

WHEREAS on 12 August 2010 and 13 September 2010 the Commission wrote to the applicant about his intentions in relation to this matter; and

WHEREAS on 15 September 2010 the applicant requested further time to get legal advice; and

WHEREAS the Commission contacted the applicant on a number of occasions about the status of the matter; and

WHEREAS on 21 September 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 7 October 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 01089

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STUART RODERICK MALLOCH SMITH
	APPLICANT
	-v-
	THE CHIEF EXECUTIVE OFFICER, EURO CONTRACTING PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 DECEMBER 2011
FILE NO/S	B 125 OF 2011
CITATION NO.	2011 WAIRC 01089

Result	Application dismissed

Order

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

WHEREAS on the 28th day of November 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 dismissed.

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

2011 WAIRC 01048

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATHRYN ANNE SPOONER
	APPLICANT
	-v-
	MANGROVE RIVER CAFE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 NOVEMBER 2011
FILE NO/S	U 169 OF 2011
CITATION NO.	2011 WAIRC 01048

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 9 November 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 01161

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROY STALL
	APPLICANT
	-v-
	ROTTNEST ISLAND AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 16 DECEMBER 2011
FILE NO/S	U 164 OF 2011
CITATION NO.	2011 WAIRC 01161

Result	Discontinued by Leave
Representation	
Applicant	Mr R Stall
Respondent	Mr R Bathurst

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 01019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW DAVID STOREY
	APPLICANT
	-v-
	THE PATIO GUYS (WA) PTY LTD AS TRUSTEE FOR THE KEOWN FAMILY TRUST T/A THE PATIO GUYS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 14 NOVEMBER 2011
FILE NO/S	U 16 OF 2011
CITATION NO.	2011 WAIRC 01019

Result	Discontinued
Representation	
Applicant	On his own behalf
Respondent	Ms M Ivanovski (of counsel)

Order

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

WHEREAS on 13 May 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 15 July 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 27 July 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 01145

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TINA TORABI
	APPLICANT
	-v-
	WARLAYIRTI ARTISTS CORPORATION (ATTN: SALLY CLIFFORD)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	U 154 OF 2011
CITATION NO.	2011 WAIRC 01145

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Ms S Clifford

Order

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

WHEREAS on 13 October 2011 the Commission convened a conference for the purpose of scheduling issues with respect to the application being lodged out of time and, with the consent of the respondent, a conciliation conference; and

WHEREAS at the conclusion of that conference the respondent was given further time to consider its position; and

WHEREAS on 21 October 2011 the respondent wrote to the Commission with an offer to settle the matter; and

WHEREAS on 24 October 2011 and 4 November 2011 the Commission wrote to the applicant about the respondent's offer of settlement; and

WHEREAS on 7 November 2011 the applicant advised the Commission that she would accept the offer; and

WHEREAS on 9 November 2011 the Commission convened a conference to confirm the terms of the settlement; and

WHEREAS on 17 November 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 17 November 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 01159

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYN MARIE VARTY
	APPLICANT
	-v-
	BAPTISTCARE INC. T/AS BAPTISTCARE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 15 DECEMBER 2011
FILE NO/S	U 126 OF 2011
CITATION NO.	2011 WAIRC 01159

Result	Application discontinued by leave
Representation	
Applicant	Mr C Fayle as agent
Respondent	Ms M Ivanovski of counsel

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 01063

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GWENDOLYNE IRIRANGI VEGAR
	APPLICANT
	-v-
	MR MICHAEL CROWLEY AND MRS MATA CROWLEY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 23 NOVEMBER 2011
FILE NO/S	U 151 OF 2009
CITATION NO.	2011 WAIRC 01063

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr M Crowley and Mrs M Crowley

Order

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

WHEREAS on 13 October 2009 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS the application was set down for hearing and determination on 21 December 2009; and

WHEREAS on 21 December 2009 and prior to the hearing commencing the applicant's representative advised the Commission that the parties had reached an agreement and the hearing was vacated; and

FURTHER the file was to remain open until the settlement had been finalised; and

WHEREAS on 15 August 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 16 August 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,
Commissioner.

[L.S.]

2011 WAIRC 01116

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAWN ANNE UGLE
	APPLICANT
	-v-
	HALO LEADERSHIP DEVELOPMENT AGENCY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	B 149 OF 2011
CITATION NO.	2011 WAIRC 01116

Result	Application discontinued
Representation	
Applicant	Mrs D A Ugle
Respondent	Ms L Smith

Order

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

AND WHEREAS on 18 October 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 21 November 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 01118

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAWN ANNE UGLE
	APPLICANT
	-v-
	HALO LEADERSHIP DEVELOPMENT AGENCY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	U 149 OF 2011
CITATION NO.	2011 WAIRC 01118

Result	Application discontinued
Representation	
Applicant	Mrs D A Ugle
Respondent	Ms L Smith

Order

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

AND WHEREAS on 18 October 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 21 November 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 01119

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PERRY UGLE
	APPLICANT
	-v-
	HALO LEADERSHIP DEVELOPMENT AGENCY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	B 150 OF 2011
CITATION NO.	2011 WAIRC 01119

Result	Application discontinued
Representation	
Applicant	Mr P Ugle
Respondent	Ms L Smith

Order

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

AND WHEREAS on 18 October 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 21 November 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,
Commissioner.

[L.S.]

2011 WAIRC 01115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PERRY UGLE
	APPLICANT
	-v-
	HALO LEADERSHIP DEVELOPMENT AGENCY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	U 150 OF 2011
CITATION NO.	2011 WAIRC 01115

Result	Application discontinued
Representation	
Applicant	Mr P Ugle
Respondent	Ms L Smith

Order

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

AND WHEREAS on 18 October 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 21 November 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 01143

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DOUGLAS JOHN WALTERS
	APPLICANT
	-v-
	KALGANS REST
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	U 99 OF 2011
CITATION NO.	2011 WAIRC 01143

Result	Application discontinued
Representation	
Applicant	Mr D J Walters
Respondent	Mr J Fiocco and Ms O Borac (both of counsel)

Order

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

AND WHEREAS on 19 July 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 6 December 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 01144

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUA JENNIFER WALTERS
	APPLICANT
	-v-
	KALGANS REST
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	U 100 OF 2011
CITATION NO.	2011 WAIRC 01144

Result	Application discontinued
Representation	
Applicant	Mrs R J Walters
Respondent	Mr J Fiocco and Ms O Borac (both of counsel)

Order

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

AND WHEREAS on 19 July 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 6 December 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 01153

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER LIONEL ZAPPA
	APPLICANT
	-v-
	POLYTECHNIC WEST (FORMERLY SWAN TAFE)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	U 11 OF 2011
CITATION NO.	2011 WAIRC 01153

Result	Discontinued by leave
Representation	
Applicant	Mr K Trainer
Respondent	Mr M Taylor

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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Tony T. Wen	Ms Carole Taylor Traffic Warden Management Unit, WA Police	U 69/2011	Commissioner J L Harrison	Consent Order issued

CONFERENCES—Matters arising out of—

2011 WAIRC 01152

DISPUTE RE ALLEGED REFUSAL TO PROVIDE DOCUMENTATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE TUESDAY, 13 DECEMBER 2011

FILE NO/S C 55 OF 2011

CITATION NO. 2011 WAIRC 01152

Result Application discontinued by leave

Representation

Applicant Mr N Paterson

Respondent Mr R Farrell

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 01074

DISPUTE RE ABOLISHMENT OF POSITIONS AND RELOCATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 25 NOVEMBER 2011

FILE NO PSAC 18 OF 2011

CITATION NO. 2011 WAIRC 01074

Result Interim Order Issued

Order

WHEREAS on Friday, the 25th day of November 2011 the Public Service Arbitrator (the Arbitrator) convened a conference between the parties; and

WHEREAS at that conference the Arbitrator was advised that:

a. On 10 November 2011 the parties had discussions regarding a range of matters which matters are ongoing; and

b. On 16 November 2011 having become aware from enquiries from its members that the respondent had advised Community Social Trainers, employees of the respondent, of its intention to call a meeting of those employees on 22 November 2011, the applicant sought from the respondent information about and an agenda for the meeting, and was advised by the respondent that:

> "The Commission has a structured communication strategy to ensure all staff receive information that is consistent and have the opportunity to participate in a discussion on 22 November 2011. There is no formal agenda for the information session; it is simply an opportunity to provide information on some important workplace imperatives regarding the Community Social Trainer and Supervisor roles. Further details will be provided to all staff on the day."

c. On 22 November 2011 at 2.00pm, the respondent conducted a meeting with its Community Social Trainers and Community Social Trainer Supervisors at which those employees were informed that a decision had been made to abolish their positions; they would be transferred to other positions; the respondent would meet with each of them on specified dates to discuss with them a range of issues; that they could be supported in those meetings, and of other information including the applicant's telephone number and of other support services available to them.

d. Without prior notification, at 2.38pm on 22 November 2011, while the meeting referred to in (c) above was occurring, a letter from the respondent was hand delivered to the applicant's offices notifying the applicant of the changes then being notified to the employees; and

WHEREAS during the discussions between the applicant and the respondent on 10 November 2011 there had been no indication that the changes referred to in c. above were being considered by the respondent; and

WHEREAS the respondent informed the Arbitrator that it did not provide prior notification to the applicant because it alleged that on a previous occasion the applicant had breached confidentiality, however the respondent had not previously addressed that alleged breach of confidentiality with the applicant; and

WHEREAS the applicant sought orders that the respondent not proceed with the implementation of the changes until it had been properly informed of the changes, and consequential information; and

WHEREAS the respondent sought and the applicant gave an undertaking that the applicant and its members would maintain the confidentiality of the information to be provided during their discussions regarding this matter; and

WHEREAS the Arbitrator notes the requirements of clause 52 of the Government Officers (Social Trainers) Award 1988 and clause 48 of the Social Trainers General Agreement 2011. It is also noted that while the respondent had notified the applicant of the changes by way of its letter of 22 November 2011, the circumstances suggested that this had not been done in good faith as the letter was not foreshadowed, and was simply delivered to the reception desk while the meeting of employees was already in progress, during a time when the parties had already commenced a series of discussions about a broad range of matters. Further the applicant had on 16 November 2011 sought information about the meeting of employees and the respondent provided a response which did not disclose any useful information; and

WHEREAS the Arbitrator is of the view that the manner in which the respondent had dealt with the issue of change to date was likely to have caused a deterioration in industrial relations between the parties, and the issuing of the orders sought would prevent the further deterioration of industrial relations in respect of the matter in question until conciliation or arbitration could resolve the matter;

NOW THEREFORE the Arbitrator pursuant to the powers conferred by s 44(6)(ba) of the *Industrial Relations Act, 1979* hereby orders that:

1. The respondent shall cease all actions to implement its decisions to:

   a. abolish the positions of Community Social Trainer and Community Social Trainer Supervisors;

   b. create and fill temporary transitional positions related to the abolition of the positions referred to in (a); and

   c. transfer incumbents of these positions except at an employee's request,

   Until the applicant has:

   a. been provided all necessary information in writing;

   b. had the opportunity to meet with the respondent to discuss and resolve all relevant issues; and

   c. had the opportunity to inform, obtain feedback from and explore options with, its members.

2. The parties are to report back to the Arbitrator in conference no later than Friday, 8 December 2011.

3. There be liberty to apply to vary or cancel these Orders.

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

2011 WAIRC 01095

DISPUTE RE ABOLISHMENT OF POSITIONS AND RELOCATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 7 DECEMBER 2011
FILE NO	PSAC 18 OF 2011
CITATION NO.	2011 WAIRC 01095

Result Order varied

Order

WHEREAS on Friday, 25 November 2011 the Public Service Arbitrator (the Arbitrator) issued Orders (2011 WAIRC 01074) and corrected by an Order on 29 November 2011 (2011 WAIRC 01080) in respect of this matter including the following order:

2. The parties are to report back to the Arbitrator in conference no later than Friday, 9 December 2011; and

WHEREAS a conference was scheduled for Friday, 9 December 2011; and

WHEREAS on 2 December 2011 the applicant requested that a further conference be convened due to the occurrence of events following the issuing of the Orders of 25 November and 29 November 2011; and

WHEREAS the Arbitrator convened a further conference on Tuesday, 6 December 2011; and

WHEREAS at that conference the parties agreed that as they had engaged in discussion during the course of the conference on that day, and had arranged for further discussions to be held on Thursday, 8 December 2011, they would seek that the Arbitrator not proceed with the conference scheduled for Friday, 9 December 2011 in accordance with the Orders of 25 November and 29 November 2011 and that a report back conference be convened at a later date; and

WHEREAS the Arbitrator is of the opinion that it is appropriate to not proceed with a report back conference on Friday, 9 December 2011, but to convene it at a later date;

NOW THEREFORE the Arbitrator pursuant to the powers conferred by s 44(6)(ba) of the *Industrial Relations Act 1979*, hereby orders that:

> Order 2 of the Orders issued on 25 November 2011 (2011 WAIRC 01074) and corrected by an Order on 29 November 2011 (2011 WAIRC 01080) be amended to provide that the parties are to report back to the Arbitrator at a date to be determined.

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

2011 WAIRC 01080

DISPUTE RE ABOLISHMENT OF POSITIONS AND RELOCATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	TUESDAY, 29 NOVEMBER 2011
FILE NO.	PSAC 18 OF 2011
CITATION NO.	2011 WAIRC 01080

Result Correction Order issued

Correction Order

WHEREAS an error occurred in the Order issued on the 25th day of November 2011 in application PSAC 18 of 2011,

NOW THEREFORE, the Public Service Arbitrator, in order to correct this error and pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT order 2 be corrected by replacing the words "Friday, 8 December 2011" with the words "Friday, 9 December 2011".

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

CONFERENCES—Matters referred—

2011 WAIRC 01002

DISPUTE RE SALARY INCREMENT ENTITLEMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Applicant
		AND
		WESTERN AUSTRALIAN COLLEGE OF TEACHING
		Respondent
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 6 SEPTEMBER 2011, THURSDAY, 14 JULY 2011, WEDNESDAY, 6 JULY 2011
DELIVERED	**:**	MONDAY, 7 NOVEMBER 2011
FILE NO.	**:**	PSACR 34 OF 2010
CITATION	**:**	2011 WAIRC 01002

CatchWords	:	Industrial Law (WA) – Interpretation of definition of "industrial matter" – Jurisdiction of Arbitrator to hear contractual benefit claims – Whether terms of Award incorporated into contract of employment – Interpretation of "continuous service" with respect to workers' compensation – Declaration and order issued
Legislation	**:**	Industrial Relations Act 1979 ss 29(1)(b); 7(1a); 80E(1); 44(9)
		Workers' Compensation and Injury Management Act 1981 s 3(a)
Result	:	Declaration And Order Made

Representation:

Applicant	:	Ms D Larson and later Mr S Farrell
Respondent	:	Mr R Andretich of counsel

Case(s) referred to in reasons:

Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309

Balfour v Travelstrength Ltd (1980) 60 WAIG 1015

Bellamy v Chairman, Public Service Board (1986) 66 WAIG 1579

Bermingham v Francis (unreported Queensland Industrial Court 4 August 1975 per Matthews J)

Byrne v Australian Airlines Ltd (1995) 185 CLR 410

Chief Executive Officer Department of Agriculture and Food v Ward and Wall (2007) 88 WAIG 155

Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337

Coles Myer Ltd v Coppin and Ors (1993) 73 WAIG 1754

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd (1986) 160 CLR 226

Director General of Health v Health Services Union of Western Australia (Union of Workers) (2011) 91 WAIG 865

FMWU v Nappy Happy Hire Pty Ltd t/as Nappy Happy Service (1993) 74 WAIG 1493

Hollier v Rambler Motors (AMC) Ltd [1972] 2 QB 71

Kounis Metal Industries Pty Ltd v TWU WA Branch (1992) 73 WAIG 14

Perth Finishing College v Watts (1989) 69 WAIG 2307

RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, and Woodworkers Union of Australia WA Branch and Ors (2000) 80 WAIG 2437

RRIA v ADSTE (1988) 68 WAIG 11

Re Restaurant Keepers Award (1998) 78 IR 340

Ryan v Textile Clothing and Footwear Union [1996] 2 VR 235

Soliman v University of Technology, Sydney (2008) 176 IR 183

Reasons for Decision

1 Ms Bogie was an employee of the Western Australian College of Teaching from 15 May 2007 to 22 September 2010 in the position of an Assistant Customer Service Officer. Ms Bogie sustained an injury on 22 October 2008 and as a result was not able to be continuously present in the workplace to undertake all of her duties from that time to the termination of her employment. It is common ground that during this period, Ms Bogie was on rehabilitation as a part of the workers' compensation process and attended the workplace to perform some duties for a total of some 26 days. In this time Ms Bogie was performing a range of light duties under the supervision of a rehabilitation provider.

2 Ms Bogie now works for another employer. The Civil Service Association has brought these proceedings on behalf of Ms Bogie and seeks an order that the time she did attend for work at the College should count as service for the purposes of the Government Officers Salaries, Allowances and Conditions Award 1989. This is important to Ms Bogie because she also seeks orders that such service count towards her obtaining a salary increment under the award and also that her service be recognised for the purposes of leave accruals.

3 Although both parties accept that during the time that Ms Bogie was employed by the College the award did not bind them, it is contended by Ms Bogie that the terms of the award were incorporated into her contract of employment and the award is therefore legally enforceable on this basis. The College disagrees.

4 As Ms Bogie is now no longer an employee of the College, in order to succeed in this claim, Ms Bogie needs to establish a number of things. First, she needs to establish that the relevant terms of the award were incorporated into her contract of employment. If so, she needs to further establish, that on its proper meaning, the provisions of the award were a benefit to her under her contract of employment with the College. If she can establish this, she then needs to establish that on the correct interpretation of the relevant provisions of the award, Ms Bogie did have "continuous service", despite her absence from the workplace because of her injury.

Industrial Matter - general jurisdiction

5 As a preliminary matter, the College's contention is that there is no industrial matter before the Arbitrator for the purposes of s 44(9) of the Act. This submission was made on the basis that Ms Bogie is no longer an employee of the respondent. Thus, according to the submissions, there is no longer any live industrial matter for the Arbitrator to enquire into and deal with in the present case. As this issue arose at a relatively late stage in the case, the parties were given an opportunity to make written submissions on the point.

6 In short, the Association contended that the matter before the Arbitrator is an industrial matter because it falls within the definition of industrial matter in s 7 of the Act. The definition is broad enough to include a person who was formerly employed by an employer who is a public authority as defined in the Act. Furthermore, the Association contended that the matters about which Ms Bogie complains in the referral under s 44(9) of the Act all relate to her conditions of employment as set out in her

contract of employment, and fall within the definition of industrial matter. Accordingly, under s 80E of the Act, the Arbitrator has jurisdiction to enquire into and deal with the claim brought on Ms Bogie's behalf.

7 In further submissions, the College contended that neither the original claim referred to the Arbitrator, nor the s 44(9) referral, characterises the claim by Ms Bogie as one seeking the recovery of denied contractual benefits. It is a claim in the general jurisdiction of the Commission and accordingly, absent any ongoing employment relationship, is not an industrial matter. Further, the College contends that the subject matter of the claim does not seek an order for terms to take effect after employment has ended.

8 The issue of jurisdiction is always at large and, except as provided in par (i) of the definition of industrial matter in s 7 of the Act, the parties cannot confer jurisdiction on the Commission that does not otherwise exist. The Arbitrator has, under s 80E(1) of the Act, the "exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally".

9 It is well settled that the definition of industrial matter is very broad. Furthermore, the definition concerning dismissal and contractual benefits is enlarged by s 7(1a), such that those kinds of claims may be brought by former employees, despite the relationship of employee and employer having ended. Thus, in the case of a contractual benefits claim, the fact that an employee may work for a new employer at the time such claim is commenced, is no barrier to such a matter being an industrial matter and being within the Commission's jurisdiction under the Act.

10 In this case the referral under s 44(9) is in broad terms and does not specifically seek the recovery of contractual benefits. Rather, the subject matter of the referral is a dispute as to the recognition of prior service in respect of Ms Bogie who is no longer employed by the College. The s 44(9) referral clearly seeks an order which will have retrospective effect on an employment relationship that does not now exist. It may also have an effect on Ms Bogie's current employment relationship.

11 The Commission's (and Arbitrator's) jurisdiction to enquire into and deal with an industrial matter previously required (subject to specific jurisdiction in s 29(1)(b) of the Act) the present or future existence of an employer and employee relationship: *RRIA v ADSTE* (1988) 68 WAIG 11; *Kounis Metal Industries Pty Ltd v TWU WA Branch* (1992) 73 WAIG 14; *Coles Myer Ltd v Coppin and Ors* (1993) 73 WAIG 1754. These cases dealt with in particular the operation of par (c) of the definition of industrial matter, concerning the "dismissal of or refusal to employ any person or class of persons". On the strength of these authorities, the Commission's approach has been that unless at the time the application was made the above preconditions existed, there was no live industrial matter which the Commission (or Arbitrator) may have dealt with. Whilst the written submissions of the College do not identify any particular authorities, it is assumed that it is this general line of cases that is being alluded to.

12 These judgements of the Industrial Appeal Court led to an amendment to the Act by amending Act No 1 of 1995 to introduce s 7(1a) to overcome their effect, but only in relation to claims of unfair dismissal or the recovery of contractual benefits. Thus, claims of that description are within the Commission's jurisdiction regardless of the absence of an existing employment relationship or any claim that one be restored.

13 The *Pepler* line of cases was further considered in detail by the Industrial Appeal Court in *RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, and Woodworkers Union of Australia WA Branch and Ors* (2000) 80 WAIG 2437. In this matter the Commission at first instance held that a clause sought to be inserted in an award providing prospective employees the choice of being engaged on the terms of the award or a workplace agreement under the then legislation, was not an industrial matter and thus beyond the Commission's jurisdiction. This was reversed by the Full Bench of the Commission on appeal.

14 On further appeal, the Industrial Appeal Court (Kennedy and Parker JJ; Scott J dissenting), confirmed that such a clause did give rise to an industrial matter and explained the *Pepler* line of cases. In particular, Parker J sought to dispel some misconceptions as to the significance of *Pepler*. At pars 75-79 Parker J, in referring to the later case of *FMWU v Nappy Happy Hire Pty Ltd t/as Nappy Happy Service* (1993) 74 WAIG 1493, opined that their significance lay in relation to the specific part of the definition in par (c), and properly understood, did not require the continuation of an existing employment relationship as a jurisdictional fact. In *Nappy Happy*, Anderson J, at 1496 doubted the correctness of *Pepler*, but as it was a case of some long standing, declined the appellant's invitation to overrule it.

15 Subsequent to this line of cases, the definition of industrial matter in s 7 of the Act was substantially amended by the Labour Relations Reform Act 2002. This legislation changed the last line of the introductory general definition of industrial matter by deleting the words "relating to" and inserting the words "affecting or relating or pertaining to". Additionally, a new par (ca) was inserted referring to "the relationship between employers and employees". Also, significantly, the amendments added after par (i) the words "and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute…".

16 The words "any matter affecting or relating or pertaining to" are words of substantial breadth. These words must also be read with the addition of par (ca) to extend the scope of the already broad introductory definition, to "any matter affecting or relating to or pertaining to the relationship between employers and employees". "Pertain" means to "extend, tend or belong (to)... 1. To belong … as part of a whole; as an accessory … to concern … to be appropriate to … 2. To have reference, relate to …" : Shorter Oxford English Dictionary.

17 In particular, the extension of the definition of industrial matter to include "any matter of an industrial nature the subject of an industrial dispute", by the use of the words "includes" clearly manifests an intention by the legislature to significantly widen the circumstances in which a matter may come before the Commission. On its face, as long as a particular matter has an industrial character or complexion, and is in dispute between the parties, or indeed is a situation that might become a dispute, then the Commission has cognisance of such a matter and may inquire into and deal with it under s 23(1) of the Act.

18 The present claim bought by the Association is, in my view, plainly a matter of an "industrial nature". It concerns the terms and conditions of employment of Ms Bogie whilst in the service of the College which has the capacity to affect Ms Bogie in her current employment with her new employer. The Association and the College were and remain in dispute as to these issues, self evidently as the matter was referred to the Commission. Thus, the subject matter of the claim is a matter of an industrial nature the subject of a dispute between the parties. So characterised, the subject matter of the claim is also in my opinion, a matter "affecting" or "pertaining to" the relationship between employers and employees.

19 It is also a matter affecting or pertaining to matters set out in par (a) of the definition, they being "the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment". It is also a matter affecting or relating or pertaining to "conditions of employment" as specified in par (b). In this case, the subject matter of Ms Bogie's claim affects, relates to and pertains to not only Ms Bogie's relationship with her former employer, but also her relationship with her current employer and is a matter therefore, "affecting or relating or pertaining to the relationship between employers and employees". This is in addition to the matter falling within the extended definition encompassing a dispute as to a matter of an industrial nature.

20 Whilst statutory interpretation is of course, essentially a text based activity, recourse can be had to extrinsic material, as provided in s 19 of the Interpretation Act 1984. The Explanatory Memorandum on the introduction of the Labour Relations Reform Bill 2002, concerning the definition of "industrial matter" said at pars 215-216:

> "215. The definition of what constitutes an "industrial matter" for the purposes of the IR Act is also integral to the jurisdiction of the Commission.
>
> 216. The amended definition of industrial matter properly provides the Commission with the ability to deal with any matter "affecting or relating or pertaining" to a number of issues relating to employment and the relationship between employers and employees. This expanded definition will remove any doubt as to the necessity for a current employment relationship for the Commission to have jurisdiction. The Commission's capacity to deal in advance with greenfields sites and employment related matters that only arise after termination will now be beyond doubt. It now also includes the collection of union subscriptions and any matter the subject of an industrial dispute."

21 When read in context, I see no reason to read down the breadth of the expanded definition of industrial matter in s 7 of the Act, on its ordinary and natural meaning. Whilst it is of course necessary to consider the definition as a whole, no absurdity or repugnancy arises in the interpretation that I have adopted, in particular having regard to the apparent intention of the legislature as referred to in the Parliamentary materials.

22 Of course, leaving aside all of this, even if I am incorrect and the present claim by the Association does not fall within the "general" jurisdiction of the Arbitrator, then that is not the end of the matter. It may still be an industrial matter, if it can be properly characterised as a matter of the kind specified in s 7(1a) of the Act, dealing with a claim for a denied contractual benefit.

Contractual benefit

23 As Ms Bogie was no longer an employee of the College and there was no claim to restore the employment relationship, in the alternative, Ms Bogie is required to establish that the matter for determination involves the recovery of a benefit under her contract of employment. This would then bring into play the extended definition of industrial matter in s 7(1a) referred to above. This in turn requires consideration as to whether the terms of the award were incorporated into Ms Bogie's contract of service. Further, if they were, then it needs to be considered whether the subject matter of Ms Bogie's claim can properly be characterised as a "benefit" under her former contract of service with the College, to bring it within the extended meaning of industrial matter.

24 Whilst the jurisdiction of the Arbitrator under s 80E(1) is very wide, it does not extend to a claim being brought before the Arbitrator *under* s 29(1)(b)(ii) of the Act. This is because the Arbitrator's jurisdiction is exclusive of the general jurisdiction of the Commission under Part II Division 2 of the Act. This was most recently considered by the Full Bench of the Commission in *Chief Executive Officer Department of Agriculture and Food v Ward and Wall* (2007) 88 WAIG 155. The relationship between the jurisdiction of the Commission and that of the Arbitrator and the Public Service Appeal Board under the Act was also succinctly set out in the decision of the Full Bench in *Bellamy v Chairman, Public Service Board* (1986) 66 WAIG 1579, a case not referred to by the Full Bench in *Ward and Wall*.

25 In *Ward and Wall*, the Full Bench quashed a decision of the Arbitrator who purported to deal with a claim for a contractual benefit under s 29(1)(b)(ii) of the Act, whilst exercising her jurisdiction under s 80E of the Act. The decision was quashed on the footing that the Arbitrator could not purport to exercise jurisdiction under s 80E in respect of a matter brought in the Commission's general jurisdiction. The College referred to a recent decision of the Full Bench in *Director General of Health v Health Services Union of Western Australia (Union of Workers)* (2011) 91 WAIG 865. That decision is not directly on point in relation to the present matter. However, observations by Smith AP at par 71 to the effect that the jurisdiction of the Arbitrator can extend to a claim under s 29(1)(b)(ii) of the Act and citing *Ward and Wall* in this regard, are either a misstatement or if not, with respect, are incorrect.

26 Moreover, s 29(1)(b) deals with the capacity for individual employees to refer matters to the Commission, which is limited to dismissals and the recovery of denied contractual entitlements. There is no similar capacity for individuals to refer matters to the Arbitrator under s 80F of the Act. Leaving aside disputes in relation to an employer-employee agreement, the only matters that may be so referred are matters concerning the salary, range of salary of an office etc of a government officer under s 80E(2)(a) of the Act.

27 This does not mean that an organisation, on behalf of a government officer, may not invoke the jurisdiction of the Arbitrator under s 80E(1), to seek to recover a benefit under the government officer's contract of service. Such a matter would fall within

the broad definition of "industrial matter" for the purposes of ss 80E(1) and (7) of the Act. On the face of it, this would also extend to the case of a former employee, bringing into play the extended definition of industrial matter in s 7(1a).

28 Whilst the referral under s 44(9) of the Act is, as I have mentioned above, in broad terms, and is not limited to or specific to allegations by Ms Bogie that she has been denied benefits under her contract of employment, in that form of words, it does not in my view, preclude consideration of these questions in resolving the present controversy. Ms Bogie's claims can be characterised as seeking recognition of service for benefit purposes under the award. Ultimately, as the case has unfolded, given that the award did not, by its terms, apply to Ms Bogie, and Ms Bogie is no longer in employment, the only alternative jurisdictional foundation for Ms Bogie's claim is if it can be considered as a "benefit under her contract of employment".

29 Therefore I turn to consider that question now.

Did the award apply by contract?

30 As noted above, it was common ground that at the time of Ms Bogie's employment the College was not a respondent to the award. Indeed it was not made a party to the award until June 2011 (see application P 3 of 2011).

31 Ms Bogie contended that the terms of the award were incorporated into her contract of employment. The basis of this contention was that the offer of employment made to her and accepted by her in October 2007 made express reference to the terms of the award. Relevantly, the letter of appointment signed by Ms Bogie provided that:

> "The terms and conditions of the contract will be as follows:
>
> …
>
> | | |
> |---|---|
> | **Conditions of service** | As per the Government Officers Salaries and Conditions (GOSAC) Award." |

32 Ms Bogie accepted the offer of employment in a separate section of the letter of offer headed:

> "ACCEPTANCE OF CONTRACT.
>
> I accept the terms and conditions set out in this contract letter.
>
> _____
>
> Ms Karen Preedy"

33 Some evidence was given about the offer from the College to Ms Bogie by Mr Donaldson the Manager of Corporate Services. He said that he always understood that the award applied to the College and he did not discover to the contrary until a short time prior to the hearing. Mr Donaldson prepared the letter of offer of employment to Ms Bogie. At the time he believed that the College was a party to the award and there was no need, and he did not intend, to incorporate it into the contract between Ms Bogie and the College. According to Mr Donaldson, he also understood that the Association also believed that the award did apply to the College until recently.

