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FULL BENCH—Unions—Application for registration—

2012 WAIRC 00845

AMALGAMATION OF THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS (AWUW) AND THE FOREST PRODUCTS, FURNISHING AND ALLIED INDUSTRIES INDUSTRIAL UNION OF WORKERS, WA (FPF)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2012 WAIRC 00845
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	:	MONDAY, 27 AUGUST 2012
DELIVERED	:	TUESDAY, 18 SEPTEMBER 2012
FILE NO.	:	FBM 4 OF 2012
BETWEEN	:	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE FOREST PRODUCTS, FURNISHING AND ALLIED INDUSTRIES INDUSTRIAL UNION OF WORKERS, WA Applicants AND (NOT APPLICABLE) Respondent

CatchWords	:	Industrial Law (WA) - application pursuant to s 72 of the *Industrial Relations Act 1979* (WA) - amalgamation of two registered employee organisations - new organisation registered subject to compliance by direction given by the Full Bench
Legislation	:	*Industrial Relations Act 1979* (WA) s 7, s 53, s 53(1), s 55, s 55(1), s 55(2), s 55(3), s 55(4), s 55(4)(a), s 55(4)(d), s 55(4)(e), s 55(4)(e)(i), s 55(5), s 56, s 56(1), s 56(1)(a), s 56(1)(b), s 56(1)(c), s 56(1)(e), s 56(1)(f), s 56A, s 57, s 58(2), s 59, s 64D, s 66, s 71, s 72, s 72(1), s 72(2), s 72(3); *Conciliation and Arbitration Act 1904* (Cth); *Fair Work (Registered Organisations) Act 2009* (Cth).
Result	:	Order made

Representation:

Applicants : Mr M Zoetbrood and Mr S Price

Case(s) cited:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Construction, Forestry, Mining and Energy Union of Workers [2012] WAIRC 00095; (2012) 92 WAIG 227

Western Australian Railway Officers' Union and Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch [2010] WAIRC 00417; (2010) 90 WAIG 596

Reasons for Decision

THE FULL BENCH:

Introduction

1 This is an application by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWUW) and The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA (FPF) to amalgamate. Each employee organisation is registered under the *Industrial Relations Act 1979* (WA) (the Act) and makes application under Part II Division 4 of the Act for the registration of a new organisation pursuant to s 72 of the Act to be called The Australian Workers' Union, West Australian Branch, Industrial Union of Workers. At the time of hearing this matter, the AWUW had 6,329 members and the FPF 466.

2 The AWUW and the FPF have effectively operated as one organisation from the same premises and have had substantially the same elected union officials since 1995. Officials who hold right of entry permits for the FPF also hold permits for the AWUW. It is also relevant to note that pursuant to r 8 of the rules of the federal body registered under the provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth), The Australian Workers' Union (AWU), a Western Australian state union is defined as the AWUW or the FPF. Under this rule, members of the FPF are members of the AWU and entitled to all the benefits of membership of the AWU.

3 Since 1995, a number of attempts have been made to formally amalgamate the AWUW and the FPF. The most recent application (prior to this application) for the amalgamation of the AWUW and the FPF was made on 27 May 2011 in matter No FBM 5 of 2011. That application was discontinued on 16 August 2011 because the inconsistencies in the AWUW rules between the executive positions and the West Australian branch of the AWU would not have allowed a consequent application under s 71 of the Act, to obtain declarations and orders as a step enabling a s 71 certificate to issue, to succeed. In part to address this issue an application was made pursuant to s 66 of the Act in PRES 1 of 2011 on 6 September 2011. The reason for that application was that the rules of the AWUW required the election of offices of a president and secretary of the mining division. However, the mining division had ceased to exist some time ago and had no members. On 20 September 2011, an order was made under s 66 of the Act by Smith AP which waived the requirement to comply with the rules of the AWUW which provided for the defunct mining division and the requirement to fill the positions of mining division president and mining division secretary as executive offices of the AWUW: [2011] WAIRC 00896; (2011) 91 WAIG 2139.

4 Following the making of that order, the process for amalgamating the two unions was recommenced following a review by the two amalgamating organisations of the current registered rules of the AWUW.

Statutory requirements for amalgamation

5 Pursuant to s 72 of the Act, two or more organisations registered under the Act may apply for registration of a new organisation. Section 72 of the Act provides as follows:

> (1) Where 2 or more organisations (in this section referred to as the amalgamating organisations) apply for the registration of a new organisation and the rules of the proposed new organisation are such that the only persons eligible for membership of the new organisation will be persons who, if the amalgamating organisations had remained in being, would have been eligible for membership of at least one of the amalgamating organisations, the new organisation may be registered by authority of the Full Bench.
>
> (2) An application under this section shall be made under the respective seals of the amalgamating organisations and shall be signed by the secretary and principal executive officer of each of those organisations.
>
> (3) The provisions of this Division applying to and in relation to the registration of organisations under section 53(1) or 54(1), other than section 55(5), shall apply with such modifications as are necessary, to and in relation to the registration of an organisation under this section.
>
> (4) Subsection (1) does not prevent the alteration, pursuant to this Act, at any time after an organisation has been registered under this section, of the rules referred to in that subsection.
>
> (5) On and from the date on which an organisation is registered under this section —
>
> (a) the registration of each of the amalgamating organisations is cancelled;
>
> (b) all the property, rights, duties, and obligations whatever held by, vested in, or imposed on each of those organisations shall be held by, vested in, or imposed on, as the case may be, the new organisation;

(c) actions and other proceedings already commenced by or against any of those organisations may be continued by or against the new organisation and the new organisation is substituted for each of those organisations as a party; and

(d) actions and other proceedings that could have been brought by or against any of those organisations may be brought by or against the new organisation.

6 The first requirement of s 72 is that the rules of the proposed new organisation must be such that the only persons eligible for membership of the new organisation must be persons who, if each of the amalgamating organisations had remained in existence, would have been eligible for membership of at least one of the amalgamating organisations (s 72(1)).

7 Pursuant to s 58(2) of the Act, the Full Bench is empowered to authorise the Registrar to register an organisation unconditionally or subject to the compliance by the organisation with any direction given to it by the Full Bench.

8 When regard is had to the rules of the proposed new organisation, it is clear that s 72(1) of the Act has been complied with. It is apparent that proposed r 4 of the rules of the proposed new organisation replicates r 4 of the rules of the AWUW and r 2 of the FPF. There is, however, an error in the proviso to r 4(1) – (16) of the proposed rules. The proviso states as follows:

> PROVIDED THAT all persons who have been appointed as officers or employees of the Union shall be entitled also to become and remain members of the Union during their continuance in office or employment; PROVIDED further that no person who is or is eligible to be a member of -
>
> Eastern Goldfields Municipal and Road Board Labourers' Union of Workers;
>
> Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth;
>
> The Western Australian Government Tramways, Motor Omnibus and River Ferries Employees' Union of Workers, Perth;
>
> The Builders Labourers' Union of Workers of Perth, Western Australia;
>
> Except to the extent provided by subrule 28, Westralian Brickyard, Pottery, Porcelain and Roof Tile Fixers Employees' Union of Workers, Perth;
>
> as constituted on the 19th day of August, 1947; or any other Union registered under the provisions of 'Industrial Arbitration Act, 1912-1941' (as reprinted) at the date of registration of this Union shall be eligible for or admitted to Membership of the Union, but as from 7th day of March, 1979, the limitation herein imposed by virtue of the registration of the Sugar Refining Employees' Industrial Union of Workers, Fremantle, W.A., at the date of registration of this union shall no longer apply.

9 The effect of the proviso in referring to the words 'at the date of registration of this union' in the proposed rules of the new organisation would be that the proviso is to be read as from the date of registration of the new organisation. So as to preserve the historical context of this clause of exclusion, we are of the opinion that the new organisation should be registered on the condition that it then complies with a direction of the Full Bench to vary its rules to provide in respect of this proviso the date of the AWUW's registration in lieu of the words in the proviso 'at the date of registration of this union'. The AWUW was registered on 18 July 1941. As the provision in this proviso creates words of exclusion from membership, the requirement in s 72(1) of the Act that persons eligible for membership of a new organisation must have been eligible for membership of one of the amalgamating organisations is not raised. This is because the words of exclusion as they stand in the proposed rules are likely to exclude a larger number of persons than under the rules of the AWUW because the date of exclusion from membership would run from the date of registration of the new organisation. This is because the proviso in the current proposed form would exclude from membership of the new organisation any employee who is employed or usually employed in any of the industries or callings set out in r 4(1) – (16) and who is eligible to be a member of any organisation registered under the Act at this present time. Although these words are also contained in the rules of the AWUW, the effect of those words in the rules of the AWUW is only to exclude from membership those workers who were also eligible to be a member of another organisation as at 18 July 1941.

10 A similar issue arises in proposed r 4(38). This rule replicates r 2(l) of the rules of the FPF. Rule 4(38) excludes some workers employed or usually employed in the sawmilling, sleeper cutting and wood chipping industries in a location defined in the sub-rule. Rule 4(38) replicates that provision as follows:

> The Union shall consist of workers employed or usually employed in the sawmilling, sleeper cutting and wood chipping industry as hereinafter defined throughout the South West Land Division of the State of Western Australia excluding the locality comprised within a radius of forty-five (45) kilometres from the G.P.O. Perth, together with the persons who from time to time are elected General Secretary and/or Organiser and/or Industrial Officer of the Union. Notwithstanding the foregoing persons engaged in felling or cutting of timber in plantations at Gnangara, Mundaring, Yanchep and Pinjar shall be eligible for membership of the Union provided that such persons are at the time of this application not eligible to be members of any other Union registered in the State of Western Australia.

11 The FPF was formed by amalgamation of The United Furniture Trades Industrial Union of Workers, WA and The West Australian Timber Industry Industrial Union of Workers, South-West Land Division on 27 November 1990. The proviso to r 2(l) of the rules of the FPF was registered by the Registrar in accordance with the following order being made by the Full Bench on 2 November 1992: (1992) 72 WAIG 2754:

(1) That leave be and is hereby granted to Mr G N Hocking (of Counsel) to appear on behalf of the applicant herein.

(2) That leave be and is hereby granted to the applicant to amend the application herein in the following terms of the schedule (exhibit 2 herein tendered on the 29th day of October 1992), Proposed Alteration to Rule 2 of the Registered Rules of The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA:-

'Insert the following words immediately after the existing sub-rule (l) of Rule 2. - Constitution, immediately prior to sub-rule (m):

Notwithstanding the foregoing persons engaged in felling or cutting of timber in plantations at Gnangara, Mundaring, Yanchep and Pinjar shall be eligible for membership of the Union provided that such persons are at the time of this application not eligible to be members of any other Union registered in the State of Western Australia.'

(3) That the Registrar be and is hereby authorised to register the alteration to rule 2 herein in accordance with order (2) hereof.

12 In our opinion, the words 'persons are at the time of this application not eligible' should be construed for the purpose of fixing a date of effect of the proviso in proposed r 4(38) as the date on which the order was made by the Full Bench. This is because these words do not contemplate effect from the date of registration of the amendment to the rules, but the time the amendment became part of the application which pursuant to order (2) of the order made by the Full Bench was 2 November 1992. To properly reflect the historical effect of this proviso, we are of the opinion that a direction should be given to the new organisation that once registered it should vary this provision by deleting the words 'at the time of this application' and add in their place the words 'as at 2 November 1992'.

13 For the same reasons we have expressed in relation to the operative effect of the exclusionary proviso to proposed r 4(1) – (16), we are of the opinion that the requirement in s 72(1) of the Act is not affected by the current form of proposed r 4(38).

14 The application complies with s 72(2) of the Act because the application is signed by the presidents and secretaries of both the AWUW and the FPF and the common seals of both organisations are affixed to the application.

15 Turning to s 72(3) of the Act, s 53 relates to the qualifications for and the basis of registration of organisations of employees. Section 53(1) provides that an organisation consisting of not less than 200 employees associated for the purpose of protecting or furthering the interests of employees may be registered by authority of the Full Bench. It is clear that both the AWUW and the FPF are registered organisations who consist of not less than 200 employees. It is also clear from proposed r 3 that the new organisation is to be formed for the purpose of protecting or furthering the interests of employees.

16 Other than s 55(5) of the Act, s 55 applies. Section 55(1), s 55(2), s 55(3) and s 55(4) of the Act provide:

(1) An organisation seeking registration under section 53 or 54 shall lodge in the office of the Registrar —

(a) a list of the officers of the organisation with their addresses; and

(b) 3 copies of the rules of the organisation; and

(c) the prescribed form of application.

(2) When the organisation has complied with the requirements of subsection (1) the Registrar shall publish in the required manner —

(a) a notice of the application; and

(b) a copy of such rules of the organisation as relate to the qualification of persons for membership of the organisation and, without limiting the generality thereof, including any rule by which the area of the State within which the organisation operates, or intends to operate, is limited; and

(c) notice that any person who objects to the registration of the organisation and who, having given notice of that objection within the time and in the manner prescribed, satisfies the Full Bench that he has a sufficient interest in the matter, may appear and be heard in objection to the application.

(3) An application under this section shall not be listed for hearing before the Full Bench until after the expiration of 30 days from the day on which the matters referred to in subsection (2) are first published.

(4) Notwithstanding that an organisation complies with section 53(1) or 54(1) or that the Full Bench is satisfied for the purposes of section 53(2) or 54(2), the Full Bench shall refuse an application by the organisation under this section unless it is satisfied that —

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

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

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

(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; and

(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;

and

(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.

17 In compliance with s 55(1) of the Act, the AWUW and the FPF have made the application in the prescribed form and have filed a list of officers of the new organisation with their addresses and three copies of the rules.

18 Pursuant to s 55(2) of the Act, the Registrar has published in the Western Australian Industrial Gazette the notice of the application and a copy of the rules of the new organisation as they relate to the qualification of persons for membership and a notice that any person who wishes to object should file a notice of objection. The notice was published in the gazette on 27 June 2012: (2012) 92 WAIG 701.

19 The application was listed for hearing on 27 August 2012, which was the date notified in the gazette. Consequently, as required by s 55(3) of the Act, the hearing was held after the expiration of 30 days from the date on which the notice was published.

20 Pursuant to s 55(4)(a) of the Act, the application is required to be authorised in accordance with the rules of both organisations. In both the rules of the AWUW and the FPF there is no procedure prescribed for the approval of the rules of a proposed amalgamated organisation, nor is there any specific procedure prescribed for the approval of a proposed amalgamation. However, both the AWUW and the FPF followed the procedure set down in their rules for alterations to the rules.

21 The process for alteration of rules prescribed in r 36 of the rules of the AWUW is as follows:

(1) Notwithstanding anything contained in these rules, and subject to the provisions of the Industrial Arbitration Act, 1979 and any subsequent amendment thereof, no rule shall be altered or repealed, and no new rule shall be added except by a majority vote of the members present in person at a General Meeting of the Union specially called for the purpose, of which seven days' previous notice, specifying the time, place and objects of such meeting shall have been given.

(2) Notice of such General Meeting shall be given by publication of an advertisement in a newspaper circulating in the district in which the head office of the Union is situated, and by posting a copy of the notice in a conspicuous place outside the said office. Fifteen members shall form a quorum at such meeting. Such alterations, repeals or additions of rules shall be subject to the requisites of the Industrial Arbitration Act, 1979 and any subsequent amendment thereof, and shall be registered with the Registrar of Industrial Unions.

(3) An alteration to these Rules shall not be or become effective until the Registrar of Industrial Unions has given to the Union a Certificate that the alteration has been registered pursuant to the Industrial Arbitration Act, 1979.

(4) No application shall be made to the Registrar of Industrial Unions for the registration of any proposed alteration to these Rules unless a notice of the proposed alteration and the reasons therefor is published in The Australian Worker which shall be distributed to all financial members.

(5) The notice referred to in subrule (4) shall also inform the members that

(i) The union intends to apply to the Registrar of Industrial Unions for the registration of the proposed alteration after the expiration of 35 days from the date of issue of The Australian Worker.

(ii) the members or any of them may object to the proposed alteration by forwarding written objection to the Registrar of Industrial Unions to reach him no later than 35 days from the date of the issue of The Australian Worker.

(6) Provided that no amendment of the Rules which affects the local autonomy of the Mining Division shall be made, except where such amendment is approved by a majority decision, by plebiscite of the members of that Division.

22 In the statutory declaration made by Stephen James Price, the secretary of the AWUW, made on 5 June 2012, Mr Price sets out the procedural steps which were taken by the AWUW in compliance with the requirements of its r 36. This procedure was as follows:

(a) Notice of a general meeting was given to members of the AWUW by advertisement in The West Australian newspaper on 6 February 2012. The notice of the general meeting was also placed on the door of the AWUW registered office in compliance with the requirements of r 36(1) and r 36(2). The notice stated that a general meeting would be held at 6.00pm on 15 February 2012 at the Kwinana Social Club, 19 Hope Valley Road, Kwinana and that the purpose of the general meeting was to authorise the amalgamation of the AWUW and the FPF and the proposed rules of the amalgamated union.

(b) A general meeting in accordance with the notice was held on 15 February 2012. At the meeting a quorum of 15 was required and 27 financial members of the AWUW were present.

(c) The 27 members at the general meeting unanimously approved the proposed amalgamation and rules.

(d) Following the meeting, in compliance with r 36(4), notice of the proposed amalgamation was placed in The Australian Worker magazine. This magazine was distributed to all members of the AWUW and the FPF by mail. The members would have received this magazine between 19 April 2012 and 26 April 2012. The application for the amalgamation was filed on 5 June 2012 which was not prior to 35 days after the publication of the notice in 'The Australian Worker' magazine.

23 The proposed amalgamation was also approved in accordance with the requirements of r 37 of the FPF. Rule 37 of the rules of the FPF provides:

(1) No amendment, repeal or alteration of Union Rules shall be made unless the amendment, repeal or alteration has been passed or approved by a vote of the majority of members of the Union present in person at a Special Meeting called for the purpose. Seven (7) clear days notice shall be given in the calling of such a meeting by advertisement in 'The West Australian' Public Notices Classification, and by circular to shop stewards.

(2) Any amendment, repeal or alteration of rules carried by the Special Meeting shall be brought to the attention of members by the posting of same on notice boards in factories or workrooms where members are employed or when applicable, by individual correspondence. The notice shall state the reasons for such amendment, repeal or alteration and inform members that they may object to the amendment, repeal or alteration by forwarding a written objection to the Industrial Registrar to reach him no later than twenty-one (21) days after the date of the posting of such a notice or the reception of same.

(3) With respect to any proposed alteration relating to the qualifications of persons for membership of the Union, members are to be informed that they may object to the making of such an application and informed of the calling of such a meeting to discuss such an application in accordance with the provisions of paragraphs (1) and (2) hereof.

24 The statutory declaration of Mr Craig William Ramirez, the president of the FPF, made on 1 June 2012, provides evidence that the procedure set out in r 37 was complied with. The procedure in r 37 of the rules of the FPF is similar to r 36 of the rules of the AWUW. This procedure was as follows:

(a) A notice of a special meeting of the FPF was advertised in The West Australian newspaper on 31 January 2012. The notice of the special meeting was also mailed to all shop stewards and members of the FPF executive as required by r 37(2).

(b) The notice stated that a special meeting of the FPF would be held at 11.30am on 18 February 2012 at the union's south west office at 20 Albatross Crescent, Eaton and that the purpose of the special meeting was to authorise the amalgamation of the FPF and the AWUW.

(c) The meeting was attended by eight members of the FPF which satisfied the requirements of r 11 which required eight members to form a quorum at a special meeting.

(d) At the meeting a resolution was passed unanimously by all members to approve the proposed amalgamation and the proposed rules of the new organisation.

(e) Following the meeting, a copy of the resolution that was passed at the special meeting was mailed to all shop stewards to be placed on notice boards at their workplaces. Copies of the resolution were also sent to individual members at workplaces where there was no shop steward and copies were also sent to all members of the FPF executive. All members of the FPF also received a copy of The Australian Worker magazine which contained a copy of the notice that the AWUW had also approved the amalgamation.

25 It is clear from the matters set out in these statutory declarations of Mr Price and Mr Ramirez that reasonable notice was given to members of the proposed amalgamation and the proposed rules and an opportunity was given to members of both organisations to object to the amalgamation or the proposed rules. It is notable that neither union received any objections. Nor has the Registrar received any objections to the proposed amalgamation.

26 For these reasons, we are satisfied as required by s 55(4) of the Act that:

(a) The application has been authorised in accordance with the rules of both organisations.

(b) Reasonable steps have been taken to adequately inform their members:

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

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

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

27 The Act also prescribes a number of matters that must be set out expressly in the rules of an organisation for an organisation to be registered. Firstly, s 55(4)(d) of the Act requires that the rules of an organisation are to 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. The procedure and compliance with this statutory requirement is set out in proposed r 36 of the rules of the proposed amalgamated organisation.

28 There are also a number of provisions which must be complied with and procedures that must be provided for in the rules of an organisation that relate to elections. Section 55(4)(e) of the Act requires that the rules of an organisation must provide for elections to be by secret ballot and conform with the requirements of s 56(1) of the Act and are such as to ensure, as far as practicable, that no irregularity can occur in connection with an election.

29 Section 56 of the Act only applies to election to an office within the organisation. 'Office' is defined in s 7 of the Act to mean:

> ***office*** in relation to an organisation means —
>
> (a) the office of a member of the committee of management of the organisation; and
>
> (b) the office of president, vice president, secretary, assistant secretary, or other executive office by whatever name called of the organisation; and
>
> (c) the office of a person holding, whether as trustee or otherwise, property of the organisation, or property in which the organisation has any beneficial interest; and
>
> (d) an office within the organisation for the filling of which an election is conducted within the organisation; and
>
> (e) any other office, all or any of the functions of which are declared by the Full Bench pursuant to section 68 to be those of an office in the organisation,
>
> but does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation;

30 Consequently, it is only the offices that are created in an organisation that are part of the committee of management of an organisation that are required to comply with s 56 of the Act. Pursuant to proposed r 30, the offices to be elected are the president, two vice-presidents, secretary, assistant secretary and seven executive committee members. These are the offices that form part of the committee of management of the union pursuant to proposed r 24 of the rules of the amalgamated organisation.

31 In compliance with the provisions of s 55(4)(e)(i), proposed r 31A provides for a method of voting that is by secret ballot.

32 In relation to the rules that conform with the requirements of s 56(1) of the Act, s 56 of the Act provides:

> (1) The rules of an organisation —
>
> (a) shall provide for the conduct of every election to an office within the organisation (including the acceptance or the rejection of nominations) by a returning officer, not being the holder of any other office in, and not being an employee of, the organisation; and
>
> (b) shall provide that, if the returning officer conducting such election finds a nomination to be defective, he shall before rejecting the nomination, notify the person concerned of the defect, and where it is practicable to do so, give him the opportunity of remedying the defect within such period as is applicable under the rules, which shall, where practicable, be not less than 7 days after his being so notified; and
>
> (c) shall provide for the election of the holder of each office within the organisation, such election to be either by —
>
> (i) a direct voting system; or
>
> (ii) a collegiate electoral system being, in the case of an office the duties of which are of a full-time nature, a one-tier collegiate electoral system;
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> and
>
> (d) shall, in relation to any election for office —
>
> (i) provide that the election shall be by secret ballot; and
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> (ii) make provision for —
>
> (I) absent voting; and
>
> (II) the manner in which persons may become candidates for election; and
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> (III) the appointment, conduct and duties of returning officers; and
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> (IV) the conduct of the ballot; and
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> (V) the appointment, conduct, and duties of scrutineers to represent the candidates at the ballot; and
>
> (VI) the declaration of the result of the ballot;
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> and
>
> (iii) ensure, as far as practicable, that no irregularity can occur in connection with the election;
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> and
>
> (e) shall not permit a person to be elected to hold an office within the organisation for a period exceeding 4 years without being re-elected; and
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> (f) shall not permit a person to be elected to fill a casual vacancy in an office for a period exceeding the unexpired portion of the term of the person who has vacated the office.
>
> (2) Where the rules of an organisation which was registered immediately prior to the coming into operation of this section do not, in the opinion of the Registrar, conform with the requirements of subsection (1), the Registrar may, after inviting the organisation to consult with him on the matter, allow the organisation such time as he determines within which to bring them into conformity with those requirements or determine such alterations of the rules as will in his opinion bring them into conformity with those requirements.

(3) The Registrar shall register the alterations determined by him, or made by the organisation to his satisfaction, pursuant to subsection (2) and thereupon the rules shall be deemed to be altered accordingly.

33 As required by s 56(1)(a) of the Act, proposed r 27(1) empowers the executive to appoint as a returning officer a person who is not an unfinancial member of the union, not the holder of any office in the union and not an employee of the union. The conduct of an election is provided for in proposed r 30, r 31 and r 31A. The procedure for a returning officer to correct defective nominations as required by s 56(1)(b) of the Act is set out in proposed r 31(6) of the rules. As required by s 56(1)(c) of the Act, r 31 and r 31A provide for a direct voting system. In addition, r 30, r 31 and r 31A make provision for absent voting, the manner in which persons may become candidates for election, the conduct and duties of returning officers, the conduct of the ballot, the appointment, conduct and duties of scrutineers to represent the candidates at the ballot and the declaration of the result of the ballot. The returning officer is empowered under proposed r 31(1) to take action or give any directions as the returning officer considers necessary to ensure that no irregularities occur in or in relation to an election or remedy any procedural defects that appear to the returning officer to exist in the rules of the union. This provision, together with the provisions that deal with invalidity under proposed r 31(3) and r 31(4) of the proposed rules, provide for steps to ensure, as far as practicable, that no irregularity can occur in connection with the election. Rule 31(3) and r 31(4) provide as follows:

(3) No error or omission in the carrying out or observance of any Rule is to invalidate an election unless the error or omission is of such a nature that the result of the election has or may have been affected.

(4) If, notwithstanding any Rule limiting the right to vote in any election to members of a particular financial status, any member not of that particular financial status is permitted to vote as a result of accident or any bona fide error of fact or misconstruction of the Rules, that member must, if otherwise qualified, be deemed to have been entitled to vote.

34 These provisions, together with the provision in r 31(15) which provides for a procedure to be applied for tied votes, also provide steps to ensure, as far as practicable, that no irregularity can occur in connection with the election. The prescriptive method of balloting in r 31A also assists in this regard.

35 As required by s 56(1)(e) of the Act, proposed r 30 provides that offices are to be elected every fourth year for all members of the committee of management. In addition, proposed r 32 satisfies the requirements of s 56(1)(f) of the Act which prohibits a person being elected to fill a casual vacancy in an office for a period exceeding the unexpired portion of the term of the person who has vacated the office.

36 Proposed r 32 provides that a person so appointed is to hold office for so much of the unexpired part of the term of the office that does not exceed 12 months or three-quarters of the term of the office whichever is the greater.

37 The proposed rules also comply with s 56A and s 57 of the Act. Section 57 of the Act requires that every election via direct voting system be via secret postal ballot. This requirement is provided for in proposed r 31A(8) of the proposed rules. Section 56A of the Act sets the terms by which casual vacancies are to be filled and r 32 contains the terms which are prescribed by that provision of the Act.

38 We are, however, not satisfied that s 64D of the Act, which requires that the rules of an organisation shall provide for the register of members to be purged on not less than four occasions in each year, has been complied with as there is nothing in the proposed rules that requires the secretary of the union or any other officer of the proposed organisation to carry out this task. However, this failure cannot result in the application being dismissed by the Full Bench as it is not a condition of registration of an organisation under s 55 of the Act that s 64D of the Act be complied with. As set out above in [7] of these reasons for decision, the Full Bench has the power to authorise the Registrar to register an organisation, subject to the compliance by the organisation with any direction given to it by the Full Bench in dealing with the application by the organisation for registration. Consequently, we are of the opinion that a direction should be given by the Full Bench that once the amalgamation takes effect that the new organisation take steps to amend its rules to reflect the requirements of s 64D of the Act.

39 We are satisfied the name of the proposed organisation does not contravene s 59 of the Act. Section 59 provides that the Full Bench shall not authorise the registration of an organisation under a name identical with that by which any other organisation has been registered or which by reason of its resemblance to the name of another organisation or body or for any other reason is, in the opinion of the Full Bench, likely to deceive or mislead any person. Although the proposed organisation will bear the same name as the AWUW, once registered the AWUW in its current form will cease to exist so no issue will arise about registration of an organisation under a name that is identical by which any other organisation has been registered.

40 Having reviewed the proposed rules, we are of the opinion that there are other errors in the rules that need to be corrected by amendment to the rules once the new organisation is registered. These are as follows:

(a) Rule 4(18) contains an out-dated measurement in miles. This sub-rule should be amended to state the measurement in kilometres.

(b) Rule 4(20)(b) contains a formatting error of the list of organisations which creates an inference that the Australasian Society of Engineers' Industrial Union of Workers, Goldfields No 1 Branch and the Australasian Society of Engineers' Industrial Union of Workers, Midland Junction Branch were one organisation.

(c) The titles of branch executive, branch president, branch vice-president, branch secretary and branch assistant secretary in r 14, r 34 and r 35 are confusing as the management committee of the new organisation pursuant to r 24 is the executive, the president, two vice-presidents, secretary, assistant secretary and seven financial members.

(d) In proposed r 47, the new organisation is defined as the union and is a branch of the AWU registered under the provisions of the *Conciliation and Arbitration Act 1904* (Cth) and any subsequent amendments thereto. This rule should be amended to update the name of the Commonwealth Act to the *Fair Work (Registered Organisations) Act*.

(e) As the new organisation is defined as the union and as a branch in r 47, the references to the union in r 14 should, if it intended these are to refer to the AWU, be changed to the AWU.

(f) There appears to be an inconsistency in the language used in respect of 'Divisions' in r 25 and r 26 and 'Sub-Branch' in r 35.

(g) Rule 19 sets out a provision that is struck through to reflect that r 19 of the rules of the AWUW was disallowed by order of the Commission on 15 December 1997: Application No 2198 of 1997; (1997) 78 WAIG 339. As it is not necessary to reflect the striking out of this provision, r 19 should be amended to simply state: deleted.

(h) Proposed r 28 replicates r 28 of the rules of the AWUW. It appears to be a transitional provision that enables transfer of property from the trustees. As the proposed rules do not create any office of trustee, this proposed rule may not have any work to do. Following the registration of the new organisation, if this rule has no current operative effect, it should be deleted.

41 For these reasons, we are of the opinion that the Full Bench should authorise the Registrar to register the new organisation, subject to it then complying with a direction that the rules referred to in the above paragraph of our reasons and [9], [10], [11], [12], [13], [38] and [39] are to be amended to remedy the identified issues.

2012 WAIRC 00850

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE FOREST PRODUCTS, FURNISHING AND ALLIED INDUSTRIES INDUSTRIAL UNION OF WORKERS, WA
	APPLICANTS
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 19 SEPTEMBER 2012
FILE NO/S	FBM 4 OF 2012
CITATION NO.	2012 WAIRC 00850

Result	Order made
Appearances	
Applicants	Mr M Zoetbrood and Mr S Price

Order

This matter having come on for hearing before the Full Bench on 27 August 2012, and having heard Mr M Zoetbrood and Mr S Price on behalf of the applicants, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) (the Act), hereby orders that —

1. The Registrar be and is hereby authorised to register a new organisation to be known as 'The Australian Workers' Union, West Australian Branch, Industrial Union of Workers', in accordance with s 72(1) of the Act, being the product of the amalgamation of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA, subject to it then complying with the direction given by the Full Bench in the Schedule of this order.

2. The rules attached to the application filed herein on 5 June 2012, subject to the amendments set out in the Schedule hereto, are authorised pursuant to s 58(2) of the Act, and hereby declared to be the rules of 'The Australian Workers' Union, West Australian Branch, Industrial Union of Workers'.

By the Full Bench

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

SCHEDULE

Following registration of the new organisation, steps are to be taken forthwith to alter its rules in accordance with r 36 of its rules to remedy the following errors, omissions and out-dated measurements as follows:

1. Amend the proviso to r 4(1) – (16) to delete the words 'at the date of registration of this union' to 'as at 18 July 1941'.
2. Amend r 4(18) to express the measurement of 14 miles in kilometres.
3. Amend the proviso to r 4(38) by deleting the words 'at the time of this application' to 'as at 2 November 1992'.
4. Correct the list of organisations in r 4(20)(b) by appropriate formatting of the list.
5. Consider amending r 14 to change references to 'the Union' to 'The Australian Workers' Union'.
6. Amend r 47 by deleting the words 'Conciliation and Arbitration Act 1904' to 'Fair Work (Registered Organisations) Act 2009'.
7. Either create the titles for members of the Executive as Branch President, Branch Vice-Presidents, Branch Secretary and Branch Assistant Secretary and title the Executive itself the Branch Executive in all of the rules that create these offices and provide for duties and obligations of the Executive and the offices, or, alternatively, retain the titles of the Executive and the offices without any reference to Branch. If the latter course is adopted:
   (a) All references to Branch in r 14 should be amended to change the references to Branch Executive, Branch Secretary, relevant Branch Secretary and Branch Secretaries to Executive, Secretary and Secretaries.
   (b) Similar amendments should be made to r 34 and r 35 to the titles of Branch Executive, Branch President, Branch Vice-President, Branch Vice-Presidents, Branch Secretary and Branch Assistant Secretary.
8. Remove the inconsistency in language between the references to 'Divisions' in r 25 and r 26 and 'Sub-Branch' in r 35(1)(b), r 35(1)(j) and r 35(1)(m).
9. Rule 19 should be amended to state 'deleted'.
10. Add an obligation to require the Secretary or any other office holder to purge the register of its members on not less than four occasions in each year by striking off the names of members whose membership has ended under s 64A or s 64B of the Act or under the rules.
11. Delete r 28 if it has no current operative effect.

FULL BENCH—Unions—Declarations made under Section 71—

2012 WAIRC 00880

APPLICATION REQUESTING ORDER AUTHORISING REGISTRAR TO ISSUE A NEW CERTIFICATE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2012 WAIRC 00880
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	THURSDAY, 20 SEPTEMBER 2012
DELIVERED	**:**	THURSDAY, 27 SEPTEMBER 2012
FILE NO.	**:**	FBM 5 OF 2012
BETWEEN	**:**	UNITED VOICE WA
		Appellant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial Law (WA) - application to amend certificate issued by Registrar under s 71(5) of the *Industrial Relations Act 1979* (WA) - recent name change of organisation - in the circumstances no power to amend
Legislation	:	*Industrial Relations Act 1979* (WA) s 71, s 71(1), s 71(2), s 71(3), s 71(4), s 71(5), s 71(8)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr V Nguyen (of counsel) and with him Mr D Kelly

Case(s) referred to in reasons:

In the matter of an application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch [2004] WAIRC 12802; [2004] WAIRC 12799; (2004) 84 WAIG 3207

Reasons for Decision

THE FULL BENCH:

The application

1 This is an application brought pursuant to s 71 of the *Industrial Relations Act 1979* (WA) (the Act) by the applicant who is registered as an organisation under the Act.

2 The applicant formally changed its name to United Voice WA when a Full Bench authorised an amendment to its registered rules on 21 June 2011: [2011] WAIRC 00433; (2011) 91 WAIG 1034. Prior to altering its name in 2011, the applicant's name was the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.

3 In this application, the applicant seeks an order authorising the Registrar to issue a new certificate pursuant to s 71(5) of the Act. The applicant makes the application on the basis that it wishes to update a certificate issued to it in 2001 to reflect the applicant's change of name and the change of name of its counterpart federal body.

Background

4 A certificate was issued by the Registrar under s 71(5) of the Act on 6 February 2001 in which it was declared as follows:

> 1. that the provisions of the Industrial Relations Act 1979, relating to elections for office within an organization do not, from 6 February 2001, apply in relation to offices in the 'Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch' and;
>
> 2. that from 6 February 2001 , the persons holding office in the 'Western Australian Branch of the Australian Liquor, Hospitality and Miscellaneous Workers Union' an organization registered under the provisions of the Workplace Relations Act, 1996, shall for all purposes, be the officers of the 'Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch'.

5 The certificate issued following a decision being made by the Full Bench of the Commission on 6 February 2001 which granted a declaration pursuant to s 71(2) and s 71(4) of the Act: [2001] WAIRC 01991; [2001] WAIRC 01983; (2001) 81 WAIG 398:

> (1) THAT the rules of the applicant, and its Counterpart Federal Body, the Australian Liquor, Hospitality and Miscellaneous Workers Union, relating to the qualifications of persons for membership be and are deemed to be the same in accordance with s.71(2) of the Act.
>
> (2) THAT the rules of the Counterpart Federal Body prescribing the offices which shall exist in the Branch be and are hereby deemed to be the same as the rules of the applicant herein, prescribing the offices which exist in the applicant organisation, in accordance with s.71(4) of the Act.