34 The question whether the terms of an award or industrial agreement are incorporated into a contract of employment can be far from straight forward. As the learned authors in *Macken's Law of Employment* 7th Edition observe at 6.270:

> "*Awards and employment contracts*
>
> **[6.270]** Modern awards assume the existence of a contract of employment however the terms of awards are not automatically incorporated into the employment contract. Whether award terms become contract terms will depend on whether the parties intended to incorporate the award terms into their contract. The question is an important one in cases where an aggrieved party is seeking to bring a common law action for damages for breach of the employment contract. The usual remedy for breach of contract is payment of expectation-based damages, that is, damages based on the innocent party's entitlement to be placed in the position he or she would have been, had the contract been properly performed according to its terms.[115] The remedies for breach of an award are determined by statute, and include pecuniary penalties, injunction, compensation for loss suffered as a consequence of the contravention, and (in appropriate cases) reinstatement orders.[116]
>
> Application of these statutory remedies may not produce the same outcome as a contract claim. For example, it was argued in *Gregory v Philip Morris Ltd*[117] that an award clause prohibiting dismissals that were "harsh, unjust or unreasonable" was necessarily incorporated as a term in an employment contract, so that the employee was entitled to contract damages based on his expectation of long term employment. Mr Gregory received an amount of $30,000 in respect of approximately 18 months wages that the court estimated he would have been likely to have received if Philip Morris had complied with its obligations under the award. If the matter had been resolved purely on the basis that there had been a breach of the award, the appropriate remedy would have been an order that the employer observe the award, or a pecuniary fine. Following *Gregory*, the Federal Court awarded contract-based damages of several years wages to an unfairly dismissed employee in *Bostik (Australia) Pty Ltd v Gorgevski* (No 1).[118]
>
> This line of authority was overturned in *Byrne v Australian Airlines Ltd*,[119] where the High Court held that industrial awards were not incorporated into employment contracts without the express intention of the parties. The High Court held that award terms would not be implied into employment contracts in fact or by law.[120] The High Court held that awards operate with statutory force and there was no need to convert statutory rights and obligations into contractual rights and obligations. Brennan CJ, Dawson and Toohey J indicated that:
>
> > in a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by Award, it is unnecessary that the contract of employment should provide for those matters already covered by the Award. The contract may provide additional benefits, but cannot derogate from the terms imposed by

the Award. The Award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations.[121]"

35 Additionally, when referring to the incorporation of enterprise agreements into contracts of employment, the learned authors further go on to state at par 6.290:

"Before a term in an enterprise agreement will have effect as a term of the employment contract (and give rise to contractual damages for breach) it will be necessary to demonstrate that the parties either expressly or impliedly intended the term to have contractual effect (and not merely effect according to the statute).

Where parties are shown to have agreed to incorporate the statutory provision or industrial instrument into the contract, terms from the statute or instrument will be given contractual effect, so long as the terms are promissory in nature. So terms from an enterprise agreement making provision for rates of redundancy pay were held (by majority) to be incorporated by reference into a contract in *Riverwood International Australia Pty Ltd v McCormick.* [133] A term from an enterprise agreement that provided that the employee would not be dismissed without cause was held to be incorporated into the employment contract in *Murray Irrigation Ltd v Balsdon.*[134]

Nevertheless, mere mention of the existence of an award or enterprise agreement which binds the parties will not conclusively determine that the award or agreement clauses are incorporated into and binding in contract. It may be that on proper construction of the contract document, the reference to the award or agreement manifests nothing more than an acknowledgment by the parties of the statutory instruments which will also govern their relationship, according to the terms of the statute. Mention of industrial instruments in a contract document may serve to identify "relevant information capable of affecting the parties contractual relations rather than documents intended to be binding and enforceable as part of their contractual relations".[135]"

36 In this case of course, somewhat unusually, the relevant award was not legally binding by force of the Act at the time of the formation or during Ms Bogie's employment, even though the parties thought it was. Thus, while in Ms Bogie's contract of employment reference was made to the award, another document could equally have been referred to such as a manual or some other form of document. This would remove the distraction as to whether the instrument referred to would be legally binding by force of statute regardless of the terms of the contract.

37 The two issues to determine are firstly, did the award apply contractually by express incorporation? If not, did the award apply contractually as an implied term? To determine the first issue, careful consideration needs to be given to the language of Ms Bogie's letter of appointment. I turn to this first issue now.

38 The applicable principles referred to above were considered in *Soliman v University of Technology, Sydney* (2008) 176 IR 183. In this case Jagot J said at pars 63-65:

"Does the contract of employment incorporate the agreement?

63 The first way in which the applicant submitted that the contract of employment incorporated the whole of the agreement (or at least its disciplinary provisions) was by reference.

64 *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 (North and Mansfield JJ) confirmed the principles applying to incorporation of documents by reference into employment contracts (adopting the principles identified by Weinberg J in *McCormick v Riverwood International (Australia) Pty Ltd* (1999) 167 ALR 689; [1999] FCA 1640 at [70] to [78]). First, it must be assumed that the contract of employment was made in good faith with the object of at least potential mutual benefit by due performance. Secondly, the meaning of the contract is to be determined objectively, the essential question being what reasonable business people in the position of the parties would have taken the clause to mean (citing *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 at 840). Thirdly, parties may be bound by the meaning to be reasonably inferred in the circumstances even if that meaning is not advanced by either party. Fourthly, the meaning of contractual terms is ascertained by considering them in context (including the "objective background of the transaction...its factual matrix, genesis and aim, and the common assumption of the parties" (citing *Cheshire & Fifoot's Law of Contract*, 7th Aust ed, 1997). Fifthly, the terms of the contract are those the parties intended to incorporate including express terms, inferred terms based on actual intention, and implied terms based on presumed intention. Sixthly, "it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract" (citing *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346). Seventhly, "evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning" (citing *Codelfa* at 352).

65 In *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62; at [287] Jessup J described the approach in *Riverwood* as one where "all the facts and circumstances surrounding the making of the contract in question" should be considered in ascertaining whether any terms should be inferred based on intention. Black CJ, also in *Goldman Sachs* at [23], observed that:

The principles to be applied in determining whether any, and if so what, parts of WWU were terms of the contract of employment are not in doubt. It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the

promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179, the Court said:

> It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

Award as an express term

39 I have set out the relevant parts of Ms Bogie's letter of appointment above. To ascertain the effect of the letter requires a consideration of its terms as a whole. The second para refers to the "terms and conditions of the contract". This is a clear and unambiguous statement in and of itself. The reference to "conditions of service" is to be read subject to other headings in the letter such as "Duration", "Remuneration", "Termination" etc which are generally consistent with the main heading dealing with "Conditions of service". The subheading "Conditions of Service" is followed by the words "As per the Government Officers Salaries, Allowances and Conditions (GOSAC) Award."

40 The award sets out in detail terms and conditions of employment for employees who are government officers employed by the public authorities listed in the schedule of respondents to the award. The award document makes comprehensive provision setting out in detail all aspects of the terms and conditions relevant to the employment relationship, for the benefit of both employees and employers.

41 The ordinary and natural meaning of "as per", in the letter, being used as a preposition, is "1. by means of, by the instrumentality of; … according to, as stated or indicated by,": Shorter Oxford English Dictionary. Such language, when read in the context of the letter as a whole, is consistent with the introductory words in the second paragraph, as referring to the "Terms and conditions of contract will be" in accordance with or "as stated in" the award.

42 If this and nothing more was before the Commission this may lead to the conclusion that the terms of the contract included the terms of the award. However some regard must be had to the evidence of Mr Donaldson.

43 Whilst generally extrinsic evidence cannot be led to ascertain the intention of the parties as to the terms of a contract, there are some exceptions to this principle. One of them is in cases where the existence of a binding contract itself is in question: see generally *Laws of Australia Contract: General Principles Ch 7.4 Part C*. An example of extrinsic evidence being introduced to prove that parties did not intend to be contractually bound is *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309. Other cases where extrinsic evidence may be led include both patent and latent ambiguity in the meaning of a contract term.

44 It is to be noted that Mr Donaldson's evidence was that at the time he engaged Ms Bogie, he believed that the award applied to all employees, and this was also seemingly the view of the Association. Importantly however, there was no evidence from Ms Bogie as to her view of the effect of the award at the time she accepted the offer of employment from the College. That is, there is no evidence before me as to the *mutual intention* of the parties to the contract in this regard. There was for example, no evidence that the College communicated to Ms Bogie, prior to her signing the letter of offer of employment, the view that the reference to the award should not be seen as contractual. The importance of mutual actual intention, in relation to the contractual effect of a written instrument, was emphasised by Hayne JA in *Ryan v Textile Clothing and Footwear Union* [1996] 2 VR 235 at 265. If there was such evidence, combined with the evidence of Mr Donaldson, this may have been persuasive and against the contention that the award was incorporated contractually into Ms Bogie's contract of employment to negative any contractual intention in this regard: *Air Great Lakes Pty Ltd*.

45 In the absence of mutual intention that the award was not to have contractual effect, I consider it to be in accordance with the plain meaning of Ms Bogie's letter of appointment that the terms of the award were incorporated by reference into her contract and therefore became terms of Ms Bogie's contract with the College.

Did the award apply as an implied term?

46 In the alternative, if the award was not incorporated expressly into Ms Bogie's contract of employment, was it, in all of the circumstances, to be implied? The terms of an award or collective agreement having statutory force will not be incorporated as an implied term as such an instrument will operate on the contract by force of statute and implication is unnecessary: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410. In the absence of the award legally binding the parties, it can be implied in fact, based on the presumed intentions of the parties, by the application of the usual principles for implication of terms as set out in cases such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337. This is the "business efficacy" test. A term may also be implied in fact through a course of dealing or custom and usage.

47 I am not persuaded that it would be necessary to imply all of the terms of the award as a matter of business efficacy, such that the above test would be satisfied. The essential elements of the contract are set out in Ms Bogie's letter of appointment. Perhaps it may be said that the term of the award in relation to hours of work may be implied. I do not see that other terms would be necessarily implied to make the contract effective. There was also no evidence of a course of dealing or a custom and practice between Ms Bogie and the College, as the parties to the contract, to imply the terms of the award on these bases: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226; *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71.

Is Ms Bogie's claim a contractual benefit?

48 The meaning of "contractual benefit" is very broad. It covers any "advantage, entitlement, right, superiority, favour, good or perquisite": *Balfour v Travelstrength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College v Watts* (1989) 69 WAIG 2307. I am satisfied that based on the terms of the s 44(9) referral, and the relevant terms of the award, that Ms Bogie's claim for recognition of service whilst on workers' compensation for benefit purposes, falls within this broad meaning.

49 I am therefore also satisfied that Ms Bogie's claim, so characterised, also falls within the definition of industrial matter by the extended definition in s 7(1a) of the Act, despite the relationship of employer and employee no longer being in existence and there being no claim to restore it at the time of the commencement of the claim.

Did Ms Bogie have continuous service?

50 Based on the agreed facts Ms Bogie initially was absent from the workplace on workers' compensation from 22 October 2008 and returned to the workplace on 29 April 2009. On that day, Ms Bogie returned to work under the guidance of a rehabilitation provider and attended at work sporadically performing various light duties. From 29 April 2009 to the end of 2009 Ms Bogie attended at work for some 184 hours or 24.5 days. It is agreed that in May 2009, Ms Bogie worked four hours per day on Wednesdays and Fridays of each week. In June 2009, Ms Bogie attended for four hours per day on Mondays, Wednesdays and Fridays mostly. Only a few days were worked for four hours in July. The Monday, Wednesday and Friday pattern was repeated for most of August. In September, October and November Ms Bogie's attendances for four hours at work were sporadic. No attendances were recorded for December 2009. In 2010, up until 8 January, Ms Bogie attended work on two days. She did not attend work at all after this time.

51 The relevant provisions of the award need to be considered in determining whether the record of attendance of Ms Bogie as agreed, constitutes continuous service for benefit purposes. The key provision is cl 18 – Annual Increments. This provided at the time of Ms Bogie's employment as follows:

"18. – ANNUAL INCREMENTS

(1) Officers shall proceed to the maximum of their salary range by annual increments subject to a satisfactory report on the officer's level of performance and conduct.

(2) The following procedure will apply prior to the payment of an increment:

(a) Their manager will produce a report on the officer's performance and conduct no later than 12 months since the officer's last incremental advance.

(b) Where the report is satisfactory, the increment will be paid.

(c) Where the report is unsatisfactory:

(i) The officer will be shown the report and required to initial it.

(ii) The officer will be provided with an opportunity to comment in writing.

(iii) The officer's comments will be considered immediately by the employer and a decision made as to whether to approve the payment of the increment or withhold payment for a specific period.

(iv) Where the increment is withheld, the employer before the expiry of the specified period will complete a further report and provisions paragraph (b) and (c) of this subclause will apply.

(3) The non-payment of an increment will not change the normal anniversary date of any further increment payments.

(4) For the purposes of this clause "continuous service", except where an increment is payable according to age, shall not include:

(a) any period exceeding 14 calendar days during which an officer is absent on leave without pay. In the case of leave without pay which exceeds 14 calendar days the entire period of such leave without pay is excised in full;

(b) any period which exceeds six months in one continuous period during which an officer is absent on workers' compensation. Provided that only that portion of such continuous absence which exceeds six months shall not count as "continuous service";

(c) any period which exceeds three months in one continuous period during which an officer is absent on sick leave without pay. Provided that only that portion of such continuous absence which exceeds three months shall not count as "continuous service"."

52 Thus an officer would receive annual salary increments, in accordance with this clause, for continuous service in any 12 month period, only if a satisfactory performance or conduct assessment was made regarding the employee.

53 There is a clear distinction at law between an employee remaining in employment on the one hand, and being in the "service" of the employer on the other. An employee can plainly be employed, but not able to render service, for which wages or salary is payable. Further, unless there is a provision in an industrial instrument authorising an absence from work, generally, an absence from work without authority will break continuity of service for benefit purposes: *Bermingham v Francis* (unreported Queensland Industrial Court 4 August 1975 per Matthews J); *Re Restaurant Keepers Award* (1998) 78 IR 340 per Westwood P (and the cases cited).

54 It will in most cases, depend upon a consideration of the terms of the relevant industrial instrument in question, as to how such absences are to be treated. As a general observation however, an absence on workers' compensation, in accordance with a

statutory regime dealing with compensable injuries in the workplace, such as in this State, should be regarded in my opinion, as an authorised absence. It is an absence from work, sanctioned by State legislation, where an employee continues to be paid their normal weekly earnings (but which is characterised as compensation), by their employer, and the employer is reimbursed by the relevant workers' compensation insurer.

55 In this matter cl 18(4)(b) is the most important provision to consider. The clause indicates that the draftsperson of the award intended that an absence of an employee *on* workers' compensation should not break continuity of service, subject to the conditions specified. That is, an absence on workers' compensation is regarded by cl 18 as an authorised absence. There has, however, been a limit imposed. A period of up to one continuous absence of six months will not break continuity. A period in excess of this will, but only that portion which exceeds the six month limit. This seems to seek a balance on the one hand between the right of an employee to be absent on workers' compensation for a reasonable period, without suffering the penalty of loss of continuous service, and on the other, to not unreasonably burden an employer in cases where an employee is absent on workers' compensation for an extended period.

56 The thrust of the argument by the College can be shortly stated as follows. Mr Andretich submitted that from the time of first receiving weekly payments of compensation, and because of her injury, Ms Bogie ceased rendering "service". She did not render service because she was absent on workers' compensation and it was the regime under the workers' compensation legislation that governed her entitlements and not any entitlements derived from the terms of the award. Thus, the entire period of being in receipt of workers' compensation, in excess of the initial six month period, must be discounted for the purposes of determining continuous service for benefit purposes under the award.

57 On the other hand, the Association focussed on the word "absence" in the subclause, and contended that Ms Bogie's presence, even sporadic, meant she was not absent.

58 For the reasons set out below, I am unable to accept the contention that as a general proposition, an absence on workers' compensation will necessarily break service for continuity of service purposes. However, in this case, under the relevant provisions of the award, Ms Bogie should be regarded as not having continuous service beyond the six month limit prescribed.

59 Workers' compensation in this State is governed by the terms of the Workers' Compensation and Injury Management Act 1981. Its purposes as specified in s 3(a) include the provision of a scheme of compensation to employees suffering an injury in the course of employment and the making of provision for the management of the person's injury to get them back to work. Payment of weekly compensation is calculated by reference to the earnings of an employee under a relevant industrial instrument that may apply as prescribed in Schedule 1 to the legislation. As noted above, in my view, an absence on workers' compensation is not an absence from the workplace without authority. It should be characterised as an authorised absence which is not dissimilar to an absence on authorised sick leave for sickness or injury, but is dealt with in accordance with the workers' compensation regime under the State legislation.

60 How, in specific terms, an absence on workers' compensation will be considered in a particular case, would largely depend upon the relevant provisions of the industrial instrument or statute in question. For example, the long service leave legislation in this State recognises an absence from duty by reason of sickness or injury as not breaking service, but only up to a maximum of 15 working days in any year of employment.

61 It seems on the agreed facts that from April 2009 Ms Bogie regained at least some partial capacity to perform work and, as part of a rehabilitation program, consistent with the purposes of the workers' compensation legislation, did attend the workplace on the dates and for the periods noted above. As Ms Bogie was absent for a continuous period from 22 October 2008 to 29 April 2009, approximately 1 week in excess of 6 months, that one week period is not to be considered as service. What is contentious is the status of Ms Bogie's "service" from 29 April onwards.

62 To construe cl 18(4)(b) in the manner contended by the Association, that is to only focus on the word "absence", is to read the clause as if that word can be severed from the remainder. In my view, the words "absent on workers' compensation" are to be read as a composite phrase. The draftsperson of cl 18(4)(b) clearly intended to link the absence with being "on" workers' compensation. In its ordinary understanding a person who is "on workers' compensation" is to be regarded as on an authorised period of absence, subject to their gradual rehabilitation back into the workplace. If the word "absent" had been left out of the sub-clause entirely, there would be no argument in this case. In my view, the word as included, only serves to refer to the usual circumstance that applied for most of the time in this case, that a person is away from work when injured.

63 The fact of Ms Bogie's sporadic attendance at work as part of a rehabilitation programme does not alter this conclusion. She was doing so as part of the conditions attaching to her entitlement to weekly payments under the workers' compensation legislation. She was plainly not able to perform her pre-injury duties. She was only undertaking modified duties, was still in receipt of weekly payments, and was "*on* workers' compensation" up until the redemption agreement reached in September 2010.

64 This conclusion is reinforced by other provisions of the award.

65 As to annual leave, by cl 23(1)(a) "each officer is entitled to four weeks' leave on full pay for each year of service". Further, cl 23(11) provides:

> "(11) When computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period an officer is on annual leave, observing a public holiday prescribed by this award, absence through sickness with or without pay. This provision applies except for that portion of an absence through sickness without pay that exceeds three months, absence on workers' compensation except for that portion of an absence that exceeds six months, or any period exceeding two weeks during which the officer is absent on leave without pay."

66 Whilst the drafting of this subclause leaves something to be desired, in my view, the reference to "no deduction from such leave …" should be read as referring to the various matters referred to in the remainder of the subclause as constituting

continuous service for annual leave purposes. This would give the subclause what I consider to be its intended effect. Thus, it is only in the case of an absence on workers' compensation for a period in excess of six months, that the provision comes into play, in largely the same terms as cl 18(4)(b) dealing with continuous service for the purposes of annual increments. Ms Bogie's period on workers' compensation in excess of the six months, for the same reasons outlined above, did not count as service for annual leave purposes.

67 The position in relation to long service leave is somewhat different. Clause 25 – Long Service Leave, subclause (4), provides that:

> "For the purposes of determining an officer's long service leave entitlement under the provisions of subclauses (1), (2) and (3) of this clause the expression "continuous service" includes any period during which the officer is absent on full pay or part pay from the officers duties, but does not include:
>
> (a) any period exceeding two weeks during which the officer is absent on leave without pay or parental leave without pay, unless the employer determines otherwise;
>
> …"

68 There is otherwise no express exclusion for an absence on workers' compensation from consideration of continuous service for long service leave purposes. Consistently with the views I have expressed above, I see no difficulty in concluding that Ms Bogie's absence on workers' compensation, as a period of authorised absence, should be regarded as "continuous service" for the purposes of long service leave under this particular clause. Ms Bogie was not on leave without pay during this period. She was being paid, at her full or partial rate of pay, albeit characterised as compensation under the workers' compensation legislation.

69 If I am incorrect as to the approach to the interpretation of cl 18(4)(b), and Ms Bogie should not be considered to be "absent" from the workplace for the purposes of a service increment, there is another major hurdle to her claim. That simply is an increment under the former cl 18(1) was not unconditional. It required a satisfactory report by the College on Ms Bogie's performance over the twelve months since her last increment date. This could not be achieved because Ms Bogie was absent for most of this period and only serves to reinforce my conclusion as to the effect of her absence.

Conclusion

70 It is not entirely clear from the evidence how Ms Bogie's leave entitlements were dealt with when she compromised her workers' compensation claim in September 2010 and tendered her resignation. Presumably all entitlements then owing were paid to her. I note however the possible effect of cl 25(11) of the award in relation to long service leave accrued with a previous employer in the public sector. In view of this, there should be a declaration that Ms Bogie's period of absence on workers' compensation be regarded as service for long service leave purposes, with the claim otherwise being dismissed.

2011 WAIRC 01033

DISPUTE RE SALARY INCREMENT ENTITLEMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		APPLICANT
		AND
		WESTERN AUSTRALIAN COLLEGE OF TEACHING
		RESPONDENT
CORAM	**:**	PUBLIC SERVICE ARBITRATOR
		COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 6 SEPTEMBER 2011, THURSDAY, 14 JULY 2011, WEDNESDAY, 6 JULY 2011
DELIVERED	**:**	TUESDAY, 15 NOVEMBER 2011
FILE NO.	**:**	PSACR 34 OF 2010
CITATION	**:**	2011 WAIRC 01033

Catchwords	:	Industrial Law (WA) – Supplementary reasons for decision - Speaking to the minutes of proposed order - Dates of service for purpose of accrual of long service leave – Declaration and order issued
Legislation	**:**	Industrial Relations Act 1979 ss 35(3); 26(2); 44(9)
Result	:	Declaration and order made
Representation:		
Applicant	**:**	Mr S Farrell
Respondent	**:**	Mr R Andretich of counsel

Supplementary Reasons for Decision

1 On 7 November 2011 the Commission as presently constituted sitting as an Arbitrator published its reasons for decision and minute of proposed order in respect of the claims by the Association. The College requested a speaking to the minutes of the proposed order as it is entitled to do under s 35(3) of the Act.

2 A speaking to the minutes was held on 11 November 2011. Mr Andretich on behalf of the College referred to the minute of proposed order and declaration concerning Ms Bogie's absence on workers' compensation for long service leave purposes. He submitted that whilst the minute refers to the date of 20 September 2010 as the end date for service purposes, the notice of referral under s 44(9) of the Act referred initially at par 4, to August 2010, which was amended during the course of the hearing of the matter to 8 January 2010. Accordingly, counsel submitted that the latter date may be the more appropriate date to be included in the declaration.

3 The Association through Mr Farrell whilst acknowledging the point raised by Mr Andretich, submitted that there were two discrete claims before the Arbitrator. The first was service for increment purposes which was the subject of the amended date, and the second, service more generally for leave accruals. Accordingly it would be appropriate to retain the date in the minute as giving effect to the Arbitrator's decision.

4 I have considered the submissions and the point raised by Mr Andretich. Whilst it perhaps could have been clearer in the s 44(9) referral, there are two discrete claims at pars 4 and 5 of the referral. The first refers to service for increment purposes upon which claim Ms Bogie was unsuccessful. The second, as expressed in par 5, but without reference to any particular date, is service for the purpose of leave accruals. It was upon that issue that Ms Bogie was partially successful.

5 The reason for the specification of the date of 20 September 2010 is because Ms Bogie resigned from her employment and compromised her workers' compensation claim at that time. Ordinarily, therefore, any service for long service leave purposes would encompass the entire period of employment from date of commencement to date of termination of employment. Whilst not particularising any date, the intent in my view was a claim for service for leave accrual purposes whilst Ms Bogie was employed by the College. The earlier date of January 2010 specified in the referral was the last date on which Ms Bogie was present at the workplace, even though her employment did not terminate until later in the year.

6 Further, by s 26(2) of the Act, the Arbitrator, for the purposes of granting relief or redress, is not restricted to the specific claim made or to the subject matter of the claim. In my view September 2010 accurately reflects Ms Bogie's period of employment with the College, at least for the purposes of long service leave accrual. That date should, however, be the date as reflected in the s 76 Memorandum of Agreement made under the Workers Compensation and Injury Management Act 1981, which was 22 September 2010. This was the date of Ms Bogie's letter of resignation to the College.

7 Accordingly a declaration and order now issues.

2011 WAIRC 01034

DISPUTE RE SALARY INCREMENT ENTITLEMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	WESTERN AUSTRALIAN COLLEGE OF TEACHING
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 NOVEMBER 2011
FILE NO	PSACR 34 OF 2010
CITATION NO.	2011 WAIRC 01034

Result	Declaration and order made
Representation	
Applicant	Ms D Larson and later Mr S Farrell
Respondent	Mr R Andretich of counsel

Declaration and Order

HAVING heard Ms D Larson and later Mr S Farrell on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

1. DECLARES that Ms Bogie's period of absence on workers' compensation from 22 December 2008 to 22 September 2010 be regarded as service for long service leave purposes.

2. ORDERS that otherwise the application be and is hereby dismissed.

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

2011 WAIRC 01068

DISPUTE RE SUPPLY OF ADDITIONAL WASHING, SHOWERING AND CHANGING FACILITIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF AUSTRALIA WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	CHIEF OPERATIONS OFFICER - FIRE & EMERGENCY SERVICES AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2011
FILE NO/S	CRA 16 OF 2010
CITATION NO.	2011 WAIRC 01068

Result	Discontinued
Representation	
Applicant	Mr G Geer and Ms L Anderson
Respondent	Ms G Anderson

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission listed the matter for hearing and determination on 22, 23, 29 and 30 August 2011; and

WHEREAS on 19 August 2011, and following a request from the respondent, the hearing of the matter was adjourned to dates to be fixed; and

WHEREAS on 20 September 2011 the Commission wrote to the parties about listing the matter for hearing; and

WHEREAS on 28 September 2011 the applicant advised the Commission that the matter was to be discontinued; and

WHEREAS on 29 September 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 29 September 2011 the respondent consented to the matter being discontinued;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health services Board	Harrison C	C 13/2011	17/03/2011 20/07/2011	Dispute re reinstatement of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2011 WAIRC 01072

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CORRINE ANDREW
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS THE DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S. 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENT
	SUSAN CUDLIPP
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMALLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
	MICHELLE BENN
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMALLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 25 NOVEMBER 2011
FILE NO/S	U 184 OF 2010, U 193 OF 2010, U 202 OF 2010
CITATION NO.	2011 WAIRC 01072

Result	Order issued
Representation	
Applicants	Mr M Clancy, Ms V Loveridge and Ms C Lever
Respondents	Mr M Aulfrey (of counsel), Ms K Worlock (of counsel) and Ms S Smith

Order

WHEREAS these matters are set down for hearing and determination on 5, 6, 7, 8 and 9 December 2011; and

WHEREAS on 18 and 21 November 2011 the applicants lodged applications in the Commission seeking discovery of a number of documents from the respondents; and

WHEREAS the Commission listed the matters for a conference on 24 November 2011; and

WHEREAS after hearing from the parties the Commission determined that the following orders will issue to assist the parties with the discovery of relevant documentation for the hearing of these applications;

NOW THEREFORE having heard Mr M Clancy, Ms V Loveridge and Ms C Lever on behalf of the applicants and Mr M Aulfrey and Ms K Worlock of counsel on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT by the close of business Wednesday 30 November 2011 the respondents provide to each applicant copies of three pages of notes and two CTG records with respect to the visit of the mother of the deceased infant, the subject of these applications, to King Edward Memorial Hospital on 29 April 2010.
2. THAT by the close of business Monday 28 November 2011 Mr Clancy is to provide to the respondents the date of a previous visit by the mother of the deceased infant the subject of these applications to King Edward Memorial Hospital and the respondents are to provide copies of the notes of this visit, if they exist, by the close of business Wednesday 30 November 2011.

3. THAT by the close of business Tuesday 29 November 2011 the respondents are to advise Mr Clancy if the documents listed at Point 12 of Ms Cudlipp's application for discovery with respect to the Protocol, Policy and Procedure Manual 2008 exist and if they exist the respondent is to provide copies of these documents to Mr Clancy by the close of business Thursday 1 December 2011.

4. THAT by the close of business Wednesday 30 November 2011 the respondents are to provide to the applicants the redacted documents referred to in Point 6 of Ms Cudlipp's application for discovery.

5. THAT leave is granted to each applicant to file and serve any additional witness statements with respect to a nurse overriding a Doctor's decision that a patient not have a home birth, by the close of business Tuesday 29 November 2011.

6. THAT leave is granted to the respondents to file and serve responses to any additional witness statements filed by each applicant and any notes provided by the respondent about visits by the mother of the deceased infant the subject of these applications to King Edward Memorial Hospital prior to and on 29 April 2010, by the close of business Thursday 1 December 2011.

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

2011 WAIRC 01158

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF STEPHEN ATKINSON
	APPLICANT
	-v-
	LATRO LAWYERS
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 14 DECEMBER 2011
FILE NO.	B 142 OF 2011
CITATION NO.	2011 WAIRC 01158
Result	Direction issued

Direction

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

WHEREAS the application was set down for a Directions hearing on the 12th day of December 2011; and

WHEREAS the Commission is of the opinion that the issuing of the directions will assist in the conduct of the hearing of the matter;

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

1. THAT evidence in chief for all witnesses shall be adduced by way of witness statements with any documents attached.

2. THAT no evidence in chief shall be adduced other than by witness statement without the leave of the Commission.

3. THAT the applicant file and serve his witness statements fourteen days prior to the hearing.

4. THAT the respondent file and serve their witness statements seven days prior to the hearing.

5. THAT the parties file and serve Outlines of Submissions three days prior to the hearing.

6. THAT the parties prepare a bundle of documents by consent and a Statement of Agreed Facts.

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

2011 WAIRC 01157

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF STEPHEN ATKINSON
	APPLICANT
	-v-
	LATRO LAWYERS
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 14 DECEMBER 2011
FILE NO/S	B 142 OF 2011
CITATION NO.	2011 WAIRC 01157

Result Name of respondent amended

Order

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

WHEREAS by a letter dated the 18th day of November 2011 the applicant sought to amend the name of the respondent to "Latro Southern Pty Ltd"; and

WHEREAS at a directions hearing on the 12th day of December 2011 the respondent agreed to amending the name of the respondent;

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

THAT the name of the respondent in the application be amended to "Latro Southern Pty Ltd".

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

2011 WAIRC 01085

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS PATRICIA MARGARET JONES
	APPLICANT
	-v-
	SOFTBALL WA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 29 NOVEMBER 2011
FILE NO/S	U 160 OF 2011
CITATION NO.	2011 WAIRC 01085

Result	Extension of time granted
Representation	
Applicant	Ms P Jones
Respondent	No appearance

Order

HAVING heard Ms P Jones on her own behalf and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the time within which the notice of application in the herein matter is to be filed is extended to 26 September 2011.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority Railway Employees (Network and Infrastructure) Industrial Agreement 2011 AG 25/2011	10/11/2011	The Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner S J Kenner	Agreement registered
Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 AG 24/2011	10/11/2011	the Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, WA Branch	Commissioner S J Kenner	Agreement registered
St Mary's Anglican Girl's School (Inc) (Enterprise Bargaining) Agreement 2012 AG 30/2011	15/11/2011	The Independent Education Union of Western Australia, Union of Employees AND ANOT HER	(Not applicable)	Mayman C	Agreement registered
Western Australia Police Industrial Agreement 2011 PSAAG 21/2011	7/12/2011	Commissioner of Police	Western Australian Police Union of Workers	Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2011 WAIRC 01093

APPEAL AGAINST DECISION MADE ON 16 SEPTEMBER 2010 RELATING TO UNFAIR DISMISSAL AND BREACH OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JULIE ALLDAY

APPELLANT

-v-

DEPARTMENT OF TRANSPORT

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRMAN
MR D SOLOSY - BOARD MEMBER
MR S JENKINS - BOARD MEMBER

DATE WEDNESDAY, 7 DECEMBER 2011

FILE NO PSAB 19 OF 2010

CITATION NO. 2011 WAIRC 01093

Result Discontinued

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS on 22 November 2010 the appellant's representative advised the Board that a settlement had been reached in relation to the matter; and

WHEREAS on 3 August 2011 the appellant filed a Notice of Withdrawal or Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, 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,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2011 WAIRC 01101

APPEAL AGAINST THE DECISION MADE ON 10 SEPTEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE DEVENISH
	APPELLANT
	-v-
	METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS A SPAZIANI - BOARD MEMBER
	MR J NICHOLAS - BOARD MEMBER
DATE	THURSDAY, 8 DECEMBER 2011
FILE NO	PSAB 12 OF 2009
CITATION NO.	2011 WAIRC 01101

Result Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*; and

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

NOW THEREFORE, 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.

2011 WAIRC 01056

AGAINST THE DECISION TO TERMINATE MS GAME-BOWKER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS LYNNE GAME-BOWKER
	APPELLANT
	-v-
	THE WATER CORPORATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
DATE	TUESDAY, 22 NOVEMBER 2011
FILE NO	PSAB 17 OF 2011
CITATION NO.	2011 WAIRC 01056

Result	Discontinued by Leave
Representation	
Appellant	Mr A Skinner
Respondent	Ms D Poole

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,
Commissioner.
[L.S.] On behalf of the Public Service Appeal Board.

2011 WAIRC 01041

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 01041
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD
		THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN
		MR B DODDS - BOARD MEMBER
		MR K CHINNERY - BOARD MEMBER
HEARD	**:**	MONDAY, 13 JUNE 2011, TUESDAY, 14 JUNE 2011, WEDNESDAY, 15 JUNE 2011
DELIVERED	**:**	WEDNESDAY, 16 NOVEMBER 2011
BETWEEN	**:**	GLENN ROSS
		Appellant
		AND
		MR PETER CONRAN, DIRECTOR GENERAL
		DEPT OF THE PREMIER AND CABINET
		Respondent
FILE NO.	**:**	PSAB 17 OF 2010
BETWEEN	**:**	GLENN JAMES ROSS
		Appellant
		AND
		PETER CONRAN, DIRECTOR GENERAL, DEPARTMENT OF THE PREMIER AND CABINET
		Respondent
FILE NO.	**:**	PSAB 21 OF 2010
BETWEEN	**:**	GLENN JAMES ROSS
		Appellant
		AND
		PETER CONRAN, DIRECTOR GENERAL DEPARTMENT OF THE PREMIER AND CABINET
		Respondent
FILE NO.	**:**	PSAB 22 OF 2010

CatchWords	**:**	Industrial Law (WA) – Public Service Appeal Board – Appeal against decision in relation to an interpretation of s 66 and s 102 of the *Public Sector Management Act 1994* (WA) – Conditions of employment of a public service officer whilst on secondment considered – Nature of a secondment arrangement made under s 66 considered – Agreement reached between respondent and Edith Cowan University (ECU) that the appellant would perform specified functions including research support – Other than performance of functions, services or duties whilst on secondment the appellant's terms and conditions of employment

		as a public service officer remained unchanged and he was bound to comply with s 102 where it applied – Section 102 applies to activities which are private activities and not to activities which are part of the functions of a public service officer – Appellant not required to obtain to perform approval for overseas work that was research work that was part of approved ECU research work – The meaning of engaged in or undertaking any business considered – The appellant required permission from the respondent pursuant to s 102(1)(d) or s 102(e) to perform work overseas that was not part of ECU approved research – As the appellant competently and diligently at all times carried out full-time functions as a lecturer for ECU whilst performing work overseas, it was not reasonable for the respondent to deduct leave credits for the periods of time when the appellant was overseas – Respondent entitled to deduct 15 days leave from appellant's entitlements for time not worked in ECU limited service period in 2007, 2008 and 2009 – Respondent's request for information sought in the decision given on 20 October 2010 reasonable – Appellant's functions of office as a public service officer considered
Legislation	:	*Industrial Relations Act 1979* (WA) s 80I(1)(a);
		Public Sector Management Act 1994 (WA) s 64(1), s 64(1)(b), s 64(3), s 66, s 67, s 102, s 102(1), s 102(1)(b), s 102(1)(c), s 102(1)(d), s 102(1)(e);
		Public Service Regulations 1988 (WA) reg 8.
Result	:	PSAB 17 of 2010 – Appeal upheld – decision adjusted in part
		PSAB 22 of 2010 – Appeal upheld – decision adjusted
		PSAB 21 of 2010 – Appeal dismissed

Representation:

Counsel:		
Appellant	:	Ms P J Giles (of counsel)
Respondent	:	Mr R J Andretich (of counsel)
Solicitors:		
Appellant	:	Donna Percy & Co
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 71 ALR 615

Finance Sector Union of Australia v Commonwealth Bank of Australia [2001] FCA 1613; (2001) 111 IR 241

Gothard v Davey [2010] FCA 1163

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 60 ALR 509

Minister for Education v Galipo [2001] WAIRC 2543; (2001) 81 WAIG 1145

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Case(s) also cited:

Civil Service Association of Western Australia v Commissioner Corruption and Crime Commission [2008] WAIRC 001531; (2009) 89 WAIG 3

Director General Department of Premier and Cabinet v Read [2009] WAIRC 00114; (2009) WAIG 553

Re C&T Grinter Transport Services Pty Ltd [2004] FCA 1148

Schlafrig v Payne [1999] WASCA 174

Reasons for Decision

SMITH AP:

Background

1 The appellant has filed three appeals to the Public Service Appeal Board (the Board) pursuant to s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (the Act). Each appeal is against a decision of the respondent as an employing authority in relation to an interpretation of a provision of the *Public Sector Management Act 1994* (WA) (the PSM Act) concerning the conditions of service of public service officers. By consent, the appeals were heard together. The appeals collectively raise an interpretation of s 66 of the PSM Act which provides for secondment arrangements and s 102 of the PSM Act which provides that employees are not to be employed outside of government without written permission of his or her employing authority.

2 The appellant is a public service officer. From July 2007 until 13 August 2010, the appellant worked at Edith Cowan University (ECU) pursuant to a secondment agreement made between ECU and the respondent under s 66 of the PSM Act.

3 In a letter to the respondent dated 2 February 2010, the appellant sought retrospective approval from the respondent to engage in secondary employment pursuant to s 102 of the PSM Act. Following the receival of the request, a dispute arose as to whether it was necessary for the appellant to obtain the permission of the respondent under s 102 for work carried out by him

whilst overseas and whether the appellant should be required to take annual leave for the periods of time that he carried out work overseas. A dispute also arose as to whether the appellant should be required to take annual leave over the ECU Christmas shutdown period each year whilst he was engaged on secondment at ECU. A consequence of these disputes was that the respondent did not extend the secondment beyond 13 August 2010.

4 At all material times, the appellant contends that the work that he carried out overseas was part of the duties of the position he held on secondment as an academic at ECU in the School of Law and Justice.

5 Following the termination of the appellant's secondment at ECU, the appellant sought permission from the respondent to engage in activities overseas with the United Nations Office on Drugs and Crime (UNODC) and to engage in secondary employment during leave or personal time in the two years to follow. The respondent sought further information from the appellant about the proposed work. The appellant provided some information, but refused to provide information about consultancy contracts and specific details of remuneration and other benefits that he anticipated he would receive. In light of this response, the respondent refused permission on 20 October 2010 for the appellant to engage in those activities. The respondent, however, informed the appellant that if he did wish to obtain approval he should provide the information requested and an undertaking that he would not hold himself out to be representing the government or the Department of Premier and Cabinet (DPC) and would not use any official information, equipment or facilities in the activities unconnected with his employment.

The appeals

6 PSAB 17 of 2010 seeks to challenge the respondent's decision to require the deduction of annual leave credits in respect of activities undertaken by the appellant overseas that were set out in the letter by the appellant to the respondent dated 2 February 2010. PSAB 22 of 2010 is an appeal against the decision by the respondent conveyed to the appellant by email on 4 June 2010 to require him to take paid leave while undertaking work overseas in July 2010. Both PSAB 17 of 2010 and PSAB 22 of 2010 are appeals in relation to the interpretation of s 66 and s 102 of the PSM Act.

7 PSAB 21 of 2010 is an appeal against the decision of the respondent solely in relation to the interpretation of s 102 of the PSM Act. It is an appeal against a decision of the respondent on 20 October 2010 to refuse permission to engage in overseas work as a criminal justice consultant.

Terms of conditions of secondment to ECU

8 Pursuant to s 66 of the PSM Act, with the consent of a public service officer, the respondent as an employing authority is empowered to enter into an arrangement in writing with an employer outside the public sector for the secondment of the public service officer to perform functions or services for, or duties in the service of, the employer during such period as is specified in that arrangement.

9 In 2006, the appellant was employed by the Corruption and Crime Commission (the CCC) and was in dispute with the CCC about the classification of a position held by him. During that time the appellant was on leave and undertook voluntary work at ECU in the School of Law and Justice for the purpose of giving him something to do. At about that time he was appointed as a non-salaried Adjunct Professor. Prior to this time, he had engaged in lecturing at ECU from time to time.

10 On 1 September 2006, the appellant made an application to the CCC for permission to engage in secondary or private employment pursuant to s 102 of the PSM Act. The proposed position and role was consultant or occasional lecturer. That application was approved by the CCC on 7 November 2006.

11 In early 2007, the appellant was returned to the public service when he accepted a position under protest with DPC at level 7.3. The appellant was in dispute with DPC about this level of classification. He was appointed to an unattached position without duties. The respondent anticipated at that time that the appellant would be transferred or redeployed to another agency to a position for which he was qualified.

12 The Civil Service Association of Western Australia Incorporated bought an action on behalf of the appellant in an attempt to deal with some of the issues that the appellant was in dispute with the CCC. Unfortunately, the appellant's health suffered during 2006 and 2007 as a result of his disputes and for a large part of that time until the secondment to ECU he was on administrative leave.

13 In May 2007, DPC began negotiating a secondment arrangement for the appellant with ECU.

14 On 14 May 2007, Maria Sandercott, Acting Human Resource Consultant from DPC, sent an email to Professor Mark Stoney who was the Head of School of the School of Law and Justice at the Faculty of Business and Law at ECU, in which she said (exhibit A – GR 12):

> As discussed this morning, the Department of the Premier and Cabinet (DPC) would like to offer the services of Mr Glenn Ross to ECU for a period of six months commencing as soon as possible. DPC would fund Mr Ross' placement and not seek recoup from ECU.
>
> Can you please initiate discussions with your HR section to enable this placement and I will seek approval from our Director General. I will be in contact once approved.
>
> Please contact me on 9222 9518 should you require any further information.

15 On 28 May 2007, Ms Sandercott again sent an email to Professor Stoney asking (exhibit A – GR 13):

> How are you? I'm just following up on the proposed secondment of Mr Glenn Ross to ECU.
>
> Are you able to provide me with an outline of work that Mr Ross is currently undertaking or would be undertaking if the secondment was approved?

16 In response, Professor Stoney said in an email sent by him to Ms Sandercott on 29 May 2007 (exhibit A – GR 13):

> Thanks-I spoke with Glenn a few days ago as I was getting the documentation for his appointment arranged with ECU HR - he advised me to 'hold' for the moment as there were a number of other avenues being explored (I thought by you). As previously advised, the School of Law and Justice would be very pleased to engage Glenn as discussed.
>
> Glenn would be engaged in the development and delivery of a number of units in our undergraduate and post graduate programs on criminology and justice investigations and intelligence. Glenn would also provide support and guidance (supervision) to our masters and honours students. Glenn would also be asked to provide research support in our various research projects and grants.
>
> Where do we go from here? I await your advice and Glenn's advice.

17 Prior to the secondment arrangement being agreed to, the appellant wrote to the then Director General of DPC, Mr Wauchope, on 6 June 2007, seeking approval under s 102 of the PSM Act to engage in secondary employment. In his letter he stated (exhibit 4 – GM 201):

> In accordance with s. 102 of the Public Sector Management Act 1994, I apply for permission to engage in secondary employment.
>
> I have an existing approval to undertake secondary employment granted on 1 September 2007 by the Corruption and Crime Commission. On the basis of that approval I entered into an agreement with Edith Cowan University to deliver lectures and to undertake the associated marking and assessment activities during semester 1 of 2007. The lectures were delivered in evening classes during my own time, as was the marking of assignments, etc. I was paid for this employment.
>
> I have also undertaken to co-develop a new unit of study and to co-deliver the unit through recorded audio-visual means during semester 2 of 2007. The work associated with developing and recording these lectures is to be undertaken after hours during my own time. I am to be paid for these services.
>
> Your approval is sought for this secondary employment.

18 On 13 June 2007, Mr Wauchope granted approval to the appellant to undertake course co-development and delivery in semester 2 of 2007 for ECU (exhibit 4 – GM 202):

> Thank you for your letter of 6 June 2007 seeking approval to undertake course co-development and delivery in semester 2, 2007 for the Edith Cowan University. In accordance with Section 102(1)(e) of the *Public Sector Management Act 1994*, public officers are required to seek approval to accept or engage in external employment for reward.
>
> I am satisfied that this part-time employment as a course developer and deliverer, to be undertaken outside your normal hours of duty should not create an actual, potential or perceived conflict of interest with your Departmental responsibilities, and is unlikely to be detrimental to your work performance. Accordingly, I am pleased to approve your request.

19 In the meantime, ECU took steps to formalise the secondment arrangement between DPC, the appellant and ECU.

20 On 23 May 2007, the Manager Faculty Operations at the Faculty of Business and Law at ECU, sent to Professor Stoney a draft letter of secondment to be sent to the appellant and a proposed secondment agreement. The draft letter stated (exhibit A – GR 15):

> Further to our ongoing discussions on the subject of your secondment to Edith Cowan University as Lecturer of Criminology and Justice I am now writing to confirm the basis for the secondment and how this will work.
>
> The secondment will commence on 04/06/07 for a period to 30/11/07. During your secondment you will report directly to me. Early termination of this secondment can be brought about by either party or yourself subject to providing 4 weeks notice.
>
> The Department of Premier and Cabinet will pay your salary and other employment benefits during your secondment to Edith Cowan University.
>
> Should the terms of the secondment alter from any outlined in this letter, the terms and conditions agreed in the secondment agreement will override this letter.
>
> It has been agreed between the Department of Premier and Cabinet and Edith Cowan University that you maybe [sic] required to return to the Department of Premier and Cabinet in order to attend training events or organisational meetings on occasions. On such occasions your line manager will contact you in good time in order to minimise any inconvenience this may cause.
>
> Whilst on secondment, you are expected to adhere to the ' legislative requirements, process and practices' of *Edith Cowan University*. In addition you are required to abide by *Edith Cowan University* confidentiality policy, the purpose of which is to protect the misuse of information which may be considered sensitive or confidential in nature. Where any breach of this occurs this could lead to early termination of the secondment.
>
> We see this as a great opportunity and look forward to working with you. To indicate your acceptance of this offer of secondment and the conditions contained in the Terms and Conditions outlined in the Secondment Agreement. Please sign and date a copy of the Secondment Agreement and return to me.

21 On 18 June 2007, the appellant informed Elizabeth Delany at DPC in an email that Associate Professor Stoney had given him a number of documents to look at and sign regarding commencing a secondment at ECU (exhibit A – GR 14).

22 On 19 June 2007, the appellant advised Ms Delany that he was happy with the secondment arrangements as proposed by ECU (exhibit A – GR 16).

23 On 20 June 2007, Mr Wauchope sent to Professor Stoney a letter confirming the placement of the appellant on secondment. The letter stated (exhibit 4 – GM 203):

> I am writing to confirm the placement of Mr Glenn Ross to Edith Cowan University. Mr Ross is a Level 7 officer employed under the Public Service General Agreement 2006.
>
> The placement will be for the period 21 June 2007 to 30 November 2007.
>
> It is agreed that the Department of the Premier and Cabinet continue to be responsible for Mr Ross' salary for the duration of the placement. In accordance with the Agreement Mr Ross will be required to work 7.5 hours per day, 75 hours per fortnight. It would be appreciated if all leave requests for Mr Ross be forwarded to this office.
>
> This Department will write to Mr Ross to confirm these arrangements.
>
> If you have any queries regarding this matter, please contact Ms Carissa Griffiths on 9222 9628.
>
> I thank you for your assistance in this matter.

24 On 2 July 2007, Ms Delany sent a letter to the appellant in which it was stated (exhibit A – GR 17):

> I am pleased to advise that approval has been given for your placement to Edith Cowan University.
>
> The placement will be for the period 21 June 2007 to 30 November 2007.
>
> The Department of the Premier and Cabinet will continue to be responsible for the payment of your salary and maintenance of your leave entitlements for the duration of the secondment.
>
> Whilst on secondment your continuity of service and tenure of employment will be maintained.
>
> Should you agree to the above conditions in relation to your secondment, please sign the attached duplicate letter and return to the Human Resource Services Branch.
>
> If you have any queries regarding this matter, please contact Ms Carissa Griffiths, on 9222 9628.

25 The appellant in his witness statement said that he had no recollection of signing the secondment agreement document prepared by ECU and attached to exhibit A – GR 15, but contemporaneous documents indicate that he did sign it. However, the evidence before the Board indicates that DPC were not aware of the ECU secondment agreement until sometime in early 2010 and there is no evidence before the Board that anyone from ECU or DPC signed the document.

26 The initial secondment was for a period from 21 June 2007 to 30 November 2007. Towards the end of this period further extensions were agreed to by the parties for the arrangement to continue. Whilst further letters were sent regularly at six monthly periods to confirm the extensions of the secondment arrangement, no substantially new terms were sought to be introduced in the letters that were sent from DPC to ECU or to the appellant.

27 The secondment was bought to an end on 13 August 2010 by the respondent. At that time, the appellant was required to return to DPC.

Overseas work performed by the appellant during 2009 and 2010

28 The respondent, Peter Francis Conran, the current Director General of DPC, gave evidence that in December 2008 Mr Mick Palmer, the Commonwealth Inspector of Transport Security, telephoned him. At that time Mr Palmer was undertaking a consultancy with the Commonwealth Department of Infrastructure. Mr Conran and Mr Palmer had had a long association of over 30 years. During the telephone conversation, Mr Palmer asked Mr Conran whether it would be possible to second the appellant to the Commonwealth for two to four weeks to assist in conducting a Federal government review. On 2 January 2009, Mr Conran received an email from Mr Palmer formally requesting the approval of the release of the appellant from his present duties at the expense of the Commonwealth to assist in an inquiry which he (Mr Palmer) had been directed to conduct by the Federal Minister for Infrastructure, Transport, Regional Development and Local Government. The review was into the procedures, systems and security arrangements governing the handling of a government green paper. The review was to be confined to inquiries within the Minister's Office and his Department and was to take two to four weeks. In the email, Mr Palmer also informed Mr Conran that he understood that the appellant was presently attached to DPC but was on secondment to ECU, but that tentative contact had been made with the appellant who had indicated he was willing to assist and that the appellant's Head of School had supported the appellant's involvement.

29 On 8 January 2009, Mr Conran responded to Mr Palmer's request by email and advised that he approved of the arrangement and said 'my people are doing the paper work now'.

30 The appellant gave evidence that whilst working on the inquiry with Mr Palmer he continued to fulfil all of his ECU student contact duties and his involvement in the inquiry took him to Brisbane on several occasions and to Canberra more than once.

31 On 4 February 2009, Mr Palmer wrote to Professor Stoney to thank him for his willingness to second the appellant to assist in the conduct of the inquiry. In the letter he also asked Professor Stoney about the possibility of drawing upon the appellant's research and report writing skills as part of a fresh inquiry into International Piracy and Armed Robbery at Sea Security, the impact or potential impact on maritime shipping and trade to and from Australia and the possible options for improving effectiveness of security practices and arrangements and increasing the safety of ships and crew. In this letter, Mr Palmer said that:

(a) he thought the nature and the extent of the required research whilst critical to the inquiry had the potential to also be of benefit to ECU and would provide the appellant with an expanded network of scholars, international and Australian stakeholders and practitioners who are involved in issues relating to piracy, organised crime and terrorism;

(b) from a personal perspective he regarded the appellant as a person of integrity and capacity and to be a valued member of an inquiry team of this nature and that much of the research could be conducted in situ;

(c) he anticipated that the appellant's participation could involve brief absences from the university over the next eight to nine month period; and

(d) he contemplated that the appellant's involvement would only be part-time and would be on the basis the appellant would be able to balance his responsibilities at ECU with the demands of the inquiry.

32 It seems, however, that Mr Palmer did not raise with anyone from DPC as to whether the respondent would agree to the appellant's participation in this inquiry.

33 As a result of this work, the appellant visited Kenya to identify opportunities for Australia to increase its involvement as a member of the international community. He also travelled to Brisbane and Canberra in connection with this inquiry.

34 The appellant's interests in the issue of piracy did not finish at this time and have remained ongoing. He continued his involvement with the Office of Transport Security and says he has continued to provide information to Mr Palmer from time to time.

35 As a result of this work, the appellant came into contact with UNODC. In an email that Mr Palmer sent on 5 May 2009 to a number of people whose identities are immaterial to these appeals, Mr Palmer indicated that the lead agency for combatting piracy was UNODC and UNODC was establishing a program in Kenya. In particular, Mr Palmer said (exhibit A – GR 21):

> To allow an assessment to be made of the feasibility of the Kenyan police training initiatives I am sending Peter Pearsall and a member of the ITS Expert Panel, Mr Glenn Ross who is highly experienced in anti corruption inquiries and prison management, to Kenya this coming Saturday to meet with Alan Cole (who has requested our attendance at a meeting next week which he is holding with Kenyan Officials to determine the nature and scope of the UNODC assistance package to Kenya) and with representatives from the Interpol Regional Central Bureau in Nairobi and the Kenyan Maritime Police in Mombasa.

36 Stemming from his work with the piracy inquiry with Mr Palmer, the appellant was requested by UNODC to provide some assistance to them with prison assessments in East Africa. The appellant was also asked by UNODC that if payments were to be made for the prison assessments, would he be able to accept such payments. The appellant told UNODC he would have to take advice on the matter, which he did. He spoke to Professor Stoney who explained to him that ECU encouraged academics to be involved in external consultancy projects and that the ECU Consultancy Policy enabled the acceptance of consultancy fees for the reasons identified in that policy.

37 The ECU Consultancy Policy provides that an employee may provide services as consultants to bodies external to the university on a paid basis, subject to approval being granted (exhibit A – GR 23). In particular, cl 4.7 of the policy relevantly provides:

> **Submission of Institutional Consultancy Proposal**
>
> Prior to granting approval, the instigator for the Institutional Consultancy shall provide the following documentation:
>
> 4.7.1 Statement of the consultancy service to be provided;
>
> 4.7.2 Details of employee time/hours to be allocated to providing the service;
>
> 4.7.3 Copy of the Contract;
>
> 4.7.4 Budget and details of distribution/allocation to the individual;
>
> 4.7.5 Itemization of University resources to be used;
>
> 4.7.6 Proposed timelines;
>
> 4.7.7 Details of any quality/OSH/Risk assurance procedures and/or compliance requirements (including approval by the University's Human Research Ethics Committee or Animal Ethics Committee if required); and
>
> 4.7.8 Any other document as requested by the delegated authority.

38 On 10 June 2009, the appellant sent an email to Professor Stoney stating he was confirming an earlier discussion that he had accepted a short term consultancy with UNODC to assist them in an aspect of their Counter Piracy Program. He said his involvement would be reviewing a number of prisons where pirates are being held with a view to having the prisons meet UN minimum standards. He was to depart for Kenya on 4 July 2009 where, together with UNODC officials, he would visit four prisons. Then he would go to the Seychelles to visit their prison and undertake a training needs analysis for their probation and parole service and return to Australia on 15 July 2009. He advised Professor Stoney that during his physical absence he would remain in telephone and email contact and that he did not expect that his role at ECU would suffer unduly (exhibit A – GR 24). Whilst the appellant was absent from Australia during that period of time he received a daily subsistence allowance from UNODC. During this period he 'fed' information back to Mr Palmer's office during this and subsequent periods overseas.

39 Shortly after the appellant returned to Australia he was contacted again by UNODC and was requested by them to assist in the conducting of training in Kenya for members of the judiciary, prosecutors, police and prison personnel from 25 July 2009 to 31 July 2009. He subsequently attended Kenya between those dates and received a daily subsistence allowance for this period. Again he spoke to Professor Stoney about his involvement prior to his participation.

40 On another occasion the appellant was requested by UNODC to attend the Seychelles to provide advice on criminal justice matters. The work arose from a request of the British High Commissioner to the Seychelles. Consequently, the appellant left to go overseas on 15 September 2009 and returned on 22 October 2009. Again he received a daily subsistence allowance for this work. Whilst away he provided criminal justice capacity building advice in Kenya, the Seychelles and Mauritius. Whilst

he was overseas he was contacted by the British Foreign and Commonwealth Office and asked if he could undertake an assessment of the immigration facilities at the international airport in Nairobi, which he did. This work resulted in him attending the 2009 International Corrections and Prisons Association Conference in Barbados in October 2009 where he delivered a presentation on Somali piracy. He paid accommodation and conference fees himself to attend this conference. Several weeks later he delivered a similar presentation in Perth at the Australian and New Zealand Society of Criminology Conference which was held at the University of Western Australia.

41 The appellant carried out further work in Kenya and the Seychelles in January 2010.

42 During 2009, the appellant began exploring research potentials in Kenya. By 2 September 2009, and after a period of developing relationships, the appellant took steps to secure funding to enable the research to continue, including an application to the Australian Government Research Support for National Security 2009/2010. He also sought and obtained the involvement of UNODC and the Inspector of Transport Security as industry partners.

43 In January 2010, the appellant made an application to the ECU Ethics Committee for approval to undertake specific research in Africa with Somali pirates. In the application, the appellant was described under the heading 'Experience of Researchers' as a Chief Investigator along with Dr Pamela Henry from ECU. The appellant was also described as a person who lectures postgraduates at ECU Joondalup and (exhibit A – GR 30) and as:

> [A] consultant to the United Nations Office of Drugs and Crime Counter Piracy Program and is seconded to the Inspector of Transport Security Inquiry into Piracy and Armed Robbery at Sea. He holds an extensive career developing correctional facilities within Australia and abroad and also participated in the establishment of the Corruption and Crime Commission of WA.

44 The appellant presented his proposal at the ECU Ethics Committee on 5 March 2010. The committee was chaired by Professor Stoney and research approval was granted. The approval period for the research was from 8 March 2010 to 1 December 2010. On 1 April 2010, the appellant wrote to Mr Palmer and provided an update of the work that was being conducted. He told Mr Palmer that the next phase of the project was to develop the interviewing tools that would be used as a basis for information collection. This was to be undertaken in Kenya with UNODC. He also advised Mr Palmer that he would be in Kenya from 12 April 2010 to 23 April 2010 to co-ordinate the development of the tools and the refining of methodological/logistical issues prior to piloting the instrument with the 19 currently convicted Somali pirates (exhibit A – GR 31).

45 The appellant also travelled to Kenya from 7 June 2010 to 25 June 2010 to conduct research with the Somali pirates. On that occasion, he travelled with Dr Karine Hamilton and he made a specific travel approval request to ECU for that travel with Dr Hamilton, because Dr Hamilton's expenses were being paid for by ECU. This was the only occasion on which the appellant made an application to the ECU for travel approval.

DPC's knowledge of the appellant's work overseas

46 Apart from the secondment to the Australian Federal Government in January 2009 for a period of four weeks, from June 2007 until early 2010, DPC had little knowledge of the appellant's activities.

47 In early 2010, Mr Conran spoke with Mr Palmer by telephone. During the conversation Mr Palmer informed Mr Conran that the appellant had been engaged in work with UNODC and other sovereign governments in Africa providing consultancy advice, training in prisons and working with Somali pirates.

48 As a result of the conversation Mr Conran had with Mr Palmer, Mr Gregory John Moore, the Assistant Director General, State Administration and Corporate Support in DPC, sent an email to the appellant on 1 February 2010 (exhibit 4 – GM 208). At that time, Mr Moore was concerned that since June 2007 the appellant had only applied for 12 days of annual leave. In the email to the appellant on 1 February 2010, Mr Moore raised with the appellant that DPC policy requires all staff of the Department to clear at least four weeks' leave every calendar year, and to have no more than 17 weeks' accrued leave as a maximum. He also pointed out that the appellant currently had over 46 weeks of leave and he had not made an application for leave since October 2008. Mr Moore informed the appellant he needed to address the leave issue promptly and he was aware that ECU had closed from 24 December 2009 to 8 January 2010 and he thought that 'supposedly' all staff were on leave. Mr Moore also raised with the appellant in the email that information had come to hand that indicated that the appellant had been doing some paid work for UNODC and that if this was so, there did not appear to be a request to the Director General for approval to undertake such work in accordance with s 102 of the PSM Act. Mr Moore asked the appellant to also address that issue on an urgent basis.

49 The appellant responded to the issues raised by Mr Moore the next day by sending a letter to Mr Conran. In the letter he stated as follows (exhibit A – GR 35):

> Pursuant to s. 102 of the PSM Act, I hereby make (belated) application for approval to engage in secondary employment. I apologise for this lateness as I was under the misapprehension that while at ECU I needed to comply with the requirements of the ECU Act and the policy and procedures there under. This stemmed from my experience at the CCC where seconded staff are required to comply with CCC conditions of employment, which are different to those of the pubic (sic) service. In any event, I advise as follows.
>
> During my involvement in the piracy inquiry undertaken by Mick Palmer, of which you were aware, I was requested by UNODC East Africa to assist them by undertaking an assessment of Shimo la Tewa Prison in Mombasa, which I did.
>
> Subsequently I have been contacted a number of times and asked to provide further assistance. On the first such occasion I raised this matter with Professor Stoney at ECU and he felt that such an engagement was within the broad role of a senior academic – the position I was filling. He further advised that here [sic] were no difficulties in accepting payment and that there was ample precedent to this effect. He cited further benefits likely to accrue to the university through my involvement in this international work.

To date I have been absent for the following periods:

1.	06.07.2009 - 16.07.2009	prison assessments Kenya
2.	25.07.2009 - 31.07.2009	delivery of training program in Kenya
3.	17.08.2009 - 21.08.2009	provision of advice to Seychelles government
4.	15.09.2009 - 22.10.2009	support to Kenya prisons, delivery of training at IMO delegates in Seychelles, provided advice to the Mauritius government
5.	26.10.2009 - 30.10.2009	delivered paper at conference in Barbados
6.	02.12.2009 - 18.12.2009	support to Kenya prisons, Seychelles criminal justice program, prison assessment Mauritius and delivery of training
7.	25.01.2010 - 12.02.2010	support to Kenya prisons, advice to Seychelles government.

I did receive payment for the first period and daily subsistence allowance for periods 1-5. I am however hopeful that at some point there will be consideration of further payment for my involvement.

While undertaking these activities overseas, I have at all times carried out my required work load at ECU. This has been made possible as:

- The course work units I deliver are for post-graduates who are not on campus and who I communicate with by email and phone in any case;
- I supervise my research students by email and occasionally on campus; and
- I continue to develop research topics and conference papers whether in Australia or overseas.

I believe that my reputation as a criminologist has been enhanced by this international work. Just today I was asked by the Kenyan Anti-Corruption Commission if I could present at a conference in April of this year. I have accepted this invitation but have declined their offer of payment of a speaker's fee.

I would be happy for you to speak with Professor Stoney regarding both my contributions to the school and the academic value of the work I have been involved in overseas. I would also welcome the opportunity to make a presentation to yourself or other interested parties of the work I have been doing and the research generated. (footnotes omitted)

50 The assessment of the appellant's request for approval for secondary employment was referred to Mr Kenneth Allan Jones who is the Principal Project Officer and Senior Integrity Officer for DPC. His role is to provide advice to the Director General of DPC on the application of s 102 of the PSM Act, the Public Sector Code of Ethics and DPC's Code of Conduct. When Mr Jones received the appellant's request for approval, Mr Jones sent an email to the appellant on 15 February 2010 requesting further information to enable him to assess the s 102 request. In the email Mr Jones stated (exhibit A – GR 36):

The Department's Code of Conduct (attached) specifically requires officers to seek the Director General's approval before engaging in external employment for reward. This is to ensure that conflicts of interest are minimised, and that officers on the public payroll and [sic] not receiving remuneration as a public officer whilst at the same time earning additional income as a private individual. Therefore, DPC officers engaging in activities unconnected with their employment during normal working hours are required to take leave whilst engaging in those activities.

Whilst I note your advice that your engagements for UNDOC [sic] have some connection to your Edith Cowan responsibilities and the university supported your participation, as a seconded officer paid by this Department, your principal obligations are to the Director General of DPC who is your employer. These assignments have no relevance to your DPC functions, and consequently, unless otherwise approved by the Director General as a formal secondment to UNDOC [sic], you are required to take leave for each and every assignment taking place in normal work hours for which you received your normal salary.