6 At the time the declaration was made by the Full Bench, the name of the applicant was the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch. On 16 September 2004, the Registrar was authorised to change its name to the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch by a Full Bench: ***In the matter of an application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch*** [2004] WAIRC 12802; [2004] WAIRC 12799; (2004) 84 WAIG 3207.

7 On 15 February 2011, the counterpart federal body of the applicant changed its name from the Liquor, Hospitality and Miscellaneous Union to United Voice: [2011] FWA 766. The counterpart federal body had also previously changed its name by removing the word 'Australian' from its title on 27 February 2004: ***In the matter of an application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch*** [18].

Conclusion

8 When this application was heard, the Full Bench was informed by counsel for the applicant that he was instructed that:

> (a) Since the Full Bench made its declaration under s 71(2) and s 71(4) of the Act on 6 February 2001, there has been no change to the eligibility rules of the applicant or the eligibility rules of its counterpart federal body.

(b) There has been no change in the rules prescribing the offices that exist in the applicant and the counterpart federal body or to the duties that attach to each of those offices.

9 The Full Bench informed the applicant's counsel and secretary at the hearing that, if in its opinion the instructions were correct, the s 71 certificate issued by the Registrar of the Commission on 6 February 2001 would still have operative effect as a change in the name of the applicant would not result in an invalidity of the currency of the s 71 certificate as a new organisation had not been created by a mere name change.

10 The Full Bench also expressed its opinion that, in any event, it has no power to amend a s 71 certificate in these circumstances. Under s 71 of the Act, the role of the Full Bench is administrative. Under s 71(1), s 71(2), s 71(3) and s 71(4) of the Act its role is to examine the rules of a state organisation and the rules of a counterpart federal body and make declarations as to whether the rules of the:

(a) state organisation and its counterpart federal body relating to the qualifications of persons for membership are substantially the same;

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

11 The only circumstance that can arise for a Full Bench to amend a certificate issued by the Registrar under s 71(5) of the Act is under s 71(8) of the Act. This provision specifically empowers the Full Bench to amend a s 71(5) certificate by exempting a state organisation from compliance of particular provisions of the Act in relation to a memorandum of an agreement a state organisation reaches with its counterpart federal body, in respect of the management and control of funds or property, of the state organisation. This application does not relate to such a memorandum. Consequently, the power to amend a s 71(5) certificate cannot be invoked.

12 For these reasons, an order will issue dismissing the application.

2012 WAIRC 00879

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 27 SEPTEMBER 2012
FILE NO/S	FBM 5 OF 2012
CITATION NO.	2012 WAIRC 00879

Result	Application dismissed
Appearances	
Applicant	Mr V Nguyen (of counsel) and with him Mr D Kelly

Order

This matter having come on for hearing before the Full Bench on 20 September 2012, and having heard Mr V Nguyen (of counsel) and with him Mr D Kelly on behalf of the applicant, and reasons for decision having been delivered on 27 September 2012, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2012 WAIRC 00923

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT
	APPLICANT
	-and-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 11 OCTOBER 2012
FILE NO/S	PRES 4 OF 2012
CITATION NO.	2012 WAIRC 00923

Result	Order issued
Appearances	
Applicant	In person
Respondent	Mr T Dixon (of counsel)

Order

This matter having come on for a directions hearing before me on Wednesday, 10 October 2012, and having heard the applicant in person and Mr T Dixon of counsel on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. The applicant is to file and serve his submissions in response to the respondent's application to strike out in the submissions filed on Tuesday, 9 October 2012, by close of business on Wednesday, 17 October 2012.
2. The respondent is to file and serve its submissions in reply to the applicant's submissions filed in accordance with order 1 of this order, by close of business on Wednesday, 31 October 2012.
3. The matter is to be determined on the submissions and documents filed by the parties.
4. There be liberty to the parties to apply to vary this order.

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

AWARDS/AGREEMENTS—Variation of—

2012 WAIRC 00889

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ELECTRICAL & COMMUNICATIONS ASSOCIATION OF WA (INC) AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 41 OF 2012
CITATION NO.	2012 WAIRC 00889

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electrical Contracting Industry Award 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 26 September 2012.

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

SCHEDULE

1. Clause 6. – Safety Footwear: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) On "construction work" a payment of 14 cents for each hour worked shall be paid to all employees to compensate them for the requirement to wear approved safety footwear which the employees are to ensure are maintained in sound condition.

1. Clause 12. – Overtime: Delete paragraph (e) of subclause (2) and insert in lieu thereof the following:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid $12.90 for such meal and for a second or subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, $12.90.

2. Clause 18. – Special Rates and Provision:

A. Delete subclause (1), (2), (3), (4) and (5) and insert in lieu thereof the following:

(1) **Height Money**: An employee shall be paid an allowance of $2.60 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.

(2) **Dirt Money**: An employee shall be paid an allowance of 53 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Grain Dust**: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 89 cents per hour.

(4) **Confined Space**: An employee shall be paid an allowance of 63 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(5) **Diesel Engine Ships**: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 89 cents per hour whilst so engaged.

B. Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) **Hot Work**: An employee shall be paid an allowance of 53 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

C. Delete subclauses (9), (10), (11) and (12) and insert in lieu thereof the following:

(9) **Percussion Tools**: An employee shall be paid an allowance of 33 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) **Chemical, Artificial Manure and Cement Works**: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of $13.20 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) **Abattoirs**: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $17.70 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) **Phosphate Ships**: An employee shall be paid an allowance of 79 cents for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

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

(19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.50 per week in addition to their ordinary rate.

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

(21) **Nominee**: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of $65.50 per week.

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

19. – CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of 77.9 cents per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

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

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

		Per Day $
(i)	Up to and including 50 kilometre radius	16.85
	OR	
(ii)	Over 50 kilometres up to and including 60 kilometre radius	21.30
	OR	
(iii)	Over 60 kilometres up to and including 75 kilometre radius	32.75
	OR	
(iv)	Over 75 kilometres up to and including 90 kilometre radius	46.35
	OR	
(v)	Over 90 kilometres up to and including 105 kilometre radius	60.10

6. Clause 21. – Distant Work:

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

(6) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of $32.90 for any weekend that they returns to their home from the job but only if –

(a) The employee advises the employer or their agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required to work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

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

(9) Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $14.55 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

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

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of $32.40 per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and $32.40 shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of $32.40 being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

4. Clause 30. – Special Provisions – Western Power: Delete subclause (2),(3),(4),(5) and (6) and insert in lieu thereof the following:

(2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:

(a) $2.10 per hour for each hour worked if employed at Muja;

(b) $1.25 per hour for each hour worked if employed at Kwinana;

(3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:

(i) An allowance of $16.85 per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;

(ii) An allowance of $45.45 per day if the employee resides outside that radius;

in lieu of the allowance prescribed in the said Clause.

(b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

(4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid $28.65 on each occasion upon which the employee returns home at the weekend but only if -

(a) The employee has completed three months' continuous service with the employer;

(b) The employee is not required for work during the weekend;

(c) The employee returns to the job on the first working day following the weekend;

(d) The employer does not provide or offer to provide suitable transport;

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

(5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -

(a) Shall be paid an amount of $77.20 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and

(b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid $77.20 and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service;

and the provisions of subclause (3) and subclause (4) of Clause 21. - Distant Work shall not apply to such an employee.

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of $430.20 per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

9. Clause 36. – Superannuation: Delete subparagraph (i) of paragraph (b) of subclause (2) and insert in lieu thereof the following:

(i) For Apprentices not engaged on construction work, a weekly contribution calculated as 9% of the rate of pay prescribed in the First Schedule - Wages of this Award as follows:

Four Year Term	**Three and a Half Year Term**	**Three Year Term**
1st Year $27.19	Six Months $27.19	
2nd Year $35.55	Next Year $35.55	1st Year $35.55
3rd Year $46.70	Next Year $46.70	2nd Year $46.70
4th Year $55.07	Final Year $55.07	3rd Year $55.07

6. First Schedule - Wages:

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

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$27.30
(b)	If placed in charge of more than ten and not more than twenty other employees	$41.90
(c)	If placed in charge of more than twenty other employees	$54.00

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

(5) Tool Allowance:

(a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:

(i) $15.70 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $15.70 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

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

(6) Construction Allowance:

(a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:

(i) $48.70 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $43.80 per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $25.90 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

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

(9) Licence Allowance:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid $23.20 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of $35.40 per week in addition to rates prescribed in this schedule.

2012 WAIRC 00886

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	CHUBB ELECTRONIC SECURITY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 45 OF 2012
CITATION NO.	2012 WAIRC 00886

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electrical Trades (Security Alarms Industry) Award, 1980 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 26 September 2012.

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

SCHEDULE

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

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $12.30 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $8.45 for each meal so required.

2. Clause 15. – Special Rates and Provisions:

A. Delete subclause (1) to (4) of this clause and insert the following in lieu thereof:

(1) **Height Money:** An employee shall be paid an allowance of $2.75 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) **Dirt Money**: An employee shall be paid an allowance of 56 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Confined Space**: An employee shall be paid an allowance of 70 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) **Hot Work:** An employee shall be paid an allowance of 56 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

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

(6) **Percussion Tools:**

An employee shall be paid an allowance of 35 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

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

(13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $11.40 per week in addition to his ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $23.10 per week.

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

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

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

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Rate per Kilometre (cents)			
Metropolitan Area	81.5	72.8	63.3
South West Land Division	83.4	74.6	64.9
North of 23.5 ^{o} South Latitude	92.1	82.3	71.6
Rest of the State	85.8	77.2	66.9
Motor Cycle (In All Areas)	27.9 Cents per Kilometre		

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

(4) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of **$**34.20 for any weekend that he/she returns to their home from the job but only if -

(a) The employee advises the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **$**15.20 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 28. – Wages: Delete subclauses (3) - (5) and insert in lieu thereof the following:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of $15.90 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

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

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

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

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) $51.60 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $46.60 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $26.90 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) **Leading Hand:** In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid –

(a)	If placed in charge of not less than three and not more than ten other employees	$29.30
(b)	If placed in charge of more than ten and not more than twenty other employees	$44.70
(c)	If placed in charge of more than twenty other employees	$57.50

2012 WAIRC 00885

ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH

APPLICANT

-v-

ACTION ELECTRONICS PTY LTD AND OTHERS

RESPONDENTS

CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 47 OF 2012
CITATION NO.	2012 WAIRC 00885

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondent	Ms P Lim on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Ms P Lim on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electronics Industry Award No. A 22 of 1985 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 26 September 2012.

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

SCHEDULE

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

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.70 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $7.85 for each meal so required.

2. Clause 13. – Car Allowance: Delete subclause (3) of this Clause and insert thereof:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
Rate per kilometre (cents)	**Over 2600cc**	**1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	80.4	71.8	62.4
South West Land Division	82.1	73.4	64.1
North of 23.5o South Latitude	90.2	81.1	70.7
Rest of the State	84.6	76.0	65.9
MOTOR CYCLE (IN ALL AREAS)	27.4 cents per kilometre		

3. Clause 15. – Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof:

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $34.00 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $14.80 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 20. – Special Provisions: Delete subclauses (1) - (4), (6) - (8) and (14) of this clause and insert in lieu thereof the following:

(1) **Dirt Money**: An employee shall be paid an allowance of 56 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space**: An employee shall be paid an allowance of 69 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work**: An employee shall be paid an allowance of 56 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money**: An employee shall be paid an allowance of $2.65 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

(6) **Diesel Engine Ships**: The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 94 cents per hour whilst so engaged.

(7) **Percussion Tools**: An employee shall be paid an allowance of 35 cents per hour when working pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works**: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $14.10 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $11.00 per week in addition to their ordinary rate.

5. Clause 33. – Wages: Delete subclauses (2) and (5) and insert in lieu thereof the following:

(2) Leading Hands:

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

(a)	If placed in charge of not less than three and not more than ten other employees	$29.00
(b)	If placed in charge of more than ten but not more than twenty other employees	$43.70
(c)	If placed in charge of more than twenty other employees	$56.90

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -

(i) **$**15.90 per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of **$**15.90 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

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

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

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II – CONSTRUCTION WORK

6. Clause 5. – Special Rates and Provisions: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of $329.80.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

7. Clause 6. – Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (1) of this clause and insert in lieu thereof:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $16.25 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 82 cents per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 82 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

8. Clause 7. – Distant Work: Delete subclauses (6) and (7) respectively and insert in lieu thereof:

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $33.10 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $14.55 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

9. Clause 10. – Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu thereof the following:

(5) Construction Allowances:

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(i) $5.90 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) $46.00 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $26.90 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) Leading Hand:

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

(a)	If placed in charge of not less than three and not more than ten other employees	$29.00
(b)	If placed in charge of more than ten but not more than twenty other employees	$43.70
(c)	If placed in charge of more than twenty other employees	$56.90

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -

(i) $15.90 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $15.90 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

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

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2012 WAIRC 00898

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	THE MINISTER FOR WORKS AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 OCTOBER 2012
FILE NO/S	APPL 32 OF 2012
CITATION NO.	2012 WAIRC 00898

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondents	Mr A Harper
	Ms P Lim on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch, Ms P Lim on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Mr A Harper on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Engineering Trades (Government) Award, 1967 Award No. 29, 30 and 31 of 1961 and 3 of 1962 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 26 September 2012.

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

SCHEDULE

1. Clause 14. – Overtime:

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

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $12.00 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid $8.45 for each meal so required.

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

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $5.60 for breakfast.

2. Clause 17. – Special Rates and Provisions:

A. Delete subclauses (1) - (5) and insert in lieu thereof the following:

(1) **Height Money:** An employee shall be paid an allowance of $2.60 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) **Dirt Money**: Dirt Money of 54 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 60 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) Confined Space:

68 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 34 cents per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of 54 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

B. Delete subclauses (8) - (16) and insert in lieu thereof the following:

(8) Any employee working in water over his/her boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of $1.60 per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 54 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $3.25 for such examination and $1.17 per hour extra thereafter for fixing, renewing or repairing such work.

(11) **Ship Repair Work**: Any employee engaged in repair work on board ships shall be paid an additional $5.85 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $2.25 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 20 cents per hour, with a minimum payment of $1.40 per day.

(14) **Abattoirs -**

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $18.40 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $17.10 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 57 cents per hour, with a minimum payment for four hours.

(16) **Morgues -**

An employee required to work in a morgue shall be paid 57 cents per hour or part thereof, in addition to the rates prescribed in this clause.

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

(19) An employee required to repair or maintain incinerates shall be paid $3.45 per unit.

D. Delete subclauses (21) - (24) and insert in lieu thereof the following:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 40 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

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

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

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

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

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

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

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

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $22.40 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 72 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance**: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $5.10 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

E. Delete subclauses (26) - (29) and insert in lieu thereof the following:

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a “C” Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $11.00 per week in addition to their ordinary rate.

(27) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $2.25 per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $19.50 per week.

(29) Hospital Environment Allowance:

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

(a) (i) $15.70 per week for work performed in a hospital environment; and

(ii) $5.30 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

(b) $11.40 per week for work performed in a hospital environment at -

Kalgoorlie Hospital

Osborne Park Hospital

Albany Hospital

Bunbury Hospital

Geraldton Hospital

Mt. Henry Hospital

Northam Hospital

Swan Districts Hospital

Perth Dental Hospital

(c) $7.50 per week for work performed in a hospital environment at -

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

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

(a) On places within a radius of fifty kilometres from the General Post Office, Perth - $17.00 per day;

(b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth - 89 cents per kilometre;

(c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employee with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of 89 cents per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

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

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $35.00 and for any weekend that he/she returns to his home from the job but only if -

(a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) He/she is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

(7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, he/she shall be provided with suitable transport to and from that job or be paid an allowance of $15.30 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 21. – District Allowances: Delete subclause (6) of this clause and insert in lieu thereof the following:

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

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ Per Week	Town Or Place	$ Per Week
6	85.10	Nil	Nil
5	69.60	Fitzroy Crossing	93.80
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	87.50
		Marble Bar	
		Wittenoom	
		Karratha	82.30
		Port Hedland	76.20
4	35.30	Warburton Mission	94.40
		Carnarvon	32.90
3	22.20	Meekatharra	35.30
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	15.80	Kalgoorlie	5.30
		Boulder	
		Ravensthorpe	20.90
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

6. First Schedule - Wages:

A. Delete subclause (5) and insert in lieu thereof the following:

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of $17.70.

(b) This allowance shall be paid in two instalments, as follows:

(i) $8.90 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $8.80 - totalling $17.70 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

B. Delete subclause (8) and insert in lieu thereof the following:

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than ten other employees	28.40
If placed in charge of more than ten and not more than twenty other employees	43.20
If placed in charge of more than twenty other employees	55.50

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	69.30
Harvey, Dwellingup, Mundaring, Yanchep	34.50
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	17.50
Jarrahdale	17.50

C. Delete subclauses (10) - (12) inclusive and insert in lieu thereof the following:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $49.60 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $44.70 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) $26.40 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

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

(i) $15.70 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

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

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

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

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional $2.60 per hour whilst so engaged.

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

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

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $29.70 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $39.90 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule - Wages of this Award.

B. Delete subclause (7) of this clause and insert in lieu thereof the following:

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid $4.20 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2012 WAIRC 00887

GATE, FENCE AND FRAMES MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION WA BRANCH
	APPLICANT
	-v-
	CAI FENCES PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 44 OF 2012
CITATION NO.	2012 WAIRC 00887

Result	Award varied
Representation	
Applicant	Mr N Ireland and Ms B Ward
Respondents	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there be no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Gates, Fence and Frames Manufacturing Award No 24 of 1971 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 26 September 2012.

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

SCHEDULE

1. Clause 7. – Overtime: Delete paragraph (f) of subclause (3) and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (h) of this subclause, an employee required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $11.30 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $7.80 for each meal so required.

2. Clause 14. – Special Rates and Provisions: Delete subclauses (1), (2), (4), of this clause and insert in lieu thereof the following:

(1) Dirt Money: An employee shall be paid an allowance of 55 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) Confined Space: An employee shall be paid an allowance of 68 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid $11.20 per week in addition to the ordinary rate.

2. Clause 20. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $32.30 for any week-end the employee returns to the employee's home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) The employee is not required for work during that week-end;

(c) The employee returns to the job on the first working day following the week-end; and

(d) The employer does not provide, or offer to provide, suitable transport

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $14.20 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

3. First Schedule – Wages: Delete subclauses (2) and (6) of this clause and insert in lieu thereof of the following:

(2) Leading Hand: In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$29.40
(b)	If placed in charge of more than ten but not more than twenty other employees	$45.20
(c)	If placed in charge of more than twenty other employees	$58.30

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

(i) $16.40 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $16.40 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.

For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

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

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

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

2012 WAIRC 00888

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	KONE ELEVATORS PTY. LIMITED AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 43 OF 2012
CITATION NO.	2012 WAIRC 00888

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondents	Ms P Lim on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and Ms P Lim on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Lift Industry (Electrical and Metal Trades) Award 1973 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 26 September 2012.

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

SCHEDULE

1. Clause 12. – Overtime: Delete paragraph (f) of subclause (3) of this clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $12.30 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $8.45 for each meal so required.

2. Clause 16. – Special Rates and Provisions: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $22.70 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $11.30 per week in addition to his/her ordinary rate.

3. Clause 17. – Car Allowance: Delete subclause (3) and insert in lieu thereof the following:

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	ENGINE DISPLACEMENT (In Cubic Centimetres)		
Rate per Kilometre (Cents)	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Metropolitan Area	81.4	72.7	63.2
South West Land Division	83.1	74.4	64.7
North of 23.5' South Latitude	91.2	82.0	71.4
Rest of the State	85.8	76.9	67.0
Motor Cycle (In All Areas)	28.0 cents per kilometre		

4. Clause 18. – Fares & Travelling Allowance: Delete subclause (2) and insert in lieu thereof the following:

(2) An employee to whom subclause (1) of this Clause does not apply and who is engaged on construction work or regular repair service and/or maintenance work shall be paid an allowance in accordance with the provisions of this subclause to compensate for excess fares and travelling time from the employee's home to his/her place of work and return:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $16.85 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 92 cents per kilometre.

(c) Subject to the provision of paragraph (d), work performed at places beyond a 60 kilometres radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this Clause, in which case an additional allowance of 92 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres radius.

(d) In respect to work carried out from an employer's depot situated more than 60 kilometres from the G.P.O., Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is provided by the employer from and to his/her depot or such other place more convenient to the employee as is mutually agreed upon between the employer and employee, half the above rates shall be paid; provided that the conveyance used for such transport is provided with suitable seating and weatherproof covering.

5. Clause 19. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:

(6) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $34.20 for any week-end they return home from the job, but only if -

(a) The employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) The employee is not required for work during that week-end;

(c) The employee returns to the job on the first working day following the week-end; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.25 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

6. Clause 28. – Lift Industry Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $107.00 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

7. First Schedule - Wages: Delete subclauses (3) and (6) and insert in lieu thereof the following:

(3) Leading Hands:

In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than ten other employees	28.80
(b)	If placed in charge of more than ten and not more than twenty other employees	43.80
(c)	If placed in charge of more than twenty other employees	56.60

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of his/her work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $15.90 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $15.90 being the percentage which appears against his/her years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

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

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

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

2012 WAIRC 00890

METAL TRADES (GENERAL) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ANODISERS WA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 40 OF 2012
CITATION NO.	2012 WAIRC 00890

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondents	Ms P Lim on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch

Order

HAVING HEARD Ms N Ireland and Ms Be Ward on behalf of the applicant and Ms P Lim on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Metal Trades (General) Award 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 26 September 2012.

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

SCHEDULE

1. Clause 3.2 – Overtime: Delete subclause 3.2.3(6) of this clause and insert the following in lieu thereof:

(6) Subject to the provisions of 3.2.3(7), an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid $12.35 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid $8.40 for each meal so required.

2. Clause 4.8 – Wages and Supplementary Payments:

A. Delete subclause 4.8.2(1) and insert in lieu thereof the following:

4.8.2 (1) Leading Hands:

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week –

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	29.10
(b)	If placed in charge of more than 10 and not more than 20 other employees	44.40
(c)	If placed in charge of more than 20 other employees	57.40

B. Delete subclause 4.8.6(1) and insert in lieu thereof the following:

(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:

(a) $15.90 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $15.90 being the percentage which appears against the year of apprenticeship in 4.8.3;

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

C. Delete subclause 4.8.7 and insert in lieu thereof the following:

4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $25.70 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

3. Clause 5.2 – Special Rates and Facilities: Delete this clause and insert in lieu thereof the following:

5.2.1 Height Money:

An employee shall be paid an allowance of $2.65 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespeople nor to riggers and splicers on ships and buildings.

5.2.2 Dirt Money:

An employee shall be paid an allowance of 57 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

5.2.3 Grain Dust:

Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this Award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 96 cents per hour.

5.2.4 Confined Space:

An employee shall be paid an allowance of 68 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

5.2.5 Diesel Engine Ships:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 96 cents per hour whilst so engaged.

5.2.6 Boiler Work:

An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.

5.2.7 Hot Work:

An employee shall be paid an allowance of 57 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1 degrees and 54.4 degrees Celsius.

5.2.8 (1) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may -

(a) fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(b) fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(c) prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.

(2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(3) An allowance fixed pursuant to paragraph 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.

5.2.9 Tarring Pipes:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 92 cents per day whilst so engaged.

5.2.10 Percussion Tools:

An employee shall be paid an allowance of 33 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

5.2.11 Chemical, Artificial Manure and Cement Works:

An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $14.10 per week. This allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

5.2.12 Abattoirs and Tallow Rendering Works:

An employee, employed in and about an abattoir or in a rendering section of a tallow works shall be paid an allowance calculated at the rate of $18.40 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause.

5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate Award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.

5.2.14 Phosphate Ships:

An employee shall be paid an allowance of 81 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than he or she would be entitled to receive pursuant to the Award which would apply if such employee was employed in the gold mine concerned.

5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.

5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.

5.2.18 Special Rates Not Cumulative:

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely - the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.

5.2.19 Protective Equipment:

(1) An employer shall have available a sufficient supply of protective equipment as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.

(3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if the employee does, both employees shall be deemed guilty of wilful misconduct.

(4) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(5) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

5.2.20 (1) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 40 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.

(2) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.

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

(4) For the purpose of this subclause 'foundry work' shall mean -

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

(b) where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(i) non-ferrous die casting (including gravity and pressure);

(ii) casting of billets and/or ingots in metal moulds;

(iii) continuous casting of metal into billets;

(iv) melting of metal for use in printing;

(v) refining of metal.

5.2.21 An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $11.10 per week in addition to the employee's ordinary rate.

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant Regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $23.00 per week.

4. Clause 5.3 – Car Allowance: Delete 5.3.3 and insert in lieu thereof the following:

5.3.3 A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

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

AREA AND DETAILS	MOTOR CAR ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Metropolitan Area	81.0	72.6	63.1
South West Land Division	82.8	74.4	64.8
North of 23.5° South Latitude	91.2	82.1	71.3
Rest of the State	85.7	76.7	66.7
Motor Cycle (in all areas)	27.9 cents per kilometre		

5. Clause 5.5 – Distant Work: Delete 5.5.4 and 5.5.5 and insert in lieu thereof the following:

5.5.4 An employee, to whom the provisions of 5.5.1 apply, shall be paid an allowance of $34.40 for any weekend the employee returns home from the job, but only if -

(1) the employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(2) the employee is not required for work during that weekend;

(3) the employee returns to the job on the first working day following the weekend; and

(4) the employer does not provide, or offer to provide, suitable transport.

5.5.5 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.15 per day, provided that where the time actually spent in travelling either to or from the job exceeds twenty (20) minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

PART 2 – CONSTRUCTION WORK

6. Clause 13 – Wages: Delete subclauses 13.4, 13.5 and 13.6 and insert in lieu thereof the following:

13.4 Construction Allowance

(1) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid:

(a) $51.30 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) $46.10 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(c) $27.10 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid:

		$
(1)	If placed in charge of not less than three (3) and not more than ten (10) other employees	29.10
(2)	If placed in charge of more than ten (10) and not more than twenty (20) other employees	44.40
(3)	If placed in charge of more than twenty (20) other employees	57.40

13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of –

(a) $15.90 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $15.90 being the percentage which appears against his or her year of apprenticeship in 4.8.3 of Clause 4.8 – Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 Apprentices of PART 2) of this Award,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his or her work as a tradesperson or apprentice.

(2) Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

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

(4) A tradesperson or apprentice shall replace or pay for any tools supplied by his or her employer if lost through his or her negligence.

7. Clause 15.1 – Special Allowances and Provisions: Delete 15.1.2(2) and insert in lieu thereof the following:

(2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of $861.10.

8. Clause 15.1 – Special Allowances and Provisions: Delete 15.1.4 and insert in lieu thereof the following:

15.1.4 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $23.00 per week.

9. Clause 15.2 – Allowance for Travelling and Employment in construction Work: Delete 15.2.1(1), 15.2.1(2) and 15.2.1(3) and insert in lieu thereof the following:

(1) On places within a radius of 50 kilometres from the General Post Office, Perth - $16.80 per day.

(2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 89 cents per kilometre.

(3) Subject to provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 89 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

10. Clause 15.3 –Distant Work: Delete 15.3.6 and 15.3.7 and insert in lieu thereof the following:

15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of $34.40 for any weekend that the employee returns home for the job, but only if -

(1) the employee advises his or her employer or the employer's agent of his or her intention not later than the Tuesday immediately preceding the weekend in which he or she so returns.

(2) the employee is not required for work during that weekend;

(3) the employee returns to the job on the first working day following the weekend; and

(4) the employer does not provide, or offer to provide, suitable transport.

15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $15.15 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

11. Clause 15.4 – Special Provision – Western Power: Delete 15.4.3, 15.4.4 and 15.4.5 and insert in lieu thereof the following:

15.4.3 (1) An employee, to whom Clause 15.2 - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja, shall be paid -

(a) an allowance of $16.80 per day if the employee resides within a radius of 50 kilometres from the Muja power station;

(b) an allowance of $44.30 per day if the employee resides outside that radius

in lieu of the allowance prescribed in the said clause.

(2) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

15.4.4 In addition to the allowance payable pursuant to subclause 15.3.6 of Clause 15.3 - Distant Work of this PART, an employee to whom that clause applies shall be paid $33.05 on each occasion upon which the employee returns home at the weekend, but only if -

(1) the employee has completed three months' continuous service with the employer;

(2) the employee is not required for work during the weekend;

(3) the employee returns to the job on the first working day following the weekend;

(4) the employer does not provide, or offer to provide, suitable transport;

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

15.4.5 An employee to whom Clause 15.3 - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth -

(1) shall be paid an amount of $77.70 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in 15.3.3 of the said clause; and

(2) in lieu of the provisions of 15.3.4 of the said clause, shall be paid $77.70 and for three (3) hours at ordinary rates when the employee's services terminate, if the employee has completed three (3) months' continuous service,

and the provisions of 15.3.3 and 15.3.4 of Clause 15.3 - Distant Work of this PART shall not apply to such employee.

2012 WAIRC 00860

PARLIAMENTARY EMPLOYEES AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 21 SEPTEMBER 2012
FILE NO/S	APPL 82 OF 2007
CITATION NO.	2012 WAIRC 00860

Result Award varied and consolidated

Order

HAVING heard Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated and Mr S Dane on behalf of United Voice WA and Ms C Holmes on behalf of the Department of Commerce and with her Ms T Hunter on behalf of Parliamentary Services, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Parliamentary Employees Award 1989 be varied and consolidated 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 21st day of September 2012.

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

SCHEDULE

1. Delete the entire contents of the Award and insert the following in lieu thereof:

PART 1 AWARD STRUCTURE

1. - TITLE

This Award shall be known as the Parliamentary Employees Award 1989.

2. - ARRANGEMENT

3. - SCOPE

This Award shall apply to all employees eligible for membership of the Civil Service Association of Western Australia Incorporated or United Voice WA employed in the Parliament of the State of Western Australia, except those employees whose salaries or salary ranges are determined or recommended pursuant to the *Salaries and Allowances Act, 1975* and who do not occupy offices for which the remuneration is determined by an Act of Parliament to be fixed rate, or is determined or to be determined by the Governor pursuant to the provisions of any Act of Parliament.

4. - TERM

The term of this Award shall be for a period of one year from the date hereof.

5. - DEFINITIONS

"Association" means the Civil Service Association of Western Australia Incorporated.

"De facto partner" means a relationship (other than a legal marriage) between two persons, of either different sexes or the same sex, who live together in a "marriage-like" relationship, as provided for by the *Interpretation Act 1984* as amended from time to time.

"Employee" means an Officer or a PSSE.

"Part-time employment" is defined as regular and continuing employment of less than the hours outlined in Clause 9. – Hours of Duty performed by permanent or fixed term contract staff.

"PSSE" means a Parliamentary Support Services Employee, being all those employees employed in the occupational areas of gardening, catering, stewarding or bar tending.

"Officer" is an employee who is not a PSSE.

"Partner" means a person who is either a spouse or a de facto partner.

"Sessional employee" means an employee who has been advised of the requirement to perform sessional work in their contact of employment.

"Union" means United Voice WA.

PART 2 CONTRACT OF EMPLOYMENT

6. - PART-TIME EMPLOYMENT

(1) Definitions

(a) Part-time employment is defined as regular and continuing employment of less than the hours outlined in Clause 9. – Hours of Duty performed by permanent or fixed term contract staff.

(2) Part-time Agreement

(a) Each permanent part-time arrangement shall be confirmed by the employer in writing and should include the hours to be worked daily and weekly by the employee, including starting and finishing times, which shall hereinafter be referred to as "ordinary working hours".

(b) The employer shall give an employee one (1) month's notice of any proposed variation to that employee's ordinary working hours, provided that the employer shall not vary the employee's total weekly hours of duty without the employee's prior written consent.

(c) The conversion of a full-time employee to part-time employment can only be implemented with the written consent or by written request of that employee. No employee may be converted to part-time employment without the employee's prior agreement.

(d) Hours of duty will be in accordance with Clause 9. - Hours of Duty, which includes flexible working hours for Parliamentary Officers not required to perform sessional work.

(3) The provisions of Clause 10. - Overtime of this Award shall apply to all time worked outside the ordinary working hours prescribed by subclause (2)(a) of this clause.

(4) Salary and Wages

An employee who is employed on a part-time basis shall be paid a proportion of the appropriate full-time wage or salary dependent upon time worked. This shall be calculated in the following manner:

(a) PSSEs

$$\frac{\text{Hours worked per fortnight}}{76} \times \frac{\text{Full-time fortnightly wage}}{1}$$

(b) Parliamentary Officers

$$\frac{\text{Hours worked per fortnight}}{75} \times \frac{\text{Full-time fortnightly salary}}{1}$$

(5) Annual Increments – Parliamentary Officers

A part-time Parliamentary Officer shall be entitled to annual increments in accordance with Clause 18. - Annual Increments of the Public Service Award 1992, subject to meeting the usual performance criteria.

(6) Leave Entitlements

(a) A part-time employee shall be entitled on a pro rata basis to the same leave and conditions prescribed in the Award for full-time employees.

(b) Payment to an employee proceeding on accrued annual leave and long service leave shall be calculated on a pro rata basis having regard for any variations to the employee's ordinary working hours during the accrual period.

(b) Sick leave and any other paid leave shall be paid at the employee’s current salary or wages, but only for those hours or days that would normally have been worked had the employee not been on such leave.

(7) Public Holidays

Employees are entitled to the holidays prescribed in Clause 26. - Public Holidays of this Award without variation of the employee's fortnightly wage or salary provided the holidays occur on a day which is normally worked.

(8) Right of Reversion

(a) Where a full-time employee is permitted, at his or her initiative, to work part-time for a period no greater than 12 months in the position he or she occupied on a full-time basis before becoming part-time, that employee has a right (upon written application) to revert to full-time hours in that position as soon as deemed practicable by the employer, but no later than the expiry of the agreed period.

(b) A full-time employee who is permitted at his or her initiative to work part-time for a period greater than 12 months in the position he or she occupied on a full-time basis before becoming part-time, may apply to revert to full-time hours in that position but only as soon as is deemed practicable by the employer.

This should not prevent the transfer of said employee to another full-time position at a salary commensurable to that of his or her previous full-time position.

(c) A part-time employee who was previously a full-time employee within the organisation, who occupies a part-time office which was the initiative of management and who desires to revert to full-time employment will be required to seek promotion or transfer to full-time position by:

(i) application for advertised vacancies; and/or

(ii) by notification in writing to the employer of his or her desire to revert to full-time employment.

(d) Nothing in paragraph (c) hereof shall prevent the employer, with the written consent of the employee, transferring that employee to a full-time position with a wage or salary rate less than the employee's substantive position.

Prior to effecting the transfer of an employee under this subclause, the employer shall:

(i) notify the employee of the specific position to which the employer proposes to transfer the employee and

(ii) obtain the written consent of the employee to his or her transfer to that position.

7. - CASUAL EMPLOYMENT

(1) Casual employment shall only apply to PSSEs and shall mean:

(a) an employee engaged by the hour in any period of engagement as determined by the employer; or

(b) an employee engaged on an hourly rate of pay by agreement between the Union or Association and the employer.

(2) A casual employee shall not be engaged for less than 2 consecutive hours per time.

(3) A casual employee shall be paid for each hour worked at the appropriate classification in this Award in accordance with the relevant formula:

Casual PSSEs

$$\frac{\text{Fortnightly Wage}}{76}$$

with the addition of twenty percent in lieu of annual leave, sick leave, long service leave and payment for public holidays.

(4) Conditions of employment, paid leave and allowances provided under the provisions of this Award shall not apply to a casual employee with the exception of bereavement and carers leave. However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of their duties, the employee shall be entitled to reimbursement in accordance with the provisions of this Award.

(5) The employment of a casual employee may be terminated at any time by the giving of one hour's notice on either side, or the payment or forfeiture, as the case may be, of one hour's pay.

(6) A casual employee shall be informed that their employment is casual and that they have no entitlement to paid leave, with the exception of bereavement leave and carer's leave before they are engaged.

8. - REDUNDANCY

(1) Definitions

Except where otherwise provided, pay means:

(a) the award rate of pay, excluding allowances, applicable to the substantive classification of the employee of the pay or, where the employee does not have a substantive classification, the rate of pay, excluding allowances, under his or her contract of employment;

(b) an enterprise bargaining allowance as defined in the Public Sector Management (Redeployment and Redundancy) Regulations 1994;

(c) an allowance for an employee being in charge of other employees; and

(d) a tally or piece rate;

but does not include an allowance of any other kind.

"Redundancy" means a situation when a job performed by an employee ceases to exist or becomes surplus to requirements.

(2) Redeployment

(a) With respect to each employee whose position is declared redundant, the employer, unless otherwise agreed, shall attempt to redeploy the employee to suitable alternative employment within the Parliament of the State of Western Australia. In the event that no suitable alternative employment is available, the employee shall be entitled to the benefits set out in subclause (4) of this clause.