To assist in me completing the assessment of your request, could you please advise:

1. Whether you applied for leave to undertake the assignments from UNDOC [sic] - while your Departmental leave records do not show any leave for the periods or absence in your letter of 2 February 2010, I am aware that it appears that some level bookings e-mailed to DPC may have gone astray and that you are providing further details to the Department?
2. What if any payment did you receive for undertaking these assignments (your letter indicates that you were paid for the assignment in July 2007 to assess prisons in Kenya)?
3. How much per day were you paid for the 'daily subsistence allowance' that applied to assignments 1-5? In this regard, I assume that UNDOC [sic] also paid your travel and accommodation expenses?

51 The appellant gave evidence that when he received Mr Jones' email he found Mr Jones' comments that the assignments have no relevance to his DPC functions to be somewhat strange as he did not have and never had had any functions at DPC as he had never been given any duties by DPC. Also, he was of the opinion that the terms of his secondment under s 66 of the PSM Act to ECU required that he perform functions and services for ECU and not the home agency.

52 In any event, the appellant replied to Mr Jones by email on 15 February 2010 (exhibit A – GR 37). In this email he said that his duties at the university include delivery of course work units, development of course work material, supervision of research students and undertaking research. In particular, he said that the course work units that he delivers are a postgraduate level and have no class or tutorials on site at the university. Rather, the course work is internet based and students work on the material

at times suitable to themselves – most usually after hours and on weekends. To accommodate this requirement he worked during those 'out of hours' times and was available to students. He also informed Mr Jones that whilst overseas the time zone differences mean that he is available to deal with student issues quite late into the evening and morning. He also said that he was of the opinion that the entirety of the work that he did at ECU had no relevance to DPC functions and that the work that he carried out with the UN was entirely relevant to the functions of ECU. He also provided Mr Jones with examples of how he saw this work to be relevant to the functions of ECU as follows (exhibit A – GR 37):

> During my recent visit to the Seychelles I met with the Special Advisor to the President. The government of the Seychelles had entered into an agreement with ECU for the delivery of pre-primary, primary and secondary teaching training and, through me, ECU has been asked to develop a proposal for the development of an agreement for the delivery of training to police, military police, coast guard, prison staff and national parks rangers. I also met with the Chief Justice and the Minister responsible for the prison service and outlined a number of criminal justice reform measures that the Seychelles need to undertake to get into step with international standards. I believe that the Seychelles government is appreciative of the advice I have provided.
>
> During my recent visit to Kenya I was invited to meet with the Kenya Anti-Corruption Commission to discuss anti-corruption activities. Stemming from this I have been invited to make a presentation at a series of four anti-corruption conferences across Kenya. The basis of my presentation will be the work I have been undertaking with one of my research students concerning powers and functions of anti-corruption agencies necessary to achieve good practices. I am also undertaking joint research with the Kenya Department of Corrections and have returned with the medical reviews on 100 Somali pirates held on remand and the same review of 100 non-pirate remandees. The outcomes of the analysis of these reviews is important to the EU and UN due to concerns that prisons in Kenya may not meet international standards thereby throwing into jeopardy the current arrangement for pirates captured by EUNAVFOR warships, NATO and CTF 151 to off-load pirates in Kenya. I have also agreed to participate in further research in the prison system related to juvenile sex offending populations, and reproductive health issues for female offenders. I have also entered into an agreement with the Chief Magistrate to undertake an evaluation of a remand review programme, a bail review programme, fine payment scheme and a court improvement programme. I also await ethics committee approval to commence to interview the Somali pirate population to determine a range of factors to do with demographic and social measures and, importantly, motivation issues to become a pirate. This research is being undertaken jointly with the UNODC and I believe that this research will be of interest to ASIO and the US State Dept, both of whom are aware of it.

53 In answer to the three questions asked by Mr Jones, the appellant said on 15 February 2010 that he had not applied for leave during the periods when he undertook the assignments with UNODC as he continued to perform his ECU duties. In relation to the request for information about the amount received as a daily subsistence allowance, the appellant simply said that he did not see that this information was relevant and asked how this information might affect a decision to grant or not grant approval. He also asked which of the following three criteria set out in the Code of Conduct under cl 6.5.1 was relevant to the decision. The Code of Conduct criteria for assessment of applications under s 102 requires the following matters to be considered:

(a) Possible detrimental effect on an officer's efficiency.

(b) Inconvenience to the Department.

(c) Whether the employment would give rise to an actual, potential or perceived conflict of interest.

54 The appellant also said in his email on 15 February 2010 to Mr Jones that he could not identify any conflict of interest, actual, potential or perceived in carrying out this work.

55 Two days after Mr Jones had received the appellant's email, Mr Jones telephoned Professor Stoney to seek further general information about the appellant's engagement in overseas activities with UNODC and to ascertain whether those activities had been approved by ECU and whether the activities were consistent with those for other academic staff. While Mr Jones was talking to Professor Stoney he typed what he described as 'key dot points' and when the conversation was finished he converted these to a file note of the conversation. The file note records the following (exhibit 2 – KJ 4):

> Contacted Professor Mark Stoney at Edith Cowan University on 17 February 2010 to seek further information on Mr Ross' application for approval to engage in activities unconnected with his employment (section 102), and other questions arising from his retrospective application.
>
> Professor Stoney confirmed that he had no objection to Mr Ross accepting assignments with UNODC, and while Mr Ross makes a substantial contribution to his Department, the benefits from his engagement in prison reviews and similar in Africa are of little practical value to ECU. Professor Stoney was unaware that Mr Ross had not sought approval from DPC, and agrees that Mr Ross is obligated to comply with DPC requirements rather than ECU's. When asked directly whether he would approve such absences for his staff (Mr Ross seems to suggest that this is commonplace ain [sic] academia), Professor Stoney stated that he would not have approved such significant absences for his staff. In Mr Ross' case, he recognised that he was pursing [sic] a personal interest that might lead to a new career (although in Professor Stoney's view, if Mr Ross wants a career at ECU, there are many other things that he could do to improve his prospects).
>
> Professor Stoney was surprised when I informed him that Mr Ross' correspondence showed he had been overseas for 80 working days since 1/7/2009 (ie in excess of 3 months). Professor Stoney agreed that Mr Ross should take leave for the time that he was away. In general discussion, Professor Stoney also confirmed that the university closed over the Christmas/New Year period, and that most recently, his staff were on compulsory annual leave from 24/12/2009 – 8/1/2010 - in his opinion, Mr Ross should also have been on leave at the same time.
>
> With regards to Mr Ross' assertion about being available to students outside normal working hours, Professor Stoney advised that academic staff are expected to be available outside normal working hours and this is recognised in more generous leave arrangements and an emphasis on meeting deadlines, deliverables and student outcomes rather than time and attendance. This enables them to have very flexible working arrangements (other than up front lecture time) and

means that they regularly work from home, and at times that suit them. His view was that so long as they deliver the education programs effectively, he is not concerned about the number of hours that people work. However, Professor Stoney felt that Mr Ross's assertion that he was able to effectively service his students whilst in Africa was dubious given the poor standard of telecommunications in third world countries.

56 Mr Jones acted on the information recorded in the file note and provided to Mr Conran on 18 February 2010 a number of conclusions he had reached in respect of his assessment of the appellant's application to engage in secondary employment. In the advice to Mr Conran, Mr Jones stated (exhibit 2 – KJ 5):

(a) It was evident that the work engaged in by the appellant for UNODC in Kenya, the Seychelles and Mauritius had been undertaken during normal working hours and resulted in the appellant's absence from the workplace.

(b) The appellant's assertions that consistent with other ECU employees, he was available to students after hours and at weekends and continued to be whilst overseas, and that ECU would not require others to take leave in similar circumstances was not consistent with advice received from Professor Stoney.

(c) Whilst Professor Stoney was aware of the appellant's engagement with UNODC and approved the same, the work was of minimal benefit to the university other than its potential for research possibilities. Professor Stoney believed that these engagements were more about the appellant pursuing his passion than advancing the interests of ECU per se.

(d) Professor Stoney confirmed that he would not have approved similar arrangements for his staff. However, he indicated the appellant was providing useful information to ECU and to his study area.

(e) It is unlikely there was any conflict of interest between the appellant's UNODC assignments and his official responsibilities. Yet, it was clearly inappropriate to have been paid his normal salary while absent from work unless he was on approved leave.

(f) The appellant should be instructed to submit leave applications for the days that he was absent whilst on overseas assignments.

(g) The appellant should be required to clear leave over the Christmas/New Year period as other ECU staff were not required to work during this period, and that Professor Stoney had advised that his staff were on annual leave during this period and considered it would be appropriate that the appellant be on leave at that time unless he had made other arrangements with DPC.

(h) The appellant should be instructed that he is required to formally seek the approval of the Director General in future in advance of any engagement by UNODC or any other organisation, and that if approved, he will be required to take leave for the duration of the assignment.

(i) The appellant had declined to provide details of remuneration received from UNODC as the appellant did not consider it to be relevant. As he (Mr Jones) could not find any policy or legislative basis on which they might require the appellant to provide this information, to avoid a protracted debate, he had chosen to leave that issue to one side for the present.

57 On 18 February 2010, Mr Conran sent the following letter to the appellant (exhibit 2 – KJ 6):

> Thank you for your e-mail correspondence of 2 February 2010 seeking retrospective approval pursuant to Section 102(1) of the *Public Sector Management Act 1994* (the Act) for several engagements by the United Nations Office of Drugs and Crime (UNODC) to undertake work on their behalf overseas, principally in Africa. In this regard, I note that your advice that you sought and received Professor Stoney's approval to undertake the first of these assignments and have operated under that arrangement since. While appropriate to seek his approval, as you continue to be an employee of the Department of the Premier and Cabinet, you should also have sought my approval for each and every engagement.
>
> Your correspondence identifies seven periods of absence whilst on engagement to UNODC totalling approximately 80 working days. As advised by Mr Jones, I consider that it is inappropriate for an officer to be paid when absent from the workplace unless on approved leave or some other approved purpose such as professional development. In my view, your engagement with UNODC was not an approved purpose in this context and accordingly, you are required to submit either annual or long service leave applications for the periods of absence disclosed in your letter of 2 February 2010. I understand that DPC's HR branch recently supplied you with a soft copy of a leave application and look forward to receiving these applications in due course.
>
> While it appears that the engagements with UNODC in activities unconnected with your function already undertaken do not seem to have created a conflict of interest with your Departmental responsibilities, before accepting any future engagement by UNODC or any other organisation, you are required to formally seek my approval. To enable proper consideration of each request, you should provide details of the assignment, its duration, ECU's endorsement and what if any remuneration is to be provided. If approved, you will be required to take leave for the duration of any engagement. Although the potential for a conflict of interest (perceived or actual) between these assignments and your official responsibilities is remote, you should be aware that it is your responsibility to promptly disclose any conflict of interest that may arise from this external activity.

58 On 24 February 2010, the appellant wrote to Mr Conran asking him to reconsider the decision given on 18 February 2010 and stated that whilst he was absent from Australia he continued to fulfil all of his responsibilities to ECU and that he had been informed by Professor Stoney he was able to accept payment for work for UNODC (exhibit A – GR 41). He also said in the letter to Mr Conran that his work overseas had led to the development of a number of research topics that he was anxious to continue and to further develop the school's international teaching program. In the letter he also requested approval to engage in paid secondary employment during 2010. He said that UNODC had requested that he enter into an agreement to provide advice and counsel to UNODC staff and law enforcement practitioners in a number of African countries and that this work

could run through until 31 May 2010. He informed Mr Conran that he had already accepted this offer and sought advice as to whether he could continue with this work or not. He said the work did not require his presence in Africa and could be provided from Western Australia without any disruption to his responsibilities at ECU. He also stated that to the best of his knowledge his agreement with UNODC would not cause any possible detriment to his efficiency, inconvenience the Department or ECU in any way, or give rise to an actual, potential or perceived conflict of interest. He also sought clarification as to whether he could proceed with his acceptance of an invitation to participate (unpaid) in a series of conferences commencing in March 2010 being held across Kenya by the Kenya Anti-Corruption Commission, and whether it was necessary to discontinue the (unpaid) joint research projects between UNODC and ECU which would require him visiting Africa on several occasions throughout 2010 and possibly 2011.

59 On 15 March 2010, Mr Conran wrote to the appellant and informed him that as a public service officer employed by DPC in accordance with the PSM Act and on secondment to ECU until 30 June 2010 he had an obligation to keep both DPC and ECU informed on his respective obligations and requirements of each organisation under this arrangement (exhibit A – GR 42). Mr Conran also informed the appellant again that he had to submit leave applications for the periods of absence disclosed in the letter of 2 February 2010, and that such leave applications should cover the period 24 December 2009 to 8 January 2010, when ECU was closed, and the staff of the School of Law and Justice were required to take leave. Mr Conran also asked the appellant to submit leave forms to cover similar periods over the Christmas periods in 2007 and 2008. Mr Conran then reiterated his direction that the appellant was required to seek approval before accepting any future engagement by UNODC or any other organisation and that he (the appellant) would be expected to be on leave for the duration of any approved engagement.

60 Sometime prior to the appellant replying to Mr Conran's letter, the appellant became aware of the file note that Mr Jones had written about the telephone conversation that he had had with Professor Stoney. The appellant says the file note contained substantial insignificant errors and was not a correct record.

61 Prior to sending another letter to Mr Conran, the appellant asked Professor Stoney to review a draft of a proposed letter and to make any changes. The last page of the letter referred to the file note of Mr Jones about the conversation. Professor Stoney amended that paragraph of the letter to read (exhibit A – GR 43):

> Professor Stoney has advised me that the notes taken are in important respects inconsistent with his recollection of the conversation and do not properly reflect the tenor of the discussions held and ought not to be relied upon.

62 After amendments were made by Professor Stoney, the appellant sent a letter dated 26 March 2010 to the respondent (exhibit A – GR 44). The letter also indicated that Professor Stoney wanted Mr Conran to contact him to correct any misunderstandings. In the letter the appellant made submissions in respect to the following issues:

(a) Secondment to ECU

The appellant pointed out that:

(i) The ECU Policy Statement dealing with Secondment Appointments provides that:

> All inward Secondees to ECU will be subject to and must abide by the statutes, policies, procedures in place at the University, as amended from time-to-time and by any lawful directions for the duration of the secondment, unless otherwise agreed between the parties.

(ii) By letter dated 23 May 2007, Professor Stoney had directed him to adhere to the legislative requirements processes and practices of ECU.

(b) Secondary Employment

The appellant pointed to the ECU Consultancy Policy that recognises that consultancy work is a facet of academia and such activities, engagements and collaborations undertaken by academic employees provide benefits to ECU. The appellant submitted that it was not reasonable to attempt to apply s 102 of the PSM Act to an academic undertaking consultancy services. Further, that the functions of his employment as an Adjunct Associate Professor at ECU included the capacity to accept paid personal consultancies. Alternatively, he requested that retrospective approval to the consultancy work that he had performed be granted.

(c) Role of a Practitioner Scholar

The appellant contended that his status at ECU is that of an Adjunct Associate Professor to undertake research and teaching duties, the role of which is a Practitioner Scholar. In particular, Practitioner Scholars are expected to be involved in research, and, among other matters, to maintain the currency of his/her professional practice and maintain close links with his/her professional community. He then pointed out that following his paid consultancy for UNODC, he was requested to provide further assistance on a range of criminal justice development projects in several countries in Africa. There was no payment for these additional consultancies although his airfares, travel costs and daily expenses were paid at the applicable UN rates. He submitted that undertaking this work to assist in international counter-piracy efforts and criminal justice improvement programs was entirely consistent with his role at ECU as a Practitioner Scholar. Further, that Professor Stoney is the only person who was in a position to determine whether the work he had performed was commensurate with his role and function as a Practitioner Scholar and to the standard required.

(d) Christmas Shutdown Leave

The appellant pointed to the ECU Academic Staff Union Collective Agreement which provides that ECU shall observe an annual limited services period of two weeks which shall commence at the date set by the Vice-Chancellor. This period of time is known as PHIL days. The collective agreement also provided that employees who work on Labour Day, Foundation Day and the Queen’s Birthday public holidays were granted five additional days on full pay and that these days were to be taken at the limited services period and not be cumulative. He

then submitted that whilst he was on secondment to ECU he was required to observe the above requirements and there was no requirement to take annual leave while on PHIL days.

63 At the time the letter was sent the appellant had scheduled a meeting with Mr Conran on 31 March 2010. Unfortunately, that meeting did not proceed as Mr Conran was injured in a storm that affected the metropolitan area of Perth in March 2010.

64 On receipt of this letter by DPC it was referred to Mr Jones for his advice to Mr Conran.

65 On 25 May 2010, Mr Jones provided advice to Mr Conran about the matters set out in the letter. Importantly, prior to providing advice, Mr Jones did not take any steps to clarify the issues that he had discussed previously with Professor Stoney. In advice given on 25 May 2010 to Mr Conran, Mr Jones said that the appellant appears to overlook the following (exhibit 2 – KJ 10):

(a) He is a permanent public service officer, on secondment to ECU and is not an employee of ECU or a member of their academic staff.

(b) Therefore, his employment conditions are those applying to a public service officer, not to an ECU employee.

(c) He is required to comply with the PSM Act, the Department's Code of Conduct and other public sector codes of practice – where these codes conflict with ECU codes of practice, the PSM Act and public sector codes prevail.

66 Mr Jones also advised that whilst the appellant reluctantly conceded that he would seek s 102 approvals, his correspondence of 24 February 2010 failed to provide the information required to enable assessment of his application. In particular, the appellant had refused to provide details of any remuneration or other payment received from UNODC, although he had been approached to undertake an assignment in Kenya commencing in March 2010. Mr Jones also informed Mr Conran that he had received information from another source that indicated that the appellant may have accepted that engagement as he was said to have been overseas in March/April 2010. Mr Jones also pointed out to Mr Conran that despite a lawful instruction contained in correspondence to the appellant on 15 March 2010, the appellant had not yet lodged leave applications for the periods that he was overseas or for the ECU Christmas closure periods.

67 Following the advice given by Mr Jones, Mr Conran made the decision not to further extend the appellant's secondment to ECU and sent a letter to the appellant dated 25 May 2010 in which he said (exhibit 2 – KJ 11):

> I refer to your correspondence of 26 March 2010, and reiterate the position made in my correspondence of 15 March 2010, noting that you are yet to comply with the requirements contained therein.
>
> I do understand the role and functions of an academic institution, however you continue to be a permanent public service officer. Therefore, your employment conditions are those that flow from the *Public Sector Management Act 1994* (the PSM Act), the *Public Service Award 1992* and the Public Service General Agreement 2008, not those which apply to ECU staff subject to the ECU Academic Staff Union Collective agreement. Therefore, I do not accept your position that ECU academic staff employment arrangements for external employment (for reward or otherwise), and leave while absent from the workplace and during Christmas close-down apply to you.
>
> Accordingly, in light of your failure to submit leave applications as instructed in my correspondence of 15 March 2010, I have directed the Human Resource Services Branch to reduce your accrued annual leave by 93 day's annual leave having regard for absences shown in the attached schedule.
>
> With regard to your request for retrospective section 102 PSM Act approval for a three-week consultancy, in the absence of further information about the nature of the consultancy, the principal to the contract and the remuneration or otherwise received, the Department is not able to assess your request. You are hereby instructed that you are not to accept any further external engagements of the type referred to in section 102 of the PSM Act, and advise that any violation of this instruction may be regarded as a breach of discipline.
>
> I note that your current secondment concludes 30 June 2010. I have instructed the Manager, Human Resource Services to advise ECU that this secondment will not be extended beyond that date. Consequently, on 1 July 2010 you are to report to the 22nd floor, 197 St Georges Terrace where you will be given work to do until such time as you can be deployed to a suitable position in the public sector. In this regard, I inform you that it is my intention to register you for redeployment as the Department has no suitable positions into which you can be redeployed.
>
> Should you have any further questions about this advice please contact Ms Kathryn Andrews, Manager Human Resources on 9222 9616

68 The appellant responded to the letter from Mr Conran in a letter dated 31 May 2010 (exhibit 3 – PC 10). In the letter he asked Mr Conran or his representative to meet with him and Professor Stoney to negotiate the issues. He also requested that whilst dispute resolution steps were being undertaken that the actions detailed in Mr Conran's letter dated 25 May 2010 be held in abeyance, namely the deduction of leave credits, discontinuation of the secondment to ECU and registration for redeployment.

69 In the meantime, the appellant lodged an application to the Public Service Arbitrator on 11 May 2010 in PSA 22 of 2010 which sought to deal with the appellant's dispute about the assessment of his classification in accordance with the directions given in PSAC 27 of 2006.

70 On 2 June 2010, Acting Senior Commissioner Scott convened a conciliation conference between the parties. During the conference, the matters of the pending expiry date of 30 June 2010 of the secondment to ECU and issues around DPC's requirement to clear leave for overseas visits were raised. Mr Moore, who attended the conference on behalf of the respondent, was aware at that time that the appellant was due to depart for Africa on 5 June 2010. During the conference Mr Moore informed the appellant that, although he was still within the period of secondment to ECU, he was required to gain the approval of the respondent to carry out the research he was scheduled to undertake in Kenya with Somali pirates. Whilst the appellant was of the opinion that it was not necessary to obtain approval, he gave an undertaking to comply with the request.

71 On 3 June 2010, the appellant sent an email to Mr Moore about the proposed visit to Kenya commencing on 5 June 2010. In the email he advised Mr Moore of (exhibit A – GR 49):

(a) The involvement of the industry partners, Alan Cole from UNODC and Mick Palmer, the Commonwealth Inspector of Transport Security.

(b) His involvement by his research assistant, Dr Hamilton.

(c) The approval of the project by the ECU Human Research Ethics Committee chaired by Professor Stoney.

(d) Travel approval had been given by Professor Stoney and Professor Arshad.

(e) The return date was scheduled for Saturday, 26 June 2010.

72 Attached to the email was a four page document which set out details of the research that was to be conducted.

73 Mr Moore responded to the appellant's email by email on the next day (exhibit A – GR 51). He advised the appellant that DPC would agree to a further short term secondment to ECU for the period 1 July 2010 to the close of business of 13 August 2010. Mr Moore also advised the appellant that the Kenyan trip had been discussed with Mr Conran and that conditional approval was given for the appellant to attend the Kenyan research project from 5 June 2010 to 25 June 2010 on the basis that:

(a) He did not receive or accept any other payment for his work other than that by DPC for the period of his absence; and

(b) His period of absence be covered by him being on leave.

Mr Moore advised the appellant that his request for deferral of the decision to debit previous absences from leave would be addressed in the next few weeks.

74 The appellant responded to the email from Mr Moore on the same day by email (exhibit A – GR 51). He told Mr Moore that he had no alternative but to comply with the direction to take leave for the next three weeks whilst he was on university approved research, but it was something he would look to discuss further at a later time.

Mr Moore's meeting with Professor Stoney on 18 June 2010

75 Whilst the appellant was overseas, Mr Moore met with Professor Stoney on 18 June 2010. During the discussion with Professor Stoney, Mr Moore indicated that DPC were questioning where the secondment was going, given that it was approaching the third year anniversary. Mr Moore asked Professor Stoney whether the school would employ the appellant. Professor Stoney said that as much as he valued the appellant, if he was to be employed it would need to be by way of a competitive selection process and the appellant would have some weaknesses in this process because he would be competing with people who have completed their doctorates and who might have other skills and qualifications and more established research. This was especially the case given that the appellant would probably be seeking employment at the level of Associate Professor and he could not say with any certainty that he would be able to employ him.

76 Professor Stoney did, however, indicate to Mr Moore that he may be able to accommodate the appellant's salary in 2011 as he was successful in a budget bid for extra salary. However, there may be higher priorities for staff with other disciplines. Professor Stoney said when giving evidence that on a number of occasions during the meeting with Mr Moore he told Mr Moore that the appellant was a very valuable asset to ECU and he had performed some important functions for the school. He said this was a 'win' for ECU because the appellant had significant skills but came to the school at no cost to their budget. They also discussed the issue of leave. Professor Stoney told Mr Moore that he thought he had not managed that as well as he could have, but that he considered this was a matter between the appellant and the Department, as he saw the role to manage the leave was between the appellant and the employer.

77 Professor Stoney also told Mr Moore that it was not uncommon for staff members to travel for purposes connected with their academic work. He said that this may not always be directly a benefit to the school, such travel had potential benefits in terms of research opportunities, teaching and learning opportunities and engagement opportunities. He explained that ECU was a new law school and that some of the appellant's work potentially has a high profile and the appellant is connected with some significant players who could be useful to the school. He said, however, these things take time and they may not see an outcome of this work for two, three or five years.

78 After the appellant's secondment ended, ECU did not offer the appellant employment and the position held by him has not been filled.

Evidence from ECU witnesses about the appellant's overseas work and work carried out at ECU

(a) Professor Stoney's evidence

79 Professor Stoney was the Head of School of the School of Law and Justice for six years until 6 June 2011 when he became the Associate Dean of Teaching and Learning. He has also been the Professor of Law and Justice at the School of Law and Justice for the last three years.

80 Professor Stoney first met the appellant in 2007. The appellant was introduced to him by Associate Professor Margaret Mitchell, who was the Head of the Sellenger Centre, which is the School of Law and Justice research centre. The appellant had done some research grants work for Professor Mitchell and had also carried out occasional guest lecturing and he had been appointed by ECU as an Adjunct Professor prior to working for ECU on secondment. Associate Professor Mitchell put a proposal to Professor Stoney that the appellant be seconded from DPC. The basis of the secondment was that it was to be at no cost to the school. Professor Stoney formed the view after reviewing the appellant's background that the appellant would be a really good 'fit' in academic life, so he agreed to the secondment.

81 The appellant came to them as a traditional academic. Professor Stoney gave evidence that the roles of academics vary depending on their qualifications, skills and experience. They can be fully engaged in either teaching or research and more usually both. In light of the appellant's qualifications and experience, Professor Stoney saw him as being a researcher, teacher

and mentor for students and staff and also thought the appellant could enhance engagement opportunities with stakeholders such as WA Police and Corrections. After the secondment commenced, Professor Stoney received an email from DPC every six or 12 months asking whether he was happy to extend the appellant's secondment. At all times he was happy to do so.

82 Professor Stoney did not manage the appellant's performance in the way he would manage a full-time paid employee. Also, the appellant did not book his annual leave with him. With other staff Professor Stoney controlled the timing of annual leave, in accordance with ECU policies and procedures. Yet, he met with the appellant on a regular basis to discuss what he was doing. The appellant came to school meetings and in every other way he participated as a member of the school.

83 When the appellant took up the secondment, ECU sent a letter to the appellant describing him as a Lecturer of Criminology and Justice. When giving evidence before the Board, Professor Stoney said the title should be Lecturer in Criminology and Justice as the role was not to just lecture in criminology and justice, there was a broader engagement in research, as all lecturers are appointed to perform and not just lecture in criminology. Professor Stoney also said that the appellant did perform the role of practitioner scholar because he was engaged in teaching and learning, research and professional engagement. Apart from a few guest lectures the appellant had no face-to-face contact with students. He was, however, required to prepare unit materials, prepare courses, be an effective teacher, mentor staff, undertake or support research, build engagement opportunities and engage in the life of the school. The appellant was not necessarily required to work seven and a half hours a day on every particular day, but he was able to say the appellant carried out a full workload (ts 71).

84 The first communication Professor Stoney received about the appellant taking leave was an email from DPC on 1 February 2010 in which he was asked what leave the appellant had taken over Christmas. Professor Stoney replied to the email on the same day by email and indicated that ECU was closed for business from Christmas Eve and reopened in early January. He also said in the email that he was happy to manage the appellant's annual leave, but had not to that time seen it as his responsibility.

85 As to the work carried out by the appellant whilst on secondment at ECU, Professor Stoney's evidence was that the major initiative was that the appellant had almost single-handedly developed a graduate certificate in child protection. The appellant formed a steering committee in 2007 to 2008 to develop the course and started to run the certificate in July 2009. The school had also developed a number of other graduate certificates in which the appellant became a pivotal player. These included graduate certificates in criminology and justice, and one in investigations and intelligence. The appellant had also played a major role in developing and teaching these units. He was a significant contributor to the school, he was well liked and respected in the school and remained so. All of the units the appellant was involved in were taught online. Consequently, the appellant did not teach in a classroom.

86 Professor Stoney also gave evidence that if members of staff who are part of the financial establishment of the school are travelling, he is closely interested in how long they are going to be away to ensure that they meet all their commitments to the school. If a staff member travels overseas at the cost of the school, he requires concrete outcomes for the school. However, the appellant's travel was not at the cost of the school. This was not uncommon. With all staff he is interested in ensuring that the commitments of the school are met and that the travel has sufficient benefits, direct or indirect, to the school. Professor Stoney says he told Mr Jones of these matters when he rang him early in 2010 during which Mr Jones raised the issue of the appellant's international travel. A few weeks after the telephone call, Professor Stoney saw the file note of the conversation written by Mr Jones on 17 February 2010, which was sometime prior to the appellant sending the letter to Mr Conran dated 26 March 2010. Professor Stoney gave evidence in these proceedings that the file note did not accord with his memory of the discussion he had with Mr Jones. He saw the file note as being couched in negative terms and that is not the way he views the appellant. His evidence is that he did say to Mr Jones that he had no objection to the appellant accepting assignments and that the appellant made a substantial contribution to the school. Professor Stoney said, however, he did not say to Mr Jones that the benefits from his engagement in prison reviews in Africa were of little practical value to ECU. What he did say was that there may not be any direct value at that point to ECU, but he did go on to say that the benefits to the school which flow from these activities take time to develop, the outcomes and timelines are often difficult to be definitive on, and that they are important for the school to pursue where possible.

87 He has no memory of making a statement to Mr Jones that suggested if the appellant had been a full-time paid employee of the school that he would not have approved his absences. He said he always assesses applications for leave and travel on an individual basis.

88 Professor Stoney agreed that he did say to Mr Jones that he was surprised at the period of time that the appellant was away in 2009, as it amounted to a total of about five months. For most staff he would not agree to such an absence, but the appellant was one of the few staff members whose only commitment is to online teaching, so the appellant's case was different. Most staff were required to be in the classroom, so external travel is not as easily managed. When asked in cross-examination if he would be concerned if he is paying for a staff member who is away for almost half of the year outside Australia, Professor Stoney said he probably would be worried, but he was not saying he would not have approved the work. He said approval would depend upon the circumstances of the load of the person and what they delivered and whether they could carry out their work properly from an external place. The same principles did not apply to the appellant as he was not an employee. However, the appellant always talked to him about opportunities and if he saw value in them he agreed to the appellant going. Professor Stoney was, however, never placed in a position where he had to say to the appellant, 'I don't want you to go'.

89 Professor Stoney testified that at no time during the telephone conversation he had with Mr Jones did he suggest that when the appellant was away, his work was not being done properly for the school. He also said he has no memory of making the statement 'if Mr Ross wants a career at ECU, there are many other things he could do to improve his prospects'. He said, in fact, he does not recall being asked by Mr Jones about the appellant's employment prospects. He understood that from 1 July 2009 the appellant's absences were made up of work undertaken on behalf of Mr Palmer in connection with the maritime piracy inquiry, international conference attendance, provision of assistance to UNODC and research activities on behalf of ECU. The appellant regularly sought him out to advise him of developments in the work that he was doing and of any

intended periods of absence. The appellant was passionate about his work for ECU, both on campus and off. Professor Stoney understood that the appellant continued to manage his student case load when not on campus and continued with the development of course material. From his point of view, the appellant would be treated in the same way as all other staff in relation to work related absences. If he was on approved work related absences from work he would not be required to take annual leave. If it was not related to work then the situation would be different.

90 Professor Stoney agreed to a request from Mr Palmer to make periodic use of the appellant over a period of some eight to nine months during 2009 in connection with an inquiry that he, Mr Palmer, was undertaking into maritime piracy in Africa. Professor Stoney saw no reason to discuss this arrangement with DPC. Professor Stoney was never given any advice by DPC through the three years of the appellant's secondment as to what was expected of him by DPC in his handling of the appellant's terms and conditions of employment.