(b) Where it is possible to redeploy the employee to a new employer within the Parliament of the State of Western Australia, annual leave and long service leave accrued prior to the date of redeployment shall be calculated in accordance with this Award and transferred to and credited by the new employer.

(c) Suitable alternative employment shall be defined as that which provides an employee with a position which;

(i) is a position where the ordinary hours of duty being in general no less than those worked by the employee in his/her substantive position, with a Parliament House employer, unless otherwise agreed;

(ii) has a wage or salary as close as practicable to that of the employee's substantive position; and

(iii) has regard to the relevance of the duties and responsibilities, qualifications, experience, and the competence of the employee.

(3) Leave and assistance to seek alternative employment

The employer shall facilitate redeployment by granting employees who have been made redundant up to one day's paid leave to attend interviews and career counselling without loss of pay.

(4) Severance pay

(a) Each employee identified as being surplus to the employer's requirement and for whom suitable alternative employment cannot be found shall be entitled to the benefits of this subclause.

(b) Where an employee identified as surplus to requirements is able to carry out the duties and responsibilities in an equivalent manner to an employee not identified as surplus, the latter, with the approval of the employer, may elect to resign in place of the former, in which case the benefits of this sub-clause shall apply to that employee.

(c) Each employee referred to in paragraphs (a) and (b) hereof shall receive a severance payment from the employer in accordance with the following formula:

(i) three weeks pay for each completed year of continuous service provided that the maximum entitlement shall be of 52 weeks' pay;

(ii) continuous service shall have the same meaning as that prescribed in the Wages Employees Long Service Leave General Order ((1986) 66 WAIG 319) as amended from time to time.

(5) Payment for leave entitlements:

In addition to the severance payments prescribed by subclause 4(c) of this clause, employees shall also receive:

(a) pro rata annual leave.

(b) pro rata long service leave calculated on each completed twelve (12) months of service in accordance with the terms and conditions of entitlement available pursuant to Clause 28. - Long Service Leave as appropriate.

(c) leave loading on accrued annual leave.

(d) as part of the definition of pay, for the purpose of severance, any allowance of the kinds that has been paid continuously for the preceding 12 months including:

(i) an allowance for temporary undertaking duties other than those of the substantive office, post or position of the relevant employee;

(ii) a higher duties allowance; and

(iii) a shift allowance which is paid on a regular basis including during periods of annual leave.

(6) Exempt employees

This clause does not apply to:

(a) employees retired on grounds of ill health;

(b) employees whose employment is terminated as a consequence of poor performance or misconduct on the part of the employee;

(c) an employee where an agreement has been reached between the employee and the employer that the employee is only engaged for a defined period under a fixed term contract at the conclusion of which the employment shall cease; or

(d) casual employees.

(7) Minimum provisions

The provisions of this clause are minimum provisions.

PART 3 HOURS OF WORK

9. - HOURS OF DUTY

PART A - PARLIAMENTARY OFFICERS

(1) Subject to subclause (3) of this part, the ordinary hours of attendance of Parliamentary Officers not required to perform sessional work shall be in accordance with the provisions of Clause 20. - Hours of the Public Service Award 1992.

(2) (a) For Parliamentary Officers required to perform sessional work, (when the House is not sitting) the ordinary hours of attendance shall not exceed 65 hours per fortnight or six and a half hours per day. Such hours shall be worked on Monday to Friday between the hours of 8.00 a.m. and 6.00 p.m.

(b) For Parliamentary Officers required to perform sessional work, (when the House is sitting), in addition to the ordinary hours mentioned in subclause (2)(a) above, shall be required to work between 4.30 p.m. and 7.30 p.m. in accordance with subclause (2) of Clause 10. - Overtime of this Award. Time worked past 7.30 p.m. shall be paid as overtime as defined in Clause 10 of this Award.

(3) Ordinary hours may be worked outside the hours specified in subclause (1) of this part hereof where it is permitted, pursuant to an agreement between the employer and the Association.

PART B - PSSEs

(1) The ordinary hours of attendance of PSSEs not required to work sessional work shall not exceed 76 hours per fortnight nor 7 hours 40 minutes per day. Such hours shall be worked on Monday to Friday between the hours of 7.00 a.m. and 6.00 p.m.

(2) PSSEs required to perform sessional work shall be rostered pursuant to an agreement between the employer and the Union for no less than six hours and no more than ten hours per day. Any hours worked in excess of those rostered hours shall be paid overtime as defined in Clause 10 of this Award.

10. - OVERTIME

(1) Overtime means all time worked in excess of the ordinary hours, and/or rostered hours.

(2) For Parliamentary Officers required to work under Part A(2) of Clause 9. – Hours of Duty no overtime shall be paid between 4.30pm and 7.30pm while the House is sitting.

(3) Where an employee is required to be on duty during the evening meal break, payment shall be made at the rate of time and a half.

(4) All time worked on Saturday or Sunday will be paid at the appropriate rate for a minimum of three hours.

(5) Payment for overtime for Parliamentary Officers shall be calculated on an hourly basis in accordance with the following formula:

Weekdays

For the first three hours on any one week day:

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

After the first three hours on any one week day:

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

Saturdays

First three hours on any Saturday:

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

After the first three hours or after 12.00 noon, whichever is the earlier, on any Saturday:

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

Sundays

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{2}{1}$$

Public Service Holidays

During prescribed hours of duty:

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{3}{2}$$

in addition to the normal day's pay.

During hours outside of prescribed hours of duty:

$$\frac{\text{Fortnightly Salary}}{75} \times \frac{5}{2}$$

(6) Payment for overtime for PSSEs shall be calculated on an hourly basis in accordance with the following formula.

Weekdays

For the first two hours on any one week day:

$$\frac{\text{Fortnightly Wages}}{76} \times \frac{3}{2}$$

After the first two hours on any one week day:

$$\frac{\text{Fortnightly Wages}}{76} \times \frac{2}{1}$$

Saturdays

First two hours on any Saturday:

$$\frac{\text{Fortnightly Wages}}{76} \times \frac{3}{2}$$

After the first two hours or after 12.00 noon, whichever is the earlier, on any Saturday:

$$\frac{\text{Fortnightly Wages}}{76} \times \frac{2}{1}$$

Sundays

$$\frac{\text{Fortnightly Wages}}{76} \times \frac{2}{1}$$

Public Service Holidays

$$\frac{\text{Fortnightly Wages}}{76} \times \frac{5}{2}$$

(7) All other provisions relating to overtime shall be as per Clause 22. – Overtime Allowance of the Public Service Award 1992.

11. - MEAL BREAKS

(1) An employee shall not work for more than five hours without a break for a meal. Such meal break shall not be less than 30 minutes nor more than one hour, to be taken as mutually arranged between the employer and the employee.

(2) The customary 15 minutes morning, afternoon and after 9.00 p.m. tea breaks shall continue to be observed.

(3) Employees performing sessional work shall have a meal break of 60 minutes to be taken between 5.30 p.m. and 7.30 p.m., with the exception of catering staff which shall be by mutual agreement between the Association, the Union and employer.

12. - SHIFT WORK

All provisions relating to this allowance shall be as per Clause 21. – Shift Work Allowance of the Public Service Award 1992.

PART 4 SALARY AND WAGES

13. - MINIMUM ADULT AWARD WAGE

(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time employees aged 21 or more is $627.70 per week payable on and from the commencement of the first pay period on or after 1 July 2012.

(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

(6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

(7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

(8) Subject to this clause the minimum adult award wage shall –

(a) Apply to all work in ordinary hours.

(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2012 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $543.50 per week on and from the commencement of the first pay period on or after 1 July 2012.

14. - PAYMENT OF SALARIES AND WAGES

(1) Salaries and wages shall be paid fortnightly but, where the usual pay day falls on a public holiday, payment shall be made on the previous working day.

(2) A fortnight's salary shall be computed by dividing the annual salary by 313 and multiplying the result by 12.

(3) The hourly rate shall be computed as 1/75th of the fortnight's salary for Parliamentary Officers and as 1/76th of the fortnight salary for PSSEs.

(4) Salaries and wages shall be paid by direct funds transfer to the credit of an account nominated by the employee at such Bank, Building Society or Credit Union approved by the Accountable Officer. Provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement between the employer, the Association and the Union, payment may be made by cheque.

15. - PARLIAMENTARY OFFICERS - SALARIES

(1) The annual salaries applicable to Parliamentary Officers not covered by subclause (2) shall be as follows:

Level	Salary Per Annum $	Arbitrated Safety Net Adjustments $	Total Salary Per Annum $
Level 1			
Under 17 years	10445	8161	18606
17 years	12207	9538	21745
18 years	14238	11125	25363
19 years	16481	12878	29359
20 years	18507	14461	32968
1.1	20331	15886	36217
1.2	20983	15908	36891
1.3	21634	15930	37564
1.4	22281	16061	38342
1.5	22932	16083	39015
1.6	23583	16105	39688
1.7	24332	16023	40355
1.8	24850	16041	40891
1.9	25616	16067	41683
Level 2			
2.1	26533	16098	42631
2.2	27236	16122	43358
2.3	27975	16147	44122
2.4	28756	16173	44929
2.5	29573	16201	45774
Level 3			
3.1	30696	16239	46935
3.2	31571	16269	47840
3.3	32473	16300	48773
3.4	33399	16223	49622
Level 4			
4.1	34669	16266	50935
4.2	35664	16192	51856
4.3	36688	16227	52915
Level 5			
5.1	38660	16294	54954
5.2	39993	16339	56332
5.3	41378	16386	57764
5.4	42815	16435	59250
Level 6			
6.1	45126	16514	61640
6.2	46697	16567	63264
6.3	48323	16623	64946
6.4	50059	16682	66741
Level 7			
7.1	52721	16772	69493
7.2	54563	16835	71398
7.3	56567	16903	73470
Level 8			
8.1	59824	17041	76838
8.2	62157	17093	79250
8.3	65050	17191	82241
Level 9			
9.1	68663	17314	85977
9.2	71104	17397	88501
9.3	73888	17492	91380
Class 1	78098	17635	95733
Class 2	82308	17778	100086
Class 3	86516	17921	104437
Class 4	90726	18064	108790

(2) (a) The provisions of Clause 12. – Specified Callings of the Public Service Award 1992 shall apply where the employer engages a Parliamentary Officer in a position designated as a specified calling.

(b) The annual salaries for Parliamentary Officers engaged as a specified calling shall be as follows:

Level	Salary Per Annum $	Arbitrated Safety Net Adjustments $	Total Salary Per Annum $
Level 2/4			
1st year	26533	16098	42631
2nd year	27975	16147	44122
3rd year	29573	16201	45774
4th year	31571	16269	47840
5th year	34669	16266	50935
6th year	36688	16227	52915
Level 5			
1st year	38660	16294	54954
2nd year	39993	16339	56332
3rd year	41378	16386	57764
4th year	42815	16435	59250
Level 6			
1st year	45126	16514	61640
2nd year	46697	16567	63264
3rd year	48323	16623	64946
4th year	50059	16682	66741
Level 7			
1st year	52721	16772	69493
2nd year	54563	16835	71398
3rd year	56567	16903	73470
Level 8			
1st year	59824	17041	76838
2nd year	62157	17093	79250
3rd year	65050	17191	82241
Level 9			
1st year	68663	17314	85977
2nd year	71104	17397	88501
3rd year	73888	17492	91380
Class 1	78098	17635	95733
Class 2	82308	17778	100086
Class 3	86516	17921	104437
Class 4	90726	18064	108790

(3) Salary increases resulting from State Wage Case Decisions are calculated for those Parliamentary Officers under the age of 21 years employed at Level 1 by dividing the current junior annual salary by the current Level 1.1 annual salary and multiplying the result by the new Level 1.1 annual salary which includes the State Wage Case increase. The following formula is to be applied:

$$\frac{\text{Current junior rate}}{\text{Current Level 1.1 rate}} \times \text{New Level 1.1 rate} = \text{New junior rate}$$

(4) Annual Increments

(a) Parliamentary Officers shall proceed to the maximum of their salary range by annual increments, after 12 months continuous service at each increment point, unless there is an adverse report on their performance or conduct which recommends the non-payment of an annual increment.

(b) The following process shall apply where a report on a Parliamentary Officer's performance or conduct recommends the non-payment of an annual increment:

(i) The Parliamentary Officer will be shown the report prior to completing 12 months continuous service since their last incremental advance.

(ii) The Parliamentary Officer will be provided with an opportunity to comment in writing.

(iii) The Parliamentary 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 the above provisions will apply.

(c) The non-payment of an increment will not change the normal anniversary date of any further increment payments.

(5) Special Allowances

The employer shall not be prohibited from granting special allowances based on additional duties and responsibilities undertaken by a Parliamentary Officer due to expertise and knowledge of the Parliamentary Officer.

(6) Amalgamation of Salary Classes

In allocating salaries or salary ranges the employer may amalgamate any two or more levels or, allocate specific salary points from a level or levels prescribed by this Award.

16. - PARLIAMENTARY SUPPORT SERVICES EMPLOYEE WAGES

(1) The weekly wage applicable to PSSEs covered by this Award shall be as follows:

(a) Classification	Base Rate Per Week $	Arbitrated Safety Net Adjustments $	Total Rate Per Week $
Kitchen Hands and Gardeners			
1st year of service	372.08	303.93	676.01
2nd year of service	376.68	304.09	680.77
3rd year of service	380.58	304.22	684.80
Steward/Cleaner			
1st year of service	391.45	304.59	696.04
2nd year of service	395.96	304.74	700.70
3rd year of service	399.65	304.87	704.52
Steward/Cleaner and Relieving Bar Attendant			
1st year of service	401.69	304.94	706.63
2nd year of service	406.41	305.10	711.51
3rd year of service	410.82	305.25	716.07
Cook (Cakes and Second)			
1st year of service	414.51	305.37	719.88
2nd year of service	419.32	307.60	726.92
3rd year of service	423.53	307.75	731.28
Assistant Chief Steward			
1st year of service	425.17	307.80	732.97
2nd year of service	431.53	308.02	739.55
3rd year of service	437.27	308.21	745.48
Horticulturist (Certificate)			
1st year of service	433.27	308.08	741.35
2nd year of service	438.60	308.26	746.86
3rd year of service	442.95	308.41	751.36
Tradesperson Cook			
1st year of service	454.79	308.81	763.60
2nd year of service	459.10	308.96	768.06
3rd year of service	462.89	307.02	769.91
Chef, Chief Steward and Bar Attendant			
1st year of service	491.90	308.00	799.90
2nd year of service	498.15	308.22	806.37
3rd year of service	504.61	308.43	813.04
Foreperson of Horticulture			
1st year of service	478.27	307.54	785.81
2nd year of service	483.19	307.71	790.90
3rd year of service	487.39	307.85	795.24

(2) Apprentices: The weekly wage rate shall be a percentage, as hereunder, of the tradesperson's rate:

	%
Five Year Term	
First Year	40
Second Year	48
Third Year	55
Fourth Year	75
Fifth Year	88
	%
Four Year Term	
First Year	42
Second Year	55
Third Year	75
Fourth Year	88
Three and a Half Year Term	
First Six Months	42
Next Year	55
Next Following Year	75
Final Year	88
Three Year Term	
First Year	55
Second Year	75
Third Year	88

For the purpose of this clause "Tradesperson's Rate" means the rate of pay for a tradesperson under this Award.

(3) The following allowances shall be paid to PSSEs indexed according to State Wage decisions and shall be:-

(a)	Chef	
	1st year	$136.10 per fortnight
	2nd year	$272.00 per fortnight
(b)	Tradesperson Cook (Sous Chef)	
	1st year	$ 88.40 per fortnight
	2nd year	$136.10 per fortnight
(c)	Stewards to Speaker and President	$67.90 per fortnight

(4) An allowance of $39.40 per fortnight shall be paid to all PSSEs employed in the kitchen, dining room and bar areas.

17. - APPRENTICES

(1) Apprentices may be taken in the ratio of one apprentice for every two or fraction of two (the fraction being not less than one) tradespersons and shall not be taken in excess of that ratio unless -

(a) the Union agrees; or

(b) the Commission so determines.

18. - SALARY PACKAGING

(1) An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with this clause and Australian Taxation Office requirements.

(2) Salary packaging is an arrangement whereby the entitlements and benefits under this Award, contributing toward the Total Employment Cost (TEC) (as defined in subclause (3) of this clause) of an employee, can be reduced by and substituted with another or other benefits.

(3) The TEC for salary packaging purposes is calculated by adding the following entitlements and benefits:

(a) the base salary;

(b) other cash allowances;

(c) non cash benefits;

(d) any Fringe Benefit Tax liabilities currently paid; and

(e) any variable components.

(4) Where an employee enters into a salary packaging arrangement the employee will be required to enter into a separate written agreement with the employer setting out the terms and conditions of the salary packaging arrangement

(5) Notwithstanding any salary packaging arrangement, the salary rate as specified in this Award, is the basis for calculating salary related entitlements specified in the Award.

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory employer contributions made to superannuation schemes established under the *State Superannuation Act 2000* are calculated on the gross (pre packaged) salary amount regardless of whether an employee participates in a salary packaging arrangement with their employer.

(7) A salary packaging arrangement cannot increase the costs to the employer of employing an individual.

(8) A salary packaging arrangement is to provide that the amount of any taxes, penalties or other costs for which the employer or employee is or may become liable for and are related to the salary packaging arrangement, shall be borne in full by the employee.

(9) In the event of any increase in taxes, penalties or costs relating to a salary packaging arrangement, the employee may vary or cancel that salary packaging arrangement.

PART 5 ALLOWANCES AND FACILITIES

19. - MEAL ALLOWANCE

(1) An employee who is required to work overtime under Clause 10. – Overtime, and where such overtime extends beyond 5.00 p.m., a meal allowance shall be paid in accordance with the provisions of Clause 22. - Overtime of the Public Service Award 1992 as amended. Provided that where such overtime extends beyond 6.00 a.m. the following day, an allowance of $15.20 or the amount charged by the House, whichever is the higher, for such a three course meal shall be paid.

(2) Provided however that where a meal of a reasonable standard is provided by the House at no cost to the employee the allowance provided for in subclause (1) of this clause shall not apply.

(3) All other provisions relating to this allowance shall be as per subclause (5) of Clause 22. – Overtime Allowance of the Public Service Award 1992.

20. – MISCELLANEOUS ALLOWANCES

(1) The following clauses of the Public Service Award 1992 shall apply to all employees:

(a) Clause 47. - Motor Vehicle Allowance

(2) The following clauses of the Public Service Award 1992 shall apply to Parliamentary Officers:

(a) Clause 19. - Higher Duties Allowance

(b) Clause 54. - Travelling Allowance

(c) Clause 49. - Protective Clothing Allowance

21. - SPECIAL PROVISIONS

(1) After Hours Transport

Employees required to work after 11.00pm shall be entitled to have transport provided or be paid an allowance for use of their private motor vehicle from work to their residence.

(2) Recreational and other Facilities

Recreational facilities, change and rest rooms and any other facility not otherwise reserved from time to time for use of Members of Parliament or designated senior staff shall be available to all employees during working hours.

22. - HIGHER DUTIES ALLOWANCE - PARLIAMENTARY SUPPORT SERVICE EMPLOYEES

(1) A PSSE who performs duties which carry a higher minimum rate than that which such PSSE usually performs shall be entitled to the higher minimum rate while so employed.

(2) Where such PSSE is engaged in the higher grade of work for more than two hours on any day or shift, the employee shall be paid the higher rate for the whole day or shift.

(3) Notwithstanding the provisions of this clause payment for higher duties shall not apply to a PSSE required to act in another position while the permanent PSSE is on a single Accrued Day Off.

23. - UNIFORMS AND CLOTHING

(1) The employer shall provide at the employer's expense issues of uniforms and clothing for employees pursuant to an agreement between the employer, the Association and the Union. Each employee concerned shall receive an initial issue as per that agreement at the time such employee commences employment, with additional issues to be supplied by the employer as per that agreement.

(2) Such uniforms supplied shall be laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, an employee shall be paid $8.50 per week for such laundering and/or dry cleaning, excepting any person employed as a Cook who shall be paid $13.00 per week for laundering and/or dry cleaning.

(3) For the purposes of this clause a uniform shall consist of such articles of clothing as monogrammed or coloured jackets, dresses, blouses, overalls, aprons, caps, collars, cuffs, or other special apparel which the employer may require an employee to wear whilst on duty, and shall also include the ordinary apparel usually worn by a Cook, such as black and white check or white trousers, white coats, white shirt, white apron and cap.

(4) Individual protective clothing and footwear shall be available to Kitchen and Garden PSSEs when:

(a) they are required to wash dishes, handle detergents, acids, soaps or any injurious substances;

(b) conditions are such that they are unable to avoid their clothing becoming dirty or wet or are unable to avoid their feet becoming wet;

(c) operating equipment or machinery which may be dangerous to exposed portions of the body or omit fumes or noise.

24. - FIRST AID

The employer shall provide readily accessible first aid cabinets and a sick room for the use of employees in some reasonably accessible location within the employer's premises.

25. - BREAKAGES

The employer shall not charge a sum against, nor deduct any sum from the salary of an employee in respect of breakages of crockery, tools, implements or other utensils supplied by the employer for use by the employee, except in the case of wilful misconduct.

PART 6 LEAVE AND PUBLIC HOLIDAYS

26. - PUBLIC HOLIDAYS

(1) The following days shall be allowed as holidays with pay:

(a) New Year's Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day.

(b) The Anniversary of the Birthday of the Sovereign, Australia Day, Western Australia Day, Labour Day.

(c) All days which the Governor may appoint and are notified as Public Service Holidays.

(2) When any of the days mentioned in subclause (1) of this clause falls on a Saturday or on a Sunday, the holiday shall be observed on the next succeeding Monday.

When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next succeeding Tuesday.

In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

(3) When any of the days observed as a holiday in this clause fall during a period of annual leave the holiday or holidays shall be observed on the next succeeding day or days as the case may be after completion of that annual leave.

(4) This clause shall not apply to casual employees.

27. - ANNUAL LEAVE

Parliamentary Officers

(1) Parliamentary Officers performing sessional work shall be allowed five weeks leave in each 12 months service. Of this leave, four weeks shall be counted as ordinary recreational leave and the remaining week as special leave.

(2) All other provisions relating to annual leave for Parliamentary Officers shall be as per Clause 23. – Annual Leave of the Public Service Award 1992. In addition, the provisions of subclause (5)(b) and (c) also apply to Parliamentary Officers.

PSSEs

(3) PSSEs shall be granted annual leave as follows:-

(a) Except as hereinafter provided a period of four weeks' leave shall be allowed to a PSSE, by their employer after each period of 12 months' continuous service with their employer.

(b) The entitlement shall accrue pro rata on a weekly basis and is cumulative.

(c) The annual leave prescribed in paragraph (3)(a) may, with the consent of the PSSE and the employer, be taken in any portion, provided that one portion shall be at least one week.

(4) (a) A PSSE shall be paid for any period of annual leave prescribed by subclause (3) at the wage rate applicable to the PSSE.

(b) Where an employee's hours of work have varied during the qualifying period, the employee shall be paid the average of such hours worked during the qualifying period.

(5) (a) A PSSE may, with the approval of the employer, be allowed to take the annual leave prescribed by this clause before the completion of 12 months' continuous service as prescribed by paragraph (3)(a).

Provided that when a PSSE has proceeded on leave prior to the completion of the 12 months' continuous service the loading prescribed in subclause (10) shall be paid on a pro rata basis.

(b) Where the employer and a PSSE have not agreed when the PSSE is to take their annual leave, subject to paragraph (5)(c), the employer is not to refuse the PSSE taking, at any time suitable to the PSSE, any period of annual leave, the entitlement to which accrued more than 12 months before that time.

(c) The PSSE is to give the employer at least two weeks' notice of the period during which the PSSE intends to take their leave in accordance with paragraph (5)(b).

(6) (a) If a PSSE lawfully terminates their service, or their employment is terminated by the employer through no fault of the PSSE, the PSSE shall be paid 2.92 hours or in the case of PSSEs provided for in subclause (8), 3.65 hours in respect of each completed week of continuous service in that qualifying period

(b) If the services of a PSSE terminates and the PSSE has taken a period of leave in accordance with paragraph (5)(a), and if the period of leave so taken exceeds that which would become due pursuant to paragraph (6)(a), the PSSE shall be liable to repay an amount representing the difference between the amount received by the PSSE for the period of leave taken in accordance with paragraph (5)(a) and the amount which would have accrued in accordance with paragraph (6)(a). The employer may deduct this amount from monies due to the PSSE by reason of the other provisions of this Award at the time of termination.

(c) In addition to any payment to which PSSEs may be entitled under paragraph (6)(a), a PSSE whose employment terminates after completion of a 12 month qualifying period and who has not been allowed the leave prescribed under this Award in respect of that qualifying period, shall be given payment as prescribed in paragraphs (4)(a) and (b) and subclause (10), in lieu of that leave unless they have been justifiably dismissed for misconduct and the misconduct for which they have been dismissed occurred prior to the completion of that qualifying period.

(7) (a) When work is closed down for the purpose of allowing annual leave to be taken, PSSEs with less than a full year’s service shall only be entitled to payment during such period for the number of days leave due to them.

(b) Provided that nothing herein contained shall deprive the employer of their right to retain such PSSEs during the close down period as may be required.

(8) Shift PSSEs shall be allowed one week's leave in addition to that prescribed in paragraph (3)(a) with respect to each period of 12 months continuous service.

(9) (a) PSSEs continue to accrue annual leave while on paid leave for the following purposes:

(i) annual leave;

(ii) long service leave;

(iii) observing a public holiday prescribed by this Award;

(iv) sick leave;

(v) carer's leave;

(vi) bereavement leave;

(vii) parental leave; and

(viii) workers' compensation, except for that portion of an absence that exceeds six months in any year.

(b) PSSEs continue to accrue annual leave while on unpaid sick leave except for that portion of an absence that exceeds three months.

(c) PSSEs do not accrue annual leave when absent on approved periods of leave without pay that exceed 14 consecutive calendar days.

(10) Annual Leave Loading

(a) A PSSE shall be paid a loading of 17.5 percent calculated on the rate as prescribed in paragraph (4)(a).

(b) The loading prescribed in this subclause shall not apply to proportionate leave on termination.

(c) The loading prescribed in this subclause shall be payable on retirement, provided the PSSE is over 55 years of age.

(11) The provisions of this clause shall not apply to casual employees.

28. - LONG SERVICE LEAVE

(1) Parliamentary Officers shall be entitled to the long service leave arrangements provided by Clause 25. – Long Service Leave of the Public Service Award 1992.

(2) PSSEs shall be entitled to long service leave pursuant to the Long Service Leave Government Wages Employees General Order.

29. - SICK LEAVE

(1) Sick leave - Parliamentary Officers

Parliamentary Officers will receive the sick leave provisions of Clause 26. - Sick Leave of the Public Service Award 1992.

(2) PSSEs - Entitlement

(a) The employer shall credit full time PSSEs with 76 hours of sick leave credits for each 12 month period of continuous service.

(b) This sick leave entitlement accrues pro rata on a weekly basis.

(c) On the completion of each year, unused sick leave credits will accumulate.

(d) A PSSE employed on a fixed term contract shall receive the same entitlement as a permanent employee.

(e) A part time PSSE shall be entitled to the same sick leave credits as a full time PSSE, but on a pro rata basis according to the number of hours worked each fortnight. Payment for sick leave shall only be made for those hours that would normally have been worked had the PSSE not been on sick leave.

(f) Sick leave may be taken on an hourly basis or part thereof.

(g) Payment may be adjusted at the end of each accruing year, or at the time the PSSE leaves the service of the employer, in the event of the PSSE being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred.

(3) For the purposes of subclause (2), "continuous service" shall not include any period:

(a) exceeding 14 calendar days in one continuous period during which a PSSE employee is absent on leave without pay. In the case of leave without pay that exceeds 14 calendar days, the entire period of such leave without pay is excised in full;

(b) which exceeds six months in one continuous period during which a PSSE is absent on workers' compensation. Only that portion of such continuous absence that exceeds six months shall not count as "continuous service"; or

(c) which exceeds three months in one continuous period during which a PSSE is absent on sick leave without pay. Only the portion of such continuous absence that exceeds three months shall not count as "continuous service".

(4) Evidence

(a) An application for sick leave exceeding three consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

(b) The amount of sick leave which may be granted without production of evidence to satisfy a reasonable person required by paragraph (4)(a) shall not exceed, in aggregate, five working days in any one accruing year.

(c) A PSSE shall, as soon as reasonably practicable, notify the employer of their inability to attend for work due to illness or injury, and the estimated duration of the absence.

(d) Other than in extraordinary circumstances, the notification required by paragraph (4)(c) shall be given to the employer within 24 hours of the commencement of the absence.

(5) Accessing sick leave whilst on leave

(a) Other than as provided for in this subclause, a PSSE is unable to access sick leave while on any period of annual or long service leave.

(b) Where a PSSE is ill during a period of annual leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that, as a result of the illness, the PSSE was confined to their place of residence or a hospital for a period of at least seven consecutive calendar days, the employer shall grant sick leave for the period during which the PSSE was so confined and reinstate annual leave equivalent to the period of confinement.

(c) Payment for replaced annual leave shall be at the wage rate applicable at the time the leave is subsequently taken provided that, where the annual leave loading prescribed in subclause 27(10) has been paid to the PSSE with respect to the replaced annual leave, it shall be deemed to have been paid.

(d) Where a PSSE is ill during a period of long service leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that, as a result of the illness, the PSSE was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the employer may grant sick leave for the period during which the PSSE was so confined and reinstate long service leave equivalent to the period of confinement.

(6) In exceptional circumstances, the employer may approve the conversion of a PSSE's sick leave credits to half pay to cover an absence on sick leave due to illness.

(7) A PSSE is unable to access sick leave while on any period of leave without pay.

(8) If a PSSE's injury or illness is attributable to:

(a) the PSSE's serious and wilful misconduct; or

(b) the PSSE's gross and wilful neglect,

in the course of their employment, the PSSE is not entitled to be paid for their absence from work resulting from the illness or injury.

(9) Workers' compensation

(a) Where a PSSE suffers a disability or illness within the meaning of section 5 of the *Workers' Compensation and Injury Management Act 1981* (WA) which necessitates that employee being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits.

(b) In accordance with section 80(2) of the *Workers' Compensation and Injury Management Act 1981* (WA), where the claim for workers' compensation is decided in favour of the PSSE, sick leave credits are to be reinstated and the period of absence granted as sick leave without pay.

(10) Portability

Where:

(a) a PSSE was, immediately prior to being employed by the employer, employed in the service of the public service of Western Australia or any other state body of Western Australia; and

(b) the period of employment between the date when the PSSE ceased previous employment and the date of commencing employment with the employer does not exceed one week or any other period approved by the employer;

the employer will credit the PSSE additional sick leave credits equivalent to those held at the date the employee ceased previous employment.

(11) Unused sick leave will not be cashed out or paid out when a PSSE ceases their employment.

(12) The provisions of this clause do not apply to casual PSSEs or Parliamentary Officers.

30. – CARER'S LEAVE

(1) An employee is entitled to use, each year, up to ten (10) days of the employee's sick leave entitlement to provide care or support to a member of the employee's family or household who requires care or support because of:

(a) an illness or injury of the member; or

(b) an unexpected emergency affecting the member.

(2) An employee shall, wherever practicable, give the employer notice of the intention to take carer's leave and the estimated length of absence. If it is not practicable to give prior notice of absence, an employee shall notify the employer as soon as possible on the first day of absence. Where possible, an estimate of the period of absence from work shall be provided.

(3) An employee shall provide, where required by the employer, evidence to establish the requirement to take carers leave. An application for carers leave exceeding two consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

(4) The definition of family shall be the definition of "relative" contained in the Western Australian *Equal Opportunity Act 1984*. That is, a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependant on, or is a member of the household of, the employee. "Member of the employee's household" means a person who, at or immediately before the relevant time for assessing the employee's eligibility to take leave, lived with the employee.

(5) Carers leave may be taken on an hourly basis or part thereof.

(6) Where an employee cannot take paid carer's leave for a particular occasion, an employee is entitled to unpaid carer's leave of up to two days for each occasion on which a member of the employee's family or household requires care and support because of:

(a) an illness or injury of the member;

(b) an unexpected emergency affecting the member; or

(c) the birth of a child by the member.

(7) A casual employee shall be entitled to not be available to attend work or to leave work if they need to provide care or support for a member of their family or household because of:

(a) an illness or injury of the member;

(b) an unexpected emergency affecting the member; or

(c) the birth of a child by the member.

(8) The employer and the casual employee shall agree on the period for which the casual employee will be entitled to not be available to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for up to 48 hours (i.e. two days) per occasion. The casual employee is not entitled to any payment for the period of non-attendance.

(9) An employer must not fail to re-engage a casual employee because the casual employee accessed this entitlement. The rights of an employer to engage or not engage a casual employee are otherwise not affected.

31. – BEREAVEMENT LEAVE

(1) Employees, including casuals, shall on the death of:

(a) a partner of the employee;

(b) a child, stepchild or grandchild of the employee (including an adult child, step-child or grandchild);

(c) a parent, step-parent or grandparent of the employee;

(d) a brother, sister, step-brother or step-sister of the employee; or

(e) any other person who, immediately before that person's death, lived with the employee as a member of an employee's household;

be eligible for up to two (2) days paid bereavement leave, provided that at the request of the employee the employer may exercise discretion to grant bereavement leave to the employee in respect of some other person with whom the employee has a special relationship.

(2) The two (2) days need not be consecutive.

(3) Bereavement leave is not to be taken during any other period of leave.

(4) An employee shall not be entitled to claim payment for bereavement leave on a day when that employee is not ordinarily rostered to work.

(5) Payment of such leave may be subject to an employee providing evidence, if so requested by the employer, of the death or relationship to the deceased that would satisfy a reasonable person.

(6) Employees requiring more than two (2) days bereavement leave in order to travel overseas or interstate in the event of the death overseas or interstate of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave and/or leave without pay, provided all accrued leave is exhausted.

32. - PARENTAL LEAVE

(1) Definitions

(a) "Employee" includes full time, part time, permanent, fixed term contract and "eligible" casual employees.

(b) A casual employee is "eligible" if the employee -

(i) has been engaged by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least twelve (12) months; and

(ii) but for an expected birth of a child to the employee or the employee's partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

(c) Without limiting (1)(b), a casual employee is also "eligible" if the employee –

(i) was engaged by the employer on a regular and systematic basis for a sequence of periods during a period (the first period of employment) of less than twelve (12) months; and

(ii) at the end of the first period of employment, the employee ceased, on the employer's initiative, to be so engaged by the employer ; and

(iii) the employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the second period of employment) that started not more than three months after the end of the first period of employment; and

(iv) the combined length of the first period of employment and the second period of employment is at least twelve (12) months; and

(v) the employee, but for an expected birth of a child to the employee or the employee's partner or an expected placement of a child with the employee with a view to adoption of the child by the employee, would have a reasonable expectation of continuing engagement with the employer on a regular and systematic basis.

(d) "Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.

(e) "Replacement employee" is an employee specifically engaged to replace an employee proceeding on parental leave.

(2) Entitlement to Parental Leave

(a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

(i) birth of a child to the employee or the employee's partner; or

(ii) adoption of a child who is not the child or the stepchild of the employee or the employee's partner; is under the age of five (5); and has not lived continuously with the employee for six (6) months or longer.

(b) An employee, other than an eligible casual employee, identified as the primary care giver of a child and who has completed twelve months continuous service with the employer shall be entitled to fourteen weeks paid parental leave which will form part of the 52 week entitlement provided in (2)(a) of this clause:

(c) An employee may take the paid parental leave specified in (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled.

(d) A pregnant employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed fourteen weeks.

(f) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.

(g) Parental leave may only be taken concurrently by an employee and their partner as provided for in subclause (5) or under special circumstances with the approval of the employer.

(h) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(i) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(j) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

(3) Birth of a child

(a) An employee shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner confirming the pregnancy and the estimated date of birth.

(b) If the pregnancy results in other than a live child or the child dies in the fourteen weeks immediately after the birth, the entitlement to paid parental leave remains intact.

(4) Adoption of a child

(a) An employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or

examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.

(b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

(5) Partner Leave

(a) An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one (1) week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(c) The employer is to agree to an employee's request to extend their partner leave under (5)(b) unless:

(i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:

- cost;
- lack of adequate replacement staff;
- loss of efficiency; and
- impact on the production or delivery of products or services by the Employer.

(d) The Employer is to give the employee written notice of the employer's decision on a request for extended partner leave. If the employee's request is refused, the notice is to set out the reasons for the refusal.

(e) An employee who believes their request for extended partner leave under (5)(b) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Employer to demonstrate that the refusal was justified in the circumstances.

(f) The taking of partner leave by an employee shall have no effect on their or their partner's entitlement, where applicable, to paid parental leave under this clause.