91 When Professor Stoney was asked about what connection the appellant's work in Africa and the Seychelles relating to international piracy had to the work as an academic at ECU, Professor Stoney said that one of the priorities of the School of Law and Justice was to build engagement and research. In particular, he saw the activities of the appellant as opportunities to engage and build research in the school and also build some teaching and learning opportunities by way of training and/or short courses and/or graduate certificates and the like.

92 As to the essential services period, that is, the time when the university shuts down over Christmas, Professor Stoney said he tried to make it clear to Mr Jones and later to Mr Moore that the essential services period is not regarded as a period of time where staff are to take annual leave. It is compulsory leave that includes compulsory Christmas holidays and is in recognition of the fact that during the year, academics work outside normal working hours and on some public holidays. The only public holidays taken in the normal academic year are Good Friday, Easter Monday and Anzac Day. On other public holidays they work their normal hours. This is in order to avoid disruption to the teaching program. Leave over the time of the essential services period is additional to academics' annual leave entitlements of 20 days per annum. Professor Stoney said the appellant, like everyone else in the school, was required to be on leave during the essential services period. An important feature of academic life is on meeting deadlines and outcomes, rather than time and attendance. Professor Stoney said that apart from when the appellant was away, he tended to be frequently 'on the corridors' at the school's premises at ECU Joondalup.

93 When asked about when academics are required to take their annual leave, and what those annual leave entitlements are, Professor Stoney said that academic staff are required to take 20 days of annual leave at a time when it does not unreasonably disrupt the program of the university. So, generally, staff are discouraged from taking annual leave during teaching time, and traditionally most staff take their leave between December and February or in July each year, and all staff in his school are encouraged to take their annual leave each year.

94 Professor Stoney agreed that he told Mr Jones that he was aware that telecommunications in Africa is sometimes difficult. By this he said he was not implying in any way that the appellant's travel to Africa compromised the performance of his duties at the school. The comment about telecommunications in Africa was a general comment and one based on his own experience, but he maintains that he made no assertion to Mr Jones that he had suggested it was dubious that the appellant would be able to service his students' needs whilst he was away from ECU in Africa.

95 Professor Stoney also gave evidence that the appellant's consultancies and advisory services have resulted in business opportunities and benefits for ECU. At the time of giving evidence in June 2011, he anticipated in the following two weeks representatives of ECU were to meet with senior representatives of the Department of Foreign Affairs and Trade to discuss teaching opportunities, course delivery and short courses into sections of Africa. He said he did not know whether those talks would lead to anything, but it was promising.

(b) Evidence given by other ECU academics and ECU students

96 Bernadine Kathryn Tucker, Ronelle Ann Jarvis and Rebecca Mary Anderson were all students at ECU whilst the appellant was on secondment. The appellant was the academic who delivered courses to them from 2008 until 2010. Each gave evidence that during that period of time they had regular contact with the appellant in the course of their studies. When he was overseas they would email him regarding their student work and they would receive a reply from him in days. In particular, Ms Tucker gave evidence that she submitted her masters thesis for marking to him while he was overseas. She says there was no delay in having her thesis marked and the appellant provided her with a great deal of assistance and she passed her masters with 'flying colours'. Ms Jarvis also gave evidence that the appellant was always available to her within a short period of time to assist her. Mr Anderson said when the appellant was overseas she emailed him regarding her student work and she usually received a reply within two to three days. She also said her assignments were marked within an appropriate timeframe and there was never any delay in communication. At no time did she feel that the appellant's overseas travel delayed her studies.

97 Natalie Jane Gately is a Lecturer at ECU School of Law and Justice and a Research Scholar. She is also the WA Manager for the Drug Use Monitoring Project. She oversaw the appellant in his work and she also had contact with him through the postgraduate units he taught. She speaks very highly of the appellant's abilities as a lecturer. She said that the appellant often copied her into replies that he sent to students to keep her 'in the loop'. From the correspondence she saw, it appeared to her that the appellant was readily available to his students and always answered their questions promptly, regardless of whether he was overseas or not.

98 Sharan Kraemer is a Lecture/Research Scholar, Practicum and Honours Co-ordinator at ECU at the School of Law and Justice. She has been at ECU since 2001 and has been employed as a lecturer since 2003. She first met the appellant when she started work at ECU because at that time he was working as a sessional lecturer. She gave evidence that the appellant has done some guest lectures for her because he has immense knowledge in some of the areas they teach. She was aware that the appellant engaged in some international work whilst he was at ECU on secondment. She gave evidence that the appellant has always been available on email and she had never had difficulty contacting him by email whilst he was away.

99 Ms Kraemer and Ms Gately have authored a prisoner health survey. Ms Kraemer testified that the appellant spoke to prison officers in Kenya about the survey which generated a lot of interest and led to positive publicity for ECU. He also set up the possibility for some students from ECU to go to Kenya through the United Nations and carry out some practicums within Kenyan prisons.

100 Dr Pamela Jayne Henry is the Director of the Sellenger Centre in the School of Law and Justice at ECU. She gave evidence that the appellant is a valuable contributor to the development of research incentives at the Sellenger Centre. She said the research examining the experience of Somali pirates would not have been possible without the appellant's involvement. Also his contacts in Kenya have provided the Sellenger Centre with access to participants, accommodation and in-kind funding. Her opinion is that in her experience, no staff members had experienced difficulties as a consequence of the appellant's overseas commitments during his time at ECU and his involvement with the school has led to positive outcomes. She also said his lectures are well received, his research is innovative, he has facilitated practicum placements for students and postgraduate students respond well to him.

The appellant's overseas work after his secondment with ECU came to an end

101 The appellant received advice dated 23 June 2010 from DPC that the secondment with ECU was extended through to 13 August 2010 (exhibit A – GR 52). He also became aware of a letter from Mr Moore to Professor Stoney dated 18 June 2010 in which Mr Moore informed Professor Stoney that he (Mr Moore) intended to discuss with the appellant on his return to Australia options for moving forward beyond August 2010, and for him (the appellant) to return to the public sector for deployment to a suitable role (exhibit 4 – GM 215). The appellant was not provided with a copy of this letter by DPC. Despite this advice to ECU, Mr Moore did not hold any discussions with the appellant.

102 The appellant attended a second conciliation conference at the Commission before Acting Senior Commissioner Scott on 11 August 2010 and was advised by Mr Moore that his secondment was to end on 13 August 2010 and he was required to report for duty at DPC on 16 August 2010. At the conference, Mr Moore put to the appellant that he may wish to consider clearing his accrued leave so that he need not return to work at DPC on 16 August 2010. This would have enabled the appellant to continue to attend to his ECU obligations and commitments. The appellant, however, declined the offer. The appellant was also informed at the conference by Mr Moore that the appellant's past absences overseas, in the view of DPC, attracted leave deductions. This came as a surprise to the appellant at that point of time as he was of the view that the information that he had previously provided had negated the requirement to take leave when carrying out work overseas.

103 On 16 August 2010, the appellant returned to DPC. At that time Mr Moore informed the appellant that DPC would be moving to formally register him as a redeployee and explained the process of how that would work. This did not, however, occur. The appellant filed a number of appeals in the Public Service Board, including these appeals, shortly after his return to DPC.

104 It is common ground that the appellant was not provided with any duties on his return to DPC. He was, however, assigned a case manager from DPC's human resource services branch to assist him in accessing job opportunities and he was provided with an office, email, computer and internet access. Mr Moore said whilst he was conscious of the fact of finding some work for the appellant to keep him occupied, to some extent the appellant was keeping himself busy on what appeared to be research into criminology matters, public social policy, and child abuse law and policy.

105 Sometime after his return to DPC, the appellant made a request for permission to deliver three guest lectures at ECU on international human rights, sexual offences and mentally disordered offenders. The appellant informed Mr Moore that it was estimated it would take approximately 20 hours to develop the lectures and produce power points. On 20 August 2010, Mr Moore informed the appellant by email that Mr Conran had approved the appellant's involvement in delivering the lectures and it would be expected that the bulk of the preparation time would be done in his (the appellant's) own time (exhibit A – GR 72).

106 On 26 July 2010, whilst still on secondment, the appellant had written to Mr Conran advising him in conjunction with his functions as an academic at ECU, he had accepted an invitation to be a plenary speaker at a conference being held in Canada from 19 September 2010 to 22 September 2010. His participation was as a keynote speaker and the costs associated with this attendance were to be met by the International Institute on Special Needs Offenders and Policy Research (Canada) (exhibit A – GR 74). Participation in the conference had been approved from ECU by Professor Stoney. On 7 September 2010, approval was given by the respondent to attend the conference if the appellant took annual leave (exhibit A – GR 77).

107 On his return to work, the appellant became ill as a result of the disputes he had with DPC about his level of classification, his overseas work and the fact he was returned to DPC without meaningful work being provided to him and spent increasingly less periods of time at work. His last day of attendance at DPC was on 8 December 2010, and in January 2011 the appellant lodged a workers' compensation claim with DPC.

108 Despite his illness, the appellant took annual leave between 24 September 2010 to 6 October 2010 and travelled to Canada to deliver the conference presentation on special needs offenders. He returned to the DPC on the first working day after 6 October 2010.

109 On 6 October 2010, the appellant advised Mr Conran that he had applied for annual leave to undertake work with UNODC during November/December 2010, and there was a potential that he might be offered payment for such work, although none had been offered at the time and no discussions had been held. In his letter he said for an abundance of caution he was notifying the Director General of such potential of payment. He also said that he had taken cognisance of the DPC Code of Conduct and he was confident that no conflict of interest was involved. He also advised there could be no detrimental effect on his efficiency as the work was to take place during a period of leave. Also, there could be no inconvenience to the Department as it was to occur during a period of leave and there was to be no actual, potential or perceived conflict of interest with his functions at DPC as the work he would undertake had no relevance to the jurisdiction of Western Australia or the functions of DPC (exhibit A – GR 62).

110 On 13 October 2010, Mr Jones advised Mr Conran that in the absence of more comprehensive information, it was not possible for him to properly assess whether the appellant's proposed engagement and activities unconnected with his employment constituted an actual, potential or perceived conflict of interest. Mr Jones also stated the following in his advice to Mr Conran (exhibit 2 – KJ 13):

> I also note advice from Mr Moore that in conversation, Mr Ross mentioned that he is still 'assisting' ECU students, presumably while he winds down his ECU involvement. Given the cessation of his secondment, it is appropriate that should this 'assistance' be anything more that [sic] a voluntary activity, Mr Ross seeks your approval to continue. In this respect, I confirm that approval granted to Mr Ross in 2007 to undertake ECU course development and delivery applied to the duration of second semester 2007.
>
> In this regard, Mr Ross is no longer seconded to ECU having returned to the Department on cessation of his secondment. Whilst there may have been some valid basis to his claims that the external activities undertaken in the past were connected to his employment (through the terms of his secondment), there is no longer any basis for such a claim.
>
> When considering what constitutes a conflict of interest, Mr Andretich observed that the expression of views or opinions on international criminal justice or other similar issues inconsistent with the Government's views on such matters might quite reasonably be considered to be an actual or potential conflict of interest. This risk increases significantly should Mr Ross hold himself out, or be perceived by others to be a representative of the WA Government (particularly considering his employment by a central agency), or of the Commonwealth Government.
>
> Accordingly, I have drafted the attached correspondence to Mr Ross seeking further and better particulars in order to enable proper consideration to be given to his requests.

111 A letter was then sent to the appellant signed by Mr Conran dated 13 October 2010. In the letter Mr Conran stated that he was unable to grant the written permission requested and sought the following information to properly consider the request to carry out work for UNODC in November and December 2010 (exhibit 2 – KJ 14):

(i) full details of the organisation(s) to which you will be providing assistance/consultancy advice including a contact person able to provide further information if required;

(ii) comprehensive details of the subject matter on which assistance/consultancy advice is to be provided including details of proposed recipients, when and where it will be delivered, and the nature of the service /advice to be provided;

(iii) details of any remuneration, per diem or other allowance, airfares and accommodation provided by the organisation(s) for whom you will work and/or recipients of the assistance/consultancy advice; and

(iv) the actual dates on which you will be engaged in activities unconnected with your employment whilst on annual leave.

112 Mr Conran also informed the appellant in the letter that on receipt of the requested information, he would give further consideration to the appellant's requests having regard for the potential for these activities to constitute an actual, potential or perceived conflict of interest with the appellant's official responsibilities and the government's interests.

113 The appellant responded to Mr Conran's request for information on the following day in a letter to Mr Conran dated 14 October 2010. In his letter the appellant sought to broaden his request to include other periods of leave or personal time to be taken in the next two years. He then went on to say (exhibit 2 – K 15):

> You identify four points on which you seek clarification and to which I respond bearing in mind the extended nature of the approval now sought:
>
> **1. Full details of the organisation(s) to which you will be providing assistance/consultancy advice including a contact person able to provide further information if required.**
>
> Approval is sought for secondary employment as a Criminal Justice Consultant. Likely clients would include the United Nations and other organizations external to Australia.
>
> In respect of this particular instance, and as mentioned, I have not entered any agreement to provide paid consultancy at this time. However, the organisation to which the current potential exists is the United Nations Office on Drugs and Crime East Africa which is located in Nairobi Kenya.
>
> If there are information requirements in addition to that provided in respect of this potential engagement, or more generally, I request that you direct them to me and I will provide the required response or arrange for same.
>
> **2. Comprehensive details of the subject matter on which assistance/consultancy advice is to be provided including details of proposed recipients, when and where it will be delivered, and the nature of the service/advice provided.**
>
> I believe that I have expertise in a range of areas that may be of interest to organisations seeking to engage consultants including:
>
> - Criminal justice capacity building
> - Crime prevention
> - Custodial and non-custodial corrections
> - Legislative and policy development
> - Training

The current potential opportunity concerns providing general consultancy advice on criminal justice matters and with specific attention to prison facility commissioning and staff training. I have no greater detail than this as, as I have stated, I have not entered into any agreement.

I envisage that my consultancy services may find a client base in countries within Africa or located within the West Indian Ocean. I will not be seeking or accepting consultancies within Australia without requesting specific additional approval.

3. Details of any remuneration, per diem or other allowances, airfares and accommodation provided by the organisation(s) for whom you will work and/or recipients of the assistance/consultancy advice;

Of course remuneration received etc, will be dependent upon the type and extent of service I am contracted to provide and will vary. Information or remuneration rates, etc will be commercial-in-confidence.

In respect of the current potential, I have not entered into any discussions concerning remuneration rates. At this time I am proceeding on the basis that there will be no payment for the contributions that I make. The nature of the work has extrinsic rewards such that I would not be distressed at not being paid at all. Having said this, I fail to see the relevancy of remuneration received, including the significance of the cost of airfares, in considering whether there is a conflict of interest or not. Perhaps you might be able to explain the relevance of this request so that I can better understand what needs to be provided.

Depending on the type of contracts I might enter into, remuneration might be an all embracing rate, a rate plus expenses, or a rate plus per deim [sic]. Again, the exact nature of these rates would be commercial-in-confidence.

4. The actual dates on which you will be engaged in activities unconnected with your employment whilst on annual leave.

I am on annual leave for the period 8 November through 3 December 2010. I do not have any contract at this time and the quantum of time that might be requested of me is not certain. However, I am unable to see the relevance of whether the consultancy was for one, two, three or four weeks when considering whether there was a potential or actual conflict of interest. Perhaps you might be able to explain the relevance of this request so that I can better understand what needs to be provided.

In any event this point is now somewhat moot as I am requesting approval to engage in secondary employment during leave or personal time over the next two years.

I understand that approval for annual or other leave is at the convenience of the Department, but that any approval should not be unnecessarily withheld.

In terms of the matters that you are required to properly consider as per the department's Code of Conduct, I provide as follows taking into account the expanded nature of my request:

a) Potential detrimental effect on productivity.

I am not expecting that requests for my services will be numerous as I am not intending to advertise my services; it will be as a result of being sought out. In the main I would anticipate that that [sic] such requests for consultancy services would be met during periods of leave and hence there would be no detrimental effect on my productivity such as to cause this request not to be approved.

b) Inconvenience to the Department

Following from the above, performing consultancy services during periods of leave or personal time should not result in any inconvenience to the Department as approval for leave is at the convenience of the Department.

c) Actual, potential or perceived conflict of interest

I do not have duties or responsibilities at the Department that are in any way remotely connected with the consultancy services that I might provide. I attest that there is no actual, potential or perceived conflict of interest that I am aware of such as to cause this request not to be approved.

114 On 20 October 2010, Mr Jones provided further advice to Mr Conran (exhibit 2 – KJ 16). On the same day, Mr Conran wrote to the appellant as follows (exhibit 3 – PC 27):

I refer to your correspondence of 14 October 2010 in response to my letter of 13 October 2010 seeking further information about your proposed activities unconnected with employment.

In the absence of specific details requested about consultancy contracts or other activities in which you propose to engage, I am unable to grant the approval requested. For the same reason, I am not prepared to consider your request for a two year 'blanket approval' to engage in activities unconnected with your employment whilst on leave or in your own time.

Should you wish to seek approval as required under section 102 of the *Public Sector Management Act 1994* (the Act) for the period of your annual leave from 8 November – 3 December 2010, you should provide the detailed information requested in my previous correspondence of 13 October 2010. In particular, I require you to explicitly confirm that you will not hold yourself out to be representing the Government or department, and in accordance with section 9 of the Act no official information, equipment or facilities will be utilised in the activities unconnected with your employment. In this regard, I also take this opportunity to remind you of the statutory obligation for all employees set out in section 102 of the Act to have received written permission before engaging in any activities unconnected with their employment, other than any activities specified in the public sector standards for the purposes of this section.

Other applications for secondary employment

115 On 7 September 2010, the appellant sought to attend a counter-terrorism conference being held in Perth from 30 November 2010 to 2 December 2010. The appellant gave evidence that by the time Mr Moore sought to speak to him about permission to attend the time for submission of abstracts had well passed and there was no potential for him to proceed so he told Mr Moore 'not to bother'. Consequently, the appellant did not attend this conference.

116 In October 2010, the appellant sought permission to attend and participate in a research forum at ECU on 29 October 2010. Mr Moore advised the appellant on 19 October 2010 that Mr Conran had approved his attendance, subject to him attending in his own time, not holding himself out to be representing DPC and being scrupulous in the use of official information, equipment and facilities (exhibit A – GR 73).

117 Shortly thereafter, the appellant was requested to attend and participate in the counter-terrorism roundtable conference being held by the Department of Foreign Affairs and Trade (DFAT) in Canberra in January 2011. In an email to Mr Moore on 9 December 2010, the appellant sought approval to attend this conference. The conference was to take place on 20 January and 21 January 2010. DFAT was to make the bookings and meet the costs of the appellant's travel. The appellant provided a copy of the itinerary to the respondent. On 15 December 2010, the appellant provided further information and a likely list of attendees (exhibit A – GR 81). On 17 December 2010, Peter Shannon, the Assistant Secretary for the Counter-Terrorism Branch of DFAT, wrote to Mr Conran seeking approval for the participation of the appellant in a roundtable that DFAT was hosting (exhibit A – GR 83). After receiving that letter, Mr Conran approved the appellant's participation at that conference on 21 December 2010 (exhibit A – GR 84). The approval was subject to the appellant making an application for three days annual or other accrued leave to cover the time that he would be absent.

The respondent's concerns about the appellant's engagement in overseas work

118 Mr Conran gave evidence that over the course of several months in 2010, while the dispute about the appellant's engagement with UNODC and sovereign African governments was ongoing, he had several conversations with Mr Palmer. Mr Conran became increasingly concerned about the nature and scope of the appellant's activities in Africa. Mr Conran came to the view that it was appropriate to seek additional information from the appellant to satisfy himself that the appellant's engagement and activities whilst in Africa were not in conflict with his official responsibilities as a public service officer. Mr Conran was also concerned whether it was appropriate for a person being paid by the Western Australian government to be employed in work of this nature which was very much outside the responsibilities of the State government. The fact that the appellant had been paid in the past to perform such work elevated his level of concern.

119 On 21 December 2010, Mr Conran wrote to Messrs Alan Cole and Mark Shaw of UNODC seeking information about the nature of the work for which the appellant had been engaged and specific details of the contracts the appellant had entered into (exhibit 3 – PC 33). Both Mr Cole and Mr Shaw subsequently responded and declined to provide contract details unless authorised by the appellant.

120 When giving evidence, Mr Conran explained how his concerns about the overseas work related to his concerns about whether he should review the appellant's secondment arrangements to ECU. Initially Mr Conran was comfortable with the arrangement with ECU as he had some sympathy for the appellant, but he was of the opinion that if the appellant was engaging in further work outside the secondment, whether paid or unpaid, he wanted to ensure that those arrangements were appropriate because the appellant was being paid public monies. Also it was not for DPC to be paying for the appellant while the appellant was being paid for by another organisation.

121 When asked what was his understanding of the nature of the secondment between DPC and ECU, Mr Conran said he understood the appellant was a person who was working at the university and undertaking some tutoring, possibly some lecturing duties, and some research. He, however, conceded he never turned his mind to the detail of the arrangement between DPC and ECU. Mr Conran also expressed the opinion that the appellant had been less than honest with DPC in relation to his arrangements for overseas work, and that was of concern to him.

What were the terms of the secondment?

122 The appellant puts forward three alternative constructions of the secondment arrangement:

(a) That whilst the secondment arrangement was in place the appellant ceased to be employed by ECU.

(b) The contract between the appellant and the respondent was suspended by mutual agreement whilst the agreement was on foot ***Minister for Education v Galipo*** (2001) 81 WAIG 1145.

(c) Although the appellant remained an employee of the respondent throughout the secondment, the terms and conditions of his contract of employment became those of a member of the academic staff of ECU.

123 The consequence of each of the appellant's arguments is that s 102 of the PSM Act had no effect during the period of secondment and the appellant's international work was part of the duties and conditions of the engagement as a lecturer at ECU and did not require him to take leave to participate in these activities. Also, as a lecturer, he was entitled to leave in lieu of public holidays as PHIL days.

124 The respondent contends whilst on secondment that the conditions of employment of the appellant were regulated by the PSM Act, the Public Service Award, the Public Service General Agreements of 2006 and 2008 and that there was no change to the employment conditions of the appellant during the secondment.

125 The respondent says that pursuant to s 102(1)(c), s 102(1)(d) and s 102(1)(e) of the PSM Act, the appellant was required to seek permission to undertake work to provide advice for reward in relation to incarceration and criminal justice matters. The respondent also says that the external work the appellant engaged in whilst on secondment and the activities he sought approval to engage in, in October 2010, were and are activities in a private capacity. In particular, the evidence given by

Professor Stoney establishes that ECU had not assigned the external overseas activities, nor was the appellant regarded as a member of the establishment of the university.

126 The starting point of construction of the secondment arrangement turns on the express provisions of the PSM Act, in particular s 66 of the PSM Act. Section 66 provides:

> An employing authority of a department or organisation (in this section referred to as the ***seconding authority***) may, if it considers it to be in the public interest to do so and the public service officer concerned consents, enter into an arrangement in writing with another such employing authority or with an employer outside the Public Sector for the secondment of a public service officer (other than an executive officer) in the department or organisation of the seconding authority to perform functions or services for, or duties in the service of, the other department or organisation or that employer during such period as is specified in that arrangement.

127 Importantly, s 66 contemplates a tripartite arrangement. The first part of that arrangement is the employer of a public service officer is empowered to enter into an 'arrangement' in writing with another employer inside or outside the public sector for the secondment of a public service officer. By the use of the word 'arrangement', it is not necessary for the parties to enter into an agreement that is binding in contract. For example in this matter, it is doubtful that a finding could be made that the arrangement made between ECU and the respondent was supported by consideration. The second part of the arrangement is that the public service officer must consent. It is also notable that the arrangement between the employer of the public service officer and the other organisation is required to be in writing and the secondment is for the performance of functions or services for or duties in the service of the other organisation.

128 Whilst it is apparent in this matter that at the time the arrangement was entered into in 2007 that agreement was reached to second the appellant to perform functions or services for ECU or duties in the service of ECU, to determine what those functions, services or duties were to be performed, the correspondence passed between DPC and ECU at the time the arrangement was negotiated needs to be examined.

129 Any matters agreed between ECU and the appellant, unless agreed to by the Director General of DPC (or his agents acting on his behalf), cannot form part of the secondment arrangement as s 66 contemplates that agreed arrangement must have been made between DPC and ECU. Consequently, the matters stated by Professor Stoney in the letter dated 23 May 2007, sent to the appellant (exhibit A – GR 15), unless agreed to by the Director General of DPC, could not form part of the secondment arrangement that was binding on DPC and the appellant as a public service officer. In particular, the direction given to the appellant by Professor Stoney (exhibit A – GR 15) that whilst on secondment the appellant was expected to adhere to the 'legislative requirements, processes and practices' of ECU did not form part of the secondment arrangement as there is no evidence before the Board that a Director General of DPC or anyone acting on their behalf in DPC agreed to such a term.

130 The evidence, however, does establish that agreement was reached between the Director General of DPC and ECU that the appellant was to work as a lecturer of (or in) Criminology and Justice and DPC would fund the appellant's placement and not seek recoup from ECU (exhibit A – [98] and GR 12). It is implicit from the appellant's evidence that he consented to this arrangement.

131 Importantly, the evidence does, however, reveal that an agreement was reached for the appellant to perform specified functions, services or duties for ECU during the secondment. These were set out in an email from Professor Stoney on 29 May 2007 to Ms Sandercott from DPC in answer to an email sent by her the previous day to Professor Stoney in which she asked for an outline of work to be undertaken by the appellant if the secondment was approved. In response to Ms Sandercott's email, Professor Stoney in his email sent on 29 May 2007 outlined work which could be characterised as 'functions, services and duties' within the meaning of s 66 of the PSM Act. These were that the appellant was to be engaged in the development and delivery of a number of undergraduate and postgraduate programs on criminology and justice investigations and intelligence. He was also to provide support and guidance (supervision) to masters and honours students and provide research support in ECU's various research projects and grants (exhibit A – GR 13).

132 Whilst the appellant in [94] of his witness statement (exhibit A), contends a plain reading of the duties set out in exhibit A – GR 13 were not exhaustive and his role was to be as a member of the academic community, such a construction is not open as the duties outlined by Professor Stoney were not put to DPC as a list of some of the duties the appellant would perform, but as the duties the appellant would perform.

133 The submissions made on behalf of the appellant dealt with, in some detail, whether there were any terms and conditions of the secondment arrangement that dealt with the appellant's entitlements to leave and whether DPC or ECU was responsible for managing the appellant's leave entitlements. While the appellant was advised by DPC in a letter dated 2 July 2007 by Ms Delany from DPC (exhibit A – GR 17), that DPC would be responsible for his leave entitlements for the duration of the secondment, the only reference to leave referred to in the letter to ECU on 20 June 2007 confirming the secondment was that all leave requests for the appellant were to be forwarded to DPC. Irrespective of the statements made in these documents, at law, other than the performance of functions, services or duties in the service of ECU, the appellant's other terms and conditions of employment as a public service officer remained unchanged and his contract of employment with the respondent did not cease and nor was it or the terms and conditions of his employment as a public service officer suspended. The reason why I make this finding is for the following reasons:

(a) Section 66 of the PSM Act expressly only contemplates a change in the functions and services to be performed or duties in the service of a public service officer and to whom these functions, services and duties are to be performed for. No other changes to the employment contract or statutory duties of a public service officer are contemplated.

(b) The PSM Act must be read as a whole and s 66 must be construed not divorced from its context. Statutory construction involves the analysis of the meaning of words of a provision in an Act in the context of the legislative scheme as a whole: ***K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*** (1985) 60 ALR 509

(514) (Mason J); ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 (381). When regard is had to these principles, the scope of s 66 of the PSM Act must be construed by regard to s 67 of the PSM Act which provides for the circumstances when the office of a public service officer becomes vacant. Section 67 provides:

> The office of a public service officer (other than an executive officer) becomes vacant if —
>
> (a) that public service officer dies; or
>
> (b) in the case of a term officer, the term officer completes a term of office and is not reappointed; or
>
> (c) that public service officer is dismissed, or retires from office, under this Act; or
>
> (d) the employment of that public service officer in the Public Sector is terminated under section 79(3); or
>
> (e) that public service officer resigns his or her office in writing addressed to his or her employing authority and that employing authority accepts that resignation; or
>
> (f) that public service officer is appointed or transferred under this Part to another office, post or position (unless it is an appointment and the Commissioner authorises the offices, posts or positions being held concurrently by that public service officer).

(c) When in 2007 the appellant was appointed to a position as a principal policy officer in DPC, he was appointed to an office in the public service. This position is described as unattached, as it is not attached to any specific duties. However, he is still held against an office under s 64(1) and s 64(3) of the PSM Act. Pursuant to s 67, the unattached office he held as a public service officer could not become vacant unless the circumstances subscribed in s 67 of the PSM Act applied.

134 It was argued on behalf of the appellant that if the principles considered by Moore J in ***Finance Sector Union of Australia v Commonwealth Bank of Australia*** [2001] FCA 1613; (2001) 111 IR 241 and by Edmonds J in ***Gothard v Davey*** [2010] FCA 1163 are applied to the facts of this matter, it could be argued that during the secondment to ECU the appellant ceased to be employed as a public service officer and became an employee of ECU. The principles considered in those cases examined secondment arrangements at common law and did not deal with the secondment of a statutory office holder such a public service officer. In any event, as counsel for the respondent points out in ***Finance Sector Union of Australia v Commonwealth Bank of Australia*** Moore J held that the matter is ultimately one of assessing the intention of the parties [63]. In these appeals the facts disclose that there was no evidence of an intention to create an employment relationship between the appellant and ECU.

135 The decision of the Full Bench in ***Galipo*** where it was found that a teacher's contract of employment was suspended by mutual agreement whilst she worked in a public service position is distinguishable. Ms Galipo was not a public service officer and was not seconded to the public service position under s 66 of the PSM Act or any statutory provision. Consequently, her secondment arrangement was unaffected by the operation of a provision such as s 66 or s 67 of the PSM Act.

136 For these reasons, whilst the appellant was on secondment at ECU he remained a public service officer employed by DPC. As a public sector employee and public service officer he was bound to comply with the provisions of the PSM Act.

Was the appellant required to comply with s 102 of the PSM Act?

137 Section 102(1)(b), s 102(1)(c), s 102(1)(d) and s 102(1)(e) relevantly provides:

> (1) Except with the written permission of his or her employing authority, which permission may at any time be withdrawn, an employee shall not —
>
> …
>
> (b) accept or continue to hold or discharge the duties of or be employed in a paid position in connection with any banking, insurance, mining, mercantile or other commercial business, whether it be carried on by any corporation, company, firm or individual; or
>
> (c) engage in or undertake any business referred to in paragraph (b), whether as principal or agent; or
>
> (d) engage or continue in the private practice of any profession; or
>
> (e) accept or engage in any employment for reward other than in connection with the functions of his or her office, post or position under the State.

(a) Appellant's submissions

138 The appellant contends that even if s 102(1) applied to him whilst he was on secondment to ECU his overseas activities were not activities contemplated in s 102(1)(c), s 102(1)(d) or s 102(1)(e) and as such, he was not required to seek permission from the respondent to engage in those activities. He also contended when giving evidence that since his return to DPC in August 2010 it is not necessary for him to obtain permission of the respondent to undertake overseas work for UNODC when he is on annual or long service leave as time on leave is his 'own time'.

139 The appellant also argues that the evidence discloses he has not engaged in or undertaken any business or employment for reward nor has he engaged in private practice of any profession. In support of this argument, it is said that at no time has he drawn a salary from his overseas work and he is not engaged in a 'profession' in the overseas work undertaken by him.

(b) Respondent's submissions

140 In response, the respondent says that the evidence is sufficient to conclude that the appellant undertook the business of providing advice for reward in relation to incarceration and criminal justice matters. The respondent argues that this occurred

during the period of his secondment to ECU and was likely to have continued after his return to DPC. In any event, the respondent points out, the appellant sought approval to work as a consultant in relation to criminal justice capacity building, crime prevention, custodial and non-custodial corrections, legislative and policy development and training for reward in his letter of 14 October 2010 (exhibit 3 – PC 25). It is argued that this activity would come within s 102(1)(c) if undertaken for reward. It is the type of work he engaged in during his secondment and outlined in the appellant's letter of 2 February 2010 (exhibit 3 – PC 2).

141 In the letter of 14 October 2010, the appellant's application was for approval to engage in 'secondary employment as a Criminal Justice Consultant' (exhibit 3 – PC 25). In relation to the external work identified in his letter of 2 February 2010, the appellant advised that engagement in these activities enhanced his 'reputation as a criminologist' (exhibit 3 – PC 2). In cross-examination, the appellant stated that he has been a member of an association of criminologists for a period of more than 10 years. He also reluctantly conceded when cross examined that he describes himself as a criminologist (from time to time) (ts 32), despite later saying there was no such thing as a criminologist (ts 59). Consequently, it is argued it is evident that he sees himself as a criminologist and the professional qualifications that he has justifies him in doing so.

142 The respondent points out that the external work that the appellant engaged in whilst on secondment and the activities in respect of which he sought approval to engage in the letter of October 2010 are activities in respect of which he has engaged or wishes to engage, in a private capacity. Professor Stoney was clear that he had not assigned the external activities under consideration to the appellant, nor were they otherwise activities which were performed as service or duties for ECU. The activities can fairly be regarded as ones which have been engaged in by the appellant as a private practice, that practice being as a criminologist. The activities were not ones which constituted the performance of functions or services for or duties in the service of ECU and therefore were outside the scope of the secondment. Consequently, the respondent says the appellant required leave to engage in them during work time and permission under s 102. They did not constitute service in respect of which he was entitled to be paid under the terms of his employment, those terms being contained in the PSM Act, the Public Service Award and General Agreements. The respondent says he was entitled to make a deduction from the appellant's accrued leave for the time engaged in these activities or insist that they be undertaken during periods of leave.

143 The secondment was to provide services as a 'lecturer of criminology and justice' (exhibit A – GR 15). While it may be that lecturers employed by ECU engage in external consulting work and attend conferences, the respondent points out these are private activities and not service provided to ECU. These are an incident of being an academic employee not required service or duty and the appellant was not a member of the academic staff.

144 Criminology is a recognised discipline, in fact one in which the appellant delivered lectures, and still appears to, at ECU. It is defined by the Macquarie Dictionary as 'the systematic study dealing with the causes of crimes and treatment of criminals'. The Macquarie Dictionary relevantly defines a profession to be 'a vocation requiring knowledge of some department of learning or science'.

145 While the appellant's submission was that the notion of a profession is vague and could not be sensibly applied to the activities of the appellant, the respondent says the external activities which are the subject of these appeals can be fairly regarded as ones concerning the appellant as a criminologist and ones in which he engaged in the private practice of that profession. That is, he engaged in the provision of advice concerning the causes of crime, the means of preventing it and the treatment of criminals. In his letter of 26 March 2010, the appellant says he was a 'practitioner scholar' at ECU. That requires him to have experience gained from a 'successful and sustained professional practice' (exhibit 3 – PC 7), Edith Cowan University Academic Staff Collective Agreement 2009 para 11.9.2. That practice could only on the evidence be as a criminologist. Professor Stoney agreed that the appellant was a practitioner scholar.

146 The respondent also says that where a reward has been received or will be received for the appellant's services, approval to provide them is required under s 102(1)(c) and s 102(1)(e) of the PSM Act.

(c) The scope of s 102(1) of the PSM Act

147 In ***Schlafrig v Payne*** [1999] WASCA 174, Ipp J, with whom Anderson and White JJ agreed, made the following observations about s 102(1) of the PSM Act [21] – [23]:

> [21] The purpose of s102(1) is plain, and is manifest from the heading to the section, namely, 'Employees not to engage in activities unconnected with their functions'. 'Employee' is defined by s3 of the Act as a person employed in the public sector or an 'employing authority' as defined by s5 of the Act. The body of s102(1) reveals a clear intent to preclude (subject to permission) public sector employees from being privately involved in professional or commercial activities. Thus, s102(1)(b) precludes an employee (as defined) from being a paid employee in connection with any commercial business, or discharging duties for which payment is received in connection with any such business; s102(1)(d) precludes an employee from being engaged in the private practice of any profession; s102(1)(e) is a catch-all provision, precluding employment for reward outside the public sector. Against this background, it seems to me, s102(1)(c) is intended to cover any situation, not covered by s102(1)(b), s102(1)(d) or s102(1)(e), where employees are engaged for reward in professional or commercial activities unconnected with their duties as persons employed in the public sector. Such a construction is consistent with the second reading speech relating to the Public Sector Management Bill where the Premier, being the Minister concerned, stated that the 'main thrust of the legislation' was 'good management, accountability, ethical official conduct and integrity in government'.
>
> [22] In this context it would be incongruous, in my view, if an employee in the public sector were to be able to avoid the prohibitions contained in s102(1), and the clear purpose and intent of that section, by taking a significant share in a proprietary company and using that company as a vehicle for commercial gain by seeking to increase the value of his or her shareholding. This, in effect, is the consequence of the applicant's argument. In my view the section is not capable of being so construed.

[23] In my opinion, the phrase 'any business' in s102(1)(c) has to be construed in the same way as Sir George Jessel, MR, construed the word 'business' in Smith v Anderson (1880) 15 Ch D 247 (at 258-259). The relevant issue in that case was whether a certain trust, that held shares in a number of telegraph companies, had to be registered. The applicable legislation only required registration if the trust was an association of more than 20 persons formed for the purpose of carrying on a business having as its object the acquisition of gain. The Master of the Rolls (at 258), pointed out that 'business' is a word of 'large and indefinite import' and, after examining the definitions of 'business' in various dictionaries, said:

> 'Anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification.'

Nothing in the judgments of the members of the Court of Appeal (who came to a different conclusion as to the result of the case) cast any doubt on Jessel MR's construction of the word 'business' (see, in particular, Brett LJ at 278).

148 As Ipp J aptly observed, s 102(1) is intended to preclude public sector employees from being involved in private professional or commercial activities. This intent is reflected in the heading to s 102 which provides context to the provision.

149 Importantly, when these principles are applied to the appellant's circumstances, subject to the preconditions in s 102(1)(c), s 102(1)(d) or s 102(1)(e) being met, s 102(1) can only apply to activities which are private activities and are activities which are not part of the appellant's functions as a public service officer.

150 Also of importance is that whilst the secondment arrangement was in place under s 66 of the PSM Act, the functions of the appellant as a public service officer were enlarged to include the functions specified in the secondment arrangement. This is manifest from the provisions of s 66 of the PSM Act when read together with s 102(1) of the PSM Act. It follows it would be nonsensical if a public service officer when seconded to perform functions for an employer outside the public service would be required to obtain permission under s 102(1) of the PSM Act where the functions in question were specified in writing in the secondment arrangement.

(d) ECU research project work

151 Leaving aside the preconditions to s 102(1)(c), s 102(1)(d) and s 102(1)(e), when the correspondence between the parties and the evidence given in these appeals are considered, it is apparent that it was a function of the appellant whilst on secondment at ECU to provide research support in ECU's various research projects. Mr Conran understood that was the case (ts 171). In my opinion, it is inherent in the function to provide research support that the appellant could engage in research work. However, that research work would have to be research in ECU's research projects; that is research that was approved by ECU in accordance with their processes of approval for such projects. Having heard the evidence given by the witnesses and read their witness statements, it appears that the only overseas work conducted by the appellant that fell into this category was the research work that the appellant conducted with Dr Hamilton. This research work involved interviewing Somali pirates and the work was formally approved by the ECU Ethics Committee in March 2010. The appellant travelled overseas to Kenya to conduct work for this research project from 12 April 2010 to 23 April 2010 and from 7 June 2010 to 25 June 2010. The fact that the UNODC and Mr Palmer, as the Inspector of Transport Security, were partners in the research project was not material as the work was also ECU approved research.

152 For these reasons, I am of the opinion that s 102(1) of the PSM Act did not apply to the overseas work performed by the appellant from 12 April 2010 to 23 April 2010 and from 7 June 2010 to 25 June 2010 and between those dates, as this work was part of the functions he was to perform whilst on secondment. Consequently, the respondent had no authority at law to require the appellant to take leave to perform this work as it was part of the functions the appellant was required to perform whilst on secondment to ECU.

(e) Other overseas work carried out by the appellant

153 With the exception of the delivery of a paper at a conference in Barbados in October 2009, it seems all the other consultancy work carried out by the appellant overseas was work for UNODC. The work became available to him through his contact with officers from UNODC when the appellant carried out work for Mr Palmer in 2009 when Mr Palmer was inquiring into maritime piracy in Africa. On each occasion, including the delivery of the paper in Barbados, the appellant's airfares were paid for by a third party and he received a daily subsistence allowance. On one occasion he received a consultancy fee.

154 The fact that the appellant received a consultancy fee on one occasion for prison assessments he conducted in Kenya from 6 July 2009 to 16 July 2009 is not sufficient to establish the appellant was 'engaged in or undertaking any business' within the meaning of s 102(1)(c) of the PSM Act. To engage in a business within the meaning of this provision is to engage in paid work that has an element of continuity or a series of paid contracts that can be said to raise an element of commerciality. A finding of profit is not necessary. Yet a mere possibility that further payment may be forthcoming in the future is not sufficient to raise an inference upon which a finding of commerciality can be made.

155 Turning to s 102(1)(d) of the PSM Act, whether the work overseas could be said to be work in the private practice of any profession, namely as a criminologist, turns in part whether an occupation or providing consulting services in the field of crime prevention and correction can be described as a profession. What constitutes a 'profession' was considered by French J in ***Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*** (1987) 71 ALR 615 where his Honour observed (619):

> The word 'profession' is descriptive of a class of occupations. The membership of that class is not rigid or static but shifts with general community perceptions: *Bradfield v FCT* (1924) 34 CLR 1 at 7 per Isaacs J. Whether a person carries on a profession in a given case is a question of degree and always of fact: *Robbins Herbal Institute v FCT* (1923) 32 CLR 457 at 461 per Starke J.
>
> It has been said that the word involves the idea of an occupation requiring either purely intellectual skill or else manual skill controlled, as is painting and sculpture or surgery, by the intellectual skill of the operator as distinct from an

> occupation which is substantially the production or sale or arrangement for the production or sale of commodities: *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647 at 651.
>
> The concept has created difficulties for social scientists. Theoretical definitions by reference to the crucial characteristics of professions are said to have resulted in '… a confusion so profound that there is even disagreement about the existence of the confusion': *Professions and Power*, T J Johnson, Macmillan (1972) p 22.
>
> One suggestion for definitive criteria includes the existence of a requirement for formal technical training accompanied by some institutionalised mode of validating both the adequacy of the training and the competence of the trained individual. The training, it is said, must lead to some order of mastery of a generalised cultural tradition in a manner giving primacy to an intellectual component. Skills in some form of the use of the tradition must be developed and there must be some institutional means of ensuring that the skills will be put to socially responsible uses: Parsons, 'Professions' (1968) 3 *International Encyclopaedia of Social Sciences* 536 cited in Partlett, *Professional Negligence* p 3.

156 When regard is had to the attributes described in the reasons of French J in ***Thiess***, it is clear that despite the appellant's denial to the contrary, the appellant is engaged in the profession of 'criminologist' and, in fact, described himself as such in his letter to the respondent dated 2 February 2010 when he sought retrospective approval to engage in secondary employment. However, that is not the only precondition of s 102(1)(d). For his overseas work to come within s 102(1)(d) of the PSM Act, the work in the profession must be in private practice. As the overseas work (which was not research work for ECU) did not come within the functions or services specified in the secondment arrangement, it is apparent that his work can be characterised as work engaged in the private practice of the appellant's profession as a criminologist.

157 It is immaterial whether Professor Stoney 'approved' this work. In any event, the evidence at its highest is not that he formally approved the work, but that he did not object to the appellant carrying out this work. Nor was he concerned about the appellant being away from Western Australia for a substantial period of time in 2009 as the appellant was still able to carry out his duties and functions of his ECU work as all of the appellant's courses were delivered through the internet online. It is, however, unfortunate that Professor Stoney and the officers at DPC who were responsible for managing the appellant's secondment did not properly manage the terms and conditions of the secondment arrangement. It is also unfortunate that once the errors, or perhaps what could better be described as misunderstood inferences in Mr Jones' memorandum which were drawn from the matters stated by Professor Stoney in the conversation with Mr Jones on 17 February 2010, became apparent to Professor Stoney and were notified in general terms to Mr Jones by the appellant not long after that conversation took place, that neither Mr Jones nor Professor Stoney sought to directly address those apparent errors or misunderstandings. Nor did they take any steps to clarify those matters or the terms of the secondment arrangement which was an important arrangement between DPC and ECU for the provision of functions and services to ECU.

158 In any event, whether Professor Stoney approved that overseas work or whether the work was contemplated in the role of 'practitioner scholar' is immaterial. Professor Stoney may have regarded the appellant as a practitioner scholar, but such a role was not contemplated by the terms of the secondment arrangement.

159 When regard is had to s 102(1)(e) of the PSM Act, even if the overseas work carried out by the appellant could not be regarded as work engaged in by the appellant in the private practice of a profession, it is clear that such work was carried out as employment for reward that was unconnected with his functions of the secondment arrangement, which whilst the secondment arrangement remained in place formed part of the functions of the appellant's office, post or position under the State, within the meaning of s 102(1)(e) of the PSM Act. The words 'for reward' in s 102(1)(e) can be contrasted with the words 'paid position' in s 102(1)(b). The words 'paid position', when compared to the words 'for reward', connote payment beyond expenses incurred in carrying out work, whereas 'for reward' are words that contemplate the obtaining of a benefit that has a monetary value or remuneration of any kind. This would include the provision of airfares, payment of accommodation and living expenses.

160 For these reasons, the appellant was required to seek written permission from the respondent to carry out the work he engaged in overseas that was not ECU research project work.

Should the appellant have been required to take leave whilst engaged in overseas work for UNODC that was not ECU research project work?

161 It is apparent from the documentary evidence before the Board, that the respondent, at all material times, acted upon an assumption that whilst the appellant was carrying out work for UNODC he was absent from his workplace. The difficulty with that assumption is that it relies largely upon an inference drawn from what Professor Stoney said to Mr Jones about poor standards of communication in Africa. Unfortunately, when the file note of the conversation Professor Stoney had with Mr Jones came to Professor Stoney's attention in March 2010, he took no steps to contact Mr Jones and explain to Mr Jones that the appellant was in fact able to service his students whilst in Africa and carry out a full load of all of his ECU commitments.

162 Unfortunately, too, Mr Jones did not make further enquiries of Professor Stoney. Consequently, the decision made by the respondent to deduct annual leave credits from the appellant's entitlements stood.

163 The evidence given in these proceedings by Professor Stoney and the other ECU witnesses clearly establishes that the appellant did, in fact, carry out a full load of ECU teaching duties whilst he was overseas. This is largely because all of his teaching work was delivered online and he was able to supervise his students through the use of email. Also, his student contact work when in Perth was carried out by the appellant at night and on weekends because students often made contact with him at those times. When regard is had to this evidence, the question that then arises is whether the deductions should have been made from the appellant's annual leave credits.

164 Annual leave and long service leave is paid leave whereby an employee is released from all obligations to perform work. Whilst as a public service officer the appellant's prescribed hours of work were not seven hours and 30 minutes a day under

cl 20(1) of the Public Service Award, as the General Agreements replaced the provisions of cl 20 of the Public Service Award. When the Public Service General Agreement 2008 (the 2008 General Agreement) was in place, pursuant to cl 16.1 of that agreement, the prescribed hours of duty were 150 hours per four week period to be worked between 7.00am to 6.00pm Monday to Friday. When those hours are to be worked could be varied by an employer: cl 16.5 of the 2008 General Agreement. Although these provisions require that working hours arrangements are to be put in place by an employer, where an employee is seconded to another agency it is not practical for the employer of a public service officer to put in place these arrangements as the work carried out by the seconded officer is not for the employer, but for the other agency. Nor was it practical in this matter for the respondent to regulate the times the appellant was required to carry out work for ECU. The times of delivery of that work could only be regulated by the nature of the teaching duties. They were that he was required to deliver online courses to largely postgraduate students who study outside normal working hours.

165 In the circumstances, where it was clear that the appellant, at all material times, competently and diligently performed the functions of a full-time lecturer for ECU, it was not reasonable for the respondent to require the appellant to deduct credits from the appellant's leave entitlements whilst during the relevant periods of time he was also carrying out work for UNODC overseas.

166 That does not mean that if the appellant had sought approval to carry out work for UNODC overseas prior to carrying out that work as he is required to do under s 102(1) of the PSM Act, it would not have been open for the respondent to grant permission to the appellant on condition that he take paid leave to perform that work, if the respondent formed the opinion that the nature of the work to be performed by UNODC was to be full-time and the appellant would not have been able to fulfil the full-time function for ECU in accordance with the secondment arrangement. However, no assessment was made of the extent of the UNODC work as approval was sought retrospectively.

167 For these reasons, I am of the opinion that the respondent should not have deducted credits from the appellant's leave credits for any of the overseas work carried out by the appellant, including attendance at the conference in Barbados.

Should annual leave credits have been deducted for the periods of time during the ECU Christmas limited service periods?

168 As set out above, the appellant's terms and conditions of employment whilst on secondment did not change, except for the functions, services and duties he was to perform. Consequently, his entitlements to leave were provided for in the Public Service Award and not those provided to ECU academic staff. Relevantly, cl 24 of the Public Service Award prescribes 10 specific days as public holidays each year and allows an employer to approve a day in lieu to be taken as a holiday for any of the prescribed public holidays. Three of the prescribed 10 public holidays fall within the ECU Christmas limited service periods each year. These are Christmas Day, Boxing Day and New Year's Day. Evidence was given by Professor Stoney that the only prescribed public holidays taken by teaching staff in the academic year are Good Friday, Easter Monday and Anzac Day. Consequently, the appellant, as a lecturer, whilst on secondment, was required to work on Labour Day, Foundation Day and Queen's Birthday. It can be inferred from this evidence that ECU academic staff do not work on Australia Day each year as Australia Day falls outside the academic year. The appellant as a public service officer is also entitled to receive two additional non-accruing paid leave days that can be taken at any time of the year. These days were taken into account by DPC when the appellant's annual leave entitlements were debited in August 2010.

169 After the hearing of evidence in these appeals was concluded, the Board received advice from the respondent that after considering the evidence of Professor Stoney the appellant was prepared to reinstate one day's leave for each year 2007, 2008 and 2009 (being three public holidays worked by ECU staff, offset by two public service holidays that are not available to ECU staff). As this concession is consistent with the entitlements to public holidays under the Public Service Award and the General Agreements, in my opinion, it was properly made.

170 Although Professor Stoney gave evidence that other paid PHIL days are provided to ECU academics in recognition of the requirement to work not only public holidays, but also to work outside standard working hours, the respondent points out that there is no evidence before the Board that the appellant worked more than 37.5 hours a week when performing ECU teaching functions and duties, and public service officers above level 6 have no entitlement to payment for overtime or time off in lieu: cl 22(4)(a)(i) of the Public Service Award.

171 For these reasons, I am satisfied that the respondent was entitled to deduct from the appellant's leave entitlements 15 days leave, for time not worked during the limited services period in 2007, 2008 and 2009 and not granted as time in lieu for public holidays worked and public service holidays.

Decision given on 20 October 2010 to refuse to provide approval for the appellant to engage in activities as a criminal justice consultant

172 In October 2010, the appellant sought to carry out work overseas as a criminal justice consultant. Initially the request was for voluntary work for UNODC from 8 November 2010 and 3 December 2010 during annual leave. On 14 October 2010, he extended the request to include periods of annual leave or personal leave in the next two years.

173 The appellant appeals against the decision by the respondent given on 20 October 2010 to withhold approval on the following grounds:

(a) The Director General requested information on which to base his decision that has not previously been requested of applicants for secondary employment and was unfair and inconsistent in doing so.

(b) The Director General failed to give proper consideration to relevant information provided.

(c) The Director General asked for irrelevant information, but will not give approval in its absence.

(d) The Director General requested information that does not exist, but will not give approval in its absence.

(e) The Director General asked for information beyond his powers to request, but will not give approval in its absence.

174 The appellant argues that the respondent has not acted fairly or consistently in that he has asked the appellant to provide information that other public service officers in DPC have not been required to provide when seeking approval under s 102(1) of the PSM Act. Through pre-hearing discovery the appellant sought and obtained copies of 27 applications for secondary employment considered by DPC. Copies of these applications were received into evidence as exhibit B. The appellant says that when each of these applications are analysed it can be seen he has been asked to provide information that is in excess of that asked of other applicants for secondary employment. He points out that when considering his application under s 102(1) of the PSM Act, regard should be had to the Public Sector Code of Ethics which requires the respondent to make decisions that are honest, fair, impartial and timely and all relevant information should be considered. A corollary of which is the respondent should not have regard to irrelevant information.

175 The appellant contends that:

(a) The information provided by him in regards to possible clients and the general nature of areas of consultancy expertise is relevant information.

(b) The requirement to submit specific client information and comprehensive information on services to be delivered is irrelevant information that should not be sought.

(c) The request for information on the rates of remuneration, per diem or other allowances, airfares, accommodation arrangements and actual dates on which secondary employment will be engaged whilst on annual leave is irrelevant information that should not be sought.

176 It is also argued that the respondent is acting ultra vires in seeking specific information on remuneration, per diem and other allowances.

177 The appellant points out that cl 6.5.1 of the DPC Code of Conduct (exhibit K) provides in determining whether to grant permission to undertake external employment the Director General is to have regard to:

(a) Possible detrimental effect on an officer's efficiency;

(b) Inconvenience to the Department; and

(c) Whether the employment would give rise to an actual, potential or perceived conflict of interest.

178 The appellant says when the requirements of cl 6.5.1 are considered, the information requested beyond what he has provided to the respondent has no relevancy to whether the proposed secondary employment could give rise to an actual, potential or perceived conflict of interest.

The appellant's functions of office as a public service officer

179 It is common ground that the appellant's position in DPC is as an unattached level 7 principal policy officer without allocated duties. From this fact, it is argued on behalf of the appellant that he has no functions, so no actual, potential or perceived conflict of interest could arise if he is granted permission to work as a criminal justice consultant. However, it is not correct to say the appellant has no functions. Nor does it follow that any actual, potential or perceived conflict of interest should only be measured against the appellant's allocated duties.

180 At common law, all employees have a duty to their employer of fidelity and good faith which is part of the broader duty of mutual trust and confidence that an employer and employee have to each other: Sappideen, O'Grady, Riley, Warburton, *Macken's Law of Employment* (7th ed) [5.140] and [5.880]. Part of this duty is to protect an employer's confidential information, answer lawful and reasonable questions, and for public sector employees they are required to not act inconsistently with government policies.

181 The duty not to make use of confidential information is specifically reflected in reg 8 of the *Public Service Regulations 1988* (WA) which provides that a public service officer shall not:

(a) publicly comment, either orally or in writing, on any administrative action, or upon the administration of any Department or organization; or

(b) use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service.

182 Public service officers have traditionally been appointed as 'permanent' officers. Although in more recent times public service officers can be appointed for a fixed term: see, for example, s 64(1)(b) of the PSM Act. The appellant is a permanent public service officer. Historically, public service officers, or public servants as they were known in Western Australian until the enactment of the PSM Act in 1994, were appointed as permanent officers. This was so to provide tenure and security in an attempt to ensure that the public service was composed of a body of career public servants who were able to provide 'frank and fearless advice' to the executive arm of government without fear or favour, as the public administration of the government of a State to rely upon such advice. As such, the public service as a whole must guard against being affected by politics by being politically neutral and scrupulously accountable.

183 The appellant as a public service officer holds a permanent position in the government department that is responsible for advice to the highest levels of the executive in Western Australia and the implementation of high level government policies. As Mr Jones explained when giving evidence a conflict of interest could possibly arise if the appellant was to provide advice as a criminal justice consultant to a sovereign foreign government that endorses policies that are inconsistent with the policies of the Western Australian government, or the Premier's view of international relations (ts 113).

184 Whilst it may be the case that the appellant does not intend to provide advice to any foreign governments either directly or through UNODC that could raise such a conflict, the respondent is entitled to such sufficient information from the appellant to ascertain whether such a conflict could arise. Part of a legitimate inquiry into whether such a conflict could arise would be to ascertain the specific identity of the clients the appellant intends to engage or has engaged, and the nature of services or advice

to be provided, including the names of persons who are either prospective clients or represent prospective clients who can be contacted to provide further information. These are clearly matters that are relevant to a proper assessment by the respondent of whether the appellant should be granted permission to engage in secondary employment.

185 Part of the reason for the appellant's refusal to provide the requested information is his opinion that whilst on annual or long service leave he is entitled to do as he pleases, that is, he is free to engage in work for others. This view, however, is misconceived. During leave he remains a public service officer and as such s 102 of the PSM Act continues to apply to his activities.

186 It is also relevant for the respondent to ascertain whether the appellant will be in receipt of any remuneration, per diem or other allowance, airfares and accommodation. Such information is specifically contemplated by s 102(1)(b), s 102(1)(c) and s 102(1)(e) of the PSM Act which prohibits engaging in a business and accepting or engaging in employment for reward. This information, together with information about the dates and likelihood of the frequency of engagement in secondary employment that is to attract payment or other remuneration or reward, is relevant to whether, if in the event permission is to be granted, the appellant should be required to take paid or unpaid leave. In any event, if the appellant's secondary employment is to attract a consultancy fee on top of reimbursement of travelling and living expenses, it would be open to the respondent to consider whether in the circumstances the appellant should be required to take unpaid leave as it may not be appropriate in circumstances for the appellant to receive payment from the State of Western Australia as a full-time employee whist engaging in paid work for third parties. This may be particularly relevant if the secondary work to be engaged in was to be full-time for substantial periods of time.

187 The fact that the respondent has not sought a similar amount of detailed information from other officers employed by DPC is not material or relevant. None of the other employees seek to engage in providing advice to sovereign nations in parts of the third world where the contemplated advice deals particularly with matters that deal with core government services of policing, security and imprisonment.

188 In the absence of the provision by the appellant of the information requested by Mr Conran in his decision on 20 October 2010 it cannot be said that the decision to refuse permission to the appellant to engage in work as a consultant to be unreasonable. Nor can it be said that the information requested was not reasonable.

Conclusion

189 In light of my reasons, I am of the opinion that the appeals PSAB 17 of 2010 and PSAB 22 of 2010 should be upheld. In my view, the decision of the respondent in PSAB 17 of 2010 to deduct leave from the appellant's leave credits should be adjusted by being varied to recredit the time deducted when the appellant was overseas. An order should also be made that PSAB 17 of 2010 be otherwise dismissed, as part of the decision was to deduct 15 days leave for time not worked by the appellant during the 2006, 2007 and 2009 ECU limited services period. For the reasons set out above I am of the opinion that this part of the decision should not be adjusted.

190 I am also of the opinion that the decision of the respondent in PSAB 22 of 2010 to require the appellant to take annual leave to participate in university approved research overseas be adjusted by setting the decision aside and recrediting the time deducted from the appellant's leave credits.

191 Finally, I am of the opinion that the appeal in respect of the decision in PSAB 21 of 2010 be dismissed.

MR B DODDS – BOARD MEMBER

192 I have read a draft of the reasons for decision of Smith AP. I agree with those reasons and have nothing to add.

MR K CHINNERY – BOARD MEMBER

193 I have read a draft of the reasons for decision of Smith AP. I agree with those reasons and have nothing to add.

2011 WAIRC 01102

APPEAL AGAINST THE DECISION MADE ON 23 AUGUST 2010 RELATING TO SECONDMENT FUNCTIONS, DUTIES AND RESPONSIBILITIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROSS
	APPELLANT
	-v-
	MR PETER CONRAN, DIRECTOR GENERAL DEPT OF THE PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN MR B DODDS - BOARD MEMBER MR K CHINNERY - BOARD MEMBER
DATE	FRIDAY, 9 DECEMBER 2011
FILE NO	PSAB 17 OF 2010
CITATION NO.	2011 WAIRC 01102

Result	Appeal allowed in part
Representation	
Appellant	Ms P J Giles (of counsel)
Respondent	Mr R J Andretich (of counsel)

Order

This appeal having come on for hearing before the Public Service Appeal Board on Monday, 13 June 2011, Tuesday, 14 June 2011 and Wednesday, 15 June 2011, and having heard Ms P J Giles (of counsel) on behalf of the appellant, and Mr R J Andretich (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 16 November 2011, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be upheld;
2. The decision of the respondent to deduct leave from the appellant's leave credits should be adjusted by being varied to recredit the time deducted when the appellant was overseas; and
3. The appeal is otherwise dismissed.

(Sgd.) THE HONOURABLE J H SMITH,
Acting President,
[L.S.] On behalf of the Public Service Appeal Board

2011 WAIRC 01042

APPEAL AGAINST THE DECISION MADE ON 20 OCTOBER 2010 TO REFUSE APPROVAL TO ENGAGE IN ACTIVITIES UNCONNECTED WITH EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN JAMES ROSS
	APPELLANT
	-v-
	PETER CONRAN, DIRECTOR GENERAL, DEPARTMENT OF THE PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN
	MR B DODDS - BOARD MEMBER
	MR K CHINNERY - BOARD MEMBER
DATE	WEDNESDAY, 16 NOVEMBER 2011
FILE NO	PSAB 21 OF 2010
CITATION NO.	2011 WAIRC 01042

Result	Appeal dismissed
Representation	
Appellant	Ms P J Giles (of counsel)
Respondent	Mr R J Andretich (of counsel)

Order

This appeal having come on for hearing before the Public Service Appeal Board on Monday, 13 June 2011, Tuesday, 14 June 2011 and Wednesday, 15 June 2011, and having heard Ms P J Giles (of counsel) on behalf of the appellant, and Mr R J Andretich (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 16 November 2011, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

(Sgd.) THE HONOURABLE J H SMITH,
Acting President,
[L.S.] On behalf of the Public Service Appeal Board

2011 WAIRC 01103

APPEAL AGAINST THE DECISION MADE ON 4 JUNE 2010 TO REQUIRE THE TAKING OF ANNUAL LEAVE WHILE ON SECONDMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN JAMES ROSS
	APPELLANT
	-v-
	PETER CONRAN, DIRECTOR GENERAL, DEPARTMENT OF THE PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN
	MR B DODDS - BOARD MEMBER
	MR K CHINNERY - BOARD MEMBER
DATE	FRIDAY, 9 DECEMBER 2011
FILE NO	PSAB 22 OF 2010
CITATION NO.	2011 WAIRC 01103

Result	Appeal allowed
Representation	
Appellant	Ms P J Giles (of counsel)
Respondent	Mr R J Andretich (of counsel)

Order

This appeal having come on for hearing before the Public Service Appeal Board on Monday, 13 June 2011, Tuesday, 14 June 2011 and Wednesday, 15 June 2011, and having heard Ms P J Giles (of counsel) on behalf of the appellant, and Mr R J Andretich (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 16 November 2011, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be upheld; and
2. The decision of the respondent to require the appellant to take leave to participate in university approved research overseas be adjusted by setting the decision aside and recrediting the time deducted from the appellant's leave credits.

(Sgd.) THE HONOURABLE J H SMITH,
Acting President,
[L.S.] On behalf of the Public Service Appeal Board

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 30/2011	Request for Mediation re written warnings	Beech CC	21/06/2011	Concluded

NOTICES—Union Matters—

2011 WAIRC 01112

NOTICE

FBM 8 of 2011

NOTICE is given of an application by the "Principals' Federation of Western Australia" to the Full Bench of the Western Australian Industrial Relations Commission for registration of an organisation pursuant to Section 53 of the *Industrial Relations Act 1979.*

The rules of the proposed new organisation relating to the qualification of persons for membership including any rule by which that area of the State within which the organisation operates, or intends to operate is limited, are as follows:

"4. ELIGIBILITY FOR MEMBERSHIP

(a) The Federation shall consist of persons in the following categories:

(i) Principals (as defined in Rule 3) employed or usually employed by the Department as Principals or Deputy Principals (or in the role traditionally designated as Principal or Deputy Principal (howsoever those positions may be described)) in Western Australian public schools and colleges; and

(ii) any person elected to an office in the Federation."