(6) Other leave entitlements

(a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(b) Subject to all other leave entitlements being exhausted, an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years. The employer is to agree to a request to extend their leave unless:

(i) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to its adverse effect on the employer's business and those grounds would satisfy a reasonable person. Those grounds include, but are not limited to:

- cost;
- lack of adequate replacement employees;
- loss of efficiency; and
- the impact on the production or delivery of products and services by the employer.

(c) The employer is to give the employee written notice of the employer's decision on a request for leave without pay under (6)(b). If the request is refused, the notice is to set out the reasons for the refusal.

(d) An employee who believes their request for leave without pay under (6)(b) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(e) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two (2) years.

(f) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in (6)(a) and (6)(g).

(g) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(h) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

(7) Notice and Variation

(a) An employee shall give not less than four (4) weeks notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(b) An employee seeking to adopt a child shall not be in breach of paragraph (7)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

(8) Transfer to a safe job

(a) If the employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:

(i) illness, or risks, arising out of her pregnancy; or

(ii) hazards connected with that position; then

the employer must modify the duties of the position or alternatively transfer the employee to a safe job at the same classification level for the period during which she is unable to continue in her present position.

(b) If the employee's employer does not think it to be reasonably practicable to modify the duties of the position or transfer the employee to a safe job the employee is entitled to paid leave for the period during which she is unable to continue in her present position.

(c) An entitlement to paid leave provided in clause (8)(b) is in addition to any other leave entitlement the employee has and is to be paid the amount the employee would reasonably have expected to be paid if the employee had worked during that period.

(d) An entitlement to paid leave provided in clause (8)(b) ends at the earliest of whichever of the following times is applicable:

(i) the end of the period stated in the medical certificate;

(ii) if the employee's pregnancy results in the birth of a living child – the end of the day before the date of birth;

(iii) if the employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy.

(9) Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with (9)(a).

(10) Replacement Employee

Prior to engaging a replacement employee the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

(11) Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four (4) weeks prior to the expiration of parental leave.

(b) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave.

(c) Where an employee was transferred to a safe job or proceeded on leave as provided for in (8)(b) of this clause, the employee is entitled to return to the position occupied immediately prior to the transfer or the taking of the leave.

(12) Right to return to work on a modified basis

(a) An employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 6. – Part-Time Employment of this Award.

(b) An employee may return on a modified basis that involves the employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the employee worked immediately before starting parental leave.

(13) Right to revert

(a) An employee who has returned on a part time or modified basis in accordance with subclause (12) may subsequently request the employer to permit the employee to resume working on the same basis as the employee worked immediately before starting parental leave or full time work at the same classification level.

(b) An employer is to agree to a request to revert made under (13)(a) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the employer and those grounds would satisfy a reasonable person.

(c) An employer is to give the employee written notice of the employer's decision on a request to revert under (13)(a). If the request is refused, the notice is to set out the reasons for the refusal.

(d) An employee who believes their request to revert under (13)(a) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the employer to demonstrate that the refusal was justified in the circumstances.

(14) Effect of Parental Leave on the Contract of Employment

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose of this Award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by the giving of the required period of written notice.

(e) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the employer in respect of termination of employment are not affected.

33. – OTHER FORMS OF LEAVE

(1) The following clauses of the Public Service Award 1992 shall apply to all employees:

(a) Clause 13. - Purchased Leave – 44/52 Salary Arrangement

(b) Clause 29. - Leave Without Pay, provided that the provisions of Administrative Instruction 610 shall also apply with respect to the effect of leave without pay on increments and other entitlements

(c) Clause 30. - Study Assistance

(d) Clause 34. - Blood/Plasma Donor's Leave

(e) Clause 35. - Emergency Services Leave

(f) Clause 38. – Trade Union Training Leave

(g) Clause 39. - Defence Force Reserves Leave

(h) Clause 41. - Witness and Jury Services

(2) The following clauses of the Public Services Award 1992 shall also apply to Parliamentary Officers:

(a) Clause 31. - Short Leave

34. - LEAVE TO ATTEND UNION BUSINESS

(1) The employer shall grant paid leave at the ordinary rate of pay during normal working hours to an employee:-

(a) who is required to give evidence before any Industrial Tribunal;

(b) who as an Association or Union nominated representative is required to attend negotiations and/or conferences between the Association/Union and the employer;

(c) who as an Association or Union nominated representative is required to attend:

(i) proceedings before an industrial tribunal;

(ii) meetings with Ministers of the Crown, their staff, or any other representative of Government;

(d) when prior agreement between the Association/Union and the employer has been reached for the employee to attend official Association/Union meetings preliminary to negotiations or industrial tribunal proceedings; and

(e) who as an Association/Union nominated representative is required to attend joint Association/Union/management consultative committees or working parties.

(2) The granting of leave is subject to departmental convenience and shall only be approved;

(a) where reasonable notice is given for the application for leave;

(b) for the minimum period necessary to enable the Association/Union business to be conducted or evidence to be given; and

(c) for those employees whose attendance is essential.

(3) The employer shall not be liable for any expenses associated with an employee attending to Association/Union business.

(4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.

(5) An employee shall not be entitled to paid leave to attend Association/Union business other than as prescribed by this clause.

(6) The provisions of this clause shall not apply to:

(a) Special arrangements made between the parties which provide for unpaid leave for employees to conduct Association/Union business.

(b) When an employee is absent from work without the approval of the employer; and

(c) Casual employees.

PART 7 RIGHTS AND OBLIGATIONS

35. - RECORDS AND INFORMATION

(1) The employer shall keep or cause to be kept a time and salaries record showing:

(a) the employee's name and, if the employee is under 21 years of age, his or her date of birth;

(b) the industrial instruments that apply;

(c) the date on which the employee commenced employment with the employer;

(d) for each day

(i) the time at which the employee started and finished work;

(ii) the period or periods for which the employee was paid;

and

(iii) details of work breaks including meal breaks;

(e) for each pay period

(i) the employee's designation and classification;

(ii) the gross and net amounts paid to the employee under the industrial instrument;

and

(iii) all deductions and the reasons for them;

(f) all leave taken by the employee, whether paid partly paid or unpaid;

(g) the information necessary for the calculation of the entitlement to, and payment for long service leave under this Award;

(i) any information, not otherwise covered by this subsection, that is necessary to show that the remuneration and benefits received by the employee comply with the industrial instrument.

Any system of automatic recording by means of machine shall be deemed to comply with this provision to the extent of the information recorded.

(2) The employer must ensure that –

(a) the employment records are kept in accordance with regulations made by the Governor;

(b) each entry in relation to long service leave is retained –

(i) during the employment of the employee; and

(ii) for not less than 7 years after the employment terminates;

and

(c) each other entry is retained for not less than 7 years after it is made

(3) (a) The time and salary record shall on demand be produced for inspection by the General Secretary or duly accredited official of the Association or the Union during the employer's usual office hours and when necessary the duly accredited official of the Association or the Union may take a copy of the record.

(b) the Association or the Union shall;

(i) give prior notification to the employer on when it proposes to inspect the record;

(ii) not conduct interviews whilst a House is sitting;

(iii) treat with confidentiality any information obtained from time and salary records.

(c) The employer's officer shall be deemed to be a convenient place for the purposes of inspecting records and if for any reason the time and salary record is not available when the duly accredited official of the Association or the Union calls to inspect it, the record will be made available for inspection at a mutually convenient time at the employer's office

(4) If the employer maintains a personal or other file on an employee, the employee shall be entitled to examine all material maintain on that file.

36. - RIGHT OF ENTRY

(1) The parties shall act consistently with the terms of the Division 2 G – 'Right of Entry and Inspection by Authorised Representatives' of the *Industrial Relations Act 1979*.

(2) An authorised representative shall, on notification to the employer, have the right to enter the employer's premises during working hours, including meal breaks, for the purpose of discussing with relevant employees who wish to participate in those discussions:

(a) the legitimate business of the Association and/or Union; or

(b) for the purpose of investigating complaints concerning the application of this Award,

but shall in no way unduly interfere with the work of employees.

37. - UNION FACILITIES FOR UNION REPRESENTATIVES

(1) The employer recognises the rights of the Union/Association to organise and represent their members. Union/Association representatives have a legitimate role and function in assisting the Union/Association in the tasks of recruitment, organising, communication and representing members' interests in the workplace and Parliament.

(2) The employer recognises that, under the Union's/Association's rules, Union/Association representatives are delegates representing members within a specific work site.

(3) The employer will recognise Union/Association representatives in the workplace and will allow them to carry out their role and functions.

(4) The Union/Association will advise the employer in writing of the names of the Union/Association representatives in the Parliament.

(5) The employer shall recognise the authorisation of each Union/Association representative in the Parliament and shall provide them with the following:

(a) Paid time off from normal duties to perform their functions as a Union/Association representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend Union/Association business in accordance with Clause 34. - Leave to Attend Union Business.

(b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the department and shall be in accordance with normal Parliament protocols.

(c) A noticeboard for the display of Union/Association materials including broadcast e-mail facilities.

(d) Paid access to periods of leave for the purpose of attending Union/Association training courses in accordance with Clause 38. - Trade Union Training Leave of the Public Service Award 1992.

(e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of Union/Association membership with them.

(f) Access to awards, agreements, policies and procedures.

(g) Access to information on matters affecting employees in accordance with Clause 40. – Introduction of Change.

(6) The employer recognises that it is paramount that Union/Association representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a Union/Association representative.

38. - PRESERVATION AND NON-REDUCTION

(1) No rights, privileges or entitlements presently granted to an employee shall be withdrawn or ceased unless expressly agreed to by the employer and the employee.

(2) Nothing herein contained shall enable the employer to reduce the salary or wage of an employee or conditions of work applied to any employee who at the date of this Award was being paid a higher rate of salary or wage than the minimum prescribed in this Award or was being accorded a benefit superior to any contained herein as a condition of work.

(3) An employee in receipt of a higher salary or wage than that prescribed by this Award shall continue to have that salary or wage adjusted according to State Wage Case decisions.

39. - ESTABLISHMENT OF CONSULTATIVE MECHANISMS

The Association and the Union are required to establish a consultative mechanism/s and procedures appropriate to their size, structure and needs, for consultation and negotiation on matter affecting the efficiency and productivity of the public sector.

40. - INTRODUCTION OF CHANGE

(1) (a) Where the employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and the Association and/or Union as applicable.

(b) For the purpose of this clause "significant effects" includes termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs.

Provided that where this Award or any other Award or Agreement that applies to employees covered by this Award makes provision for alteration of any of the matters referred to in this clause, an alteration shall be deemed not to have significant effect.

(2) (a) The employer shall discuss with the employees affected and the Association and/or Union, (as applicable), amongst other things:

(i) the introduction of the changes referred to in subclause (1) of this clause;

(ii) the effects the changes are likely to have on employees;

(iii) measures to avert or mitigate the adverse effects of such changes on employees; and

(iv) shall give prompt consideration to matters raised by the employees and the Association and/or Union in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision is made by the employer to make the changes referred to in subclause (1) of this clause, unless by prior arrangement, the Association and/or Union (as applicable) is represented on the body formulating recommendations for change to be considered by the employer.

(c) For the purposes of such discussion the employer shall provide to the employees concerned and the Association and/or Union (as applicable) all relevant information about the changes including:

(i) the nature of the changes proposed;

(ii) the expected effects of the changes on employees; and

(iii) any other matters likely to affect employees.

Provided that the employer shall not be required to disclose confidential information, the disclosure of which would be inimical to the employer's interests.

41. – ACCESS TO THE AWARD

Employees shall be entitled to have access to a copy of this Award. Sufficient copies shall be made available, either hard copy or by modern electronic means by the employer for this purpose. Where a hard copy is requested it shall be made available.

42. – DISPUTE SETTLEMENT PROCEDURE

(1) Any questions, disputes or difficulties arising under this Award or in the course of the employment of employees covered by the Award shall be dealt with in accordance with this clause.

(2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution within three working days.

(3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager’s superior and an attempt made to find a satisfactory solution within a further three working days.

(4) If the dispute is still not resolved, it may be referred by the employee/s or Union/Association representative to the employer or their nominee.

(5) Where the dispute cannot be resolved within five working days of the Union/Association representative’s referral of the dispute to the employer or their nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.

(6) The period for resolving a dispute may be extended by agreement between the parties.

(7) At all stages of the procedure, the employee may be accompanied by a Union/Association representative.

43. - NAMED PARTIES

The named parties to the Award are -

The Civil Service Association of Western Australia Incorporated

United Voice WA

The Governor of Western Australia in Council

The President of the Legislative Council

The Speaker of the Legislative Assembly

2012 WAIRC 00884

RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	HILLS INDUSTRIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	APPL 46 OF 2012
CITATION NO.	2012 WAIRC 00884

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondent	No appearance

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Radio and Television Employees' Award No. 3 of 1980 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 26 September 2012.

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

SCHEDULE

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

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $12.30 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $8.35 for each meal so required.

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

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

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Rate per Kilometre (Cents)			
Metropolitan Area	81.3	72.6	63.2
South West Land Division	83.1	74.4	64.7
North of 23.5 ' South Latitude	91.3	81.9	71.5
Rest of the State	85.8	76.9	67.0
Motor Cycle (In All Areas)		27.8 cents per kilometre	

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

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.20 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 29. – Wages: Delete subclauses (2) and (5) of this clause and insert the following in lieu thereof:

(2) **Leading Hands:**

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

		$
(a)	If placed in charge of not less than three and not more than ten other employees	29.00
(b)	If placed in charge of more than ten and not more than twenty other employees	44.00
(c)	If placed in charge of more than twenty other employees	56.90

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

(i) $15.80 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $15.80 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause,

for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

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

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

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

2012 WAIRC 00896

WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH

APPLICANT

-v-

THE REGISTRY OFFICER, DEPARTMENT OF HEALTH, HEALTH INDUSTRIAL RELATIONS SERVICES AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE TUESDAY, 2 OCTOBER 2012

FILE NO/S APPL 30 OF 2012

CITATION NO. 2012 WAIRC 00896

Result	Award varied
Representation	
Applicant	Ms N Ireland and Ms B Ward
Respondents	Mr C Gleeson
	Ms P Lim on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

Order

HAVING HEARD Ms N Ireland and with her Ms B Ward on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch, and as agent for the Construction, Forestry Mining and Energy Union of Workers Ms P Lim on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and Mr C Gleeson on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the WA Government Health Services Engineering and Building Services Award 2004 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 26 September 2012.

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

SCHEDULE

1. Clause 19. – Leading Hand Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid -

(a) Not less than 3 and not more than 10 other employees - $42.50 per week;

(b) More than 10 and not more than 20 other employees - $57.10 per week;

(c) More than 20 other employees - $71.30 per week.

2. Clause 23. – Special Rates and Provision:

A. Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) Disability Allowances

(a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. - Title, as at the date of registration of this Award.

(b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of $2.15 for each hour or part thereof whilst so engaged.

(c) Asbestos:

(i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority

(ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, ie. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of $0.71 per hour for each hour or part thereof whilst so engaged.

(d) Furnace Work

Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid $1.56 per hour or part thereof whilst so engaged.

(e) Construction Allowance

(i) In addition to the appropriate rate of pay prescribed in Appendix A. - Salaries of this Award, an employee shall be paid -

(aa) $47.00 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(bb) $42.40 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.

(cc) $25.00 per week if engaged otherwise on Construction Work.

(ii) The rates specified in paragraph (1)(e)(i) shall be discounted by $19.40 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.

(f) Asbestos Eradication

(i) This sub-clause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

(ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.

(iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.

(iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of $1.55 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23.- Special Rates and Provisions

(v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (ie. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.

(g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

B. Delete subclause (b), (d), (e) and (f) of subclause (3) of this clause and insert in lieu thereof the following:

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $18.30 for that week in addition to the rates otherwise prescribed.

(d) Scaffolding Certificate Allowance:

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid $0.58 per hour or part thereof: in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of $18.30 per week.

(f) Setter Out:

A setter out (other than a leading hand) in a joiner's shop shall be paid $5.54 per day in addition to the rates otherwise prescribed.

3. Clause 25. – Overtime: Delete paragraph (a) of subclause (7) of this clause and insert in lieu thereof the following:

(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of $13.15 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the requirement to work such overtime.

7. Appendix A - Salaries: Delete subclause (1) of this Appendix and insert the following in lieu thereof:

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	307.50	724.70	12.40	97.50	12.00	44164
	Building Tradesperson Level 05	105	383.50	54.60	308.20	746.30	13.04	97.80	12.00	45340
	Building Tradesperson Level 06	110	401.70	57.20	308.90	767.80	13.68	98.10	12.00	46511
	Building Tradesperson Level 07	115	420.00	59.80	307.60	787.40	14.22	98.30	12.00	47572
	Building Tradesperson Level 08	120	438.20	62.40	308.30	808.90	14.86	81.60	12.00	47856
	Building Tradesperson Level 09	125	456.50	65.00	309.00	830.50	15.50	82.00	12.00	49037
Painter	Building Tradesperson Level 04	100	365.20	52.00	307.50	724.70	12.40	75.60	12.00	43022
	Building Tradesperson Level 05	105	383.50	54.60	308.20	746.30	13.04	75.90	12.00	44198
	Building Tradesperson Level 06	110	401.70	57.20	308.90	767.80	13.68	76.10	12.00	45363
	Building Tradesperson Level 07	115	420.00	59.80	307.60	787.40	14.22	76.40	12.00	46429
	Building Tradesperson Level 08	120	438.20	62.40	306.20	806.80	14.86	59.70	12.00	46604
	Building Tradesperson Level 09	125	456.50	65.00	309.00	830.50	15.50	60.10	12.00	47894
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	307.50	724.70	12.40	92.40	12.00	43898
	Building Tradesperson Level 05	105	383.50	54.60	308.20	746.30	13.04	92.60	12.00	45069
	Building Tradesperson Level 06	110	401.70	57.20	308.90	767.80	13.68	93.00	12.00	46245
	Building Tradesperson Level 07	115	420.00	59.80	307.60	787.40	14.22	93.30	12.00	47311
	Building Tradesperson Level 08	120	438.20	62.40	308.30	808.90	14.86	76.50	12.00	47590
	Building Tradesperson Level 09	125	456.50	65.00	309.00	830.50	15.50	76.80	12.00	48765
Plumber	Building Tradesperson Level 04	100	365.20	52.00	307.50	724.70	12.40	118.70	12.00	45270
	Building Tradesperson Level 05	105	383.50	54.60	308.20	746.30	13.04	118.90	12.00	46441
	Building Tradesperson Level 06	110	401.70	57.20	308.90	767.80	13.68	119.20	12.00	47611

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
	Building Tradesperson Level 07	115	420.00	59.80	307.60	787.40	14.22	119.50	12.00	48678
	Building Tradesperson Level 08	120	438.20	62.40	308.30	808.90	14.86	102.80	12.00	48962
	Building Tradesperson Level 09	125	456.50	65.00	309.00	830.50	15.50	103.10	12.00	50137
Other Building	Building Employee Entrant Level	78	284.86	40.56	302.34	627.76	9.68	67.20	14.00	37489
employees	Building Employee Level 1	82	299.46	42.64	302.90	645.00	10.20	67.40	14.00	38426
not elsewhere	Building Employee Level 2	87	319.18	45.45	303.68	668.31	10.87	67.60	14.00	39692
classified	Building Employee Level 3	92	337.44	48.05	304.38	689.87	11.51	67.90	14.00	40861
	Building Employee Level 4	100	365.20	52.00	307.50	724.70	12.40	68.30	14.00	42745
Mechanical	Engineering Employee Level 14	78	284.86	40.56	302.34	627.76	14.68	66.10	14.00	37693
Fitter, Motor Mechanic,	Engineering Employee Level 13	82	299.46	42.64	302.90	645.00	15.40	66.30	14.00	38640
Refrigeration	Engineering Employee Level 12	87.4	319.18	45.45	303.68	668.31	16.47	66.50	14.00	39922
Fitter & other	Engineering Employee Level 11	92.4	337.44	48.05	304.38	689.87	17.41	66.80	14.00	41112
engineering	Engineering Tradesperson Level 10	100	365.20	52.00	307.50	724.70	18.80	82.50	12.00	43716
trades	Engineering Tradesperson Level 09	105	383.50	54.60	308.20	746.30	19.70	82.80	12.00	44905
employees not	Engineering Tradesperson Level 08	110	401.70	57.20	308.90	767.80	20.70	83.00	12.00	46089
elsewhere	Engineering Tradesperson Level 07	115	420.00	59.80	307.60	787.40	21.60	83.30	12.00	47174
classified	Engineering Tradesperson Level 06	125	456.50	65.00	311.10	832.60	23.50	66.90	12.00	48776
	Engineering Tradesperson Level 05	130	474.80	67.60	309.70	852.10	24.40	67.10	10.00	49746

Level		Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions) 12.00	Salary
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	307.50	724.70	18.80	104.40	12.00	44858
	Engineering Tradesperson Level 09	105	383.50	54.60	308.20	746.30	19.70	104.70	12.00	46048
	Engineering Tradesperson Level 08	110	401.70	57.20	308.90	767.80	20.70	105.10	12.00	47242
	Engineering Tradesperson Level 07	115	420.00	59.80	307.60	787.40	21.60	105.30	12.00	48322
	Engineering Tradesperson Level 06	125	456.50	65.00	309.00	830.50	23.50	88.70	12.00	49804
	Engineering Tradesperson Level 05	130	474.80	67.60	309.70	852.10	24.40	89.00	10.00	50889

AGREEMENTS—Industrial—Retirement from—

2012 WAIRC 00914

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 60 of 2012

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as:

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

(ii) the Peel Health Services Board,

(iii) the WA Country Health Service; and

The Western Australian Drug and Alcohol Authority

Will cease to be parties to the W A Health – LHMU – Support Workers Industrial Agreement 2007, No AG 59 of 2007 on and from the 29th day of October 2012.

DATED THIS 4th DAY OF OCTOBER 2012.

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

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2012 WAIRC 00862

DISPUTE RE DEED OF SETTLEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 SEPTEMBER 2012
FILE NO	PSAC 24 OF 2012
CITATION NO.	2012 WAIRC 00862

Result	Order issued
Representation	
Applicant	Mr M Shipman
Respondent	Mr J O'Brien and Mr G Moyle

Order

WHEREAS on 24 September 2012 The Civil Service Association of Western Australia Incorporated (the union) notified the Western Australian Industrial Relations Commission (the Commission) of the dispute between the union and the employer and requested a conference under s 44 of the *Industrial Relations Act 1979* (the Act);

THE COMMISSION under the powers conferred on it under the Act orders –

1. That Mr Batt has a prohibition on all cattle related activity currently with the exception of:

   administering stud records; and

   participating in an advisory role, including counselling and providing advice to staff and to students on bovine related matters.

2. In the interim Mr Batt will carry out poultry related activities.
3. From 12 November 2012 Mr Batt will participate in a graduated return to work with cattle.
4. There will be a prohibition on any calving related activity except when receiving formal training.
5. That liberty to apply is reserved to the parties in relation to this order.

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

2012 WAIRC 00928

LEVEL OF DUTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	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
	APPLICANT
	-v-
	THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 12 OCTOBER 2012
FILE NO	PSACR 21 OF 2010
CITATION NO.	2012 WAIRC 00928

Result	Consent order issued to vary Directions which issued on 8 August 2012
Representation	
Applicant	Mr J Ross
Respondent	Mr S Millman (of counsel)

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS on 8 August 2012 the Public Service Arbitrator issued directions; and

WHEREAS on 11 October 2012 the applicant lodged an application for a conference as the respondent had not complied with part of the directions; and

FURTHER the applicant was seeking an order to vary the directions; and

WHEREAS on 11 October 2012 the Commission contacted the parties and they agreed to a consent order issuing to vary the directions as proposed by the applicant in its application lodged on 11 October 2012;

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

THAT direction 11 contained in the Directions which issued on 8 August 2012 be deleted and replaced with the following:

11. THAT in relation to the reclassification applications by Waitlist Clerks at Sir Charles Gairdner Hospital (ref: R08-116):

(a) the respondent file in the Commission and serve upon the applicant, a written statement of the facts upon which the respondent relies to support the appeal and supporting witness statements by 15 October 2012.

(b) the applicant file in the Commission and serve upon the respondent, a written statement of the facts upon which the applicant relies to support the appeal and supporting witness statements by 25 October 2012.

(c) the parties provide a schedule of workplace inspections by 25 October 2012, including that inspections for Waitlist Clerk positions be held over half a day between 30 October and 6 November 2012.

(d) the Arbitrator hears the matter, in so far as it relates to Waitlist Clerks at Sir Charles Gairdner Hospital, on the following days:

Wednesday, 7 November 2012;

Thursday, 8 November 2012.

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

BOARDS OF REFERENCE—Decisions Of—

2012 WAIRC 00878

PRO RATA LONG SERVICE LEAVE ENTITLEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ROAD BOARDS, PARKS AND RACECOURSE EMPLOYEES' UNION OF WORKERS, PERTH
	APPLICANT
	-v-
	SHIRE OF CHITTERING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 27 SEPTEMBER 2012
FILE NO/S	BOR 1 OF 2012
CITATION NO.	2012 WAIRC 00878

Result Discontinued

Order

WHEREAS on 17 February 2012 the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth (the applicant) applied to the Commission to convene a Board of Reference to determine a question in relation to long service leave entitlements for one of its members, Mr Stephen Briscoe, who had been employed by the Shire of Chittering (the respondent); and

WHEREAS on 18 September 2012 the applicant advised the Commission that the parties had reached an agreement in settlement 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.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2012 WAIRC 00723

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00723
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 7 MARCH 2012 SUBMISSIONS IN WRITING 30 APRIL 2012; 3 MAY 2012
DELIVERED	**:**	TUESDAY, 7 AUGUST 2012
FILE NO.	**:**	B 142 OF 2011
BETWEEN	**:**	JEFF STEPHEN ATKINSON Applicant AND LATRO SOUTHERN PTY LTD Respondent

CatchWords	**:**	Denied contractual entitlements – Contract of employment – Alleged failure to give notice – Agreement to a lesser period of notice than required by the contract – Capacity to deduct monies from amounts due – Whether contract allowed deduction for Law Society of Western Australia membership fees and practising certificate – Apportionment of fees
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(ii)
Result	**:**	Application granted
Representation:		
Applicant	**:**	Mr J Atkinson on his own behalf
Respondent	**:**	Mr E Wong of counsel

Reasons for Decision

1 The applicant, Mr Jeff Atkinson, claims that he has been denied benefits arising from his contract of employment with the respondent in that the respondent has withheld from him an amount of $4,250.00 on account of alleged failure to give notice and an amount of $1,515.57 on account of membership fees which the respondent paid to the Law Society of Western Australia, and the cost of the applicant's Western Australian practising certificate for 2011-2012, being $593.65 and $921.92 respectively.

2 Mr Atkinson was employed by the respondent as a solicitor in the respondent's law practice in Albany. He and Mr Cameron Malcolm Syme, the respondent's principal, had discussed on a number of occasions the prospect of Mr Atkinson spending some of the working week in Denmark where he lived as opposed to travelling to the office in Albany each day. Mr Atkinson wished to maximise his time with his family and therefore wished to spend some time working from Denmark. The parties were unable to agree as to the amount of time this was to be and therefore the applicant tendered his resignation orally and later confirmed it in writing. The dispute between the parties is mainly about whether the respondent accepted a lesser period of notice than the four weeks the contract required. There is also dispute as to whether there is capacity for the respondent to deduct from amounts due to Mr Atkinson, monies expended by the respondent in anticipation of Mr Atkinson continuing employment with the respondent.

3 The letter of appointment dated 29 March 2010 and signed by Mr Atkinson that day, together with *Latro Lawyers – Terms and Conditions of Employment,* set out the contractual arrangements between the parties (exhibit 13, JSA 1).

4 Clause 21. – Termination, of the contract of employment between the parties reads:

> 21.1 REQUIRED PERIOD OF NOTICE
>
> Except during the Probationary Period, either party may terminate the employment at any time by giving the other party the required period of notice specified below.
>
> 21.2 LATRO LAWYERS MAY CHOOSE TO PAY OUT NOTICE PERIOD
>
> Instead of providing the specified notice Latro Lawyers may choose to make payment to the Employee in lieu of notice. If the Employee fails to give the required notice, the Employee shall forfeit the entitlement to any monies owing equal to the amount of notice not given.
>
> …

21.4 PERIOD OF NOTICE

The period of notice is at least 4 weeks notice in writing or such other periods as the parties agree;

5 In relation to the Law Society of WA membership fees and the applicant's practising certificate fee, the letter of appointment provides:

> We will also pay your Law Society of WA membership, annual legal practice certificate and costs of attending agreed continuing professional development seminars.

The Evidence

6 Mr Atkinson gave evidence and he called Ms Sarah Marie Latham, a legal practitioner formerly employed by the respondent, to give evidence about the circumstances relating to the notice arrangements which applied when she resigned, and about the costs of her own practising certificate and Law Society of WA fees.

7 The respondent called evidence from Mr Syme and produced witness statements sworn by Suresh Kumar Balakrishnan, Christine Woods and Deborah Lee Munro Pettet, all employees of the respondent when Mr Atkinson's employment came to an end, which dealt with conversations they had with Mr Atkinson around that time. Those statements were not challenged by Mr Atkinson.

8 Mr Atkinson's evidence is that in January or February 2011, he and Mr Syme had a discussion which Mr Atkinson described as 'a very tense meeting to the effect that he wasn't sure if he would keep me on. He was unhappy with my performance' (ts 59).

9 On 24 March 2011, Mr Atkinson signed papers for the incorporation of Denmark Legal Pty Ltd (the company). On 10 May 2011 the company was incorporated. It was registered for GST purposes from 1 July 2011. Following the conclusion of his employment with the respondent, and after his period of leave, Mr Atkinson began working as a Legal Practitioner/Director of the company.

10 Mr Atkinson says that the establishment of the company was a contingency. However, he acknowledged that it was incumbent on him to have told Mr Syme that he was setting up a company, but he did not do so.

11 Mr Atkinson says that on Monday 11 July 2011, in a meeting with Mr Syme in Mr Syme's office, Mr Syme asked him for a response to Mr Syme's previous offer to him of a pay rise and the possibility of the respondent opening an office in Denmark towards the end of 2011, from which the applicant would work a day per week. Mr Atkinson says he responded that he could accept the offer if it were for three days per week in Denmark. He also said that he wanted to spend some time with his family before making a decision. Mr Syme pressed him for an answer. Mr Atkinson informed Mr Syme that he was due a period of leave which was scheduled to commence on 22 July 2011 and would like to take that opportunity to discuss it with his wife. Mr Syme required a decision within the next day or two – he was not prepared to wait for Mr Atkinson to return from leave.

12 Mr Atkinson says that on 13 July 2011, Mr Syme asked for his response, to which Mr Atkinson says he responded that if he had to answer that day it would be difficult for him. Mr Syme said that if it was going to be difficult he thought Mr Atkinson was going to have to 'float [his] own boat' (exhibit 13, 3).

13 Mr Atkinson says he asked Mr Syme what he wanted to do; would he like Mr Atkinson to resign, to which Mr Syme said he considered Mr Atkinson had already resigned by not accepting his offer.

14 Mr Atkinson says he asked Mr Syme how much notice he would like, to which he says Mr Syme responded 'two weeks?', paused and said 'I trust you Jeff', (exhibit 13, 3) and that Mr Atkinson could work out his notice period contrary to his, Mr Syme's, usual policy. Mr Atkinson says that he agreed with that, however, he had leave booked from 22 July 2011 for nine days. He says Mr Syme responded that the last week of his notice period would be taken as annual leave and that he was happy with that. Mr Atkinson said that he offered to come back in after his leave if Mr Syme thought it was required, to assist with handing over his files. Mr Atkinson says he then asked if Mr Syme wanted his resignation in writing and he said that he did not need to as he had already resigned, and that Mr Syme would send an email to staff that night.

15 According to Mr Atkinson, they then discussed what files he had to hand over, the most pressing of which involved Mr Atkinson preparing an amended statement of claim in excess of 40 pages, to be filed on his last scheduled day of work. He assured Mr Syme it would be completed.

16 That evening Mr Syme sent an email to the staff in the following terms (formal parts omitted):

> Please note that Jeff Atkinson has decided not to continue with Latro Lawyers and will be heading off to pursue other interests (I think we will see Jeff in a Denmark office some time soon).
>
> Jeff's last day in the office will be Friday 22 July 2011, before he takes some leave in Broome.
>
> I wish Jeff all of the best with his future.
>
> (exhibit 13, JSA 3)

17 The next day, Mr Atkinson sent the following email to Mr Syme (formal parts omitted):

> Would you mind asking Wendy if she could let me know as soon as reasonably possible what my entitlements etc will be (basically what I get paid and when). I am going to have some tight budgeting ahead and the more I can plan the better.
>
> I had actually booked leave starting next Friday so Thursday will be the last day for me.
>
> (exhibit 13, JSA 3)

18 Mr Syme responded at 4:30 pm that day (formal parts omitted):

> I will do – Wendy wont be home from Hospital until next week. I would ask that you delay your leave by one day, as I wont be back in the office until Friday and I will need to do a hand over and farewell. I am in client meetings on Wednesday and Thursday and wont be able to come back any earlier.

(exhibit 13, JSA 4)

19 On Friday 15 July 2011 at 8:51 am Mr Atkinson responded by email (formal parts omitted):

> I actually have a flight booked for Friday so it will be very difficult to change at this late stage.
>
> Can I suggest that I come in the week after I return from holidays for a morning. I will remain available by telephone until then if you want to discuss anything. I obviously remain committed to all my former clients too so I won't do anything to leave them in the lurch.
>
> I think a farewell would be important for me to have closure on my time at Latros so I am keen to do it, Maybe on the morning of the usual morning tea/staff meeting.

(exhibit 13, JSA 4)

20 Mr Syme responded at 11:30 am that morning as follows (formal parts omitted):

> Ok – let's go with that – come back in after holidays. Please can you complete a handover document, listing each matter, the current status, next steps, timelines and who has responsibility for the issues.

(exhibit 13, JSA 5)

21 It seems that Mr Syme was able to attend to Mr Atkinson's departure on Thursday 21 July 2011, when there was an amicable farewell morning tea for Mr Atkinson. At the end of the day Mr Atkinson and Mr Syme met. Mr Atkinson handed over to Mr Syme the work that was remaining for others. At this meeting, Mr Atkinson also provided Mr Syme with a letter in the following terms (formal parts omitted):

> **RESIGNATION**
>
> I refer to our conversation on Wednesday 13 July 2011.
>
> I confirm that I could not accept your offer to continue working with Latro Lawyers. We both agreed that this amounted to a resignation of my employment effective from 13 July 2011.
>
> We agreed to a two week notice period and as I had booked leave we agreed that my last day would be today. Kindly arrange for my entitlements to be processed as soon as practicable. I ask that you treat my annual leave that I had booked after today as accrued leave to be paid out as a lump sum rather than ongoing salary.
>
> I thank you for my time at Latros and for dealing with the separation amicably.
>
> I wish you all the best in future.

(exhibit 7)

22 Mr Atkinson says he completed the amended statement of claim and had provided a copy to Mr Syme. Mr Syme raised the issue of Mr Atkinson's practising certificate fees and the respondent's professional indemnity insurance costs associated with Mr Atkinson's employment by the respondent. Mr Syme said that he expected Mr Atkinson to make a contribution to those costs. Importantly, Mr Atkinson says that Mr Syme said that there was no obligation on Mr Atkinson to pay a contribution but that $1,000.00 was an appropriate amount. Mr Atkinson said that he thought it was a bit harsh given the work he had put in over the last six to eight weeks, that he was short of cash due to starting up his own business and said he would discuss it with his wife and get back to Mr Syme. Mr Syme handed him his practising certificate saying he was disappointed it could not be resolved.

23 There seems to be no dispute between the parties that in their discussions Mr Atkinson and Mr Syme agreed that two clients, whom Mr Atkinson had brought with him to the respondent, would be able to go with Mr Atkinson. However, Mr Syme wanted a number of things to occur and he set these out for Mr Atkinson being; the clients would have to pay their outstanding accounts to the respondent and they would need to put in writing to the respondent that they intended to take their business to Mr Atkinson, and then Mr Syme would release the files to Mr Atkinson. Mr Atkinson left the office at the end of the day for the last time.

24 While Mr Atkinson was on leave, he received a text message from Mr Syme advising he had sent him an email. Mr Atkinson checked his email and read a letter from Mr Syme which said that Mr Atkinson's outstanding employment entitlements were $5,768.15, but that he owed the respondent $3,403.84 on account of the practising certificate fees, the professional indemnity insurance premiums and a company search, which Mr Atkinson has undertaken without authority relating to the establishment of his company. The balance of $144.31 had been paid into Mr Atkinson's bank account. Attached to the letter was an invoice setting out the amounts.

25 The letter also said that the timing of Mr Atkinson acting to set up the company, whilst still employed by the respondent, placed him in a position of conflict during his remaining time with the respondent. Mr Syme put a without prejudice offer to Mr Atkinson to resolve the issues of the expenses incurred by the respondent for Mr Atkinson's practising certificate and professional indemnity insurance, and for Mr Atkinson to re-pay to the respondent the costs he had incurred using the respondent's resources in establishing his business.

26 The letter also raised an allegation of Mr Atkinson taking with him the original documents from a client's file and leaving a copy in the respondent's files, the client being one of two which Mr Syme had agreed were appropriate for Mr Atkinson to take with him, subject to the client giving proper instructions and consent and other arrangements being resolved.

27 Ms Sarah Marie Latham, a legal practitioner formerly employed by the respondent gave evidence. She says that when she resigned, on 20 August 2010, Mr Syme said he would pay her two weeks' pay in lieu of notice and she was to leave that day. Even though she offered to work out the notice, Mr Syme refused. She also says Mr Syme did not require that she pay the respondent any pro-rata amounts on account of her practising certificate or Law Society membership. She commenced employment with another Albany based law firm approximately one month after the termination of her employment with the respondent.

28 Mr Syme's evidence is that after some concerns about Mr Atkinson needing greater supervision and Mr Atkinson wanting more autonomy, their relationship, which had been somewhat tense, improved as they worked together on a large piece of work. However, Mr Syme says that he was not aware that by May 2011 Mr Atkinson had taken steps to set up his own law firm.

29 By 15 May 2011, the respondent was obliged to pay Mr Atkinson's Law Society membership fees, his practising certificate and the firm's professional indemnity insurance in respect of all legal practitioners employed by the firm for the coming financial year. Mr Syme was unaware that within two weeks of the commencement of the new financial year Mr Atkinson would resign.

30 Mr Syme says that Mr Atkinson's resignation came about because following some discussions between them, Mr Atkinson said that he wished to work three days per week from Denmark rather that five days per week from Albany for which he was engaged. This was to enable him to spend more time with his family. Mr Syme was concerned that previous law firms which had attempted to open offices in Denmark had been unsuccessful. He was prepared to look at some arrangement for the future with a graduated increase in the number of days to be worked from Denmark, but he was not prepared to agree to three days per week in the immediate future.

31 In around May 2011, Mr Syme says he and Mr Atkinson had discussions which lead him to believe that Mr Atkinson was prepared to remain with the respondent. However, on 11 July 2011 Mr Atkinson and Mr Syme had a further discussion in Mr Syme's office where Mr Atkinson said he wanted to work from Denmark for three days per week. Mr Syme said he was reluctant to expand the company into Denmark at such a quick pace, preferring to make a graduated move and to assess its success as time went on before increasing the amount of time spent there. Mr Syme said to Mr Atkinson that it sounded like he was no longer prepared to work under the arrangements under which he was engaged and that it sounded like he was resigning. Mr Syme says that Mr Atkinson agreed that it sounded like he was resigning but he needed time to think about it.

32 On 13 July 2011 Mr Syme pressed Mr Atkinson for an answer. Mr Atkinson said that he had leave coming up and would like to take the time to discuss the situation with his wife. However, Mr Syme pressed him for an answer and Mr Atkinson resigned on 13 July 2011. Mr Syme says he asked Mr Atkinson how much notice he intended to give and that Mr Atkinson said that he would give him two weeks. Mr Syme says he explained to Mr Atkinson that his normal practice was to pay employees in lieu of notice but that in Mr Atkinson's case he needed to serve out his notice period. This was because Mr Atkinson was dealing with a complex litigation matter and he wanted him to complete the significant revision of a statement of claim before he left. He says he told Mr Atkinson that he trusted him to do the right thing. Mr Syme says that Mr Atkinson was to put his resignation in writing.

33 Mr Syme denies that it was he who set a two week notice period in response to Mr Atkinson asking how much notice he required. He says he is particularly careful in dealing with employees regarding the issue of the notice as he cannot force an employee to serve out a notice period which they are not prepared to do. He says that he asks employees 'how long are you prepared to give me in notice?' (ts 96). This was the question he says he asked Mr Atkinson to which Mr Atkinson responded 'two weeks'. Mr Syme says he did not want to create conflict at the time. He was not aware that Mr Atkinson was due to go on leave, however, when he became aware of this he asked Mr Atkinson to delay the leave. This, he says, is consistent with him not agreeing to Mr Atkinson's intentions regarding his notice. Mr Atkinson told him he already had his air ticket booked, and offered to come back into the office after his leave. Mr Syme says that this was not acceptable and he offered to compensate Mr Atkinson for costs associated with changing his air tickets so as to delay his leave arrangements. Mr Atkinson said he was not able to do that. Mr Syme says that while he may not have explicitly said to Mr Atkinson that he wanted him to work out his notice period, he says he asked him to delay his leave, to stay on and complete his work.

34 During this meeting they also discussed whether Mr Atkinson should re-pay to the respondent costs incurred in paying for Mr Atkinson's 2011-2012 practising certificate, professional indemnity insurance costs and Law Society membership.

35 Mr Syme says that the meeting ended on the basis that Mr Atkinson was to provide Mr Syme with his resignation in writing, however, this did not occur until Mr Atkinson's last day in the office.

36 On the evening of 13 July 2011, after their discussion at around 6:00 pm, Mr Syme sent an email to staff to notify them that Mr Atkinson had resigned and that his last day in the office would be 22 July 2011. When challenged by Mr Atkinson as to why Mr Syme did not communicate his concerns that Mr Atkinson had not given proper notice in accordance with the contract of employment, Mr Syme said that it was not appropriate to air dirty linen between them in an email to staff. Mr Syme also says that by this time the issue was about managing Mr Atkinson's departure from the firm, which I take to mean ensuring that Mr Atkinson's departure did not create difficulties in getting the necessary work done, or in maintaining appropriate and efficient working relationships and arrangements in the office during the notice period. In essence, Mr Syme says that in the face of the contract requiring four weeks' notice and his being unable to compel an unwilling employee to work productively, or at all, for the notice period he asked Mr Atkinson when he was leaving, and apart from asking Mr Atkinson to delay his leave, he had to accept Mr Atkinson's two weeks' notice even if he did not agree to it.

37 Mr Syme says that Mr Atkinson's offer to come back in after his leave was an offer to come back for one morning. This was not serving out notice. Mr Syme took the view that the contract provided a remedy of an adjustment to entitlements in the absence of proper notice and that there was no point having an argument about it at that point.

38 Mr Syme says that when he received the letter of resignation at the end of Mr Atkinson's last day of employment on 21 July 2011, it asserted that there was agreement to a shorter notice period when there was not. According to Mr Syme, Mr Atkinson was late for their last meeting on Mr Atkinson's last day of employment because he had to collect a computer for use in his new business.

39 Mr Syme wrote to Mr Atkinson on 28 July 2011, setting out a number of matters which were said to have come to his attention after the departure interview. Those matters included Mr Atkinson's 2011-2012 practising certificate; professional indemnity insurance; that in Mr Atkinson setting up his own law firm while still employed by the respondent, Mr Atkinson had placed himself in a position of conflict; that Mr Atkinson had utilised the respondent's resources in setting up his own practice without permission, and other matters.

Was there agreement to a lesser notice period than four weeks?

40 For the purpose of this issue, I am not satisfied that the issue of who suggested two weeks' notice assists in deciding this point. Mr Syme did not quibble when two weeks' notice was discussed at the meeting on 13 July 2011. When Mr Atkinson handed him the resignation letter on 21 July 2011 just before he left, Mr Syme did not challenge the statement that 'we agreed to a two week notice period' (ts 66). While I accept that he may have been attempting to avoid any disagreement during the time from when Mr Atkinson gave notice on 13 July 2011, to manage Mr Atkinson's departure, I find it difficult to accept that he would have allowed this statement, made at the last hour, to go unanswered if it were not what he intended. He may have played his cards close to his chest in the earlier discussion if he had not agreed to a lesser period of notice than four weeks' in an endeavour to keep the situation amicable. However, there was no real need by this point.

41 Further, during the final meeting, Mr Syme raised with Mr Atkinson that Mr Atkinson should make some contribution to the cost of Mr Atkinson's practising certificate and the respondent's professional indemnity insurance costs given that he was leaving so early into the year for which they had been paid. I have no doubt that he would have then made known to Mr Atkinson his view about giving a lesser period of notice on the basis of making the adjustment to his final payment in accordance with the forfeiture clause in the contract, had he believed it applied.

42 Further, Mr Syme wrote to Mr Atkinson soon after the employment came to an end, on 28 July 2011. This letter is said to have been for the purpose of dealing with 'a number of issues that have come to [Mr Syme's] attention after that departure interview that need to be considered in closing out your employment with [Latro Lawyers]' (ts 118). In fact those were not new issues. They were the '2011-2012 Practice Certificate and Mandatory Professional Indemnity Insurance'; Mr Atkinson having established the company and incurred expenses in that process which were charged to the respondent; that his establishing the company while an employee of the respondent placed him in a position of conflict for the remainder of his employment; that he had misrepresented the situation to Mr Syme; and a number of other matters. The letter identified the total gross amount due to Mr Atkinson on termination as $5,768.15, being $3,548.15 after tax. This is significant given that the letter sets out a calculation of what was owed to Mr Atkinson less deductions for a number of items, but does not set out any deduction for failing to give the required notice. In fact, this letter made no reference to any deduction from monies owed to Mr Atkinson on account of the failure to give the required notice. Attached to the letter was an invoice said to be '[c]osts incurred on your behalf relating to your practice'.

43 Mr Syme implies that during the discussion about the notice period he was conscious of inability to enforce a notice period and that he could rely on the forfeiture provision within the contract. However, he did not raise the issue on 13 July or 21 July 2011, or in the letter of 25 July 2011, including when he set out the deductions he asserted were due or appropriate. The first time he appears to have raised the issue was in his subsequent letter of 15 August 2011. Only then did Mr Syme assert that the notice period was not agreed. By this time the dispute was escalating.

44 I am of the view that when Mr Atkinson resigned, Mr Syme was concerned to ensure that two things occurred. Firstly, he wanted Mr Atkinson to finish the amended statement of claim and complete a handover. Secondly, he wanted the remainder of Mr Atkinson's time in the office to be both productive and amicable. I am of the view that, while Mr Syme may have strayed from his usual policy of staff not working out their notice, he did so in this case to enable Mr Atkinson to complete necessary work. Therefore, I find that provided Mr Atkinson completed his work, Mr Syme was agreeable to a lesser period of notice than the four weeks' and the respondent is not entitled to deduct from money owing to Mr Atkinson the amount of $4,250.00, which is the amount both parties have referred to in submissions (Applicant's submissions 30 April 2012, [1]; Respondent's submissions 30 April 2012 [50]).

Deduction for Practising Certificate and Law Society Membership fees

45 The respondent paid the fees for Mr Atkinson's 2011-2012 practising certificate and his Law Society of WA membership fees before he resigned. The letter of employment made this a benefit of the contract of employment. The provision in this letter followed immediately after and in the same paragraph as the salary. The contract makes no provision for these benefits to be reimbursed to the respondent for any period during which Mr Atkinson was not employed by the respondent. In this way, this case is distinguishable from *Ian McFarlane v Halperin Fleming and Meertens* [2001] WAIRC 4492, where the contract expressly provided for that reimbursement for the period when the employee is not employed.

46 As noted in *Simons v Business Computers International Pty Ltd* (65 WAIG 2039), the Commission's jurisdiction under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* is judicial, it is limited to the 'ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit, not being a benefit under an award or an order, to which the employee is entitled under a contract of service'. The role of the Commission in this case is not arbitral or legislative. It is not determining what is fair and equitable, but what the entitlement is under the contract.

47 The payment by the respondent of these fees was a benefit arising under the contract (*Perth Finishing College v Susan Watts* (1989) 69 WAIG 2307 at 2313). The contract did not specify that the benefit was to be apportioned over the period of

employment or that it was to be reimbursed to the respondent on a pro-rata basis. There would always have been a prospect that the employment might end soon after the fees had been paid. If the intention was that there would be a reimbursement or deduction on that basis, the contract could easily have specified this condition. It did not do so.

48 It is no answer to say that because Mr Atkinson set up his own company he breached his duty to the respondent. Mr Atkinson suggested that the purpose of setting up the company was not necessarily to establish a legal practice and that it could be used for a number of purposes including as a self-managed superannuation fund. This explanation is not plausible. I find that Mr Atkinson set up the company on the basis that he intended to establish a law practice in Denmark and anticipated that he would leave his employment with the respondent. It would be surprising for a legal practitioner to establish a company for purposes other than as a law practice and yet give it a name such as Mr Atkinson did in this case. He commenced the law practice through the company on 8 August 2011. However, while I find that Mr Atkinson was preparing to set up the company and to use it as a vehicle for his own law practice, and he may have had a duty to inform Mr Syme, it could hardly have been a surprise to Mr Syme, particularly given that in his email to staff of 13 July 2011 when he said 'I think we will see Jeff in a Denmark office some time soon'. In any event, this was not relevant to the issue of whether there was any contractual obligation on Mr Atkinson to repay the fees to the respondent.

49 Further, there was no evidence of there being an accepted practice of such fees being automatically reimbursed on a change of employment. On the contrary, the evidence of Ms Latham is that she left the respondent's employ soon after the beginning of a financial year and there was no indication that there was any pro-rata reimbursement of her fees by her or her new employer.

50 In those circumstances I find that there was no entitlement on the part of the respondent to deduct any amounts from the monies due to Mr Atkinson on termination of employment for the cost of his 2011-2012 practising certificate being $921.92 and Law Society of WA fees being $593.65.

51 An order will issue that the respondent pay to the applicant the amounts deducted from his final pay for notice, the practising certificate and Law Society of WA fees.

2012 WAIRC 00852

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF STEPHEN ATKINSON
	APPLICANT
	-v-
	LATRO SOUTHERN PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 19 SEPTEMBER 2012
FILE NO/S	B 142 OF 2011
CITATION NO.	2012 WAIRC 00852

Result Application granted

Order

HAVING heard the applicant on his own behalf and Mr E Wong of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the respondent pay to the applicant the sum of $5,621.26 less any amount due to the Australian Taxation Office.
2. THAT such payment to be made within 21 days of the date of this order.

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

2012 WAIRC 00858

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEFF STEPHEN ATKINSON
	APPLICANT
	-v-
	LATRO SOUTHERN PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 SEPTEMBER 2012
FILE NO.	B 142 OF 2011
CITATION NO.	2012 WAIRC 00858

Result	Correction Order issued

Correction Order

WHEREAS an error occurred in the Order issued on the 19th day of September 2012 in application B 142 of 2011,

NOW THEREFORE, the Commission, in order to correct this error and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT order 1 be corrected by replacing the words "the sum of $5,621.26" with the words "the sum of $5,623.84".

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

2012 WAIRC 00835

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL BRADY
	APPLICANT
	-v-
	MANDURAH CATHOLIC COLLEGE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 SEPTEMBER 2012
FILE NO/S	U 48 OF 2012
CITATION NO.	2012 WAIRC 00835

Result	Application dismissed
Representation	
Applicant	Mr P Brady
Respondent	Ms M Ryan

Order

WHEREAS the applicant filed a notice of discontinuance, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

2012 WAIRC 00918

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD WILLIAM DALGLEISH
	APPLICANT
	-v-
	WA NO INTEREST LOANS NETWORK INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 9 OCTOBER 2012
FILE NO/S	U 145 OF 2011
CITATION NO.	2012 WAIRC 00918

Result	Discontinued
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr S Bibby (as agent)

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 and 23 March 2012 the Commission convened conferences 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 25, 26 and 27 June 2012; and

WHEREAS on 19 June 2012 the applicant's representative advised the Commission that the parties had reached an agreement; and

WHEREAS on 21 June 2012 the hearing was vacated; and

WHEREAS on 12 July 2012 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 9 August 2012 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.

2012 WAIRC 00909

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH TRACEY ANNE GILES
	APPLICANT
	-v-
	ARCADIAN NOMINEES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 8 OCTOBER 2012
FILE NO/S	B 151 OF 2012
CITATION NO.	2012 WAIRC 00909

Result	Application discontinued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr S D Mangione

Order

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

AND WHEREAS on 20 August 2012 and 10 September 2012 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 10 September 2012 agreement was reached between the parties;

AND WHEREAS on 19 September 2012 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.

2012 WAIRC 00905

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HAYDEN BLAIR HARPER
	APPLICANT
	-v-
	MARGARET MAC-DERMOTT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 4 OCTOBER 2012
FILE NO/S	U 122 OF 2012
CITATION NO.	2012 WAIRC 00905

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 hearing on 24 September 2012 for the applicant to show cause why his application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT this application be, and is hereby, dismissed.

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

2012 WAIRC 00907

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BETTY LEIGH HARPUR
	APPLICANT
	-v-
	BRAD ANDERSON
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 5 OCTOBER 2012
FILE NO/S	B 170 OF 2012, U 170 OF 2012
CITATION NO.	2012 WAIRC 00907

Result	Application discontinued
Representation	
Applicant	Ms B Harpur
Respondent	Mrs P Anderson

Order

WHEREAS the applicant filed a notice of discontinuance, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

2012 WAIRC 00917

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUCY KIDMAN
	APPLICANT
	-v-
	DIRK SELLENGER CEO
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 9 OCTOBER 2012
FILE NO/S	U 142 OF 2012
CITATION NO.	2012 WAIRC 00917

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Mr S Roffey (as agent)

Order

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

WHEREAS on 3 August 2012 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 18 September 2012 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.

2012 WAIRC 00843

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YOUNGMAN KIM
	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
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 18 SEPTEMBER 2012
FILE NO/S	B 134 OF 2012
CITATION NO.	2012 WAIRC 00843
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 14th day of August 2012 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 the 3rd day of September 2012 the applicant filed a Notice of Discontinuance in respect of this application;

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

THAT this application be, and is hereby dismissed.

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

2012 WAIRC 00908

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN JOHN KING
	APPLICANT
	-v-
	LEIGHTON SMASH REPAIRS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 8 OCTOBER 2012
FILE NO/S	U 180 OF 2012
CITATION NO.	2012 WAIRC 00908

Result	Application discontinued
Representation	
Applicant	Mr M J King
Respondent	Mr M Vidal

Order

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

AND WHEREAS on 21 September 2012 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 21 September 2012 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.

2012 WAIRC 00910

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID RICE
	APPLICANT
	-v-
	WHELANS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 8 OCTOBER 2012
FILE NO/S	U 195 OF 2012
CITATION NO.	2012 WAIRC 00910

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 the respondent in its Notice of answer and counter proposal raised the issue of the jurisdiction of the Commission to deal with the claim;

AND WHEREAS the Commission sought written submissions from the parties on the jurisdictional issue;

AND WHEREAS on 25 September 2012 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.

2012 WAIRC 00833

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00833
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 22 JUNE 2012 WRITTEN SUBMISSIONS THURSDAY, 28 JUNE 2012
DELIVERED	**:**	FRIDAY, 14 SEPTEMBER 2012
FILE NO.	**:**	U 34 OF 2012, B 34 OF 2012
BETWEEN	**:**	PHILLIP GLEN ROSE Applicant AND TJ & LK CATTLE Respondent

Catchwords	**:**	Termination of employment - Harsh, oppressive or unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles applied - Commission satisfied applying principles that discretion should not be exercised - Application dismissed - Contractual benefit claim - Entitlements under contract of employment - Claim for payment of bonus - Whether industrial matter - Application upheld in part - Order issued
Legislation	**:**	*Industrial Relations Act 1979* s 7, s 29(1)(b)(i) and (ii)
Result	**:**	Application alleging unfair dismissal, dismissed; Contractual benefit claim, order issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr P G Brunner (of counsel)

Case(s) referred to in reasons:

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Hotcopper Australia Ltd v Saab [2002] WASCA 190; (2002) 82 WAIG 2020

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 15 February 2012 Phillip Glen Rose (the applicant) lodged applications in the Commission pursuant to s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* (the Act) against TJ & LK Cattle (the respondent) claiming that he was harshly, oppressively or unfairly dismissed on 8 December 2011 and that he is owed a benefit under his contract of employment with the respondent.

Background

2 The applicant commenced employment as a farm worker with the respondent on 15 March 2010 undertaking duties which included cropping, harvesting and chemical spraying. The applicant was employed on a casual basis working on average 40 hours per week but his weekly hours varied significantly depending on the duties to be performed. The applicant ceased employment with the respondent on 8 December 2011 and at the time his rate of pay was $20 per hour.

Applicant's evidence

3 The applicant had a good relationship with his employer Mr Tim Cattle during his employment until an incident occurred just prior to him ceasing employment. When the applicant was assisting Mr Cattle with harvesting on Sunday 4 December 2011 he was nearly crushed by a header driven by Mr Cattle. After this incident the applicant was angry and shaken and he told Mr Cattle that he could not continue working that day and he returned to his quarters. The applicant was also not in a condition to return to harvesting duties the next day because he was so shaken by the incident and instead he undertook maintenance at his living quarters.

4 Mr Cattle rang the applicant on Monday 5 December 2011 and they discussed whether Mr Cattle owed him an additional $2 per hour which the applicant maintained had been wrongly deducted as superannuation contributions from his pay since the outset of his employment with the respondent. In response Mr Cattle told the applicant that the situation between them was untenable and the applicant therefore believed that he no longer had a job with the respondent. Mr Cattle then asked the applicant to put his claim in writing so he could assess it. The applicant wrote out his claim for the hours he had worked and the amount owing to him based on an extra $2 per hour since commencing employment with the respondent. On 6 December 2011 he sent these figures to Mr Cattle along with a reference to vacating his quarters (Exhibit A1).

5 The applicant gave evidence that on 7 December 2011 Mr Cattle and Ms Leonie Cattle arrived at his quarters. Mr Cattle gave him a letter confirming the cessation of his employment with the respondent, the letter contained an offer of 10 ton of feed barley and there was a place for the applicant to sign the letter accepting these terms (Exhibit R1). There was no discussion at the time but the applicant felt pressured to sign this document. After they left the applicant rang Mr Cattle and told him that he would not sign the document but later that evening the applicant had second thoughts about accepting the offer of 10 ton of feed barley as he thought this may be the only opportunity to get some of the 20 hectares of feed barley promised to him by Mr Cattle. The applicant then rang Mr Cattle and told him that he would sign the letter, on 8 December 2011 Mr Cattle picked up the signed letter and on 9 December 2011 the applicant returned to Perth.

6 The applicant gave evidence that when he arrived in Perth he stayed at a friend's place until he found alternative accommodation on 21 January 2012. The applicant later became aware he could contest his termination when he spoke to a friend about his situation and they discussed his unhappiness with having to sign the letter which resulted in his employment ceasing. The applicant gave evidence that after this conversation he contacted the Commission on or about 14 February 2012 and lodged the application the following day.

7 The applicant stated that he would be disadvantaged if he could not continue with his claim alleging unfair termination because the $2 per hour he was owed related to his termination and he maintained that he was treated unfairly because he had no opportunity to discuss his termination with Mr Cattle.

8 The applicant believes that his unfair dismissal claim has merit because it was the respondent who initiated the cessation of his employment when Mr Cattle stated that his ongoing employment was untenable.

9 The applicant gave evidence that he reached a verbal agreement during a discussion with Mr Cattle in 2011 before seeding commenced that the respondent would give him the yield from a 20 hectare crop of feed barley of the harvest. The applicant stated that he understood that the crop yielded 1.5 ton to the hectare however he did not know the yield at the time he signed the letter on 8 December 2011 accepting 10 ton. The applicant stated that the discussion with Mr Cattle about paying him the yield from the crop occurred approximately 12 months after he commenced employment with the respondent and he gave evidence that at the time Mr Cattle said he would like to give him a pay rise and that the yield from the crop was instead of a pay rise. There was no discussion at the time about what would occur if he left his employment prior to the end of harvesting season. The applicant stated that he had earned this payment by working in the preceding 12 months even though the harvest was not finished when he ceased employment on 8 December 2011.

Respondent's evidence

10 Mr Cattle gave evidence that the incident which occurred on 4 December 2011 was unintentional and he apologised to the applicant after the incident. Mr Cattle stated that during harvesting it was possible he was under pressure and this may have contributed to the incident occurring. Mr Cattle confirmed that the applicant was agitated and upset after the incident and drove off and did not return to work that day.

11 Mr Cattle stated that he was in the workshop on the morning of Monday 5 December 2011 and the applicant came in to collect an extension cord. As the applicant was leaving Mr Cattle asked him if he was coming to work and the applicant said no and he said that they operated in a pressured environment. In reply Mr Cattle said that this was due to it being harvest time. Mr Cattle stated that the applicant then said that he had been in touch with WorkSafe because of the pressure and he said 'I'll go'. Mr Cattle stated that in the afternoon he went to the applicant's quarters because he wanted to resolve issues with the applicant. Mr Cattle stated that when he saw the applicant he had a letter containing a claim of $2 per hour he believed he was owed based on the hours he had worked for the respondent and the applicant told him that he could not deduct superannuation from his hourly wage rate. Mr Cattle stated that the applicant had not previously complained about his wages and superannuation owing to him and he was shocked and he told him that he would never 'rip' him off. Mr Cattle then left the applicant's quarters. On 6 December 2011 Mr Cattle received the letter detailing the extra money the applicant claimed he was owed and a reference to him vacating his accommodation (Exhibit A1). After Mr Cattle sought advice he prepared the letter dated 7 December 2011 advising the applicant he had seven days to vacate his quarters (Exhibit R1).

12 Mr Cattle stated that during a conversation with the applicant in March 2011 he offered him the crop from 20 hectares of feed barley as a bonus instead of giving him a pay rise. Mr Cattle stated that there was no discussion at the time about what would occur if the applicant did not complete the harvest. Mr Cattle stated the feed barley crop yielded 1.5 tons to the hectare and he believed that the applicant was entitled to receive part of this bonus even though he did not complete the harvest. Mr Cattle gave evidence that the payment of the bonus was an incentive for future work undertaken by the applicant and as the respondent was about one third of the way through the harvest when the applicant left the respondent he offered a third of the applicant's anticipated entitlement. Mr Cattle gave evidence that once the applicant agreed to accepting 10 ton he gave the monetary value of this to the applicant, minus transport costs. Mr Cattle stated that the harvest finished on or about 28 January 2012.

13 Mr Cattle stated that it had been a difficult time for him dealing with this application as the applicant questioned his honesty and integrity. There was also the financial impact of having to defend the unfair dismissal claim and he was not expecting this application. Mr Cattle claimed that he never went out of his way to cheat the applicant of any entitlement.

Applicant's submissions

14 The applicant maintains that there is merit to his application that he was unfairly dismissed and it would be unfair not to allow this application to continue as he would not have the opportunity to pursue this claim.

15 The applicant submits that he reached a verbal agreement with the respondent that the bonus was to be paid to him for work undertaken and it would be unfair to lose two thirds of this payment because he did not work a further six weeks to the end of the harvest. Given he received $1,908 from the respondent for 10 tons of grain he is seeking the payment of a further $3,816 for the remainder of the yield from the 20 hectares of feed barley. The applicant also maintains that as the grain he was entitled to was harvested during the season it would have been delivered to 'the bins' before harvesting finished. The crop would therefore have been harvested prior to the end of harvesting finishing. The applicant also argues that he is entitled to the remainder of the bonus as he did not resign.

Respondent's submissions

16 The respondent argues that the applicant did not provide an acceptable reason for the delay in lodging this application. The applicant had access to a computer and telephone in Perth after he left the respondent and he was aware of making work related complaints as he knew how to contact WorkSafe after the incident on 4 December 2011. The respondent submits that it was surprised to receive this application and there was no evidence that the applicant advised the respondent that his cessation of employment was to be contested prior to receiving the application. The offer of part of the bonus was accepted by the applicant on 7 December 2011 and the respondent thought that there were no further issues with respect to the applicant's employment with the respondent. The respondent is also incurring expenses in meeting this application.

17 The respondent maintains there is no merit to the applicant's application because he was not terminated

18 The respondent submits that the bonus due to the applicant was for 20 hectares of feed barley and both the applicant and Mr Cattle gave evidence that the bonus came to 'fruition' at the end of the harvest but the applicant's employment ceased prior to the harvest being completed. The respondent paid the applicant part of the bonus based on what it believed was fair value for the work the applicant had provided during the season. The respondent submits that the essential criteria to achieve the bonus was not met as the harvest was not completed and if there was any proportional entitlement to the bonus then the respondent has met that criteria. The respondent maintains that there is no evidence that the bonus was to be paid to the applicant for work completed by the applicant in the previous year and submits that if the Commission finds the applicant is owed the remainder of the bonus then it cannot be expressed in terms of a monetary amount as the price of barley fluctuates.

19 At the end of the hearing the respondent and applicant were given the opportunity to file written submissions as to whether the applicant's claim for a denied contractual benefit constituted an industrial matter. The respondent did so claiming that what was being sought with respect to this application was not an industrial matter.

Findings and conclusions

Should time be extended to accept the application alleging unfair dismissal?

20 Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As application U 34 of 2012 was lodged on 15 February 2012 and the applicant was terminated on 8 December 2011 it is 41 days out of the required timeframe for lodging a claim of this nature.

21 The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not this application should be accepted under s 29(3) of the Act. Section 29(3) of the Act reads as follows:

> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

22 In reaching a decision in this matter as to whether it would be unfair not to accept application U 34 of 2012 out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** [2004] WASCA 51; (2004) 84 WAIG 683 as follows:

> '1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion [26].'

23 When considering the issue of fairness, Heenan J further observed in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** the following:

> I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims [74].

24 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

25 On the evidence currently before me it is unclear that the applicant has an arguable case that he was unfairly terminated as there is insufficient evidence before me in support of the applicant's claim that he did not resign. There was an incident during harvesting on 4 December 2011 and the applicant felt unsafe after this incident and the applicant decided that due to the impact of this incident on his future safety he would not return to undertake harvesting duties. I find that it was unclear what the applicant specifically required in order to return to work apart from Mr Cattle referring to the applicant saying that he wanted to work in a less pressurised environment. I find that when the applicant indicated to Mr Cattle that he would not continue harvesting after this incident Mr Cattle sought to discuss the situation with the applicant but he was met by a claim from the applicant of an additional $2 per hour in wages. I find that at the time the relationship between Mr Cattle and the applicant appears to have broken down and this resulted in the applicant forming the view that his ongoing employment with the respondent was untenable. In the circumstances I am unable to determine if there is any merit to the applicant's claim that he was unfairly terminated and I find this issue is neutral.

26 I find that the applicant did not seek to prosecute this application in a timely manner and I find that the applicant has not presented good reasons for lodging this application 41 days outside of the required timeframe. Immediately after the applicant accepted the offer made to him by Mr Cattle of the 10 ton of feed barley in the amount of $1908 the applicant left the respondent's premises and I find that for some time both he and Mr Cattle believed that was the end of the matter. I find that after a lengthy period following the applicant's cessation of employment he received advice from a friend that he could contest his termination and he then commenced proceedings in a timely manner. However a substantial period of time had elapsed in the intervening period. I find that the respondent was not aware that the applicant was unhappy about the events surrounding the cessation of his employment after the applicant left the respondent and I accept that the respondent was surprised when it received this application.

27 I find that the respondent will be disadvantaged if this application is allowed to continue as it did not believe it would be required to meet an application of this nature given the lengthy timeframe between the applicant ceasing employment and this application being lodged.

28 When balancing the above findings and when taking into account the relevant factors to consider with respect to an application of this nature and the issue of fairness to both parties I find that it would be unfair to accept this application. I take into account that there was not an acceptable reason for the delay in lodging this application and there is insufficient evidence before the Commission to establish that the applicant has an arguable case that he was unfairly dismissed. I accept that the respondent will be disadvantaged if this application was allowed to continue given that the applicant did not advise the respondent within a reasonable timeframe that he would be contesting his termination. In conclusion I find that it would be unfair for the Commission to exercise its discretion to grant an extension of time within which to file application U 34 of 2012. An order will issue dismissing application U 34 of 2012.

Denied contractual benefit

29 The applicant is claiming that the respondent owes him the balance of the crop of 20 hectares of feed barley in the amount of $3,816. The applicant received the equivalent of 10 ton of feed barley minus transport costs for transporting the barley after he ceased employment with the respondent and he maintains this is only one third of the full entitlement to 30 ton which is due to him.

30 The claim before the Commission is one for an alleged denial of a contractual benefit. The law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s 7 of the Act and the claimant must be an employee, the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service, the relevant contract must be a contract of service, the benefit claimed must not arise under an award or order of this Commission and the benefit must have been denied by the employer: ***Hotcopper Australia Ltd v Saab*** (2001) 81 WAIG 2704; ***Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)*** (1999) 79 WAIG 1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: ***Balfour v Travel Strength Ltd*** (1980) 60 WAIG 1015; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

31 It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts***).

32 I find that at all material times the applicant was an employee of the respondent and he was employed under a contract of service and the benefit that the applicant is claiming does not appear to arise under an award or order of this Commission.

33 I find that in or about March 2011 a conversation took place between the applicant and Mr Cattle with respect to a bonus being paid to the applicant in lieu of a pay rise for the following year. I find that this arrangement was put to the applicant by Mr Cattle to assist with the respondent's cash flow. I find that the agreement between the applicant and the respondent was

that the applicant would receive payment for grain from 20 hectares of feed barley of the annual crop, which was harvested by the end of January 2012. I find that this payment was based on an output of 1.5 ton to the hectare for this crop, minus transport costs. I find that when this agreement was reached between the applicant and Mr Cattle that there was no discussion about the applicant's entitlement to this bonus if he ceased employment with the respondent prior to the harvest finishing.

Is the claim an industrial matter?

34 I reject the respondent's claim that the benefit being sought is not an industrial matter. The respondent argues that the benefit is a claim for the payment of damages as the applicant is seeking the conversion of 20 ton of feed barley to a dollar value. The respondent also argues that the claim is not an industrial matter as it is a claim for specified performance and is a private claim of a commercial nature (see ***Hotcopper Australia Ltd v Saab*** [2002] WASCA 190; (2002) 82 WAIG 2020).

35 Section 7 of the Act defines an industrial matter in part as follows:

> ***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

36 I find that the agreement reached between the applicant and Mr Cattle was that a bonus was to be given to the applicant in the form of a monetary amount arising out of an allocation of 20 hectares of feed barley to the applicant minus the cost of transporting the crop to the bins. I find that this bonus was to be given to the applicant in lieu of a wage rise for the previous year and became a term of the applicant's contract of employment with the respondent. I find that as this payment resulted in a monetary amount being given to the applicant from the proceeds of the feed barley crop and was to be paid to the applicant in lieu of a wage rise it formed part of the remuneration due to the applicant. I find that as the definition of industrial matter in the Act includes remuneration of an employee, that the applicant's claim before the Commission therefore relates to an industrial matter.

37 The applicant was paid one third of the bonus agreed between the applicant and Mr Cattle on or about March 2011 after he ceased employment with the respondent and the issue before the Commission is whether or not the applicant is entitled to the balance of the benefit he is claiming is owed to him.

38 There was no discussion at the time the applicant and Mr Cattle agreed on the bonus to be given to the applicant as to whether the applicant would receive the yield from 20 hectares of feed barley only if he remained employed by the respondent until the harvest was completed and the applicant worked for all but the last eight weeks of the harvest. I find even though the applicant did not complete all of the harvest for 2011 – 2012 that the applicant made a major contribution to the harvesting whilst employed by the respondent. I also find that a significant amount of feed barley crop was harvested prior to the end of the harvesting period for that year. When taking into account s 26(1)(a) of the Act considerations and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits, I find that it is appropriate that the applicant be provided with two thirds of his entitlement to the bonus given that most of the feed barley harvest was completed by 8 December 2011. I will therefore issue an order that the applicant receive a quantum of a further 10 ton of feed barley minus transport costs in the amount of $1,908.

39 An order will issue to this effect.

2012 WAIRC 00832

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP GLEN ROSE
	APPLICANT
	-v-
	TJ & LK CATTLE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 14 SEPTEMBER 2012
FILE NO/S	U 34 OF 2012
CITATION NO.	2012 WAIRC 00832

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr P G Brunner (of counsel)

Order

HAVING HEARD the applicant on his own behalf and Mr P G Brunner of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979,* hereby orders –

THAT the application be and is hereby dismissed.

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

2012 WAIRC 00861

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP GLEN ROSE
	APPLICANT
	-v-
	TJ & LK CATTLE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 SEPTEMBER 2012
FILE NO/S	B 34 OF 2012
CITATION NO.	2012 WAIRC 00861

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr P G Brunner (of counsel)

Order

HAVING HEARD the applicant on his own behalf and Mr P G Brunner 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 the respondent denied the applicant a benefit under his contract of employment.
2. ORDERS that the respondent pay the applicant $1,908 within seven (7) days of the date of this order.