The matter has been listed before the Full Bench at 10:30 am on Wednesday, 29 February 2012 in Court 3 (18th Floor). A copy of the rules of the proposed new organisation may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979,* or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S. HUTCHINSON
DEPUTY REGISTRAR 7 December 2011

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2011 WAIRC 01129

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	CARL BAILEY
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 1 OF 2010
CITATION NO.	2011 WAIRC 01129

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01139

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MIKE BAINBRIDGE
	APPLICANT
	-v-
	SAFE AND SOUND LABOUR HIRE PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 84 OF 2010
CITATION NO.	2011 WAIRC 01139

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01131

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	COREY BURNETT
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 57 OF 2010
CITATION NO.	2011 WAIRC 01131

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01134

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GRANT EWEN
	APPLICANT
	-v-
	THISTLE FABRICATION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 72 OF 2010
CITATION NO.	2011 WAIRC 01134

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01140

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	DAVID GAHAN
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 93 OF 2010
CITATION NO.	2011 WAIRC 01140

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01132

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	AARON JARVIS
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 61 OF 2010
CITATION NO.	2011 WAIRC 01132

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01135

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ROBERT KAMMERER
	APPLICANT
	-v-
	THISTLE FABRICATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 74 OF 2010
CITATION NO.	2011 WAIRC 01135

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01141

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	TERRY PRENDERGAST
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 101 OF 2010
CITATION NO.	2011 WAIRC 01141

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2011 WAIRC 01133

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	JESSICA RADISICH
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 64 OF 2010
CITATION NO.	2011 WAIRC 01133

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01137

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	NAKIA TE AHO
	APPLICANT
	-v-
	SAFE AND SOUND SCAFFOLDING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 36 OF 2010
CITATION NO.	2011 WAIRC 01137

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01138

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	BRADLEY WHANA
	APPLICANT
	-v-
	SAFE AND SOUND SCAFFOLDING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 43 OF 2010
CITATION NO.	2011 WAIRC 01138

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

2011 WAIRC 01136

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	HAYDEN YOUNG
	APPLICANT
	-v-
	UNITED INDUSTRIES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 DECEMBER 2011
FILE NO/S	OSHT 77 OF 2010
CITATION NO.	2011 WAIRC 01136

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Ms L Gibbs (of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS the Tribunal listed the application for a To show cause hearing on 14 November 2011;

AND WHEREAS there was no appearance by either party at the hearing;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2011 WAIRC 01099

REFERRAL OF DISPUTE RE TERMINATION OF CONTRACT UNDER OWNER-DRIVER ACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

In Chambers

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIA BRANCH
	APPLICANT
	-v-
	SCHWEPPES AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 8 DECEMBER 2011
FILE NO/S	RFT 27 OF 2011
CITATION NO.	2011 WAIRC 01099

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Not applicable

Order

WHEREAS on 6 December 2011 the applicant made application to the Tribunal under s 40(a) and/or (d) of the Owner-Drivers (Contracts and Disputes) Act 2007 alleging that the respondent intends to fail to comply with a number of owner-driver contracts to which it is a party;

AND WHEREAS on 6 December 2011 the applicant filed an application under reg 99D(4) of the Industrial Relations Commission Regulations 2005 seeking an order that the time for the respondent to file a notice of answer in the application be shortened to seven days from the date of the service of the notice of referral;

AND WHEREAS having considered the grounds in support of the application for a shortened time for filing a notice of answer the Tribunal is satisfied that an order should be made;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

(1) THAT the time for the filing of a notice of answer by the respondent be and is hereby shortened to seven days from the date of service of the notice of referral to the Tribunal on the respondent.

(2) THAT a copy of this order and the notice of referral to the Tribunal be forthwith served on the respondent.

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

2011 WAIRC 01160

REFERRAL OF DISPUTE RE TERMINATION OF CONTRACT UNDER OWNER-DRIVER ACT

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 AUSTRALIA BRANCH
	APPLICANT
	-v-
	SCHWEPPES AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 15 DECEMBER 2011
FILE NO/S	RFT 27 OF 2011
CITATION NO.	2011 WAIRC 01160

Result	Discontinued by leave
Representation	
Applicant	Mr A Dzieciol
Respondent	Not applicable

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 01064

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

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-
	THE TRUSTEE FOR THE M & V NORTHOVER FAMILY TRUST T/AS ORD RIVER CONTRACTING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 23 NOVEMBER 2011
FILE NO/S	RFT 13 OF 2011
CITATION NO.	2011 WAIRC 01064

Result	Order issued

Order

WHEREAS the applicant filed a referral to the Road Freight Transport Industry Tribunal (the Tribunal) under Section 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007*; and

WHEREAS on the 27th day of October 2011 the applicant filed an application seeking an order for discovery of documents; and

WHEREAS the Tribunal is of the opinion that the issuing of an order will assist in the conduct of the hearing of the matters and the respondent consents to the issuing of such an order;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007*, hereby orders:

1. THAT the respondent provide discovery in relation to the following:
   (a) time and wages records relating to the applicant for the period between 5 July 2010 and 8 November 2010, including:
      (i) payment records;
      (ii) leave entitlement records; and
      (iii) superannuation payments.
   (b) taxation records relating to the applicant's alleged employment, for the period between 5 July 2010 and 8 November 2010, including:
      (i) group certificate for the 2010/2011 financial year;
      (ii) PAYG withholding records;
      (iii) tax file number declaration form;
      (iv) tax withholding declaration form.
   (c) invoices regarding repairs for damage supposedly caused by Mr Barnden that have been paid by the respondent;
   (d) Ord River Contracting Dockets completed by Mr Barnden on a daily basis and handed to the respondent for the period between 19 September 2010 and 8 November 2010, by 22 November 2011.
2. THAT costs be reserved.

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

2011 WAIRC 01151

REFERRAL OF DISPUTE RE TERMINATION OF OWNER-DRIVER CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2011 WAIRC 01151
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 27 SEPTEMBER 2011 ADDITIONAL WRITTEN SUBMISSIONS TUESDAY, 4 OCTOBER 2011, TUESDAY, 11 OCTOBER 20011
DELIVERED	**:**	TUESDAY, 13 DECEMBER 2011
FILE NO.	**:**	RFT 5 OF 2011
BETWEEN	**:**	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH Applicant AND TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A SCT LOGISTICS Respondent

Catchwords	**:**	Owner-driver contract - Referral of dispute regarding termination of owner-driver contract - Claim for implied term of reasonable notice of three months - Whether a serious breach of contract - Respondent had good reasons to terminate contract - Application dismissed
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007* s 4, s 5, s 40(a)(ii) and s 44
Result	**:**	Dismissed
Representation:		
Applicant	**:**	Mr A Dzieciol (of counsel)
Respondent	**:**	Mr D Paton (of counsel)

Case(s) referred to in reasons:

Crawford Fitting Co v Sydney Valve and Fittings Pty Ltd (1988) 14 NSWLR 438

Keldote Pty Ltd and Ors v Riteway Transport Pty Ltd t/as Riteway Express [2010] FMCA 394

Reasons for Decision

1 This application is a claim pursuant to s 40(a)(ii) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act). The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (the applicant) claims that its member Mr Gerard Dobson trading as Layback Transport had an owner-driver contract (the Contract) to provide services to Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust T/A SCT Logistics (the respondent). The applicant claims that the Contract was terminated by the respondent on or about 24 February 2011 and in doing so the respondent breached the implied terms of the Contract causing its member to suffer loss and damage by not paying Mr Dobson reasonable notice of three months' pay. The respondent disputes the applicant's claim and maintains that Mr Dobson terminated the Contract by his behaviour or in the alternative the respondent was justified in terminating the Contract given his behaviour. The respondent therefore disputes that Mr Dobson is due any monies pursuant to the Contract.

2 Conciliation proceedings in relation to this application pursuant to s 44 of the OD Act were unavailing and this matter was set down for hearing and determination.

3 The applicant provided the following further and better particulars of its claim:

1. The Applicant brings this claim on behalf of its member, Gerard Dobson ("*Dobson"*) pursuant to s.40(a)(ii) of the *Owner-Drivers (Contracts and Disputes) Act 2007* ("*the Act*").
2. At all material times, Dobson carried on business as an owner-driver under the name of *Layback Transport.*
3. By an oral agreement between Dobson and the Respondent made in or about early 2006, Dobson and the Respondent entered into an owner-driver contract ("*the Contract*").
4. Dobson provided services to the Respondent pursuant to the Contract for a period of approximately five (5) years from about early 2006 until the Contract was terminated by the Respondent on or about 24th February 2011.
5. The Contract was for an indefinite term, and it was an implied term of the Contract that the Contract could only be terminated by the Respondent by giving Dobson reasonable notice, or in the event of a serious breach of the contract.
6. A reasonable period of notice to terminate the Contract in all of the circumstances would have been a period of three ((3) (sic) months.
7. The Respondent terminated the Contract on or about 24th February 2011 because Dobson had, allegedly, falsified his run sheet, and for other reasons set out in a letter to Dobson dated 24th February 2011.
8. Dobson denies that he falsified his run sheet as alleged by the Respondent, or that he engaged in any other conduct which would support the termination of the Contract on the grounds of a serious breach thereof.
9. Accordingly, the only basis on which the Contract could have been lawfully terminated by Respondent (sic) on 24th February 2011 was by giving Dobson reasonable notice of the termination.
10. The Respondent did not give Dobson any notice of termination of the Contract, or make any payment to Dobson in lieu of notice when it terminated the Contract. The termination of the Contract by the Respondent on or about 24th February 2011 was therefore in breach of the implied terms of the Contract set out in paragraph 5.
11. By reason of the breach of the Contract referred to in paragraph 10 Dobson suffered loss and damage.

Particulars

The loss suffered by Dobson was the amount that he would have received under the Contract in the period of reasonable notice required to be given by the Respondent to terminate the Contract, namely, a period of 3 months.

(Further and Better Particulars of Claim dated 13 September 2011)

4 The respondent provided the following particulars in a schedule attached to the Notice of Answer and Counter-proposal it lodged in the Commission on 11 May 2011:

1 The Applicant (sic) was engaged by the Respondent by way of an oral contract to provide cartage services to the Respondent from time to time (**Contrac**t). The Contract required that the Applicant (sic) provide his own truck to provide the services.

2 The Applicant (sic) traded under the name 'Layback Transport'.

3 The Contract was terminated on 24 February 2011. Attached hereto and marked "Appendix I" is a letter from the Respondent to the Applicant (sic) dated 24 February 2011 terminating the Contract (**Letter**). The Letter sets out the reasons for the termination of the Contract.

4 Amongst other grounds, the Contract was terminated because the Applicant (sic) appeared to have fraudulently falsified his run sheet. The run sheet records the time the Applicant (sic) worked for the Respondent and forms the basis for the Applicant's (sic) entitlement to payment under the Contract.

5 The Respondent sought to discuss with the Applicant (sic) the discrepancies on his run sheet however the Applicant (sic) refused to discuss the matter.

6 After the incident mentioned in paragraphs 4 and 5 above the Applicant's (sic) attitude towards staff of the Respondent was negative, uncooperative, unprofessional and unproductive. The Applicant (sic) became uncommunicative and prescribed a generally poor attitude towards the Fleet Controller.

7 Further, the Applicant (sic) caused disruption in the workplace amongst other sub-contractors by badmouthing fleet (sic) controller and fellow sub-contractors.

8 The Applicant (sic) failed to act in a calm and professional manner including in relation to workflow issues and would not work together with the Respondent to find solutions. Instead, the Applicant (sic) took an overly inflexible approach.

9 The Respondent always sought to deal with the Applicant (sic) fairly and in good faith and did so.

Applicant's evidence

5 Mr Dobson gave evidence by way of a witness statement (Exhibit A1). Mr Dobson has been a truck driver for over 40 years and he has been the owner-driver of a truck for approximately 25 years. In or about early 2006 Mr Dobson commenced work with the respondent as a subcontractor and the respondent agreed to provide him with work and in return he agreed to provide a prime-mover truck of approximately 25 tonnes and undertake the work the respondent requested him to do. The Contract between Layback Transport and the respondent was verbal and was for an indefinite period of time and it was Mr Dobson's understanding that as long as he completed his work for the respondent in a reasonable manner the respondent would continue to provide him with work. Mr Dobson understood that the respondent could not terminate this contract without giving him a reasonable opportunity to find alternative work.

6 Prior to entering into the Contract Mr Dobson subcontracted to Nexus Freight for a period of about 10 years and he stated that during this period he had keys to the yard and to the warehouse and even though he left this company because of a disagreement over hours, he left on good terms.

7 Mr Dobson worked in the refrigeration section of the respondent's operations and from time to time he worked in the dry section if he finished his work early or if the dry section needed additional drivers. Mr Dobson stated that the fleet controller allocated work to drivers.

8 Mr Dobson stated that his truck was a 1980 Ford Louisville which he had bought second hand. Mr Dobson stated that he took good care of his truck and ensured it was in good condition as the truck was his livelihood. He cleaned it regularly and he had it serviced every 10,000 kilometres and Mr Dobson had an arrangement with his mechanic to review his truck when he was servicing it and to let him know if any work needed to be done on it. Mr Dobson did not believe that the number of times his truck broke down was excessive and he maintained that any breakdowns were as a result of unforeseeable problems. For example, around late 2010 the clutch arm in his truck stopped working and he had it fixed but it broke down two more times as it was not fixed properly. Mr Dobson stated that whenever his truck was off the road for any reason he would inform the respondent that he was prepared to hire a replacement truck and on most occasions the respondent told him that it was able to cover him with its own trucks and there was no need for him to hire a replacement truck. In early 2011 the fan blade on his truck broke and he was told that his truck would be off the road for about a week so he hired a replacement truck and Mr Dobson stated that new trucks also break down.

9 Mr Dobson stated that drivers started between 4.30 am or 5.30 am in the refrigeration section and sometimes drivers are asked if they want to do some loads in the dry section after finishing in the refrigeration section and if he felt that he had done enough hours for the week he would decline this additional work. If Mr Dobson knew the respondent was busy and as many trucks as possible were needed in the dry section he had no problem doing this additional work. Mr Dobson stated that as Thursday is a quiet day in the refrigeration section he took this opportunity to attend to other issues and he therefore did not work on a Thursday. To the best of Mr Dobson's knowledge there was not much work to be done in the refrigeration section on weekends and he preferred not to work weekends and Public Holidays and he informed the respondent that he was prepared to work at these times if required however if they had another driver who wanted to work at these times they should give the work to that driver. Mr Dobson only recalled one occasion when he was asked to work on a weekend and he did not do so as he had already hired out his truck privately. Mr Dobson stated that the respondent did not appear to have any issue with him not working on a Thursday or on weekends.

10 In or about early February 2011 the refrigeration section did not appear to have much work for Mr Dobson and he enquired if the dry section needed another truck when he was working there. About a week later Mr Mark Pitcher, the Refrigeration Manager, asked him if he had spoken to 'Frank' in the dry section and he replied that he had and Mr Pitcher then told him that he should have spoken to him about working in the dry section and Mr Dobson stated that he seemed to be put out by the fact that he had made an enquiry about a possible transfer to the dry section without speaking to him first.

11 Mr Dobson gave evidence that on 16 February 2011 he started work at about 5.20 am but he put his commencement time on his run-sheet as 5.30 am, which is what he usually does. Later that afternoon he left IGA at 3.25 pm and it took him approximately 25 to 30 minutes to reach the respondent's yard in Forrestfield and he arrived there at approximately 3.50 pm. Mr Dobson's run-sheet for that day also confirms that he left IGA in Canning Vale at 3.25 pm. When Mr Dobson returned to the yard he had to wait 5 to 10 minutes for the truck in front of him to open its Wingliner and back in the trailer and he then reversed his trailer up to the loading bay and dropped his trailer. After dropping his trailer he filled out his paperwork and put his name and finish time on a sticker and put it on the keyboard of the computer in the office. He stated that by this time it

would have been about 4.15 pm to 4.20 pm and he then put down 4.30 pm as his finishing time. On 18 February 2011 Mr Jim Mingo, the Fleet Controller, approached him and asked him what time he had finished on 16 February 2011 and Mr Mingo said something along the lines of 'you knocked off at 4.00 pm not at 4.30 pm, so we will have to dock you half an hour'. Mr Dobson just said to him 'whatever' and walked away and he stated that he then forgot about this discussion. Mr Dobson stated that at the time he had personal issues with his partner and he had bigger things to worry about and he felt that there was no point in having a discussion about this issue with Mr Mingo as he had made a decision as to what he was going to do and nothing he said would change that. Mr Dobson stated that he put down 4.30 pm as his finishing time that day as he had started 5 to 10 minutes early and this was why he did not put 4.15 pm or 4.20 pm as his finishing time. Mr Dobson stated that this was the first occasion he had been accused of stealing time from the respondent. Mr Dobson stated that he does not take a meal break during the day and on several occasions he was docked half an hour for a meal break which he had not taken but he did not make a big issue about this.

12 Mr Dobson stated that on 24 February 2011 he was working in the dry section and after he had finished for the day and was handing in his paperwork, Mr Mingo rang him and told him that Mr Pitcher wanted to see him and he then went to Mr Pitcher's office. Mr Pitcher asked him to sit down and he said words to him to the effect of 'we have a few trucks over from the east, and seeing that you are the oldest, and your truck is the oldest ...'. At that point Mr Dobson got up from his chair and said to Mr Pitcher 'so what you are saying is that I am fired', he replied 'yes' and Mr Dobson then walked out of Mr Pitcher's office. Mr Pitcher started following him and he turned and whilst Mr Pitcher was standing in the doorway to his office Mr Dobson said to him something like 'how long have I got' and Mr Pitcher's reply was 'immediately'. Mr Dobson then said 'this is bullshit, I am going to the union about this'. Mr Dobson was upset at the time and he gave evidence that he may have used the words 'this is f…ing bullshit' and he then went to his truck and contacted the applicant. About a week later he received the letter from the respondent dated 24 February 2011 confirming the termination of the Contract.

13 Mr Dobson stated that he did not falsify his run-sheet on 16 February 2011 or at any other time nor did he intend to claim payment from the respondent for work he had not done and Mr Dobson maintained that he was only claiming payment for the hours he had worked. Mr Dobson stated that if he had wanted to 'rip off' the respondent he could have done so when there was no one in the office to see the time he actually finished, or by working when managers were not around. Furthermore, if he was going to do this he would not have tried to claim just an additional half an hour.

14 Mr Dobson did not tell the respondent what it could do with the Contract, as suggested by Mr Pitcher and it was the respondent through Mr Pitcher which terminated the Contract. It had always been Mr Dobson's intention to continue working for the respondent until he turned 65 years of age and to then retire and he is presently 63 years of age. Mr Dobson also gave evidence that he had no other employment arranged and he would therefore not have ceased working with the respondent over a disagreement about the payment of 30 minutes of work.

15 Mr Dobson stated that after the Contract was terminated he visited several trucking companies looking for work as a subcontract driver and it became apparent that it would be difficult for him to obtain alternative work. As he had no source of income after the respondent terminated his contract he applied to Centrelink for unemployment benefits and he was advised by Centrelink that as he had been terminated for misconduct he had to wait eight weeks to receive unemployment benefits and this placed a significant financial strain on him and his partner. Mr Dobson commenced employment on a casual basis in Karratha on 29 May 2011 and he has been working full-time in this role since the end of June 2011 and it is unlikely that he will go back to subcontract driving. He sold his truck to the person from whom he purchased it 15 years ago and he stated that at the time he was complimented on the condition of the truck by its former owner.

16 Mr Dobson submitted weekly invoices to the respondent based on being paid $76 per hour for work completed and these invoices were usually for amounts between $2,000 and $3,000 per week and in the eight months to the end of February 2011 Mr Dobson was paid a total of $76,630 by the respondent and during this period he incurred $46,540 in expenses. Mr Dobson was therefore paid approximately $3,760 per month nett for the work he did for the respondent as a subcontract driver. Mr Dobson also stated that he filled out a log book each day containing the days he worked, the kilometers he drove for the respondent, fuel used and any maintenance on his truck.

17 Mr Dobson stated that he never refused to work on a Thursday or weekends however he did say that he would prefer not to work on Thursdays and weekends. Mr Dobson accepts that his truck broke down on occasions however he did not consider that his truck had a high rate of breakdowns. Mr Dobson stated that his records show that he worked on 1 June 2011 (sic), 28 June 2010 and 26 July 2010 and his truck did not breakdown on these dates and to the best of his recollection he was in hospital with asthma between 21 and 24 July 2011 (sic) and he recalled the respondent being informed of this. Mr Dobson stated that he has never left one of the respondent's trailers by the side of the road and the only occasion he can recall his truck breaking down in Spearwood was when he was near P&D Cold Stores where he was to make his delivery. Mr Dobson called a tow truck and the driver pumped air into his tank and he was able to drive his truck to P&D Cold Stores and drop off the trailer and he then had his truck towed to be repaired.

18 Mr Dobson stated that he sat down after walking into Mr Pitcher's office on 24 February 2011 and he only stood up after Mr Pitcher told him that the respondent was getting new trucks and he said that as his truck was the oldest his contract was finishing. Mr Dobson stated that Mr Pitcher did not raise the finish time he had put on his run-sheet on 16 February 2011 at this meeting. Mr Dobson then said that he sometimes uses his arms when talking but he denied that he was waving his arms at Mr Pitcher. Mr Dobson agreed that he stood up and started talking over Mr Pitcher but this was after he told him that his truck was the oldest. Mr Dobson stated that there was nothing said at the meeting about truck breakdowns and nothing was said about him allegedly badmouthing the respondent or Mr Mingo and he did not say words to the effect of 'you're getting company trucks, so who cares'. Mr Dobson maintained that it was Mr Pitcher who raised the issue about trucks and he did not say 'this is crap. I've lost the job anyway'. Mr Dobson definitely did not say 'you can f… off and stick your job up your arse' but he said 'this is bullshit, I am going to the Union about this' or 'this is f…ing bullshit, I am going to the Union' after Mr Pitcher told him he was sacked. Mr Dobson stated that the meeting lasted approximately three minutes and Mr Dobson

conceded that he became agitated but this was after he was advised that the respondent would no longer give him any work. Mr Dobson believed that Mr Pitcher wanted to get rid of him and he used the run-sheet issue as an excuse to do so and if this was not the case then Mr Pitcher would have agreed to his request to transfer to the dry section. Mr Dobson denied that he had the following exchange with Mr Pitcher on 24 February 2011:

> Me [Mr Pitcher]: "Well, can you explain why you claimed an extra half hour the other day? You didn't explain to Jim why you put the extra time on."
>
> Dobson: "I already know what this is about, you've got more trucks coming and you just want to get rid of me."
>
> Me [Mr Pitcher]: "That's got nothing to do with what we're talking about here. We need to talk about the finish time that you put on your run-sheet. We need to discuss this, so why don't you sit down?"
>
> (Extract from Exhibit R2, p 7 – 8)

Mr Dobson maintained that Mr Pitcher never talked about the times he worked on 16 February 2011 at this meeting and Mr Dobson stated that he was 'talking with his hands' and this could possibly be called waving his arms around. Mr Dobson agreed that from time to time he badmouthed the respondent but he stated that this was a minor issue and he was just expressing a point of view and this issue was not raised with him by Mr Pitcher. Mr Dobson stated that he doubted that he said that 'you can f… off and stick your job up your arse' because he liked working with the respondent and he had no other job to go to.

19 In relation to the issues raised in the letter dated 24 February 2011 sent to him by the respondent Mr Dobson stated that he accepts that on one occasion he went into the depot to collect his paperwork and did not say anything to Mr Mingo but he did not consider that this was being 'surly' and Mr Dobson denies he was disruptive by badmouthing Mr Mingo and other contractors. Mr Dobson admitted that he had made comments about Mr Mingo to other drivers in the same way as other drivers have also said things to him about Mr Mingo which were not all complimentary.

20 The following documents were attached to Mr Dobson's witness statement:

- copy of Centrelink application for Newstart for Mr Dobson;
- copies of Mr Dobson's Income Tax Return documents for the financial year 2010/2011; and
- copies of extracts from Mr Dobson's journal/log book for June 2010 and July 2010.

21 Under cross-examination Mr Dobson agreed that when he filled out his run-sheet on 16 February 2011 it was incorrect to state that his finishing time was 4.30 pm. Mr Dobson stated that 3.30 pm to 4.00 pm was peak hour traffic.

22 Mr Dobson stated that he had a good relationship with Mr Mingo. Mr Dobson stated that when he was approached by Mr Mingo about his 16 February 2011 run-sheet on 18 February 2011 and he asked him to explain why he put 4.30 pm as his finishing time he agreed that he did not answer Mr Mingo but he did not deny or admit what was on his run-sheet. Mr Dobson also understood that Mr Mingo took 30 minutes off the hours he worked because his run-sheet for 16 February 2011 was incorrectly filled out.

23 Mr Dobson again denied that at the meeting with Mr Pitcher held on 24 February 2011 that he was asked why he had claimed extra time and why he had not explained this to Mr Mingo when asked. Mr Dobson gave evidence that he had heard a rumor that the respondent was buying more trucks and wanted to get rid of him but he denied he raised this issue at the meeting. Mr Dobson stated the following:

> Thank you. Just answer my question, thank you. And you said you knew what the meeting was about, didn't you, to Mr - to Mr Pitcher?---No.
>
> You said that you knew that they had more trucks coming, didn't you?---I heard a rumour they had more trucks coming.
>
> And they wanted to get rid of you - didn't you?---Also heard a rumour that - that they wanted to get rid of me.
>
> And Mr Pitcher told you that the fact that more trucks were coming had nothing to do with it, didn't he?---No.
>
> Well, I put it to you that's exactly what he said - - - ?---Well - - -
>
> - - - and you didn't want to hear that?--- - - - I put - - -
>
> (Transcript p 47)

Mr Dobson denied that Mr Pitcher raised his truck breaking down at this meeting and Mr Dobson agreed that his truck was old, it had problems and occasionally it had broken down. Mr Dobson stated that on one occasion he hired another truck and on other occasions he asked the respondent if it required him to obtain an alternative vehicle and he was told that it was not necessary. Mr Dobson reiterated that he did not work weekends but he denied that he refused to work weekends and he stated that when he was asked once to do so he had other work organised.

24 Mr Dobson stated that his relationship with Mr Mingo was not discussed at the meeting held on 24 February 2011 and he confirmed that he has called Mr Mingo a 'dickhead' but he maintained this was not an unusual comment. Mr Dobson stated that he was upset at the meeting with Mr Pitcher because he was told he was too old and his truck was too old and Mr Dobson agreed that he talked over Mr Pitcher when he was seeking clarification as to whether or not he had been sacked. Mr Dobson also agreed that he walked out of this meeting.

25 Under re-examination Mr Dobson stated that at the meeting held on 24 February 2011 there was no reference to the finish time he put on his run-sheet or of the necessity to work cooperatively with Mr Mingo and Mr Dobson stated that he worked on a Thursday when directed to do so. Mr Dobson described his relationship with Mr Mingo as being okay, they were friendly and they laughed and joked at times and he understood that he had a reasonable relationship with Mr Pitcher. Mr Dobson stated

that on 10 January 2011 he worked all day, on 6 August 2010 he did not work as his truck broke down, he worked on 26 July 2010 and on 14 July 2010, 22 June 2010 and 15 June 2010 he had trouble with his clutch.

Respondent's evidence

26 Mr Pitcher gave evidence by way of a witness statement (Exhibit R2). Mr Pitcher has been employed by the respondent since 2006 and he works at the respondent's Forrestfield depot. Mr Pitcher previously worked as a subcontract truck driver to the respondent for about 13 years.

27 Mr Pitcher stated that the Forrestfield depot is made up of five different divisions located in separate warehouses; Refrigeration, Operations, Administration/Rail/Intermodal Park and Fosters Warehouse. Mr Pitcher is currently the Refrigeration Manager of the refrigeration division, which is a senior position, and he has been in this position for approximately three years. Prior to undertaking this role he was employed as the respondent's Operations Manager. In his current position Mr Pitcher oversees the operations of the refrigeration division which includes ensuring that the division is compliant with Policies and Procedures, ensuring that deliveries are made as scheduled and he also deals with customers. Mr Pitcher reports directly to Mr Brad Moore who is the respondent's Western Australian State Manager and Mr Peter Lyngberg who is the National Manager for Refrigeration. Mr Pitcher stated that all of the respondent's employees within the refrigeration division at the Forrestfield depot report either directly or indirectly to him including Mr Mingo the Fleet Controller for the refrigeration division and Mr Mathew Johnson in the Customer Service Unit - Refrigeration.

28 Mr Pitcher stated that Mr Dobson was a subcontract truck driver who worked in the respondent's refrigeration division and Mr Pitcher first met him when he was a subcontract driver. Mr Pitcher stated that Mr Dobson was engaged by the respondent under a verbal arrangement whereby if work is available it is given to him to undertake, subject to Mr Dobson presenting for work in a clean and presentable state and ensuring that deliveries he is contracted to make are delivered in a professional and timely fashion and this involved supplying a clean and reliable truck for deliveries. Mr Pitcher stated that subcontract truck drivers including Mr Dobson are paid according to the hours they work each day and as far as possible, the respondent tries to keep the amount of hours it provides to each subcontract truck driver even so that each driver gets roughly the same amount of pay each week.

29 Mr Pitcher found Mr Dobson to be very inflexible in his attitude to performing work. For example, Thursdays are generally a quiet day in the refrigeration division and the respondent had a roster system for drivers to work on a Thursday to keep their hours even, but Mr Dobson refused to work on a Thursday. The respondent also put in place a roster for weekend work for subcontract drivers but Mr Dobson refused to work weekends. The respondent's operations division is usually very busy so whenever there is no work in the refrigeration division subcontract drivers are asked if they want to work in the operations division, particularly if the driver has not done a lot of hours that day and most subcontract drivers are fairly flexible and are willing to work in the operations division or any other division if they are requested to do so. However, Mr Dobson would usually refuse to work for the other divisions unless he was told that he was needed.

30 Mr Pitcher stated that Mr Dobson's truck was old and was not always reliable and it had a high number of mechanical breakdowns over the past year and Mr Pitcher relied on an email from Mr Mingo dated 22 June 2011 listing six days that Mr Dobson's truck had broken down in the last 12 months. When Mr Dobson's truck broke down in June or July 2010 on the side of the road in Spearwood the respondent had to organise another truck to pick up his trailer which was left on the side of the road and Mr Pitcher stated that leaving a trailer stranded on the side of the road suggests to passers-by that the respondent is not operating reliably and this was unacceptable. Prior to Christmas 2010 Mr Pitcher spoke to Mr Dobson after his truck broke down and he said words to him to the effect of 'you need to provide a reliable truck. If you break down again, you need to hire a truck or you won't be given work here'.

31 Mr Pitcher stated that drivers are given a written run-sheet for each run they make each day and on average a driver generally makes about three runs per day and each run-sheet records the details for that particular run including the collection and delivery address, the time the delivery was made and the amount of pallets which were delivered. The run-sheet also includes the driver's start and end time for each run and Mr Pitcher stated this information is important because subcontract truck drivers are paid according to the time they work on each run. On 17 February 2011 Mr Mingo showed Mr Pitcher Mr Dobson's run-sheet from the previous day and Mr Mingo told him that he was driving home the previous night after he finished work at around 3.40 pm and he saw Mr Dobson driving down Abernethy Road about two minutes from the depot. Mr Dobson had put down 4.30 pm as his finish time on his run-sheet and Mr Mingo asked him if he had asked Mr Dobson to do anything when he got back to the depot which might have made him stay longer and Mr Pitcher told Mr Mingo that this was not the case.

32 Mr Pitcher stated that his office is located in the refrigeration division administration offices and he has a big window directly in front of his desk which overlooks the entrance and exit to the yard from which he can see and hear the trucks arriving and leaving. Mr Pitcher stated that on 16 February 2011 he saw Mr Dobson's truck arrive in the yard at around 3.40 pm and he told Mr Mingo that he saw Mr Dobson arrive in the yard just after Mr Mingo left. Mr Mingo responded by saying that Mr Dobson was not working that day and he would ask him about it when he came in on Friday. Later that day, Mr Pitcher visited Mr Johnson in his office, which is located across the hall and also has a window overlooking the yard and after explaining to Mr Johnson the apparent discrepancy in Mr Dobson's run-sheet he asked him what time Mr Dobson finished the previous day and he replied that he thought it was around 3.45 pm because Mr Johnson left at around 4.00 pm and by that time Mr Dobson had left for the day.