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

2012 WAIRC 00926

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BHARATH SAXENA
	APPLICANT
	-v-
	PICK N MOVE INDIAN CUISINE RESTAURANT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 11 OCTOBER 2012
FILE NO/S	U 72 OF 2012, B 72 OF 2012
CITATION NO.	2012 WAIRC 00926

Result	Application for adjournment allowed
Representation	
Applicant	In person
Respondent	Mr S Alam and later Mr G McCorry (as agent)

Order

WHEREAS these are applications pursuant to s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and

WHEREAS the applications are set down for hearing on 16 October 2012; and

WHEREAS on 4 October 2012 the respondent requested an adjournment of the hearing as the respondent's owner Mr Syed Alam was to travel overseas on 5 October 2012 due to a family illness and is to return on 29 October 2012; and

FURTHER the respondent's agent also requested an adjournment due to his unavailability to attend the hearing because of Federal Court commitments; and

WHEREAS the applicant does not consent to an adjournment as he is concerned that Mr Alam is avoiding the hearing by going overseas and would not return, he will have to pay the wages of an employee to cover his shift if the hearing is delayed and he and his family will suffer stress if the hearing is delayed; and

WHEREAS after taking into account the parties' submissions and when considering whether the Commission should exercise its discretion to grant an adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* [1969] WAR 19) the Commission is of the view that an adjournment of the hearing set down for 16 October 2012 should be granted; and

WHEREAS in reaching the conclusion that the injustice to the respondent is greater than the injustice to the applicant the Commission accepts that the respondent's owner is unavailable due to unexpected family commitments, the Commission is satisfied that Mr Alam will return to Australia on the date indicated in his travel reservation details and the respondent's representative will also be unavailable on the proposed date of the hearing; and

FURTHER in reaching this decision the Commission notes that the applicant may incur costs if the applications are to be relisted which may be dealt with when the matters are heard and determined; and

WHEREAS on 9 October 2012 the Commission issued a Minute of Proposed Order in relation to this matter; and

WHEREAS on 10 October 2012 the applicant provided documentation confirming that Ms Shabeena Alam was the respondent's owner, not Mr Alam; and

WHEREAS at a Speaking to the Minute of Proposed Order on 11 October 2012 the applicant confirmed that Mr Alam was the respondent's manager and he dealt with the respondent's employment issues; and

WHEREAS the Commission advised the parties that even though Mr Alam was not the respondent's owner he is the respondent's manager and was involved in the applicant's employment and it was appropriate that he be available to give evidence;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s 27(1), hereby orders:

THAT the hearing scheduled for 16 October 2012 is adjourned to a date to be fixed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2012 WAIRC 00849

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELINA VICENZONI
	APPLICANT
	-v-
	SWAN SMASH REPAIRS - MARK DAMER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 19 SEPTEMBER 2012
FILE NO/S	U 52 OF 2012
CITATION NO.	2012 WAIRC 00849

Result	Application discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr R Gifford (as agent)

Order

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

AND WHEREAS on 30 April 2012 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 the matter was listed for hearing and determination on 12 and 13 May 2012;

AND WHEREAS on 13 August 2012, at the request of the parties, the hearing was adjourned into conference;

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

AND WHEREAS on 31 August 2012 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.

2012 WAIRC 00848

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RACHEL GAYE WILLIAMS
	APPLICANT
	-v-
	GTS CLEANING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 19 SEPTEMBER 2012
FILE NO/S	B 112 OF 2012
CITATION NO.	2012 WAIRC 00848

Result	Application discontinued
Representation	
Applicant	Ms R G Williams
Respondent	Mr T Stubbs

Order

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

AND WHEREAS on 28 August 2012 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 September 2012 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.

2012 WAIRC 00847

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RACHEL GAYE WILLIAMS
	APPLICANT
	-v-
	GTS CLEANING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 19 SEPTEMBER 2012
FILE NO/S	U 112 OF 2012
CITATION NO.	2012 WAIRC 00847

Result	Application discontinued
Representation	
Applicant	Ms R G Williams
Respondent	Mr T Stubbs

Order

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

AND WHEREAS on 28 August 2012 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 September 2012 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

CONFERENCES—Matters arising out of—

2012 WAIRC 00883

DISPUTE RE CLASSIFICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 SEPTEMBER 2012
FILE NO/S	C 51 OF 2012
CITATION NO.	2012 WAIRC 00883

Result	Interim order amended
Representation	
Applicant	Mr B Palmer
Respondent	Mr D Matthews (of counsel)

Order

WHEREAS the Commission issued an interim order on 12 September 2012

AND WHEREAS the parties agreed to the amendment to order 2. of the order and the Commission consented to the amendment

NOW THEREFORE the Commission, under the powers conferred on it under the Act orders –

THAT order 2. be deleted and replaced with the following:

2. That for the term of the interim order there by no action taken, by way of advertising of positions or appointment or transfer of existing staff, that would have the result that any person or persons other than Ms Spence perform the duties she currently performs at Burbridge School, including duties in relation to swimming at Burbridge School.

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

2012 WAIRC 00919

DISPUTE RE RELOCATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 9 OCTOBER 2012
FILE NO/S	C 45 OF 2012
CITATION NO.	2012 WAIRC 00919

Result	Application discontinued
Representation	
Applicant	Mr J Walker
Respondent	Ms T Borwick

Order

WHEREAS the applicant filed a notice of discontinuance, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

CONFERENCES—Matters referred—

2012 WAIRC 00906

DISPUTE RE THE APPLICATION OF CLAUSE 13.4 OF THE AGREEMENT TO THE ROSTERING CHANGES OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00906
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	THURSDAY, 21 JUNE 2012, FRIDAY, 22 JUNE 2012, TUESDAY, 26 JUNE 2012, WEDNESDAY, 27 JUNE 2012, FRIDAY, 29 JUNE 2012, THURSDAY, 19 JULY 2012, MONDAY, 6 AUGUST 2012, MONDAY, 13 AUGUST 2012, MONDAY, 20 AUGUST 2012,
DELIVERED	**:**	FRIDAY, 5 OCTOBER 2012
FILE NO.	**:**	CR 10 OF 2012
BETWEEN	**:**	UNITED VOICE WA Applicant AND 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

CatchWords	**:**	Industrial Law (WA) -Jurisdictional issues: re magistrate's court and delay in raising issue of concern - Review - Insufficient consultation over rostering changes - Insufficient consultation over shift changes -- Principles - Failure to comply with WA Health - LHMU - Support Workers Industrial Agreement 2007 - cl 13.4, cl 46, cl 47, *Industrial Relations Act 1979* (WA) s 44
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Minute Issued
Representation		
Union	**:**	Ms C Collins (of counsel)
Employer	**:**	Ms T Sweeney and Mr C Gleeson

Case(s) referred to in reasons:

Anthony Tomich v Equator Holdings Pty Ltd (1991) 71 WAIG 1988

Australian Industrial Relations Commission of Austin Health v Health Services Union (Victoria) [2008] 70 IR 269

Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 2623

N.B. Love Starches (W.A.) v The Food Preservers' Union of Western Australia, Union of Workers (1994) unreported

Norwest Beef Industries Limited v Western Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124

Re Cram and Others; Ex Parte Newcastle Wallsend Co Proprietary Ltd (1987) 163 CLR 140

Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

T.A. Miller Ltd -v- Minister of Housing and Local Government [1968] 1 W.L.R. 992

Case(s) also cited:

Australian Securities, and Investments Commission v Merrideth Hellicar [2012] HCA 17

Tracy Cossey v Bayswater Nominees Pty Ltd T/A Forest Place Café and Kiosk (1992) 72 WAIG 1372

Hospital Salaried Officers Association of Western Australia (Union of Workers) v The Hon Minister for Health (1981) 61 WAIG 616

Jeffrey Kennedy Murray v Hammersley Iron Pty Ltd (2004) WAIRC 10967; (2004) 84 WAIG 2325

Perth Electrical Tramways Employees' Industrial Union of Workers v The Commissioner of Railways (1927) 7 WAIG 155

Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia (1987) 67 WAIG 1097

State School Teachers Union of WA (Incorporated) v Paul Albert Director General Department of Education (2006) WAIRC 03475; (2006) 86 WAIG 370

The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch v Wormald International (Australia) Pty Ltd (1990) 70 WAIG 1287

The Liquor, Hospitality and Miscellaneous Union of Western Australia v Roman Catholic Bishop of Bunbury Chancery Office (2006) WAIRC 05670; (2006) 86 WAIG 3297

Trades and Labour Council of Western Australia v Minister for Consumer and Employment Protection (2006) WAIRC 03884; (2006) 86 WAIG 408

Western Australian Prison Officers' Union of Workers v Ministry of Justice (1994) 74 WAIG 2796

Reasons for Decision

1 The employer and the union are in dispute regarding the shift and roster changes implemented over the last 12 months at Swan District Hospital ('SKH') relating to employees employed under the *WA Health – LHMU – Support Workers Industrial Agreement 2007* ('the Agreement').

2 The union says that:

> there was insufficient release of information and consultation about the roster changes, inadequate employee involvement in the decision–making process, and that the roster changes should have been introduced in accordance with cl 13.4 of the Agreement.

3 On or about 28 November 2011, the union filed a dispute notice under s 44 of the *Industrial Relations Act 1979* (the Act). The dispute could not be resolved by the parties.

4 The union seeks:

> Meetings between the union and employees affected by the roster and shift changes, with the meetings to be held during paid work hours, on an individual or small group (of no more than five employees), and completed no later than 30 days of the date of these orders.
>
> That the employer consult with the union and all affected employees about the roster and shift changes that have taken place, the adverse effects of the changes, and the way the adverse effects may be minimised for all employees effected, with a view to taking action to minimise the adverse effects for all employees affected by the changes.
>
> That if the parties cannot resolve the dispute via this consultation process within 60 days of the date of these orders, a ballot of effected employees be held in accordance with cl 13.4.
>
> Such other orders as the Commission considers appropriate.

5 The employer disputes the union's claim and raises several jurisdictional issues, including the issue of 'inordinate delay' in filing this application approximately one year after the changes were implemented.

6 The employer denies that the relief sought by the union should be granted or any relief at all. Further, the employer considers the employees are now settled and used to the shift and roster changes resulting from the review. The employer seeks the application be dismissed.

Primary jurisdictional issue

7 On the eve of the hearing the employer raised the issue of jurisdiction denying that there had been a breach of either cl 13.4 or cl 46 of the Agreement. The employer said that the union should not be seeking to resolve the dispute under s 44 of the Act. Such a claim should come within the Industrial Magistrate's Court under Part III of the Act, in particular s 83. This question was determined by the Full Bench in the case of *Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623.

8 Given the late notice in advising of jurisdiction the union was given an opportunity to provide written submissions and the employer, in reply. The employer said the application should be dismissed on the grounds that the Commission does not have the jurisdiction to hear and determine the substantive matter.

9 The union opposed the employer's jurisdictional claim and said that the Commission does have jurisdiction to hear and determine the matter. The union is not seeking the resolution of existing rights but the determination of a live industrial dispute and the correction of an inequity. The union said the employer had failed to disclose matters relating to the roster changes and subsequently, shift changes. Further, the employer failed to involve the employees in the decision-making process. The formation of views and opinions on matters such as the existing legal rights of the parties in arbitral proceedings does not in itself amount to an infringement of legal power as referred to in *Crewe and Sons*.

10 It was considered by the union that it was open to seek a penalty through the Industrial Magistrate's Court or alternatively a s 46 interpretation in accordance with the Act. Importantly the unions view was this would not resolve the ongoing industrial dispute. The union said that it is acknowledged in *Crewe and Sons:*

> We emphasise that section 44 should not be read down and its powers are available unless it is unequivocally apparent to the Commission that the matter before it is one which should be dealt with under section 46 or section 83 or another special power conferring section of the Act. Each case will very much depend on its own circumstances.

11 In concluding the union said that the substantive matter is properly characterised as an industrial matter and is not an application for the enforcement of an Agreement.

12 In response, the employer said that the Commission had made no declaration that the matter will be attended to separately ahead of the matters of merit in the application. The Industrial Appeal Court in *Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325.

13 Once a question of jurisdiction is raised, the Commission must determine that question before exercising power to resolve the dispute before it under s 44.

14 The employer said that the Commission in this matter had made no such determination or had issued any declaration that the matters of merit and jurisdiction were to be attended to separately. It is therefore the employer's view that the Commission has an obligation to hear and make a finding as to jurisdiction before it proceeds to hear the merits of the claim.

15 The employer said that the appropriate course is to dismiss the claim and allow the union to file a new claim to allow jurisdiction to be determined first. It is the employer's view that this would not result in wasting the Commission's time. Having regard for the Full Bench views in *The Liquor, Hospitality and Miscellaneous Union of Western Australia v Roman Catholic Bishop of Bunbury Chancery Office* (2006) WAIRC 05670; (2006) 86 WAIG 3297 [42]:

> It is regrettable that the hearing and determination at first instance has in effect been a wasted process. However the Commission however constituted must observe the jurisdictional limits which the legislature has provided.

16 The employer said that the Commission in *Trades and Labour Council of Western Australia v Minister for Consumer and Employment Protection* (2006) WAIRC 03884; (2006) 86 WAIG 408 indicates that *Springdale Comfort* requires that the hearing and determination of jurisdiction objection any hearing and determination of the merits of the matter.

Conclusion of preliminary jurisdictional matter

17 The Commission has considered carefully the submissions of the employer and the union with respect to the preliminary jurisdictional issue. On the Commission's reading of *Springdale Comfort* there is no barrier to hearing the issues of jurisdiction and merit at the same time particularly in circumstances where there are significant similarities between the issues of jurisdiction and the issues of merit as there are in these proceedings. What the principles from *Springdale Comfort* do establish is that where the Commission makes its decision, the jurisdictional aspect(s) must be determined at first instance.

18 In these proceedings the notification of jurisdiction by the employer was at late notice and while that is not fatal it is the Commission's determination, on the balance of convenience, that the preliminary and merit matters ought to be heard together. It is often the situation, and indeed these proceedings have been somewhat similar, that the facts arising from the merit and jurisdictional issues are closely linked. However, that still must mean the jurisdictional aspect must be determined in accordance with the principles of *Springdale Comfort*, that is, first instance. Having regard for the principles reflected in *Crewe and Sons* the Commission has considered:

> In the ultimate analysis, the issue for determination in the present case is whether the authority was deciding a claim for payment of wages made as a matter of legal right or a claim for payment of wages made not as a matter of legal right but of what was 'right and fair'. If the former, then the decision constituted an attempted exercise of judicial power and was not the resolution of a dispute as to 'an industrial matter'. If the latter, then the decision resolved a dispute as to such a matter.

19 In the present case the Commission's view is the tribunal was determining a matter not as a claim for the payment of wages made 'as a matter of legal right' but of 'what was right and fair'. As was reflected in *Crewe and Sons* in such circumstances, where a decision determined a dispute relating to such a matter then it is considered to be the resolution of a dispute as to an industrial matter. The Commission is of the view that having regard to the circumstances of this particular case the powers of s 44 should not be read down.

20 The Commission has noted the union describes its dispute as:

> an interpretation of the Agreement incidentally and it does not seek an interpretation of the Agreement as an ends in itself.

21 When referring to award interpretation or s 46 of the Act as the employer had referred to the Commission the words in the clause are to be given their ordinary common-sense meaning and the Commission is to ascertain whether the words used have a clear and unmistakable meaning. Where there is some level of confusion, only then is it permissible to look at intrinsic material to qualify the meaning of the clause or clauses in issue as per the decision of the Industrial Appeal Court in *Norwest Beef Industries Ltd v Western Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 2124.

22 The Commission notes that the union's view that the dispute has narrowed to an incidental interpretation of the Agreement and does not seek an interpretation of the Agreement as an ends in itself. Referring to an interpretation in the decision of the High Court in *Re Cram and Others; Ex Parte Newcastle Wallsend Co Proprietary Ltd* (1987) 163 CLR 140, 148 – 150:

> But there is no substance in the suggestion that an industrial tribunal cannot interpret laws, awards and other legal instruments. A tribunal could not discharge its arbitral functions if it were unable to form an opinion on matter of interpretation. The formation of views and opinions on matters of interpretation in arbitral proceedings does not of itself amount to a usurpation of judicial power.

23 This application cannot be considered as a plain interpretative decision. Accordingly it is the view of Commission, on the balance of convenience, and in accordance with the principles of *Springdale Comfort* that it is reasonable for the issue of jurisdiction to be decided in favour of the union.

Secondary jurisdictional issue

24 The employer's view is that the Commission should dismiss this application due to an inordinate delay caused by the union between the roster and shift changes being implemented at SKH in 2010 and 2011 and this application being filed on 16 February 2012. The employer said that a delay of such length was extreme.

25 The employer requested the substantive matter be dismissed or alternatively, the Commission should refrain from further hearing and determining the matter on the grounds that further proceedings are not in the public interest under s 27(a)(ii) of the Act.

26 The union opposed the employer's application and said relevant considerations when considering public interest under this particular section of the Act include:

> length of the alleged delay;
>
> reason for the alleged delay;
>
> the prejudice suffered by both parties; and
>
> wider implications.

27 The union said the making of the application to the Commission did not create an unreasonable delay in the circumstances. The roster changes:

> were not implemented until on or after 14 February 2011;
>
> the union first raised the dispute with the employer in March 2011;
>
> at no stage was the dispute withdrawn or resolved with the employer; and
>
> once the dispute had been raised with the employer the union was unable to make an application to the Commission until the change had been accurately identified and every attempt had been made to resolve the dispute in accordance with the dispute settlement procedure as per cl 51 of the Agreement.

28 On 28 November 2011 and 2 December 2011 the union requested documents from the employer to clarify exactly what change had occurred in respect of the roster and shift changes at SKH. On 21 December 2011 the union met with the employer and remained unable to resolve the dispute and subsequently made application to the Commission on 16 February 2012. The union submits a significant reason for the time lapse between the matter first occurring and the application being made to the Commission was due to the employer's failure to disclose the roster and shift changes to the union and the relevant employees. The employer failed to:

> properly notify the union and the affected employees of roster changes;
>
> failed to properly provide relevant information to the union;
>
> as a result the union was unable to identify what changes had actually occurred; and
>
> once the changes were introduced there was much confusion amongst employees.

29 The union said that the employer appeared to intimidate employees by singling them out. There was also a view that employees felt that if the changes were disputed they may lose their jobs. The union said that the employer is primarily responsible for the time that this matter has taken to come before the Commission and it is not in the public interest to deny affected employees a remedy when the delay was caused primarily by the employer and was certainly not in their control having regard for the decision in *Cossey v Bayswater Nominees Pty Ltd T/A Forest Place Café and Kiosk* (1992) 72 WAIG 1372, 1374.

30 The union said it is relevant to take into account the prejudice that the employer may suffer if the matter proceeds to be heard and determined which, in the union's view, is minimal as:

> the employer had notice that the union disagreed with the consultation regarding roster changes from March 2011, or alternatively November 2011 and was therefore able to prepare a response to the dispute;
>
> the employer's witnesses were able to give evidence;
>
> the union's witnesses were able to give evidence;
>
> the delay was not so great that it was likely to significantly compromise the witnesses' recollection of events;
>
> there is an abundance of evidence able to establish the relevant facts in this matter including minutes of meetings, copies of correspondence and rosters;
>
> the orders sought by the union are not of such a nature as to cause prejudice to the employer's operations; and
>
> the employer is a large organisation with the ability to easily accommodate any changes as a result of the orders being granted.

31 Relevant also in matters such as this is the prejudice that may be suffered by the affected employees in such matters. Relevant decisions in this regard are *Western Australian Prison Officers' Union of Workers v Ministry of Justice* (1994) 74 WAIG 2796, 2798 and *State School Teachers Union of WA (Incorporated) v Paul Albert Director General Department of Education* (2006) WAIRC 03475; (2006) 86 WAIG 370 [25].

32 The union said that there are a number of affected employees that will be likely to suffer prejudice if the matter is not heard and determined. Employees that continue to be affected by changes to rosters including Ms Bunter, Ms Higgins and numerous others. It is the view of the union there is no other course of action open to these people.

33 In reply the employer considered the delay to be particularly serious. When a s 44 application is lodged the primary intention is to allow the Commission to become involved in disputes at an early stage. The employer's view is that an inordinate delay prevents an expeditious resolution as per *Cossey v Bayswater*.

34 The employer said that there was no further contact from the union on issues until 28 November 2011 when the union advised of a dispute. There was no contact and there continued to be an ongoing failure to attend working parties. Following November 2011 it took the union a further four months to file this application, adding to the delay.

Conclusion of secondary preliminary issue

35 The Commission has considered the submissions of the employer and the union. The Commission has been asked by the employer to exercise its powers under s 27 of the Act to dismiss the matter due to the unreasonable delay between changes being implemented at SKH between 2010/2011 until this application was filed in the Commission on 16 February 2012.

36 The Commission has had regard for the Act and the employer's view that there has been a significant delay between the implementation of changes to the rosters and the lodging of this application. Further, that it is not in the public interest that the Commission deal any further with the application, is rejected. When taking into account s 26 of the Act in relation to the employees' interests the Commission finds a significant number of the employees' claims may be prejudiced if their concerns were unable to proceed had they not had an opportunity to adequately consult with their employer regarding the merits of their rostering arrangements.

37 The Commission has considered the meaning of the words 'inordinate' 'delay' and 'extreme':

> **inordinate // (say in'awduhnuht)**
>
> adjective 1. not within proper limits; excessive: inordinate demands.
>
> 2. disorderly.
>
> 3. unrestrained in conduct, etc.
>
> 4. irregular: *inordinate hours*. [Middle English *inordinat*, from Latin *inordinātus* disordered]
>
> - inordinacy, inordinateness, *noun*
>
> - inordinately, *adverb*
>
> **delay // (say duh'lay), // (say dee-)**
>
> verb (t) 1. to put off to a later time; defer; postpone.
>
> 2. to impede the progress of; retard; hinder.
>
> - verb (i) 3. to put off action; linger; loiter: *don't delay!*
>
> - noun 4. the act of delaying; procrastination; loitering.
>
> 5. an instance of being delayed.
>
> b. a circuit whose sole function is to delay or retard a signal by a fixed amount of time.
>
> **extreme // (say uhk'streem), // (say ek-)**
>
> adjective (extremer, extremest) 1. of a character or kind farthest removed from the ordinary or average: *an extreme case; extreme measures.*
>
> 2. utmost or exceedingly great in degree: *extreme joy.*

3. farthest from the centre or middle; outermost; endmost.

4. farthest, utmost, or very far in any direction.

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38 When bearing in mind the ordinary meaning of the words the Commission does not consider the 'delay' to be 'inordinate' or 'extreme'. In the circumstances there were significant changes at SKH to the rosters that were commenced by the employer up until 14 February 2011. The Commission finds the union raised the dispute with the employer in March 2011, a month after the implementation of rosters. In the plain meaning of 'inordinate' or 'extreme' the Commission does not consider the 'delay' to have been 'inordinate' or 'extreme'. Following the raising of the dispute with the employer the union spent some considerable time identifying what changes had occurred. The union filed application in the Commission as soon as it was certain what the changes were.

39 The Commission is of the view that the reason for the time lapse between the union raising the matter with the employer and an application being made to the Commission was largely due to the employer's seeming failure to disclose the roster and shift changes to the union and its employees. As a result of this the union was unable to identify what changes had actually occurred. The Commission is of the view there appeared to be much confusion amongst the employees and the union who, whilst the employees' rosters had changed, were unable to explain exactly what those changes were. Furthermore, at no stage did the employer reveal the fact that it had introduced, for some employees, unpredictable rosters. The Commission is of the view that the employer failed to formally notify the union of the changes to the start and finishing times when introducing new shifts.

40 In considering carefully the employer's request to dismiss this application under to s 27 of the Act the Commission has also taken into account the prejudice that might be caused both to the employer and to the union, their members and potential members in terms of any outcome that may result if the Commission were to desist from hearing and determining the merits of the proceedings as lodged.

41 The Commission suggests several factors were formative in respect of the issue of delay, those being the length of the delay and the explanation for the delay. It seems to the Commission that some months passed without anything happening in relation to the issues relating to the rosters if one considers the implementation of the changed rosters as the first point of confusion or dispute. There is one significant factor weighing against the employer. The delay was brought about not by a tactical decision by the union to cause the delay but by a lengthy process of adversity or frustration occasioned by the union's members and employees of the SKH who were subject to the changed rosters without seemingly an appropriate level of understanding. The Commission has weighed that hardship in the balance.

42 The Commission considers it necessary for the employer in matters such as these to demonstrate that the delay referred to has given rise to a significant risk and that it may no longer be possible to have a fair hearing of the issues in the action or that the delay is likely to cause, or to have caused, serious prejudice. In the Commission's view not one of those matters is established and the issue is therefore determined in favour of the union.

Merit issue

43 In February 2010 at the SKH the employer commenced a review of the roster system in patient support services (PSS). As a result of the review almost half of the shifts were changed, a total of 27 shifts. Changes to the roster were introduced across SKH from 14 February 2010 and the changes were concluded in 2011. There was no dispute that changes did occur to rosters and shifts.

44 To assist the Commission the employer and union reached a statement of agreed facts which, whilst helpful in part, did little more than indicate how far the parties were in dispute.

45 The union claimed the employer made changes to the SKH support workers' rosters and shifts without complying with the requirements of cl 13.4 of the Agreement.

46 The employer asserts while there were changes to the roster system, in this case it was not necessary to comply with the provisions of cl 13.4 of the Agreement. In essence the employer relies on the review as having made 'minor' changes to the start and finish times. The employer suggests such changes do not amount to a proposal to amend the rostering system and therefore there was no obligation to comply with cl 13.4 of the Agreement.

47 Furthermore the employer is of the view that employees were already on flexible rostering arrangements and no employee was forced from fixed shift rosters to unpredictable rosters or, where such employees were on fixed shifts prior to the PSS review they remained on fixed shifts after the PSS review. For example Ms Aston who works the same fixed days now that she worked prior to the PSS review.

48 The relevant sections of the Agreement are as follows:

13.4 **Changing ordinary hours of work /rostering arrangements**

(a) The Consultative Committee established under Clause 47. Consultation Mechanism of this Agreement will apply the following principles when considering major issues relating to rostering:

(i) Rostering must balance employee and Employer needs while recognising that the priority is the provision of quality patient care.

(ii) Rostering systems must conform to relevant Agreement provisions.

(iii) Rosters should be posted well in advance of their implementation to facilitate employees planning and dispel feelings of anxiety and uncertainty.

(iv) Specific Hospital policies pertinent to rostering must be determined and recorded prior to implementing a new rostering program.

(v) Rostering policies must serve to protect individual employees against discriminatory action.

(vi) The rostering system must accommodate all employees' leave allowances.

(vii) Any proposals to alter the rostering system such as alternative methods of working time, 38 hour week or the introduction of 12 hour shifts must be supported by a two thirds majority of affected employees, or such other proportion as is agreed between the Employer and the Union.

(viii) Ballots will be by secret postal ballot of all affected employees including employees on leave or workers' compensation who can be contacted as far as reasonably practicable. Ballots will be conducted by, and the results scrutinised and declared by, two persons one of whom is nominated by the Chief Executive/General Manager at the relevant Hospital and the other of whom is nominated by the Union.

(ix) Conditions outside the workplace must be considered in any roster change of start and finish times to minimise undesirable affects e.g. personal safety and public transport.

(x) Full time and part time employees will not have their hours reduced by the introduction of rostering changes.

46 Introduction of change

46.1 Notification of Change to the Employees and the Union

(a) The Employer will notify the employees and the Union where the Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on the employees.

(b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the Employers's workforce or in the skills required; the elimination or the lessening of job opportunities, promotion opportunities or job tenure the alteration of the hours of work; the need for retraining a transfer of employees to other work or locations and restructuring of jobs.

47 Consultation mechanism

47.1 Consultative Committees are for the purpose of progressing the issues raised in this Agreement.

47.2 A Consultative Committee will be established at a Hospital when the Union or the relevant Employer notifies the other of its intention to do so.

47.3 The Union and relevant Employer will meet and jointly determine the structure and process (including elections and timetables) of the Consultative Committee.

47.4 Consultative Committees will be made up of representatives of the Employer and employees nominated by the Union.

47.5 Each employee nominated by the Union who has not previously received training will be released to attend the Union training course before the first consultative committee meeting.

47.6 The Employer will provide reasonable resourcing to ensure effective and informed employee participation, including access to all relevant information and a reasonable period of time of release to facilitate the consultative process.

47.7 Employees nominated by the Union will be paid for attendance at Consultative Committee meetings as if they had worked their normal roster.

47.8 Employees nominated by the union will be given time off in lieu when they attend a Consultative Committee meeting in their own time; such time to be equal to total travel and meeting time.

47.9 The Employer will be responsible for the keeping of proper records of the Consultative Committee. At the conclusion of each meeting, the Employer will forward minutes of the Consultative Committee to members of the Committee.

47.10 An officer of the Union is entitled to attend a meeting of the Consultative Committee and address the Committee on any issue, but will not vote on any motion.

49 The union said start and finish times were changed without sufficient consultation. The union identified different changes the employer introduced to the rosters initially, changes to shift start and finish times across the hospital and the introduction of new shifts. The union said the employer altered almost half the shifts across SKH. The union refers to these as shift changes. The employer also introduced a 6/2 roster and an unpredictable roster and/or a flexible roster as opposed to a fixed roster for employees who were not leave relievers. Prior to the changes it was the view of the union almost all employees at the SKH were on a fixed roster.

50 Mr Frank Robert James Waa Ohia, employee of the union gave evidence that to his mind he did not receive a satisfactory response from his queries to the employer and subsequently sent on a bundle of some 51 letters signed by SKH employees

identifying their concerns regarding the way changes to rosters had been implemented in 2011 (exhibit A9, annexure A). The witness gave evidence he was in attendance at the meeting with the employer on 21 December 2011. At that meeting the employer declined to reveal the nature of the changes to the roster. In addition, there had been no consultation. Further, the witness suggested the employer was unwilling to negotiate a resolution to the dispute and in his mind the employer was 'intimidating, insulting, and hostile.' (exhibit A9 [18]).

51 In March 2010 and February 2011 expressions of interest were sought from employees to either temporarily or permanently increase hours. The employer said that consultation with employees in general staff meetings as well as JCC meetings and Review Implementation Working Party (RIWP) meetings were scheduled to be held bi-monthly, however many of the meetings were cancelled. The individual changes to contracted hours and rosters, in the view of the employer, were not major changes that were likely to have a significant impact on the employees and therefore did not come under the provisions of cl 46 of the Agreement.

52 The first witness called by the employer was Ms Annemarie Alexander chief executive officer of SKH. The witness gave evidence there had been complaints from several members of PSS staff about rosters and PSS practices particularly about access to accrued days off (ADOs). It seemed that rosters were being changed at short notice or alternatively rosters were not being posted far enough in advance. As a result it was determined that a PSS review would take place regarding support services. The witness gave evidence as to how many additional hours were required to address the issues and where those hours should be placed in the roster. The secretary of the union was formally advised there would be a review of PSS. The witness said the advice sent to Mr Kelly in February 2010.

53 Ms Alexander gave evidence that in the previous year JCC meetings were scheduled every second month and the union failed to attend any of them. The witness gave evidence the JCC meeting schedule was usually put out 12 months in advance.

54 Ms Alexander gave evidence that the union was regularly consulted and involved in discussions and furthermore at the JCC meeting on 17 November 2010 Mr Thomas advised that there would be a PSS review ballot which would include the PSS review changes as a package, a commitment that was subsequently withdrawn. The witness gave evidence that throughout the entire process there was significant opportunity for consultation for employees as well as the union.

55 In cross-examination the witness was taken to document 10 (agreed bundle of documents) vol 1, in particular the third page. The witness agreed that the series of shift changes as proposed were to occur to the majority of shifts. The witness was asked whether a secret ballot of affected employees was conducted to which she answered in the negative. The witness was then asked whether the employees were promised the changes would go to ballot to which she responded in the affirmative.

56 In August 2010 the witness allocated to Ms Gail Elizabeth Miller the project of assisting the PSS manager with the PSS review. In March 2010 expressions of interest were sought from employees who would like to permanently or temporarily increase their hours. The witness was unaware of the changes that had been made to rosters and shifts and used the fact that she had been on long service leave and therefore did not know the total changes made.

57 The witness said she would not have made the comments that Ms Carlene Jean Dawson has suggested in her witness statement as she always makes effort to ensure that family responsibilities are accommodated where possible. In the case of Ms Dawson the shift was changed due to operational requirements. Ms Alexander rejected the assertion that one of the union witnesses alleged 'any trained monkey' could do the job. Further, with respect to Mr Ohia, he had referred to the witness' behaviour at the meeting as intimidating insulting and hostile. This was rejected by the witness.

58 In cross-examination the witness was asked:

> But clearly you don't have a lot of respect for United Voice, do you? --- No, I wouldn't say that, either. I've actually had - I've had really good working relationships with many United Voice organisers in the past. I think things have gone off the rails and I think it's partly because - again, it is my opinion - that United Voice have been sorted of side-tracked with the privatisation issue and not just about dealing with the - you know, with the sort of one-on-one local issues.
>
> (ts 103)

59 The union said a rotating and/or unpredictable roster was introduced at SKH for permanent employees who were not leave relievers. Additionally, a policy that all permanent employees who wanted to increase hours or transfer divisions within SKH were to work rotating or unpredictable rosters was introduced (the roster changes).

60 As a further submission the union said that roster changes were introduced without sufficient consultation and in breach of cl 46 of the Agreement. As an alternative submission, the union said that shift changes were introduced without sufficient consultation and in breach of cl 46 of the Agreement.

61 The union said the submission required the consideration of a number of specific matters, namely:

> the way in which the shifts were changed and rosters were changed and the consultation that occurred in relation to those changes;
>
> the employees that were affected by the changes;
>
> the specific consultative provisions of the Agreement that were required to be followed in light of shift changes and roster changes;
>
> whether or not the relevant consultation provisions were followed;
>
> the industrial setting; and
>
> the appropriateness of the remedy sought in light of the aforementioned considerations.

62 For simplicity, the union addressed applicable considerations for roster and shift changes in turn.

63 Ms Dihan Marie Lamey gave evidence that when she was transferred back she was not employed as a leave reliever. About February 2011 she had her roster changed to six days on/two days off without warning. The witness gave evidence that she was not consulted by her employer whether she wanted her roster changed and at no stage was she sent any correspondence or attended any meetings. No-one contacted her to advise her of the changes. She gave evidence she didn't want to work a 6/2 rotating roster but considered that she had no choice as many other staff had been placed on a similar roster.

64 The effect and the changes on the witness was she was tired and did not have as much time or energy to spend with her family. Ms Lamey gave evidence that the roster was unpredictable. Her understanding was that it was to allow three days off every six weeks, however this particular roster did not do that. Ms Lamey gave evidence that she attended a PSA meeting on or about December 2011. Ms Alexander was in attendance and in the view of the witness many of the PSA's raised complaints about the rotating rosters to which Ms Alexander responded 'well you signed the contract'. The witness gave evidence she had not signed a contract in the last three years and certainly had not signed anything agreeing to a 6/2 roster. Early in 2012 the witnesses roster returned to a 5/2 roster. The witness gave evidence she was of the view that it may be changed again at any time without consultation.

65 Ms Carlene Jean Dawson gave evidence. Ms Dawson had been employed by the employer in PSS as a PSA for nine years in the restorative unit. Before the review of the PSS the witness worked on Monday to Thursday from 7:30 am to 12:30 pm. She gave evidence that she had taken the position and SKH particularly because of the hours of work. On or about January 2011 the witness gave evidence she attended a meeting at SKH. The witness gave evidence that:

> At the meeting, Annemarie Alexander, Director of Nursing and Midwifery/Acute Care Services. announced that a number of changes to shift start and finish times for support workers would be introduced across the hospital. My shift was going to change from 7:30 am to 12:30 pm, 5 hours, to 7:30 am to 4.00 pm 8.5 hours.
>
> (exhibit A5 [4])

66 The witness gave evidence she did not want her shift to change and she did not request extra hours. In particular she is a single mother, she has a daughter who is eight years old. In circumstances where the shift had to change the witness would not be able to be there for her daughter after hours and the witness would be required to pay for childcare.

67 The witness gave evidence they were invited to the meeting to give feedback and she did not raise the issue but she was advised that shift was changing. Ms Alexander appeared to be a bit intimidating. The witness later spoke to Ms Miller about her concerns and was advised she could work instead on maternity ward but advised that the shift was certainly changing to 8.5 hours.

68 On or about 14 February 2011, when the shift changes were introduced, the witness gave evidence that she put her daughter into after-school care. The witness gave evidence that was very distressing for her however she has now become accustomed to working the 8.5 hour shifts but it is interesting to consider:

> It is hard to find time to do all the cleaning, cooking, shopping as well is looking after my daughter and getting her to appointments, when I have to work so much. I am getting into a routine but was really difficult for me at the time, and if I was given the choice at the time, I would definitely have chosen to keep my hours as they were.
>
> (exhibit A 5 [10])

69 In re-examination the witness was asked when she was given the option of working on maternity ward that involved working Fridays did the employer try and arrange the roster so the witness did not have to work Fridays to which the witness responded in the negative.

70 Ms Jennifer May Bunter gave evidence as having been employed at SKH for 15 years. Ms Bunter gave evidence she had always worked in patient support services as a PSA. On 10 February 2010 she attended a JCC meeting. At the meeting the review of the PSS was discussed and according to the witness no information regarding changes to rosters was given.

71 At the meeting Ms Alexander agreed to meet with staff at a separate meeting to discuss any current rostering issues. The meeting was scheduled within four weeks and Ms Bunter was in attendance. Ms Alexander asked a direct question if there were any issues anyone had with the current rosters. The witness gave evidence that one of the concerns was that the roster was not permitting staff to take ADOs.

72 On 14 April 2010 Ms Bunter attended a JCC meeting at SKH. Changes to rosters were not disclosed or discussed. On 17 November 2010 the witness gave evidence she attended a JCC meeting and received from the employer a number of changes intended to be introduced to shift start and finish times. Ms Bunter gave evidence she was not sufficiently worried about such changes as she considered there would be a working party followed by a ballot followed by a trial period. This was actually confirmed by the fact that a draft ballot was handed out to staff.

73 On 20 December 2010 at a general staff meeting the witness gave evidence that Ms Alexander advised no vote would be conducted. Ms Alexander's view was that staff did not have to vote on changes given they were structural changes as part of a larger support services review. The witness gave evidence that a number of people raised concerns about the changes and Ms Alexander's response was 'I can do what I like'. At one point Ms Alexander said that 'any trained monkey' could do our jobs. The witness' view was that this was her attitude to consultation. The witness gave evidence following her annual leave she returned to work towards the end of February 2011 and found her shift times had changed. Her night duty shift which had been 7:30 pm to 6.00 am was changed to 8:30 pm to 7.00 am. Her evidence was it interfered with getting her daughter ready for school.

74 The afternoon shift had also been changed so that it finished 30 minutes earlier at 8:30 pm. The witness gave evidence, this meant there was insufficient time for a handover and that the afternoon shift staff could not complete all the duties leaving work for the night shift staff to do. The witness together with two other night shift workers wrote to the support office with their concerns about the changes to the start and finish time. At no stage did the witness receive a response so Ms Bunter requested the RIWP representatives raise the issue at the next meeting. The witness was advised by Ms Lynette Anne Aston that the matter was indeed raised but that nothing was done. Ms Bunter again wrote to the support office requesting a meeting with Ms Alexander and asked that the shift be moved back at least 30 minutes so that the night shift commenced at 8.00 pm. Again no response was received.

75 In cross examination in correspondence from Ms Bunter to Ms Tucker dated 23 March 2010 the witness expressed her interest in the night shift position, in particular from 8.30 pm to 7.00 am (exhibit R1). According to the witness at no stage did she receive a response to the correspondence. The witness confirmed she had been working the changed shift for 18 months. In re-examination Ms Collins asked Ms Bunter to confirm whether she was positive that Ms Alexander had stated 'any trained monkey could do your job'. In response the witness said 'I am positive that is what she said':

> Why are you certain?--- Because we - after the meeting, the support services staff, we were discussing it and, I mean, at the time it's pretty funny when she said that and she does get a bit heated at meetings but it - it was quite - we were quite shocked that she would think that - that our jobs were - that had trained monkey could do our jobs. And the Union representative at the time was there and he was quite disgusted as well. Unfortunately he is not there any more.
>
> (ts 47)

76 Ms Aston gave evidence. Ms Aston had been employed by the employer for approximately 17 years, always working in patient support services as an orderly and PSA. Employees were guaranteed that shift times would go to a vote document 10, (agreed bundle of documents). Subsequently Ms Alexander announced the shift changes were going ahead without a ballot. The witness gave evidence there was unhappiness amongst the staff:

> On 27 January 2011, 10 March 2011 and 24 March 2011 I attended the Review Implementation Working Party meetings. It seemed to me that, because Annemarie had made up her mind and the changes had already been introduced, the meetings were more of a token than an actual opportunity to give feedback and effect change.
>
> (exhibit A7 [8])

77 The witness considered staff were not properly represented at the meetings given employees were not on shifts and meetings were not held across shifts to accommodate committee members. The witness reported many employees were forced to work a 6/2 rotating roster. Many of those staff have reported they do not rotate properly and their rosters were ad hoc and unpredictable. The witness gave evidence that many permanent staff requested a change of hours or a transfer to another division. They could only do so where they agreed to work a 'rotating' roster. To do so meant that employees were constrained to working the prescribed arrangements allowing no flexibility for staff needs.

78 Ms Frances Mary Hebden gave evidence as the health team leader having been employed by the union since February 2003. The witness gave evidence that from about February 2011 the union commenced receiving reports from members regarding changes to their rosters however reports were often varied and it was not clear as to exactly what changes had occurred.

79 The witness gave evidence that there were members who were not unhappy with their rosters however, towards the end of the year at the general meeting there were a lot of people who attended including non–members, many who signed up as new members of the union. The witness gave evidence that they had signed up because they were frustrated regarding the way their rosters had changed. Phone calls and reports from changes to rosters started coming in about February 2011. From the witness' point of view people did not understand. Even though Mr Kelly enquired about the correspondence received from Ms Alexander back in 2010 and the union asked to set up a meeting, the union received an email saying that the employer was not going any further with the review so the matter was not taken any further by the union.

80 The Commissioner addressed a question to the witness regarding a number of people that had written a letter both to the employer and to the union and had had their rosters changed or amended to what had been prior to the review commencing. The question was, had in fact the dispute been resolved to which the witness responded there were a number of people who certainly had their rosters changed back. Unfortunately for many others the options were to accept the changes or find another job. For example, for one woman the changes cost her $30 a week in child care as she had had no choice.

81 With respect to the rostering issue with the employer in March 2011 following that meeting Mr Ohia could not recall raising any concerns with the employer between March 2011 and November 2011. Mr Ohia gave evidence it would be an inconsistent conclusion to draw that the matter had been resolved in March 2011. He gave evidence that delegates had grave concerns regarding their rosters, they felt disrespected and they felt as if they had not been listened to by management during various meetings and certainly during the implementation process. It was a commonly felt issue.

82 In cross-examination Mr Ohia was asked whether he was aware that the union knew there would not be a ballot in December 2010. The witness responded in the negative.

83 On or about the end of 2009 and beginning 2010 the employer made a decision to review a number of aspects of PSS at SKH. That decision, in the opinion of the employer, resulted from a number of factors including (but not limited to):

> the result of the environmental audit into infection control;
>
> the commencement of the four hour rule;
>
> an increase in patient presentations and admissions;
>
> requirement for additional PSS equipment and training;

a high incidence of absence of workers on workers compensation;

concerns from staff regarding PSS management practices; and

the availability of additional hours.

84 The relevant authorities provided by the employer suggest that the provision of the Agreement should be read in its natural sense within the context of the award as a whole. The authorities relating to interpretation are:

Perth Electrical Tramways Employees' Industrial Union of Workers v The Commissioner of Railways (1927) 7 WAIG 155*;*

The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch v Wormald International (Australia) Pty Ltd (1990) 70 WAIG 1287;

Norwest Beef Industries Limited v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124;

Hospital Salaried Officers Association of Western Australia (Union of Workers) v The Hon Minister for Health (1981) 61 WAIG 616

Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia (1987) 67 WAIG 1097

85 The particular clause of the Agreement suggests that there must be a two-thirds majority of affected employees agree by ballot where there is an alteration to the rostering system. It is the view of the employer that there were no changes to the rostering system in this case. While the clause provides examples of changes to the system such as the introduction of 12 hour shifts, there were minimal changes to start and finish times for some divisions within the PSS at SKH. The employer says such would not amount to a change to the rostering system.

86 It is the view of the employer that there was consultation with the affected employees. The employer denies that employees were working anything other than fixed shifts prior to the PSS review and a number of employees were already on flexible rostering arrangements. Where employees were on fixed shifts prior to the PSS review they remain on fixed shifts after the PSS review. For example Ms Aston works the same fixed days now that she worked prior to the review. The latitude of the review was to cover such matters as job titles, roles and responsibilities of PSA orderly, cleaner positions, rostering practices, leave management, recruitment, selection appointment and orientation practices.

87 Ms Miller on behalf of the employer became responsible for assisting with the day to day responsibility and management of PSS including rostering. When that occurred she identified a number of issues with the PSS rosters and took steps to fix those issues including:

ensuring rosters were available at least six weeks in advance;

shifting of the location of posted rosters from inside the office to a locked glass cabinet notice board in the public area; and

reducing the number of rosters to ensure efficient rostering.

88 Ms Miller gave evidence for the employer as nurse manager at SKH responsible for the implementation of the new rosters and shift changes following the review. The witness gave evidence her involvement in the implementation process was over the period August 2010 until September 2011.

89 Ms Miller makes comments in her witness statement regarding the six days on and two days off. Rostering over a four-week cycle the employee works 20 days on and has eight days off and the employee's two days off each week rotates sequentially. During the PSS review and implementation the witness attended a number of JCC meetings and RIWP meetings. Evidence was also given that a number of meetings were rescheduled to allow for the union to attend.

90 It was the view of the witness that individual concerns from employees that arose were addressed during the consultation process. A lengthy questioning process then took place regarding Mr Anthony Paul Bradfield's shifts and whether they formed a 6/2 roster pattern. The witness agreed for a period they look like a 6/2 roster pattern however Mr Bradfield was in fact on a flexible roster.

91 The witness had spoken and consulted with all persons back in 2010 rather than in recent periods although some of the evidence related to early 2011.

Employer's concluding submissions

92 Ms Tiffany Venning, an organiser for the union forwarded an email to the employer dated 15 March 2011 alleging a breach of cl 13.4 of the Agreement, document 25 (agreed bundle of documents). The senior HR consultant at SKH did not agree. Ms Alexander gave evidence that she did not hear anything from the union suggesting there were any concerns that the union was in dispute before November 2011 (exhibit R2).

93 In the High Court case of *Australian Securities, and Investments Commission v Merrideth Hellicar* [2012] HCA 17 it was held that the minutes of the board meeting were a formal record of what occurred at the meeting. Minutes of the meeting were created and adopted close to the time of the events in question. The employer says Mr Ohia was provided with the option to review and comment on the minutes of the meeting held 24 March 2012, some 15 months after that meeting occurred therefore the content of the minutes should be accepted over the evidence given by Mr Ohia.

94 Turning to the merit submissions, in relation to hearsay and opinion evidence the employer relied upon a decision of Kenner C in *Jeffrey Kennedy Murray v Hammersley Iron Pty Ltd* (2004) WAIRC 10967; (2004) 84 WAIG 2325 in which the Commissioner comments that hearsay evidence should be afforded little weight.

95 The employer filed witness statements for Ms Miller (exhibit R3) and Ms Alexander (exhibit R2). Each of the witnesses was credible and stood up to cross examination by the union. In cases where there was conflict between the evidence of the employer's witnesses and the union's witnesses the employer said that its own evidence ought be preferred.

96 Ms Miller in evidence suggested that Mr Bradfield as a leave reliever was on a flexible roster both before and after the review (ts 107 – 110). While Ms Miller agreed some periods had a pattern with respect to rostering Mr Bradfield was still on a flexible roster.

97 Ms Lamey, witness for the union gave evidence that she did not recall dates of when meetings were called. Under cross-examination Ms Lamey stated that she did not have fixed shifts prior to the review. Ms Lamey admitted that she is now happy with the current rostering.

98 Ms Dawson gave evidence for the union that the area (the comprehensive stroke unit) she worked in had higher activity and staffing. At the time of the review Ms Dawson gave evidence she was given three options; to work on the maternity ward, to work less days on her current ward or to increase her hours. Ms Dawson's witness statement [10] concedes that she has become accustomed to working the shifts and likes the extra money. Given the passing of time it is accepted by Ms Dawson that it would be difficult to now change back.

99 Mr Bunter gave evidence for the union that she was working day shift in 2010. In March of that year she requested to work 8:30 pm to 7.00 am from Sunday to Wednesday (exhibit R1). Ms Bunter received no response to that request however currently she works the 8:30 pm to 7.00 am shift from Sunday to Wednesday and had only worked the 7:30 pm to 6.00 am shift for a few months from August 2010 until she went on leave in January 2011.

100 Ms Hebden gave evidence she was not aware of what other meetings were being attended nor could she determine whether anyone from the union had contacted SKH between March and November 2011 (ts 63). Ms Hebden gave evidence that JCC meetings were cancelled by management and at times there was only 24 hours' notice of cancellation. This evidence is in direct contradiction to the evidence given by Ms Miller and Ms Alexander and it is the view of the employer that their evidence should be preferred in this regard.

101 The changes made to shifts were that the start and finish times to shifts were moved for a number of employees. For example, the union asserted in the case of Ms Higgins changes were made to her start and finish times yet, Ms Higgins admitted under cross-examination she was a casual employee at the time of the consultation and even at this stage has not worked the new shift referred to. The second example of a shift change was that of Ms Dawson who gave evidence that the increased shift length resulted from the introduction of the stroke unit. Ms Dawson's evidence is that she is now accustomed to that roster and would find it difficult to change back (ts 42).

102 The Agreement contains scope in relation to changing hours of work and rostering. It is the view of the employer that such requirements include that a full-time employee must have an average of 80 hours per fortnight with two hours contributing towards an ADO (cl 13.1(c) - unless an alternative arrangement has been agreed to); where it is practicable not more than six consecutive days of work (cl 13.6); rosters setting out employees hours of work where it can be easily seen (cl 13.7) posted at least 48 hours before it comes into operation (cl 13.8) and at least 10 hours between shifts (cl 13.10). The employer has complied with these requirements and is not required to provide a fixed pattern of work or indeed fixed days. Further, the employer is not required to roster over five days nor six days in a row for example seven days straight.

103 It is the view of the employer that the union is seeking to reopen the review and implementation process that has been concluded. Employees are now settled and used to their current shifts and rosters. The employer says the Commission should not issue the orders sought by the union or indeed any orders at all and should indeed dismiss the application.

Union's concluding submissions

104 The union says in response to Mr Ohia's evidence that the minutes of the meeting on 24 March 2012 should be accepted. Mr Ohia said he had a very good recollection of the meeting and his evidence was reliable and should be preferred over minutes that were drafted by the employer.

105 The application by the union was made as a result of the employer causing confusion in implementing shift changes, roster changes and, in the process, failing to consult with its employees. The employer made significant changes without consultation appropriate to the Agreement provisions. It is the view of the union that some of the employees remain upset and subject to ongoing unworkable rosters. The union has made a number of submissions and continues to rely upon those submissions as outlined and filed on 18 June 2012.

106 In response to the employer's views, in particular objections to parts of the union's evidence on the grounds of hearsay and opinion, the union submits that the employer's claims that Ms Dawson's evidence should not be disregarded. It is the view of the union that Ms Dawson had direct knowledge of what was said in the meeting she attended. Furthermore the employer had the opportunity to cross-examine Ms Dawson on this point. The evidence goes to the state of mind of Ms Dawson, who in the union's view was intimidated by the director of nursing Ms Alexander. This, in the union's view, is an exception to the rule against hearsay.

107 The union in response to the employer's suggestion that Ms Dawson's evidence should be disregarded considers the fourth and fifth sentences of [6] in her witness statement are not opinion evidence, rather evidence of Ms Dawson's state of mind. With respect to Ms Lamey, once again the union says this is not opinion evidence but evidence of Ms Lamey's state of mind. Further, the rules of evidence do not apply in this jurisdiction and the union considers it has established its case through persuasive evidence.

108 The union submits that sufficient evidence has been presented to establish that both shift changes and roster changes have occurred. The union submits Ms Alexander's evidence is not credible as she contradicts herself many times during cross

examination. For example, she first states that shift start and finish times did not change (ts 89). She then states there were some changes to shift start and finish times (ts 90). The witness then denies knowledge of the changes that did occur (ts 90). Ms Alexander's evidence is against the weight of evidence from all witnesses including the employer's own evidence from Ms Miller (ts 105).

109 The union led evidence from Ms Dawson, Ms Bunter, and Ms Higgins that shift changes had adversely affected them (exhibit A5, A7, A10 and oral testimony). With respect to Ms Bunter's evidence it is noted she was adversely affected by the changes and whilst the shift time may once have suited her, Ms Bunter's evidence is they no longer do so. Further, Mr Bradfield, and Ms Lamey led evidence that the roster changes affected them (exhibits A3 and A4). Importantly, the two witnesses gave evidence the employer may change their rosters again without consultation.

110 Ms Hebden gave evidence that many employees continue to be aggrieved by the shift and roster changes evidenced by the union's highest turnout at its quarterly general meeting in late 2011 with employees complaining of unworkable rosters (ts 55). The union invites the Commission to assume from the type of changes in the evidence outlined that the changes affect numerous employees. Therefore it is likely that some of those employees continue to be adversely affected by the changes to this day. Drawing assumptions is a matter that the employer objects to.

111 The union says sufficient evidence has been led to establish there was insufficient consultation regarding the shift changes and the roster changes. It is not disputed that at a PSS meeting on 20 December 2010 the employer announced the proposed shift changes would be introduced without a ballot. The union submits this decision was made without consultation with the JCC, the union or the affected employees. This resulted in the employees concerned feeling disempowered and despondent.

112 The employer further isolated employees at the PSS meeting of 20 December 2010 by informing employees that regardless of feedback shift changes would be introduced as planned. At the same meeting the union submits threatening and belittling comments were made to employees who raised concerns and the employer refused to discuss individual concerns that were raised by employees. Individual employees were required to approach the employer directly with their concerns (exhibits A5 and A6).

113 The employer failed to notify the union or the relevant employees in any way about the roster changes nor did the employer put forward any reliable evidence that it disclosed and consulted about the roster changes. Interestingly, nowhere on the expressions of interest does the employer state that employees must work a flexible roster or a 6/2 rotating roster if they choose to increase their hours or transfer divisions. The expressions of interest were distributed on 14 February 2011 and the roster changes took effect on or about that same day on the rosters published six weeks in advance suggesting that the employer failed to consult with any employees regarding the roster changes before implementation.

114 The union submits this dispute relates to the requirements of consultation about change not requirements for rostering and for both shift changes and roster changes the employer was bound to follow the requirements of cl 13.4 of the Agreement and failed to do so. In the alternative the union submits that the employer was bound to follow the requirements of cl 46 and failed to do so.

115 It is the union's view that the employer has isolated and overwhelmed its employees and in a number of cases led them to believe they had no choice about the changes.

116 The union considers the orders it seeks are appropriate in the circumstances and provide the opportunity to resolve any issues with individual employees with minimal impact to the employer's operations.

117 The union suggests that if a ballot it seeks is conducted it provides the relevant employees an opportunity to make a choice about whether or not they accept the changes without being forced to identify themselves to the employer, an issue which appears to be relevant. The union suggests that if a ballot is conducted, a ballot should be conducted with all employees at SKH although a ballot can be limited to fewer employees if the Commission considers it proper. The employer is a large organisation with ample resources and is perfectly capable in the view of the union of returning the roster at SKH to the way it was before the shift and roster changes.

118 In conclusion, the union submits on the balance of convenience the union and its members would suffer greater prejudice if the orders it seeks were not granted, then the employer would suffer if the orders were granted.

Employer in reply

119 On 21 August 2012 the employer considered the union's closing submissions and advised the Commission it did not have any submissions in reply as there were no additional matters of law raised.

Conclusion

120 The task of the Commission in making assessments of credibility of witnesses has some issues as the Commission observed evidence directly in conflict. The Commission has had the opportunity of observing closely each of the witnesses in the witness box and in a large part the evidence of each witness was provided honestly and to the best of their recollection. Some inconsistencies arose between witnesses. For example, Ms Alexander was inconsistent in her responses regarding the extent of roster changes that have been made at SKH and at times her evidence was contrary for example to the evidence of Ms Miller regarding the roster and shift changes that have occurred. Ms Alexander admitted herself she was not responsible for the issues relating to shift start and finish times. In addition, at an important time, Ms Alexander gave evidence she was on long service leave. The Commission therefore finds, in terms of the evidence on shift start and finish times and consultation with the union, the evidence of Ms Alexander is not considered to be credible with respect to knowledge of rosters and shifts.

121 The Commission has had regard for the submissions both oral and written of the parties together with the evidence of the various witnesses.

122 One of the most important conditions of employment, leaving aside wage and salary rates, is the issue of hours and the structure in which such hours are arranged that employees are required to work. It is certainly true that disputes regarding appropriate and/or reasonable hours of work are among the most frequent and important issues dealt with by industrial tribunals. Hours of work is a shorthand term for the hours which an employee agrees to work or is required to work under a contract of employment.

123 Turning to cl 13.4 of the Agreement it is the Commission's view that the priority of providing patient care while balancing the needs of employees and employers is reflected as a primary principle in the Agreement. To specify that rostering systems must conform to the relevant Agreement provisions is of itself a very broad principle, fundamentally reliant on consultation, drawing together the views of clients, the broader hospital staff, the employer, the union, employees and union members.

124 Clause 13.4 (a)(iii) to (x) of the Agreement list the remaining principles to apply when seeking to change rosters in accordance with the provisions of the Agreement. It is interesting to note that one of the provisions relates to timing and planning 'to dispel feelings of anxiety and uncertainty', suggesting rosters should be displayed well ahead. On the basis of what occurred following the review the Commission is of the view the employer did not undertake such timing and planning.

125 The Commission finds:

> the employer promised there would be a secret ballot of the affected employees in accordance with cl 13.4 of the Agreement, a promise that was subsequently withdrawn. The ballot was to be undertaken to consider the alternative proposals to working rosters at SKH in accordance with the provisions of cl 13.4 of the Agreement;
>
> it is conclusive that there was at times, a shortage of consultation by the employer with the union about the introduction of the shift and roster changes at SKH. Furthermore, the shortage of consultation extended to many of the employees at SKH;
>
> a significant part of 2011 was spent by the union identifying exactly what shift and roster changes occurred;
>
> the breakdown in relationships between the employer and current officials of the union was patently obvious throughout the case. It is a sad day for relationships between an employer, its employees and unions, in this case the union, where consultation, in relation to a review process, where an employer relies entirely on a letter to a union secretary in 2010, an email to Tiffany Venning and a discussion seemingly to John Healey (all of which occurred in 2010 and early 2011). It was curious that John Healey did not appear as a witness;
>
> the employees were confused about the roster changes following the review and also about the shift changes emanating from the roster changes, so confused it became somewhat of an issue in terms of working the new rosters out. There was definitely throughout 2011 a significant element of disquiet and unease amongst the employees at SKH;
>
> disquiet remained amongst some employees who are concerned that there may be further roster changes at short notice and without consultation as demonstrated by the evidence;
>
> it is curious to note that the employer notified the union secretary in 2010 of the forthcoming review as an introduction of major change, yet said the roster and shift changes were minor, and therefore did not require a ballot in accordance with cl 13.4 of the Agreement. The relevant clause from the Agreement:
>
> > 46.1 provides that the Employer will notify employees where it has made a definite decision to introduce major changes that are likely to <u>have significant effects on employees</u>.
> >
> > (underlining is the Commission's own emphasis)
>
> changes were made to start and finish times for a number of employees back to original rosters and shift arrangements at SKH; and
>
> some employees at SKH are now settled and used to their current shifts and rosters.

126 Kennedy C said of the failure to consult in *N.B. Love Starches (W.A.) v The Food Preservers' Union of Western Australia, Union of Workers* (1994) unreported:

> It seems to me that notwithstanding the inherent respect which should apply for the fact of an agreement between an employer and a union, a peremptory rejection of an existing agreement as has occurred here might, perhaps, be justified in the event that it was discovered, for instance, that employees who had been or would be affected by it had been misled or deliberately ill-informed or were not informed or consulted adequately. Indeed a failure in these respects would be a very significant one in the application of the established principles for genuine enterprise bargaining which this tribunal has promoted and encouraged. I have no doubt that there is an implicit right for employees involved to know. A union, with its role legislatively recognised as a party in the process as distinct from simply an agent for employees, must be particularly diligent in this respect so far as its functioning is concerned and particularly vigilant in respect of negotiations with any employer. An enterprise bargaining arrangement between an employer and a union which is not founded in respect for the affected employees' implicit right to know and be consulted properly in the course of its negotiating and its outcomes in might well, in my view, be fundamentally flawed under the Principles and in conflict with the objects of the Act.

127 While in these proceedings, there is no evidence of either the union or the employer ceasing to function in respect of enterprise bargaining, what is evident is the limited opportunity for the ongoing involvement of employees and the union participating in roster changes and subsequently shift changes following the review at SKH, particularly in 2011 and 2012.

128 It is open for the Commission to draw implications from the failure of the employer to properly consult persons, either members of or eligible to be members of the union regarding the shift changes and roster changes made by the employer. The implications the Commission draws in this case strengthens the view I have expressed concerning the conduct of the employer, that is, in some cases the changes made by the employer have had a direct implication such as the example reflected in evidence by Ms Dawson when her shift was changed in length and she was unable to care for her child after school (exhibit 10 [5]). A night duty shift change from 7.30 pm to 6.00 am to 8.30 pm to 7.00 am to Ms Bunter's shift prevented her preparing her daughter for school (exhibit A6 [11]). The latter change was made while Ms Bunter was on annual leave.

129 In the decision of the *Australian Industrial Relations Commission of Austin Health v Health Services Union* (Victoria) [2008] 70 IR 269 DP Hamilton considered a dispute regarding a proposed change of the roster and whether the dispute among that to organisational change. It was said in the decision:

> Organisational change carries with it a sense of general system change, and not just any change. For example, a change of 5 min to the time of the tea break may not be organisational change, nor might change to an individual roster or to the hours of work of an individual.
>
> In this matter the extent of change is, objectively speaking, limited in nature. Employees are to work in blocks of five evening shifts, but work overall the same number of hours, and the same number of shifts. The organisation which is the Microbiology Laboratory remains the same. The content of jobs were performed remains the same. Work teams are not merge or rationalised, the functions of split up or reconfigured, the same 15 employees are to be used, although two additional part time employees are employed. No contractors are to be used. The extent of change is limited. In my view this is not organisational change.
>
> There seems to be little doubt that employees are upset about changes to arrangements that have been in place for some 15 to 17 years, something that any manager should have real sympathy with. Austin Hospital will no doubt have regard to employee views and needs in any decision it makes.

130 The Commission is of the view that the employer acknowledged the changes it was to make amounted to organisational change when it wrote to the secretary of the union in accordance with s 46 of the Agreement. The Commission finds that the employer from the commencement of the review onwards acknowledged that the change amounted to organisational change.

131 What the employer appeared to have was little regard for the 'views and needs' of the employees as many of the employee statements identify they weren't consulted in the process of change:

> Ms Higgins (A10);
>
> Ms Bunter (A6); and
>
> Ms Lamey (A3).

132 The Commission draws this evidence from the statements provided in the course of the proceedings. By inference, the employer's failure to consult at the time spread somewhat widely.

133 Having said that it is apparent from the evidence that in some, not all cases, employees have had further changes made by the employer since the beginning of the review, in some cases back to the original rosters prior to the review commencing:

> Ms Lamey changed from five days on and two days off to six days on and two days off roster. Since the implementation of the new arrangement she has returned to five days on and two days off roster. The witness gave evidence she is happy with the current roster however is concerned it may change again;
>
> Mr Bradfield gave evidence that his roster changed from five days on and two days off to six days on and two days off. Since that change he has returned to five days on and two days off roster, a change. He is happy however believes that the change may be temporary (ts 36);
>
> Ms Dawson had her shift changed from 7:30 am to 12:30 pm to 7:30 am to 4.00 pm. The shift was unsuitable because it required her eight year old daughter to be placed in child care. Ms Dawson's witness statement (exhibit A5 [10]) concedes that she has become accustomed to working the shifts and likes the extra money. Given the passage of time it is accepted by Ms Dawson that it would be difficult to now change back. The witness gave evidence she now likes the additional money but finds it difficult to get everything done if given the choice she would have kept her shifts as they were prior to the change (ts 42);
>
> Ms Bunter had her shift changed from 7:30 pm to 6.00 am to 8:30 pm to 7.00 am. This interfered with getting her daughter to school and meant there was insufficient time for a handover. Furthermore, it did not suit her responsibilities (ts 44). The employer said that Ms Bunter was working day shift in 2010 when she asked to work 8:30 pm to 7.00 am Sunday to Wednesday which she currently works. When Ms Bunter return from annual leave in February 2011 she returned to the 8:30 pm to 7.00 am shift;
>
> Ms Aston has had her roster changed back to her shifts prior to the review (ts 50);
>
> Ms Hebden's evidence was that there was an increase in union membership as employees were frustrated regarding the way rosters had changed. Employee's did not know when they were working ahead of time and were unable to deal with their family issues and commitments outside of work; and

> Ms Higgins worked 6.00 am to 2:30 pm Monday to Friday prior to the review. She was going to work 11.00 am to 7:30 pm and rotate through shifts meaning two weeks morning shift and one week afternoon shift. The 11.00 am shift is classified as a day shift meaning no afternoon shift penalties are accrued. Working afternoons is an imposition as Ms Higgins has had to pick up her granddaughter and it prevents spending time with her family in the evenings She gave evidence she did not want to work afternoon shift without receiving the appropriate penalties. She is currently working Monday to Friday and has not worked an afternoon shift
>
> (ts 131).

134 The employer relied upon a decision of Kenner C in *Murray v Hammersley Iron Pty Ltd* (2004) WAIRC 10967; (2004) 84 WAIG 2325 in which the Commissioner comments that hearsay evidence should be afforded little weight. Contrary to that view in the decision by the then Commissioner Beech in *Tomich v Equator Holdings Pty Ltd* (1991) 71 WAIG 1988 the question of hearsay was considered as it had been reflected upon by the Court of Appeal in *T.A. Miller Ltd -v- Minister of Housing and Local Government* [1968] 1 W.L.R. 992. A letter written by the managing director of a company concerned in a public inquiry being held by an inspector on behalf of a Minister of the Crown, was objected to on the basis that the letter, was not admissable. The letter was admitted. Evidence was produced that the letter was inaccurate, and the writer was not called as a witness or cross-examined. The inspector based some of his findings of fact on the letter and later the Minister also accepted its accuracy and dismissed an appeal from it. The Court of Appeal, per Lord Denning M.R. stated (995):

> So the inspector relied on Mr Fogwill's letter. So did the Minister in his decision. Mr Dobry said that they ought not to have relied on it at all. It ought not even to have been admitted because it was hearsay. It was not on oath, no opportunity was given to test it by cross-examination, and it was objected to. Mr Dobry said that in these circumstances it was contrary to natural justice for it to be admitted.
>
> In my opinion this point is not well founded. A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law: see Reg. -v- Deputy Industrial Injuries Commissioner, Ex parte Moore ([1965] 1 Q.B. 456 et.al.) ... Hearsay is clearly admissable before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it ... The inspector here did that. Mr Fogwill's letter ... was put to the witnesses and they contradicted it. No application was made for an adjournment to deal further with it. In these circumstances I do not see there was anything contrary to natural justice in admitting it ...

135 It is interesting to note that some of the union's and some of the employer's evidence was hearsay. For example, Ms Alexander gave evidence about what occurred in her absence when she was on long service leave. Mr Healey's attitude to satisfaction with the progress, presumably with the review (exhibit R3 [109] Ms Miller's witness statement). Conversely, the union has also submitted hearsay. The Commission as a tribunal has had every opportunity to test the evidence by way of cross-examination. Accordingly, the process was consistent with natural justice.

136 Turning to the word that was relied upon repeatedly throughout the hearing, that of 'consultation' it is the Commission's view that the word is in general use and is well understood:

> **consultation right** the right of unions and/or employers to be informed about and be given the opportunity to express their opinion on proposed changes, especially in the employer's personnel policies and practices, but also in specific organisations in relation to management decisions of a more general kind (e.g. technological change, organisational change, etc) which may affect their employment.
>
> **consultative committee** a committee established for the purposes of joint consultation between management and employees or union representatives in matters such as safety, amenities and the like. In Australia, consultative committees are generally specifically excluded from discussing award matters.
>
> CCH Macquarie Dictionary of Employment and Industrial Relations 1992

137 Having regard for the evidence, it is the view of the Commission that the employer failed to adequately consult with the employees regarding the changes to the roster at SKH. Having made that finding though it is important to consider that such a finding is of itself a retrospective consideration as many employees are now settled in the shifts and rosters they are operating within. Some employees however remain concerned that the employer may make changes again at short notice.

138 The Commission rejects the view of the union that an order ought issue requiring a ballot to be held. The Commission also rejects the employer's view that the application should be dismissed.

139 Certainly the employer has a right to implement the rosters and shifts provided it is in accordance with the Agreement at SKH. Should the Commission intervene and prevent such implementation? There is in my view no ground for such an approach, particularly at this late stage. However, there are pockets of inequities that remain that have been created by the roster and shift changes and the question remains how best to deal with those. It is recognised that the employer has already removed some of the inequities, but not all.

140 The Commission considers it is essential to relieve the concern held by some employees that the employer may make changes again at short notice and accordingly a minute will issue requiring:

> meetings to be held between the union and those employees (small group) affected by the roster and shift changes, with the meetings to be held during paid work hours, to be completed no later than 40 days of the date of the order.

141 Further the minute will require:

the employer to consult with the union and those affected employees about the roster and shift changes that have taken place, the effects of the changes, and the way in which any negative effects may be minimised for those employees affected.

142 The Commission has noted that one of the issues of unease in this dispute has been the decline in the relationship between the union and the employer in late 2011 and 2012. If the discussions referred to in [141] of the Commission's reasons for decision have not concluded by 30 November 2012 to the satisfaction of the parties, then the effect of that clause of the order will lapse. The subject matter of [141] in such circumstances will then be referred back to the Commission for hearing and determination at a time convenient to the parties.

2012 WAIRC 00916

DISPUTE RE THE APPLICATION OF CLAUSE 13.4 OF THE AGREEMENT TO THE ROSTERING CHANGES OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	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 FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 8 OCTOBER 2012
FILE NO/S	CR 10 OF 2012
CITATION NO.	2012 WAIRC 00916

Result	Order issued
Representation	
Applicant	Ms C Collins (of counsel)
Respondent	Ms T Sweeney and Mr C Gleeson

Order

HAVING HEARD Ms C Collins (of counsel) on behalf of the applicant and Ms T Sweeney and Mr C Gleeson on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred by it under the *Industrial Relations Act 1979* hereby orders –

1. Meetings to be held between the union and those employees (small groups) affected by the roster and shift changes, with the meetings to be held during paid work hours, to be completed no later than 40 days of the date of this order.
2. The employer will consult with the union and those affected employees about the roster and shift changes that have taken place, the effects of the changes, and the way in which any negative effects may be minimised for those employees affected.
3. If the discussions referred to in clause (2) of this order have not ended by November 30, 2012 to the satisfaction of the parties then the effect of clause (2) of this order will lapse. The subject matter of the clause will then be referred back to the Commission for further hearing and determination.
4. Should the parties wish to extend the time frames referred to in this order then they may make application to the Commission in writing stating the reasons.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Harrison C	PSAC 7/2011	27/06/2011	Dispute re payment of entitlements of a union member	Discontinued
The Australian Nursing Federation Industrial Union of Workers Perth	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 55/2012	N/A	Dispute re termination of employment	Discontinued
The Civil Service Association of Western Australia Inc.	Dr Ron Chalmers, Director General, Disability Services Commission	Scott A/SC	C 46/2012	6/08/2012	Dispute re performance	Concluded
The Civil Service Association Of Western Australia Incorporated	Commissioner of the Police, Department of the Police	Scott A/SC	PSAC 16/2012	26/07/2012	Dispute re review process	Concluded
The Director General of the Department of the Attorney General	The Civil Service Association of Western Australia Incorporated	Scott A/SC	PSAC 20/2011	24/01/2012	Dispute re employer's reimbursement of costs to union member	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, Department of Education	Scott A/SC	C 18/2012	28/03/2012	Dispute re dismissal	Concluded
United Voice WA	Drs Christopher Jacklyn and James McNeilly as trustees for the Beaumaris unit Trust trading as Beaumaris Family Practice	Harrison C	C 27/2012	23/05/2012	Dispute re termination of Union Member	Discontinued
United Voice WA	The Director General Department of Education and Training	Scott A/SC	C 44/2012	N/A	Dispute re Long Service Leave Entitlements	Discontinued
United Voice WA	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	Harrison C	C 54/2012	N/A	Dispute re application for trade union training leave	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	City of Albany	Harrison C	C 14/2012	18/05/2012	Dispute re revocation of contractual benefit	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Tenant's Advice Service Inc	Harrison C	C 16/2012	3/04/2012 24/05/2012	Dispute re Stand Down	Discontinued

CORRECTIONS—

2012 WAIRC 00853

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 SEPTEMBER 2012
FILE NO/S	P 17 OF 2007
CITATION NO.	2012 WAIRC 00853

Result Correcting Order

Correcting Order

HAVING heard Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated and Ms C Holmes on behalf of the Department of Commerce, and there being an error in the order of 25th day of June 2012, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the order dated 25th day of June 2012 and subsequently deposited in the office of the Registrar on 25th day of June 2012 be and is hereby corrected in the following terms:

That instruction numbered 36 has effect from the beginning of the first pay period commencing on or after 1st day of July 2012.