33 On the morning of 18 February 2011 Mr Mingo came into Mr Pitcher's office and he told him that he had just spoken to Mr Dobson and he could not explain why he had put down 4.30 pm as his finish time on 16 February 2011. Mr Mingo told him he was going to dock him half an hour's pay and Mr Dobson said to him that he did not care and Mr Pitcher then told Mr Mingo that he would have to speak to Mr Dobson about this issue. Mr Pitcher stated that he saw Mr Dobson's apparent falsification of his run-sheet as a serious issue because the respondent put a significant amount of trust in subcontract truck

drivers to accurately record their start and finish times. Additionally sometimes truck drivers arrive back at the depot after Mr Mingo has left for the day and when other employees are not around time recording is operated on an honour basis.

34 On 21 or 22 February 2011 Mr Pitcher telephoned Mr Moore and told him about Mr Dobson's apparent falsification of his run-sheet and Mr Moore told him that he needed to have a discussion with Mr Dobson and if it was true, what he had done was theft. Mr Pitcher told Mr Moore that he would talk to Mr Dobson to get his side of the story and get back to him.

35 On the afternoon of 24 February 2011 Mr Pitcher asked Mr Mingo to ask Mr Dobson to see him when he finished work to talk about the hours he was claiming. Mr Pitcher stated that between 2.00 pm and 3.00 pm Mr Dobson came into his office and he asked Mr Dobson to sit down but he refused to do so and he stood with his arms crossed over his chest. Mr Pitcher stated that the following exchange took place:

> Me [Mr Pitcher]: "Well, can you explain why you claimed an extra half hour the other day? You didn't explain to Jim why you put the extra time on."
>
> Dobson: "I already know what this is about, you've got more trucks coming and you just want to get rid of me."
>
> Me [Mr Pitcher]: "That's got nothing to do with what we're talking about here. We need to talk about the finish time that you put on your run-sheet. We need to discuss this, so why don't you sit down?"
>
> (Extract from Exhibit R2, p 7 – 8)

Mr Pitcher stated that Mr Dobson became angry and started talking over the top of him and waving his arms. Mr Pitcher then told him that his truck had had a number of breakdowns and they needed to discuss this and Mr Dobson told him that the respondent was getting its own trucks so why would they care. Mr Pitcher told him that he had heard that he had been badmouthing the respondent and Mr Mingo and he asked if there was any truth to this. In response Mr Dobson said 'this is crap. I've lost the job anyway'. Mr Dobson then left his office and as he was walking out he said loudly 'you can f… off and stick your job up your arse'. Mr Pitcher stated the meeting would have only taken about 10 minutes. Mr Pitcher gave evidence that during this meeting Mr Dobson was very agitated and aggressive but he stayed calm and professional. Mr Pitcher stated that it was never his intention to terminate Mr Dobson at this meeting and he just wanted to get Mr Dobson's side of the story and depending on what he said Mr Pitcher would have then spoken to Mr Moore and discussed what action the respondent would have taken if any. Mr Pitcher took Mr Dobson's comments as Mr Dobson terminating the services of Layback Transport's contract with the respondent and as a result the respondent issued Mr Dobson with a letter of termination. Mr Pitcher remained in his office after Mr Dobson left and he called Mr Moore and told him what had happened and Mr Moore told him that as Mr Dobson had terminated his contract with the respondent he should write a letter to him confirming this.

36 After the meeting with Mr Dobson on 24 February 2011 Mr Pitcher was telephoned by a person at Centrelink who asked if Mr Dobson was still a contractor to the respondent and he stated that he did not divulge any details to this person but he said that Mr Dobson used to work with the respondent as a subcontractor, there was an issue and he left.

37 The following documents were attached to Mr Pitcher's witness statement:

- copy of an email from Mr Mingo to Ms Heather McCall sent on 22 June 2011 regarding Mr Dobson's truck breakdowns;
- Mr Dobson's run-sheet dated 16 February 11; and
- a copy of the letter of termination sent to Mr Dobson by Mr Pitcher dated 24 February 2011.

38 Mr Pitcher stated that subcontract truck drivers such as Mr Dobson had no guarantee of minimum working hours and they are able to work elsewhere if they choose to do so.

39 Mr Pitcher gave evidence that he was told to talk to Mr Dobson about a range of issues including whether or not he claimed an extra half hour on his run-sheet, bad mouthing other employees and his frequent truck break downs. Mr Pitcher stated that at the meeting held on 24 February 2011 with Mr Dobson he did not mention new trucks being bought by the respondent and he told Mr Dobson that the respondent's issue with him had nothing to do with his age after Mr Dobson stated words to this effect and Mr Pitcher described Mr Dobson as being uptight and agitated. He stated that Mr Dobson was shouting as he left the meeting and walked down the hallway from his office and he understood that Mr Dobson had withdrawn his services to the respondent given what he had said. Mr Pitcher did not refer to Mr Dobson being terminated at this meeting and he stated that he had no intention of terminating Mr Dobson.

40 Under cross-examination Mr Pitcher stated that Mr Mingo runs the truck fleet and he can adjust times worked by subcontractors in consultation with drivers as drivers are paid for the time actually worked. Mr Pitcher stated that Mr Mingo would only talk to him about adjusting a driver's pay if there was a problem.

41 Mr Pitcher stated that he recalled occasions when Mr Dobson was not keen to work on weekends and he was once asked to do so and refused and Mr Pitcher stated that Mr Dobson did agree to work when he was told he had to work. Mr Pitcher stated that he told Mr Dobson that the respondent could not afford to have trucks continually breaking down and that Mr Dobson may need to look at updating his truck and he conceded that other drivers' trucks sometimes break down.

42 Mr Pitcher stated that Mr Dobson could not have arrived back to the depot on 16 February 2011 at 3.50 pm after leaving IGA at 3.25 pm and Mr Pitcher was aware that there was another truck present in the dock on the afternoon of 16 February 2011 which arrived before Mr Dobson's truck but he stated that this truck would have only taken a couple of minutes to manoeuvre into the loading bay. Mr Pitcher stated that all a driver had to do after finishing removing their load was to put their finish time on the run-sheet and put it in a tray in the office and write their finish time for that day on a post-it note. Mr Pitcher agreed that there was no previous issue about Mr Dobson's honesty. When it was put to Mr Pitcher that Mr Dobson finished around 4.15 pm Mr Pitcher stated that even if Mr Dobson returned to the yard at 3.50 pm it would only take a short time to unload and

do the required paperwork. Mr Pitcher stated that he did not know why Mr Dobson would falsify his run-sheet and he tried to get a response from him about this issue.

43 Mr Pitcher stated that at the meeting held on 24 February 2011 he did not refer to Mr Dobson's truck being old and he did not tell Mr Dobson that he was terminated with immediate effect. Mr Pitcher stated that he did not hear Mr Dobson say words to the effect that 'this is f…ing bullshit, I'm going to the union about this' but Mr Dobson did say something after he left the meeting. Mr Pitcher stated that he did not want to get rid of Mr Dobson but he asked Mr Mingo what was the matter with Mr Dobson as he was being surly and uncommunicative. Mr Pitcher stated that he expected to discuss Mr Dobson's attitude, his run-sheet and Mr Dobson's yard talk at this meeting and he was then going to report back to Mr Moore but he did not get to that stage in the meeting.

44 Mr Johnson gave evidence by way of a witness statement (Exhibit R3). Mr Johnson has been employed by the respondent since March 1996 and he works at the Forrestfield depot. Mr Johnson is currently employed in the Customer Service Unit for the refrigeration division and he handles customer returns, damages, discrepancies and other issues relating to customer service and he is responsible for the supervision of handling of freight within the warehouse. Prior to undertaking this role he was the Fleet Controller for the refrigeration division in 2003 or 2004 and Mr Dobson reported directly to him. During this time he had no problems with Mr Dobson's work performance or punctuality however Mr Dobson did have an older truck which would breakdown about once every six months.

45 Mr Johnson's office is located in the refrigeration division administration office and it has large windows directly in front of his desk looking out over the yard from which he can see and hear trucks arriving and leaving. He can also hear truck drivers coming into the refrigeration office to return their paperwork at the end of the day. On 17 February 2011 Mr Johnson was working in his office at around 10.30 am when Mr Pitcher came in and asked if he could remember the time Mr Dobson left the day before as he has recorded that he finished at 4.30 pm on his run-sheet. Mr Johnson told him that this finish time for 16 February 2011 did not make sense to him because from his office window he had seen Mr Dobson's truck arrive back in the yard and also heard movement in the office around 3.45 pm. Mr Johnson stated that he did not look at the clock however he thought Mr Dobson arrived about 3.45 pm because it was about 10 to 15 minutes before Mr Johnson's usual finish time at 4.00 pm. When Mr Pitcher asked him what time Mr Dobson clocked off for the day he told him that he thought it was between 3.45 pm and 4.00 pm. Mr Johnson was not sure what then happened but he was told by Mr Pitcher and Mr Mingo that Mr Dobson had become uncommunicative with them and had stopped talking to them.

46 On the afternoon of 24 February 2011 between 2.00 pm and 3.00 pm Mr Johnson was working in his office with the door open when he heard raised voices coming across the corridor near Mr Pitcher's office. Mr Johnson assumed this was Mr Dobson and Mr Pitcher because he had seen both of them walk into Mr Pitcher's office and close the door about 15 minutes beforehand. Mr Johnson heard Mr Pitcher's office door open and he heard Mr Dobson say loudly words to the effect 'f… off and stick your job up your arse' and Mr Johnson then heard Mr Dobson walk out of Mr Pitcher's office. Shortly after he saw Mr Pitcher who told him that there was a big issue with Mr Dobson and that Mr Dobson was 'just going off at me'.

47 Mr Johnson stated that he could not recall the exact time Mr Dobson returned on 16 February 2011 but it would have been around 3.45 pm. Mr Johnson stated that when he was the fleet controller drivers were always paid by the minute and their times were not rounded to the nearest half hour.

48 Under cross-examination Mr Johnson stated that it was possible Mr Dobson returned to the yard at 3.50 pm on 16 February 2011 and he was not aware of the exact time Mr Dobson left the yard that day. Mr Johnson said he did not hear Mr Dobson saying to Mr Pitcher words to the effect 'this is f…ing bulldust. I'm going to see the union' after his meeting with Mr Pitcher.

Applicant's submissions

49 The applicant argues that Mr Dobson did not falsify his run-sheet on 16 February 2011. The applicant also maintains that Mr Dobson's contract was terminated by the respondent on 24 February 2011. Mr Dobson was the only person who gave direct evidence about the times he worked on 16 February 2011 and his evidence should therefore be accepted and whilst Mr Dobson could have handled the situation better when approached by Mr Mingo to clarify the times he worked on 16 February 2011 it was the respondent who escalated this issue.

50 The applicant argues that Mr Dobson did not terminate his subcontract arrangement with the respondent on 24 February 2011 and Mr Dobson had no reason to terminate the Contract, he was happy with his job, he was working towards his retirement and he had no other job to go to. There was also no reason to contact the applicant if he had terminated the Contract. The applicant submits that in the circumstances Mr Dobson's evidence about who terminated the Contract should be preferred. The applicant also submits that Mr Dobson did not tell Mr Pitcher to 'shove his job' in the terms alleged by the respondent even though Mr Dobson was upset at the meeting. The applicant maintains that it was the respondent who terminated the Contract as it no longer wanted Mr Dobson to work for the respondent as he was an older driver with an old truck the respondent claimed was unreliable and the applicant argues that as Mr Dobson did not misconduct himself the respondent therefore had no reason to terminate the Contract without notice. The applicant argues that the letter the respondent sent to Mr Dobson dated 24 February 2011 is a letter of termination and does not indicate that Mr Dobson terminated the Contract.

51 The applicant maintains that Mr Dobson's comments about Mr Mingo were banter and that Mr Dobson got on well with Mr Mingo.

52 The applicant argues that Mr Dobson had an ongoing contractual arrangement with the respondent and Mr Dobson offered to provide services to the respondent which it accepted and Mr Dobson had a contract with the respondent to provide services on an 'as required' basis even though he worked irregular hours in his role as an owner-driver. There was also an expectation that Mr Dobson would make himself available on a weekly basis and give priority to undertaking the respondent's work so there was therefore enough certainty to form a legal relationship.

53 The applicant argues that when the Contract was terminated it must be with reasonable notice (see ***Keldote Pty Ltd and Ors v Riteway Transport Pty Ltd t/as Riteway Express*** [2010] FMCA 394). The applicant submits that based on the factors considered in this decision as to what constitutes reasonable notice and as Mr Dobson had an ongoing owner-driver contract a reasonable time for him to deploy his labour and equipment in alternative employment would be three months' notice. This quantum is reasonable notice in the circumstances and an amount of $11,265 net should be awarded to Mr Dobson by way of damages for the respondent's repudiation of the Contract.

Respondent's submissions

54 The respondent maintains that Mr Dobson deliberately and fraudulently falsified his run-sheet on 16 February 2011 as he admitted in cross-examination that he did not finish at 4.30 pm that day and Mr Dobson did not deny that he had falsified his run-sheet on 16 February 2011. The respondent submits that Mr Pitcher and Mr Johnson gave evidence that they saw Mr Dobson return to the yard around 3.45 pm and their evidence is consistent and credible and should be preferred. Mr Dobson also refused to explain this discrepancy when approached by Mr Mingo to clarify this nor did he deny the allegation. The respondent also submits that Mr Dobson was badmouthing Mr Mingo and the respondent which was inappropriate.

55 The respondent had no intention of terminating Mr Dobson at the meeting held on 24 February 2011 which was to discuss the run-sheet, his uncommunicative approach to Mr Mingo and his badmouthing of him, regular truck breakdowns and his inflexible approach to work.

56 The respondent argues that Mr Dobson's conduct on 24 February 2011 at the meeting with Mr Pitcher resulted in Mr Dobson terminating the Contract. In the alternative the respondent submits that it was justified in terminating the Contract given Mr Dobson's behaviour on 16 February 2011 and 24 February 2011 and the letter sent to Mr Dobson after this meeting reflected the respondent's understanding that Mr Dobson no longer wished to continue with the Contract and the respondent submits that the letter reflects the respondent's acceptance of this.

57 The respondent submits that there is no implied term in Mr Dobson's verbal contract with the respondent for reasonable notice and relies on ***Crawford Fitting Co v Sydney Valve and Fittings Pty Ltd*** **(1988) 14 NSWLR 438** where McHugh J stated:

> The question of whether a contract contains such an implied term is determined by the circumstances existing at the date of the contract.

The respondent maintains that there was an informal relationship between the parties and work was given to Mr Dobson on an irregular basis therefore no reasonable notice was implied into his contractual arrangements with the respondent. The OD Act also does not imply a reasonable period of notice into an owner-driver contract. In the alternative if a period of reasonable notice is implied into Mr Dobson's owner-driver contract the respondent argues that Mr Dobson terminated the Contract and there is therefore no payment due to him. If notice was implied into Mr Dobson's contract and Mr Dobson's contract was terminated by the respondent it had good reason to do so as he had committed a serious breach of the Contract by falsifying his run-sheet and he refused to explain his conduct. The respondent also maintains that Mr Dobson's conduct at the meeting held on 24 February 2011, the ongoing issues with truck breakdowns, his poor attitude to work and his uncommunicative approach to Mr Mingo contributed to a serious breach of the Contract. Mr Dobson is therefore not entitled to be paid the notice he is claiming.

58 In summary the respondent was justified in accepting Mr Dobson's termination of the Contract at the meeting held on 24 February 2011 or in the alternative the respondent was justified in terminating Mr Dobson's contract and in any event there was no term as to implied reasonable notice in the Contract and the applicant's claim on behalf of Mr Dobson should therefore fail.

Findings and conclusions

59 The Tribunal is satisfied on the evidence that for the purposes of s 4 of the OD Act that Mr Dobson is an owner-driver in that he carries on the business of transporting goods in a heavy vehicle with a gross vehicle mass of more than 4.5 tonnes. I am also satisfied on the evidence that the heavy vehicle used by Mr Dobson is supplied by him in the conduct of his business and I am satisfied that the applicant has standing to make this application on behalf of Mr Dobson pursuant to s 40 of the OD Act. I also find that Mr Dobson had an owner-driver contract with the respondent for the purposes of s 5 of the OD Act as Mr Dobson transported goods for the respondent using a heavy vehicle owned by him and in return the respondent paid him an hourly rate.

60 I listened carefully to the evidence given by each witness and closely observed them. I find that the three witnesses who gave evidence in these proceedings gave their evidence in a clear manner and to the best of their recollection. In particular I find that both Mr Dobson and Mr Pitcher gave their evidence about what transpired at the meeting held on 24 February 2011 in a forceful and direct manner and I find that the evidence they gave about this meeting was not broken down during cross-examination. As Mr Dobson and Mr Pitcher gave different versions of the events of this meeting and what was discussed at this meeting and as their evidence with respect to this issue was not broken down during cross-examination this does not assist the Tribunal in determining what took place at this meeting. I will therefore reach conclusions about what occurred at this meeting based on evidence which was corroborated by Mr Johnson as well as any relevant documentation tendered during these proceedings.

61 In this instance there needs to be a determination as to whether the Contract was terminated at the initiative of the respondent or whether Mr Dobson initiated the cessation of the Contract.

62 The cessation of a contract for services can arise out of the action of one or both parties. It was not in dispute and I find that Mr Dobson worked under a verbal owner-driver contract with the respondent on a continuous basis from early 2006 until 24 February 2011 and I find that under the Contract Mr Dobson was expected to provide his services to the respondent on a

close to full-time basis. I find that in return for Mr Dobson providing his truck and his services to transport the respondent's goods on a regular and on-going basis he was paid $76 per hour for each hour worked or part thereof. I find that during Mr Dobson's relationship with the respondent he conducted himself appropriately as a subcontractor to the respondent and I find that he provided good service to the respondent, even though his truck broke down on occasions and he was reluctant to work on a Thursday and on weekends. I also find that from time to time Mr Dobson agreed to work in the dry section of the respondent's operations to assist the respondent and that Mr Dobson was happy to assist the respondent by undertaking this role.

63 I find that Mr Dobson's relationship with the respondent was in the main uneventful until 16 February 2011. I find that on this date Mr Dobson did not fill out his run-sheet accurately and it may have been the case on the evidence that he claimed 5 to 10 minutes more than he worked that day. I also find that it appears that it was not unusual for Mr Dobson to claim different hours to the actual hours he worked as Mr Dobson gave evidence that from time to time he used a 'swings and roundabout' approach to the specific hours he claimed to have worked for the respondent. I also note that prior to 16 February 2011 Mr Dobson had not been questioned by the respondent about the hours he claimed to have worked for the respondent.

64 After carefully considering all of the evidence given in these proceedings and when taking into account relevant documentation and corroborated evidence I find that Mr Dobson's owner-driver contract was terminated by the respondent as at the end of the meeting held on 24 February 2011 and I find that the cessation of the Contract was as a result of Mr Dobson's inappropriate behaviour immediately prior to and during this meeting.

65 I find that when Mr Mingo approached Mr Dobson on 18 February 2011 about possible discrepancies in the times Mr Dobson claimed for 16 February 2011 Mr Dobson was uncooperative and I find that he did not bother to engage with Mr Mingo about this issue, which in my view was a legitimate concern on the part of the respondent. I find that Mr Dobson's behaviour towards Mr Mingo in this regard was inappropriate, notwithstanding Mr Dobson's claim that he was suffering personal difficulties at the time. I find that as a result of this incident and in light of Mr Dobson's lack of cooperation and uncommunicative attitude in clarifying the hours he was claiming payment for, after seeking advice from his manager Mr Moore, Mr Pitcher arranged to meet Mr Dobson on 24 February 2011 to discuss this matter and other concerns the respondent had with Mr Dobson, including the reliability of his truck.

66 I find that the relationship between Mr Dobson and the respondent had broken down by the end of Mr Dobson's meeting with Mr Pitcher on 24 February 2011 and I find that Mr Dobson's actions during and at the end of this meeting contributed to this breakdown. I also find that both Mr Dobson and the respondent were in no doubt that Mr Dobson's contract with the respondent had ceased as at the end of this meeting.

67 I find that the meeting held on 24 February 2011 was not convened to terminate Mr Dobson's contract. The letter sent to Mr Dobson after the meeting held on 24 February 2011, which I accept was written on the day Mr Dobson ceased work with the respondent given the reference in the letter to the meeting being held that day, identifies a number of issues Mr Pitcher wanted to discuss with Mr Dobson and there is no indication that this meeting was being convened to terminate the Contract. This letter reads as follows (formal parts omitted):

> This letter is to acknowledge that a meeting was held today between yourself as the representative of Layback Transport and myself to discuss a number of ongoing performance issues of Layback Transport that do not meet SCT Logistics expectations.
>
> Detailed below are the issues raised with you today that you were provided with an opportunity to discuss but chose instead not to communicate, to make idle threats and finally to walk out of the meeting.
>
> - Numerous vehicle breakdowns - proven to be unreliable.
>   - Informed that this is unacceptable by myself on numerous occasions.
> - Wednesday 16th falsifying information to obtain funds by deception - IE: adding 30 mins to his run times.
>   - When approached and questioned - no excuses no comments with the end result being work times amended to reflect the actual finish time of 16.00 instead of 16.30.
> - Driver (Gerard Dobson) attitude since this incident has been surly, including lack of communication and generally poor attitude towards the Fleet controller.
> - Driver (Gerard Dobson) causing disruption in the workplace and between other sub contractors by badmouthing fleet controller and fellow sub contractors.
> - Lack of flexibility - complaining about lack of hours then refusing work when offered in operations and weekend work - Not available.
>
> In light of your response today and the seriousness and ongoing nature of the issues raised with you SCT Logistics hereby notify you that the services of Layback Transport are no longer required by SCT Logistics and your services are hereby terminated effective immediately.
>
> (Exhibit R2, attachment MTP3)

68 I find that the purpose for Mr Pitcher's meeting with Mr Dobson on 24 February 2011, as confirmed in the above letter, was to discuss Mr Dobson's truck breaking down, his alleged lack of flexibility in refusing work, the alleged discrepancies in Mr Dobson's run-sheet of 16 February 2011 and the respondent's view that Mr Dobson had a poor attitude towards it and Mr Mingo. I find that soon after the commencement of the meeting Mr Dobson became angry and upset and refused to engage in any meaningful discussion with Mr Pitcher and even though it is unclear exactly what was stated by Mr Pitcher and

Mr Dobson during this meeting I find that Mr Pitcher was unable to have a meaningful dialogue with Mr Dobson given his hostile attitude towards Mr Pitcher. I find that after Mr Pitcher experienced difficulties discussing the issues he wished to with Mr Dobson and after Mr Dobson confronted Mr Pitcher about the respondent wanting to get rid of him Mr Dobson then abruptly left this meeting and I find that when Mr Dobson left the meeting he made inappropriate comments as both Mr Pitcher and Mr Johnson stated that when Mr Dobson left the meeting he said words to the effect of 'f.. off and stick your job up your arse'. I also note that Mr Dobson gave evidence that at the end of this meeting he may have sworn at Mr Pitcher after telling him the situation was 'bullshit'. Mr Dobson gave the following evidence:

> And then what happened after that?---Then he proceeded saying he's got a few trucks coming over from the eastern states. Seeing that I'm the oldest truck there and I'm the oldest driver - and I stopped him. I just stood up and said, "Well, that means that I'm sacked," and he said yes. I walked out of his office. He followed me to the door. I turned around and said, "Well, how long have I got?" and he said, "Instantly." I said, "Well, this is bullshit." I might have said the eff word. I cannot - I don't know. I can't swear on it, but I said, "I'm going to the union about this," and walked out.
>
> (Transcript p 36)

69 I find that after Mr Dobson left the meeting held on 24 February 2011 by telling Mr Pitcher that he no longer wanted to continue his contract with the respondent, the respondent then terminated the Contract by letter dated 24 February 2011. I find that the termination of the Contract occurred as a result of Mr Dobson's uncooperative and belligerent behaviour towards Mr Pitcher during and at the end of this meeting and Mr Dobson's refusal to engage with Mr Pitcher and Mr Mingo about issues the respondent wished to raise with him. I also find that the respondent formed the view, correctly in my opinion, that Mr Dobson made it clear to the respondent as at 24 February 2011 that he no longer wished to be bound by his contract with the respondent.

70 I find that in all of the circumstances of this case that the respondent had good reason to terminate the Contract. Mr Dobson conceded that the times he put on his run-sheet on 16 February 2011 were inaccurate although he maintained he worked the hours he claimed and whilst Mr Dobson may have worked the hours he claimed each day in my view the times he put on his run-sheet should have been accurately recorded as this as the basis upon which the respondent paid Mr Dobson. Furthermore, Mr Dobson gave no evidence about the reason why he did not record the actual hours he worked each day nor did he give any explanation to Mr Mingo on 18 February 2011 when he approached him for clarification about the hours he worked on 16 February 2011. Mr Dobson gave the following evidence about the times he put on his run-sheet:

> So when Mr - spoke - Mr Mingo spoke to you, he asked you why you'd put your finished down - finished time down as 4.30 on the run sheet, didn't he?---Yeah. Well - - -
>
> And you didn't answer him, did you, Mr Dobson?---He - he said to me that I didn't finish at 4.30.
>
> And he asked you to explain why you'd put 4.30 on your run sheet - - - ?---Yeah.
>
> - - - in that case, when he'd seen you driving back to the depot at a quarter to 4, didn't he?---And you'll see that I said, "Whatever," and walked out.
>
> So in effect you refused to - or didn't answer him, did you, Mr Dobson?---In - the fact is I wasn't going to stand there in the condition that I was in - - -
>
> Yes. But the fact is that you did not - - - ?--- - - - arguing over half an hour.
>
> - - - you did not answer him, did you? You didn't deny the suggestion?---I didn't deny it and I didn't admit it.
>
> Yes, okay. In fact, as you've said, all you said was, "Whatever. Just fix it then"?---Well, he's - like I said earlier, he'll either give you half an hour, he'll take half an hour. He's - you could - he's God. He can give or take. If you - if you were a bad boy he can take - - -
>
> Yes?--- - - - half an hour off you.
>
> And then - - - ?---And there's nothing you can do about it.
>
> - - - then you walked off, didn't you?---Yes. I walked off and done me job.
>
> And after that - and he took half an hour off you, didn't he?---I believe so, yes.
>
> Because you falsified the run-sheet?---I believe that's the reason why.
>
> (Transcript pp 45 - 46)

71 Mr Dobson also stated the following under cross-examination about how he incorrectly filled out his run-sheet on 16 February 2011:

> And you've stated your finish time as 1630, or 4.30 pm, haven't you?---Yeah.
>
> But you didn't finish at 4.30, did you, Mr Dobson?---Well, I finished at quarter past, 20 past 4.
>
> So you didn't finish at 4.30, did you?---No.
>
> So you would agree with me that you falsified that run sheet?---No, not really.
>
> But when you put down 4.30 on it, that wasn't right?---No. When I put down 5.30 start in the morning, that wasn't right either.
>
> No, but what I'm asking you - what I'm putting to you is that you've put down 4.30 on that document as your finish time - - - ?---Yes.

- - - but you didn't finish at 4.30, did you?---No.

Yes. So you falsified that run sheet. Isn't that right?---But what I'm saying – also saying is that I put 5.30 start in the morning on my run sheet. I started at 5.20, so I really falsified all the records then.

(Transcript p 42)

72 I find that Mr Dobson displayed a poor attitude towards his manager Mr Mingo on occasions and Mr Pitcher therefore had good reason to attempt to raise this matter with Mr Dobson on 24 February 2011 however, in the event it appears that this meeting was not long enough for this issue to be discussed. I have already found that Mr Dobson should have explained the discrepancy in his run-sheet on16 February 2011 to Mr Mingo and did not do so and Mr Dobson gave evidence that there was nothing said to him at the meeting on 24 February 2011 about him badmouthing the respondent or Mr Mingo however under cross-examination Mr Dobson conceded that at some point he had 'badmouthed' Mr Mingo and that he regarded some of the respondent's managers as 'dickheads'. I accept that interactions between workers in the transport industry can be direct at times and that workers operate in a robust environment however I find that Mr Dobson's ongoing criticism of some of his managers was unacceptable particularly when there appeared to be no basis for Mr Dobson making these comments. Mr Dobson gave evidence that he made the following comments about Mr Mingo and other employees:

And then you then - he then told you that he had heard that you were badmouthing the company and Mingo, and I'm assuming - that there was any truth in that?---Well, all the drivers badmouth. I mean, that's - without being offensive, I mean, it's like saying, "Oh, he's a bit of a dickhead, isn't he?" "Yeah, he's a dickhead." Or I can say, "Well, this lawyer's a dickhead, and that lawyer's a dickhead." You know, it's just common talk amongst truck drivers. I mean, you might know and you might understand. I don't know, but if that's called - what did you say?

Badmouthing?---Badmouthing. Yes, I badmouthed him. And the company - I like the company, I like working for the company. And like I've always said, it's just some of the dickheads running the company. I'm sorry, but that's my point of view.

But did you - go back to the question that I asked. Did you - did Mr Pitcher ask you about that - raised the issue of that, you badmouthing the company and Mingo?---No. No, he didn't.

And then you supposedly said that, "This is crap. I've lost the job anyway"?---Well, I just said - I just said, "Well - well, this is crap," or "bullshit" or whatever. I said, "I'm going to see the union."

(Transcript p 37)

Yes. Well, you'd been badmouthing Mr Mingo and SCT Logistics to other employees and drivers, hadn't you?---Well, like I explained everywhere, I'm not the only one that calls him a dickhead. But if that's badmouthing, yes.

Yes. So you admit to calling him a dickhead - dickhead?---Well - well, yeah.

Yes?---I mean, I'm not the only one that says it.

Yes, but that doesn't make it right, though, does it, Mr - Mr Dobson?---But - I know, but, I mean, it's common - just common knowledge. You've obviously in your trade - have got some word you call another lawyer that - in your office or whatever.

…

Well, I put it to you that the reason that you'd been badmouthing Mr Mingo and calling him a dickhead was because you'd been caught out and docked for half an hour of your work. That's right, isn't it, Mr - Mr Dobson?---Well, I've been calling him a dickhead long before then …

(Transcript p 51)

73 I have already found that there was an ongoing contractual relationship between Mr Dobson and the respondent whereby the respondent expected Mr Dobson to make himself and his truck available to the respondent to work on a close to full-time basis and I therefore find that under normal circumstances a term of reasonable notice would apply upon the termination of Mr Dobson's contract with the respondent. I find however that in this instance Mr Dobson is not due to be paid any notice under his owner-driver contract on the basis that the respondent had good reason to terminate Mr Dobson's contract without notice due to Mr Dobson repudiating the obligations on him to conduct himself in an honest, cooperative and respectful manner. In particular, I find that Mr Dobson did not submit a correct run-sheet for 16 February 2011 and he refused to discuss this matter with Mr Mingo. I also find that Mr Dobson's attitude towards Mr Pitcher at the meeting held on 24 February 2011 and his comment to Mr Pitcher at the end of this meeting was uncalled for and inappropriate and I find that Mr Dobson made disparaging comments about Mr Mingo and managers without good reason. In the circumstances I find that it was appropriate for the respondent to terminate the Contract without any notice being paid to Mr Dobson.

74 This application will therefore be dismissed.

2011 WAIRC 01150

REFERRAL OF DISPUTE RE TERMINATION OF OWNER-DRIVER CONTRACT

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-
	TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A SCT LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 13 DECEMBER 2011
FILE NO/S	RFT 5 OF 2011
CITATION NO.	2011 WAIRC 01150

Result	Dismissed
Representation	
Applicant	Mr A Dzieciol (of counsel)
Respondent	Mr D Paton (of counsel)

Order

HAVING HEARD Mr A Dzieciol (of counsel) on behalf of the applicant and Mr D Paton (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007* hereby orders –

THAT the application be and is hereby dismissed.

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