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

2012 WAIRC 00854

GOVERNMENT OFFICERS (STATE GOVERNMENT INSURANCE COMMISSION) AWARD, 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 SEPTEMBER 2012
FILE NO	P 18 OF 2007
CITATION NO.	2012 WAIRC 00854

Result Correcting Order

Correcting Order

HAVING heard Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated and Ms C Holmes on behalf of the Department of Commerce, and there being an error in the order of 25th day of June 2012, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the order dated 25th day of June 2012 and subsequently deposited in the office of the Registrar on 25th day of June 2012 be and is hereby corrected in the following terms:

That instruction numbered 36 has effect from the beginning of the first pay period commencing on or after 1st day of July 2012.

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

2012 WAIRC 00899

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KULWANT SINGH
	APPLICANT
	-v-
	KUMAR & SINGH PTY LTD. (TRADING AS REAL FLAVOUR OF INDIA)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 OCTOBER 2012
FILE NO.	B 44 OF 2012
CITATION NO.	2012 WAIRC 00899

Result	Order corrected
Representation	
Applicant	No appearance
Respondent	No appearance

Correction Order

WHEREAS on 10 September 2012 an order in this matter was deposited in the Office of the Registrar;

AND WHEREAS the order contained an omission with respect to the order of the Commission;

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.

PROCEDURAL DIRECTIONS AND ORDERS—

2012 WAIRC 00844

APPLICATION FOR ORDERS IN RELATION TO ALLEGED BREACH OF DISCIPLINE OF APPLICANT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00844
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	FRIDAY, 15 JUNE 2012
DELIVERED	**:**	TUESDAY, 18 SEPTEMBER 2012
FILE NO.	**:**	APPL 38 OF 2011
BETWEEN	**:**	PETER HANS WEYGERS
		Applicant
		AND
		THE DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION
		Respondent

CatchWords	**:**	Industrial Law (WA) – Government officer – School psychologist – Disciplinary action for breach of discipline pursuant to Part V, *Public Sector Management Act 1994* (WA) – Re-opened investigation – Findings of credibility and preferences for evidence – Re-interviewing of witnesses and employee – Maintenance of original findings in original investigation – Reasonable apprehension of bias of investigator
Legislation	**:**	*Public Sector Management Act 1994* s 78(2), s 80(a), s 80(b)(i), s 80(b)(ii), s 80(c), s 86(3)(b)(i), s 86(3)(b)(ii), s 86(3)(b)(iii), s 86(3)(b)(v), s 86(4), s 86(4)(a), s 86(8), s 86(8)(a), s 86(9)(b)(ii)
		Industrial Relations Act 1979 s 49(5), s 84(4)
Result	**:**	Application granted
Representation:		
Applicant	**:**	Mr G Papamihail, with him Mr D Wee, both of counsel
Respondent	**:**	Mr R Andretich of counsel, with him Mr P Broadbent

Reasons for Decision

1 The applicant seeks orders that:

(i) the decision by the Respondent under section 86(8)(a) of the Public Sector Management Act 1994 ('the Act') on 25th March 2011, to find that the Applicant was guilty of committing a breach of discipline under sections 80(a), 80(b)(i), 80(b)(ii) and 80(c) of the Act, and

(ii) the decision by the Respondent under section 86 (9)(b)(ii), 86 (3)(b)(i), 86 (3)(b)(ii), 86 (3)(b)(iii) and 86 (3)(b)(v) of the Act on 6th July 2011 to reprimand the Applicant, transfer the Applicant to new education region and to reduce the level of classification of the Applicant from a Senior School Psychologist to a Level 2 School Psychologist.

be overturned pursuant to a right of appeal under s 78 (2) of the Act.

2 There are a number of grounds of appeal. At this stage of the proceedings, the issue to be dealt with is that set out in grounds 2 and 3 as follows:

2. Despite requests by the Applicant's Solicitors to the Respondent that the Inquiry should not be re–conducted again by Mr Peter Burgess on the following grounds of perceived or apparent bias and prejudgement, the Respondent re-appointed Mr Peter Burgess to conduct the re-opened Inquiry:-

(i) Mr Peter Burgess previously conducted the disciplinary inquiry under section 86 (4)(a) of the Act and prepared a report dated 6th January 2006 to Mr Alby Hutts, the Executive Director of Human Resources of the Respondent ("the Report");

(ii) As required by section 86 (8) of the Act, the Report by Mr Burgess as the decider of fact made adverse findings against the Applicant;

(iii) Although the findings made by Mr Burgess in the Report were subsequently declared a nullity by the Industrial Relations Commission, these findings also related to the credibility of Mr Weygers and the credibility of the three complainants;

3. Any perceived or apparent bias and prejudgement is a breach of natural justice which voids the Inquiry and all actions taken by the Respondent on the basis of it.

3 On 15 June 2012 the Commission heard argument from the parties as to grounds 2 and 3, that in essence, Mr Peter Burgess should not have conducted the re-opened Inquiry on the basis of perceived or apparent bias and pre-judgement. The parties produced a statement of agreed facts for the purposes of the hearing.

Background

4 In February 2004, Mr Weygers, the applicant in this matter, in his capacity as a school psychologist employed by the respondent, attended Glendale Primary School. A number of staff employed at that school subsequently complained about the applicant's behaviour that day. The Director General instigated a preliminary disciplinary investigation undertaken by a Mr Baskwell. During this investigation certain allegations and information were provided to the applicant who is represented by his solicitors, Chan Galic. The applicant denied the allegations. A formal disciplinary enquiry was established under the *Public Sector Management Act 1994* (WA) (*PSM Act*) and charges were made in respect of the allegations.

5 Mr Peter Burgess was appointed to conduct the Inquiry. He submitted a report to the respondent in January 2006 (the 2006 Inquiry Report), concluding that the applicant had misconducted himself. The applicant then challenged the outcome of that Inquiry to the Commission. In Reasons for Decision in APPL 118/2006 dated 5 September 2008 [2008] WAIRC 0137; (2008) 88 WAIG 1838, the Commission as presently constituted found that there had been a denial of procedure fairness and issued an order declaring that the findings by Mr Burgess that the charges were proved and the penalty imposed by the respondent were a nullity.

6 The respondent appealed to the Full Bench (FBA 9 of 2008). The appeal was dismissed (2009 WAIRC 00041); (2009) 89 WAIG 267, however, there was a cross contention by the applicant. The appeal was ultimately resolved on the basis that the applicant had been denied natural justice because the respondent and Mr Burgess had failed to disclose to the applicant the actual statements and correspondence by Ms Kelly, Ms Pickersgill and Ms Taylor who had made complaints about the applicant's behaviour in the first instance. These were referred to in the matter before the Full Bench as 'the teachers' first documents'.

7 The Acting President found that the applicant was denied the opportunity of using the teachers' first documents in a way which may have assisted his defence to the charges. He said this was so because there were 'differences between what is contained in the teachers' first documents as against what was said in the complaints, charges, statutory declarations and by Mr Burgess in the interview' [103].

8 His Honour also noted specific issues about those differences raised in submissions.

9 Beech CC found that the failure to provide the documents did not deny the applicant natural justice. This was because the applicant was made aware of the allegations against him in sufficient detail for him to have a proper opportunity to comment upon them. However the Chief Commissioner said that if he was wrong in that conclusion, he agreed with the comment by Smith SC that, even though the finding and penalties were a nullity, 'it does not mean that the inquiry under s 86 of the *Public Sector Management Act* cannot either be reopened or alternatively recommenced (as a new inquiry by another enquirer appointed by the appellant), the error corrected and fresh findings made as to whether breaches of discipline have been committed by Mr Weygers' [170].

10 The Senior Commissioner agreed with the Acting President that the applicant had suffered a practical injustice as he lost the opportunity to make submissions about the matters going to the credibility of the complainants because he was not provided with the teachers' first documents.

11 Smith SC also said:

> However even though the findings and penalty have been declared a nullity, it does not mean that the inquiry under s 86 of the *PSM Act* cannot either be reopened or alternatively recommenced (as a new inquiry by another enquirer appointed by the appellant), the error corrected and fresh findings made as to whether breaches of discipline have been committed by Mr Weygers. The Commission's order at first instance did not declare the charges against Mr Weygers a nullity or quash the charges in any way. Consequently by making the order that the findings that the charges were proven and the penalty imposed is a nullity, Mr Weygers is placed in the position prior to the making of the impugned decisions that is, prior to the conclusion of the inquiry under s 86 of *PSM Act* [176].

12 The respondent appointed Mr Burgess to re-open the inquiry; the teachers' first documents and other documents requested by his solicitors were supplied to the applicant; the applicant made submissions; Mr Burgess re-interviewed the complainants; he prepared a draft report and provided it to the applicant for comment; the applicant commented by way of written submission; Mr Burgess completed his report (the Second Inquiry Report) and forwarded it to the respondent.

13 The second inquiry found the applicant guilty of the allegations. The respondent advised the applicant of this and of the penalties she proposed to impose, and invited him to provide a submission in response to the proposed penalties. He did so. The respondent applied the penalties. The applicant then filed this application.

14 During this process, on a number of occasions, the applicant objected to Mr Burgess conducting the re-opened inquiry.

This Application – Applicant's case

15 The essence of the applicant's case at this stage in proceedings is whether Mr Burgess ought to have undertaken the re-opened or second inquiry. The applicant says there is a reasonable apprehension of bias in that Mr Burgess had an inherent interest in affirming the conclusion of the 2006 inquiry such that it tainted the conduct of the second inquiry. This is said to be manifest by the way Mr Burgess conducted the second inquiry including that he did not re-examine the applicant's evidence with the applicant but he did so with the complainants.

16 Mr Burgess is said to not have brought a fresh mind to the reconsideration of the evidence of the applicant. The applicant says that where there is a prejudgement in relation to credibility of one of the witnesses then this may raise a reasonable apprehension of bias.

17 The applicant also says that the manner in which Mr Burgess expressed his views regarding the applicant and his solicitors at pages 8 and 9 of the 2006 Inquiry Report might well result in a fair-minded lay observer reasonably apprehending that Mr Burgess may not bring an impartial mind to the resolution of the issues.

18 The applicant says that Mr Burgess conducted the re-opened enquiry on the basis that the findings made in the previous inquiry would stand, so he had not brought an open mind to the second inquiry.

19 The applicant also says that Mr Burgess appears to have reversed the burden of proof by requiring Chan Galic to persuade him that the original findings made by him were wrong. It is also said that he appears to have ignored or not given sufficient weight in relation to his own findings of credibility of the complainants themselves and that Mr Burgess appears to have gone out of his way to reconcile or justify the evidence of the complainants.

20 The applicant suggests that the Senior Commissioner's comment at [176] of the Full Bench decision, with which the Chief Commissioner agreed, should be interpreted to mean that the re-opened inquiry ought to have been conducted 'by another enquirer', and not by Mr Burgess.

21 The applicant says the re-opening of the inquiry was to remedy the errors of the previous inquiry which was the failure to provide the documentation to the applicant and to bring a fresh mind to that inquiry. The applicant says that this requires that the inquiry be started again and that there should not simply be a revision of the first inquiry.

Respondent's Case

22 The respondent says the Full Bench noted that the 2006 inquiry was set aside only to the extent that findings were made in relation to the charges and recommendations as to penalty put forward by him. Otherwise the inquiry remained valid. The respondent could have commenced fresh disciplinary proceedings or continued the existing inquiry with Mr Burgess and provided the applicant with the opportunity the Full Bench found he had been denied. Thereafter Mr Burgess could make new findings, and if need be, recommendations as to penalty. The respondent says that is what occurred.

23 The respondent distinguishes *Livesey v NSW Bar Association* (1983) 151 CLR 288, on the basis that in this matter, the second inquiry was not a new inquiry but a continuation of the January 2006 inquiry.

24 The respondent also says that the findings as to credibility made by judges in *Livesey* were in the strongest terms. It was on the basis of these strong findings that the Court in *Livesey* concluded that a fair-minded observer might apprehend that there was bias on the part of the two judges. The respondent says Mr Burgess did not make 'strong findings' as to credibility in a way which can reasonably be seen to give rise to an apprehension that he may have been biased.

25 The respondent says the issue is whether the apprehension of bias principle applies to disciplinary proceedings under the *PSM Act* in the same way it applies to judicial tribunals.

26 The respondent sets out the process contained under Part 5 of the *PSM Act* and notes that whilst it is not specified, the provision of natural justice or procedural fairness is an implied requirement. Natural justice is variable and does not necessarily entail the provision of a hearing. It says the notions of pre-judgement and bias are associated with this requirement and where the adjudicator approaches a matter with a closed mind, there is a denial of a right to be heard. The respondent says that the content of procedural fairness or natural justice must be decided on the circumstances and in this case having regard to the statutory scheme of the *PSM Act*.

27 The respondent notes that the context of disciplinary processes in public sector employment is different from that applicable in court and tribunal processes and that the employing authority institutes the disciplinary proceedings, investigates and inquires into them and ultimately makes findings. The employing authority will, in many circumstances have knowledge of the circumstances, be acquainted with the officer concerned, and have views concerning that officer and perhaps preliminary views as to whether there has been a breach of discipline committed. Nevertheless, the employing authority is empowered to make findings in relation to breaches of discipline and is able to charge, investigate, inquire and determine, unlike judicial officers. In this way, the employing authority does not act as an umpire in a dispute between parties where the appearance of neutrality and lack of pre-judgement are essential to public confidence in the process leading to determination. Therefore the respondent says it is reasonable to conclude that the rule concerning apprehended bias does not, or does not as rigidly, apply to disciplinary proceedings conducted under Part 5 of the *PSM Act* in the same way as it does in relation to judicial officers or other persons exercising judicial power (see *King v Strickland & Anor* [1991] 56 SASR 225).

28 The respondent says that something approaching actual bias on the part of Mr Burgess needs to be established.

29 The respondent says it is clear that Mr Burgess did not approach his task in a biased manner or pre-judge the outcome, and that this is demonstrated by the manner in which he collected and analysed the evidence before making findings.

30 The respondent also says that the Full Bench set aside the findings only to enable submissions to be made on the original complaint material, and that the Full Bench contemplated that Mr Burgess could continue to act as an inquirer and make fresh findings should the inquiry be continued and the applicant make further submissions. The respondent says this is not an unusual course and that where error is found appeal courts often remit a matter back to the court at first instance to be heard according to law (see s 49(5), 84(4) of the *Industrial Relations Act 1979*).

31 The respondent says there is no substance to the submission that the applicant was denied a hearing by not being interviewed for the purpose of the re-opened inquiry. The applicant had the opportunity through his solicitors to say what he wished to

regarding the initial complaint and the other materials provided to him. He made comprehensive general submissions and they were considered. There was no request for the applicant to be interviewed and no point would have been served by his interview.

32 Further the respondent says the matters the subject of the application occurred on 17 February 2004. Almost eight years has elapsed since the incidents are said to have occurred. Since then the teachers concerned have provided at least four accounts of what they say occurred. The respondent says it would be unreasonable to commence a new disciplinary proceeding at this late stage given that history. In the public interest and in the interest of the parties, the disciplinary proceedings should not be protracted and become mired in the objections and procedures appropriate to criminal proceedings. The proceedings under Part 5 of the *PSM Act* are intended to be informal, not judicial in nature. In those circumstances the respondent says there is no reasonable basis in which apprehended bias arises.

33 The respondent says that what Mr Burgess has done is examine the facts and decided on a logical basis that he prefers one set of facts over another. There is no indication he had a closed mind to further facts bringing a different conclusion and he made no comment to the effect that he found the evidence of Mr Weygers untruthful or that he was more inclined to believe the word of the teachers.

Mr Burgess' Evidence

34 At the hearing on 15 June 2012, Mr Burgess gave evidence. He provided a statement setting out his qualifications and that the Education Department had asked him to re-open the inquiry and provide Mr Weygers with the initial complaint material which the complainants had provided, which had not been produced to Mr Weygers during the 2006 inquiry. He says in his witness statement:

> 13. I accepted the job and understood my task was to look at the matter again and make final findings once Mr Weygers had put his views on the issues he saw arising from the documents. This was a continuation of my original investigation and not a new inquiry.
>
> 14. It is not the case that I saw my task as assessing whether Mr Weygers might say something that could dissuade me from holding to the findings I previously made.
>
> 15. I approached the task of making findings afresh with an open mind.
>
> 16. The further documents were provided by me to Mr Weygers through his solicitors. They made extensive submissions on them which I considered in the context of all the evidentiary material before making new findings.
>
> 17. I did this with an open mind.
>
> 18. My assessment was that the charges were made out. The reasoning is extensively set out in my report of November 2010.
>
> 19. The submissions made on Mr Weygers' behalf were put by me to the teachers as they related to their evidence during interview and their comments noted by me.
>
> 20. I did not think to interview Mr Weygers again, and relate their comments on his submission to him. There did not seem any point. It was he wanting to have a say on the initial complaint material which he had done comprehensively.
>
> 21. I needed to obtain the teachers' comments on what he said and then consider what findings could be made on all of the evidence.
>
> 22. He did not ask for an interview but in any event I provided a draft copy of my further report to Chan Gallic (sic) in respect to which they made submissions which I considered before I arrived at a final position.
>
> (exhibit R1)

35 Mr Burgess was cross-examined on his statement. He said that he did not interview Mr Weygers as Mr Weygers was represented by Mr Wee of Chan Galic and he put all questions to Mr Weygers through his solicitors and received responses. He did not assess the demeanour of those providing evidence in determining credibility, but determined it by assessing and analysing the materials provided by all of the people to the inquiry.

36 Mr Burgess says that he preferred the versions of events of the complainants and made that preference as early as the 2006 Inquiry Report (t 11).

37 Mr Burgess denies that he relied on his original findings and tested those by seeing if the submissions of Chan Galic in any way altered the original findings. He says he looked at what Chan Galic was saying 'to see whether that – what their – whether there was substance to their – their version of issues that they put to me' (t 11).

38 Mr Burgess used the word 'assessment' to describe how he examined the conflicting material before him. He says he opened all the documents and had them on three monitors and compared them. I take this to mean that he had loaded all of the documents on to his computer and displayed them on three screens at the same time to enable him to compare them. While he did not use the term in his evidence, I believe he was attempting to describe a process of comparison and analysis of conflicting and supporting materials which were before him. He says he does not come to conclusions by considering the demeanour of the interviewees, but by analysing what they have said in their written statements and interviews.

39 Mr Burgess says that when he was asked to re-open the inquiry, he 'commenced in an open mind' and started from 'Okay, well let's start afresh' (t 13). Mr Burgess says that in the 2006 inquiry he telephoned and left messages for Mr Weygers to contact him. Mr Weygers did not contact him but Chan Galic did, and all communications came via Chan Galic. He said 'I've never spoken to Mr Weygers' (t 14).

40 Following the outcome of the appeal before the Full Bench, Mr Burgess provided the documents which were the subject of the appeal to Chan Galic, who asked to be provided with further documents. He says that some 250 documents were then provided by the Department, and then Chan Galic made a submission to him. Mr Burgess then provided Chan Galic with a copy of his draft report for comment and they made a further submission. He says that no one from Chan Galic invited him to or suggested that he should interview Mr Weygers (t 14).

Consideration and Conclusions

Apprehended Bias

41 In *Livesey*, the High Court of Australia unanimously held that:

> In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters 'of degree and particular circumstances may strike different minds in different ways' (per Aickin J in *Shaw* (1980) 55 ALIR, at p16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court.

42 *Livesey* involved proceedings in the Court of Appeal of the Supreme Court of New South Wales that Livesey be struck off the roll of counsel for professional misconduct. Part of the evidence to be considered related to circumstances in which Livesey had been involved along with a Ms Bacon. Ms Bacon had previously been a witness in a case where Moffitt P and Reynolds JA had expressed strong views that Ms Bacon 'lacked both credit and credibility as a witness'. Moffitt P in his judgment had made comments including that he was 'unimpressed with the plaintiff (Ms Bacon) as a witness and during the hearing found the content of her evidence at critical points…to be incredible and unacceptable…' He said that her evidence 'was tailored by a sharp mind to meet the difficult implications which arise from admitted facts, rather than to recollect and to tell the Court frankly what occurred'. He concluded that 'clearly the plaintiff has not told this Court the truth, as she knows it, of important and critical aspects of the bail matter' and that her "untruthful evidence given in this Court" was a factor contributing to a conclusion that she was "unfit to be a barrister". Reynolds JA commented that having listened to her in cross-examination, Ms Bacon left him "with the firm conviction that she is not telling the truth as to what occurred". He expressed the view that part of her evidence was "inconceivable", "highly improbable" and "implausible". Reynolds JA also made comment that Ms Bacon was party to a corrupt agreement.

43 Ms Bacon's evidence in *Livesey* related to the determination of a matter which was described as 'the central and most important' of the contested issues in the proceedings.

44 The High Court noted that the issue in *Livesey* was 'the appearance and not the actuality of bias by reason of prejudgment' [299]. Whilst the Court found that it was impossible to lay down an inflexible rule and that each case must be determined by reference to its particular circumstances, it said that:

> It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, *expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact* [300] (emphasis added).

45 In *British American Tobacco Australia Services Ltd v Laurie & Others* [2011] HCA 2; [2010] 242 CLR 283, French CJ referred to the test for apparent bias in *Ebner v Official Trustee in Bankruptcy* requiring two steps. The first is 'the identification of what it is said might lead a judge…to decide a case other than on its legal and factual merits'. The second is 'articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits' [37]. French CJ also referred to the 'distinct, though sometimes overlapping, main categories of case' set out by Deane J in *Webb v The Queen*. In this case, the category of interest, being 'where the judge has an interest in the proceedings, whether pecuniary or otherwise, giving rise to a reasonable apprehension of prejudice, partially or prejudgment' is relevant.

46 French CJ also commented:

> The scrutiny required of claims of bias based on prior findings by a decision-maker was emphasised, in relation to administrative decisions, by Gaudron and McHugh JJ in *Laws v Australian Broadcasting Tribunal*. Their Honours, after referring to *R v Australian Stevedoring Industry Board,* Angliss and Shaw, said:
>
> > 'When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be *firmly established* is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she *will not alter that conclusion* irrespective of the evidence or arguments presented to him or her.' (emphasis added.)

> The requirement that an apprehension of bias, based on judicial conduct, by 'firmly established' is consistent with the most recent decisions of the Court and gives content to the requirement that an apprehension of bias, in that class of case, be reasonable.

47 French CJ referred to Mason J in *Re JRL; Ex parte CJL* who also required that the reasonable apprehension of bias by reason of prejudgment must be 'firmly established'.

48 The issue of whether a so called domestic tribunal is bound by the rule regarding apprehended bias was dealt with in *Maloney*. In that case Glass JA, with whom the other members of the Court agreed, noted that there has been no suggestion that the High Court in *Re Watson; Ex parte Armstrong* expressed the view that the rule applied to domestic tribunals. Domestic tribunals were described as 'acting under rules resting upon a consensual basis' (*Australian Workers' Union & Ors v Bowen & Ors (No 2)* [1948] 77 CLR 601). Even though the requirements of natural justice that apply to domestic tribunals in some respects are different from those which apply in courts there is no application of the rule regarding apprehended bias.

49 The authorities in *Maloney* refer to domestic tribunals by reference to organisations such as unions and clubs where members, who are the subject of proceedings, have joined the organisation and agreed to comply with its rules. In that context this was the domestic forum acting under rules resting upon a consensual basis referred by Dickson J in *Australian Workers' Union*. This has no application in dealing with an investigation or inquiry instituted by one party against another which is not consensual and where the rules to be applied are in fact set out in statute.

50 In this circumstance I would distinguish between what might be a domestic tribunal for the purposes of the rule and an inquirer or investigator under the *PSM Act* as compared with a judicial or quasi-judicial tribunal. It may be that the investigator or inquirer falls between the two extremes. However, each case rests on its own circumstances.

51 One of the most helpful cases in this particular matter is *Lohse v Arthur & Ors No 3* (2009) 180 FCR 334. This matter involved an investigation into allegations that the applicant had breached the *Australian Public Service Code of Conduct* in the course of his employment with the Commonwealth Department of Health and Aging, in accordance with the legislative framework which included subsidiary legislation including 'commissioner's directions'. Graham J noted at paragraph [33] that '[t]he rules of natural justice require that a person making a determination as to whether an APS employee has breached the Code of Conduct must be unbiased and free from any reasonable apprehension of bias'. He noted that:

> A decision-maker will be biased if he or she does not approach the decision-making task entrusted to him or her with an open mind which is open to persuasion one way or the other. If a decision-maker has pre-judged a case so as to be unable or unwilling to decide it impartially, that decision-maker's determination will be affected by actual bias (citations omitted) [33].

52 Graham J went on to deal with the test of an administrative decision being made in private. At [38] His Honour referred to *Re RRT; Ex parte H* 75 ALJR 982; 179 ALR 425 where Gleeson CJ, Gaudron and Gummow JJ said, in respect of the test of apprehended bias and its application in administrative proceedings:

> *27 The test for apprehended bias in relation to curial proceedings is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided. That formulation owes much to the fact that court proceedings are held in public. There is some incongruity in formulating a test in terms of "a fair-minded lay observer" when, as is the case with the tribunal, proceedings are held in private.*
>
> *28 Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as distinct from probability, as to what will be done or what might have been done. To do otherwise, would be to risk confusion of apprehended bias with actual bias by requiring substantially the same proof.*
>
> *29 Though the test in administrative proceedings, as in curial proceedings, is, in our view, one of objective possibility, the non-curial nature of the body or tribunal in question and the different character of the proceedings must, as already indicated, be taken into account. In the present case, a significant difference between curial proceedings and the proceedings of the tribunal is that the former are adversarial and the parties are usually legally represented, whereas the latter are inquisitorial in nature and the parties are not represented.'*
>
> 39 While the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different (per McHugh J in *Hot Holdings* 210 CLR 438 at [70]).
>
> 40 Natural justice and fairness are not to be equated. In the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness (per Mason J, as his Honour then was, in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 583.
>
> …
>
> 42 The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, in accordance with procedures that are fair to the individual in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the

> Act seeks to advance or protect or permits to be taken into account as legitimate considerations (per Mason J in *Kioa v West* at 585; cf *Salemi v MacKellar (No. 2)* [1977] HCA 26; (1977) 137 CLR 396 at 451 per Jacobs J).

53 In noting that the proceedings under the code of conduct were not adversarial but inquisitorial, Graham J said that the decision-maker is an inquisitor obliged to be fair [45].

54 The respondent asserts that 'it is reasonable to conclude that the rule concerning apprehended bias does not, or does not as rigidly, apply to disciplinary proceedings conducted under Part 5 of the *PSM Act* in the same way that it does in relation to judicial officers or other persons exercising judicial power'. However the respondent also referred to *King v Strickland and Another* (1991) 56 SASR 225. In that case *King CJ* in referring to the public service system applicable in that state to disciplinary proceedings said:

> The principle to be applied is clear. A person is disqualified from adjudicating if a reasonable person being aware of the relevant facts would suspect that he might not bring a fair and unprejudiced mind to the determination of the matter [229].

55 An inquiry into the allegations of breaches of discipline undertaken in accordance with the *PSM Act* is often undertaken by a person external to the agency. This assists in the inquirer being seen to be impartial however it is not a requirement. The process is inquisitorial. The inquirer usually interviews any witnesses including the person against whom the allegations are made. Alternatively or in addition, written submissions are considered along with relevant documents. Interviews are usually undertaken in private between the inquirer and the interviewee, although there may be a representative, advisor, support person or witness present. There is no provision for cross-examination of witnesses. The respondent in the matter may decline to be interviewed and may make submissions in writing through their representative.

56 It is true, as Mr Andretich for the respondent says, that the employer may undertake the process, and persons involved may be known to each other. The employer ultimately makes a decision about an employee with whom he or she may have had a number of dealings.

57 However, decisions and findings are to be made objectively. As noted above, the involvement of an external inquirer may assist in the process being perceived as fair and the findings as being objective. However it is not necessary.

58 I conclude that the principle or the rule relating to perceived bias applies to a person undertaking a disciplinary inquiry under the *PSM Act* in much the same way as it applies to judicial officers or other persons exercising judicial power, taking account of the circumstances of the case, including that the disciplinary inquiry is not an adversarial process but an inquisitorial one and is undertaken in private. It means that the adjudicator referred to in *King v Strickland* is required to bring an impartial mind to the matters before them.

59 The authorities require that there is a two stage process in determining whether there is a reasonable apprehension of bias. This requires clarification of what it is said might lead Mr Burgess to decide the case other than on its legal and factual merits. Secondly, this must be 'an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits' (*Ebner*).

60 The applicant says Mr Burgess had an inherent intent in affirming his findings from the 2006 first inquiry.

Consideration of Particular Alleged Demonstrations of Perceived Bias

1. Adverse Comments about Mr Weygers and His Solicitors

61 The applicant says Mr Burgess' reports demonstrate their claims. The first such demonstration is said to be the manner in which Mr Burgess expressed clear views regarding the applicant and his solicitors at pages 8 and 9 of the 2006 Inquiry Report.

62 At page 8 of the 2006 Inquiry Report, Mr Burgess made comments which the applicant has in particular objected to and said that they constitute unjustified criticism of the applicant and his solicitors, namely:

a. that the applicant did not return phone calls or respond to correspondence written to him by Mr Burgess and that this caused delays in the conduct of the disciplinary inquiry.

b. that the applicant's solicitors suggested that they did not have sufficient time to review the applicant's statement after it had been printed out after the interview with Mr Burgess.

c. that the applicant's solicitors did not email an electronic copy of the applicant's revised statement despite specific instructions by Mr Burgess to do so, to enable Mr Burgess to raise any supplementary questions.

d. the revised statement submitted by the applicant's solicitors contained additional pages referring to the previous investigation conducted by Mr Joe Baskwell and various issues which the applicant's solicitors wished to draw to Mr Burgess's attention.

Consideration

63 It is true that Mr Burgess's report contains the comments referred to. These comments may be seen as criticisms of either the applicant or his solicitors or both. However they need to be properly considered in context. That context is that Mr Burgess was setting out the facts associated with the conduct of his inquiry under the heading of Investigation Plan. His first comment is aimed at explaining the effect of Mr Weygers not returning phone calls or responding to written correspondence, as extending the amount of time taken to undertake the process.

64 The recording of the applicant's solicitors comment that they did not have sufficient time to review the applicant's statement after it had been printed out after the interview by Mr Burgess, should be read in the context. I do not read this as criticism or the expression of a negative view of Mr Weygers or his solicitor, but rather as an explanation of the process and the fact that agreement was reached as to a particular process being followed.

65 The comment that Mr Weygers' solicitor did not email an electronic copy of the applicant's revised statement despite specific instructions by Mr Burgess to do so to enable Mr Burgess to raise any supplementary questions is a criticism of the solicitors. However there is no indication either of itself or in the context of other comments, that it played any part in the way in which the inquiry proceeded, or was likely to affect Mr Burgess's views and findings.

66 In light of the two stage process referred to earlier, I see no link between these comments or criticisms and any perceived bias. They constitute part of a recitation of the conduct of the inquiry and provide explanations for why the process appears to have taken longer than might otherwise have been anticipated.

67 As to the comments regarding additional pages referring to the previous investigation conducted by Mr Baskwell, Mr Burgess' response was that '[a]n analysis, critical or otherwise, of the preceding investigation is not within the directions supplied by the Executive Director, Human Resources under section 86(4) of the *PSM Act*; no action was therefore taken on Mr Weygers's apparent attempt to direct the Inquirer to review and take into account the preceding investigation' (pg. 9). This is a rebuff to Mr Weygers' seeking that the Inquirer revisit the investigator's report, however the Inquirer did not see it as being within his remit, and rejected the approach. However, seen in light of the Acting President's comments about inconsistencies in versions of events including in the Baskwell report critique, it may have been appropriate to have considered this submission. It would seem though that Mr Burgess did not see the relevance of that document.

68 I am not satisfied that in the circumstances, this issue, taken alone, is indicative of any apprehended bias. Taken with other matters, it may indicate a propensity to not wish to address inconsistencies in the complainants' various versions.

2. Findings of Credibility and Preferences for Evidence

69 The applicant says that in the 2006 Inquiry Report, Mr Burgess indicated a preference for the evidence of the complainants to that of the applicant and therefore believed that the complainants were more credible than the applicant.

70 An examination of each of the examples given by the applicant which are said to demonstrate that Mr Burgess preferred the evidence of the complainants to that of the applicant and therefore believed that the complainants were more credible than the applicant contained at pages 52, 53, 55, 56, 58, 60, 61, 62, and 63 are dealt with in similar fashion in the report. Commencing with page 52, the 2006 Inquiry Report sets out the circumstances of the allegations being made and examines what each of the complainants and the applicant say. Mr Burgess considered whether there was evidence to support the allegations and whether there was evidence to support the applicant's response. For example, in a number of the allegations, the applicant's response included that there was collusion between the complainants. Mr Burgess examined the evidence as to where various people were at particular points in time and, for example at page 52, says '[i]t would appear there is no evidence of collusive behaviour between Ms Pickersgill and Ms Kelly in making their respective complaints or Ms Taylor and either Ms Pickersgill or Ms Kelly.'

71 He goes on to say, having considered another complaint, that '[t]here was no evidence presented to indicate Ms Horrocks had spoken to Ms Pickersgill, Ms Kelly or Ms Taylor prior to raising her concerns about comments Mr. Weygers allegedly made to her on 17 February 2004 and to Ms Taylor.' He also said '[i]t would appear there is no evidence of collusive behaviour on the part of Ms Taylor, Ms Kelly, Ms Pickersgill or Ms Horrocks or any other persons to make false accusations against Mr. Weygers on 17 February 2004.'

72 At page 53, Mr Burgess examines further Mr Weygers' responses as to a possible misinterpretation of Mr Weygers' conversations and issues of communication. He concludes:

> Mr. Weygers has presented a number of reasons why the allegations that were made by Ms Kelly, Ms Pickersgill and Ms Horrocks were made against him. It is not possible to find any substance in any of Mr. Weygers (sic) reasons presented by Mr. Weygers to explain the allegations made by the aforementioned employees.

73 At page 55, Mr Burgess again deals with the issue of collusive behaviour and concludes that:

> (O)n the facts presented there was no evidence to support such a proposition: there was no evidence presented to suggest Ms Pickersgill or Ms Kelly made false accusations against Mr. Weygers. As it would appear Ms Pickersgill's and Ms Kelly's complaints were made independently the positive correlation of their reported comments would seem to indicate that Mr. Weygers made the comments contained in this allegation or words to that effect.

74 He went on to indicate a preference for Ms Kelly's version over Mr Weygers' version for a number of reasons including a lack of evidence as to why Ms Kelly would make a false accusation, or about collusive behaviour and that there is a positive correlation between Ms Kelly's comments and Ms Pickersgill's comments, and concluded that neither had an opportunity to discuss what Mr Weygers had said between the comments being made and each individual advising Ms Taylor of the comments.

75 At page 58, the issue of collusion is again dealt with after Mr Burgess had noted that:

> [i]t would appear something occurred during lunch time that caused Ms Pickersgill to appear in the condition Ms Taylor observed her in. It would also appear that it was Mr Weygers comments that effected (sic) Ms Pickersgill. There was no evidence presented to indicate Ms Pickersgill made false accusations regarding Mr. Weygers: the issue of collusion has been discussed and discarded and it is not considered Mr. Weygers's issues of poor speech patterns on his behalf where the temperature had any relevance in any of the complaints. Equally his conspiracy theories were considered to be without substance.

76 At page 60, Mr Burgess notes Mr Weygers' denial of the allegation of verbal comments of a sexual nature to Ms Kelly. He examines the explanation given by Mr Weygers, the versions of the conversation provided by Mr Weygers and Ms Kelly, and

finds that they are mutually exclusive. He concludes that Ms Kelly's version is preferred for a number of reasons being:

1. There was no evidence presented as to why Ms Kelly would make a false accusation or of there being any collusive behaviour on Ms Kelly's part;
2. Mr Weygers' recollection of the distance he was Ms Kelly was found to be incorrect;
3. His previous version of comments to Ms Kelly was also found to be not a full version of what he stated; and
4. Mr Weygers' explanation of why he may have been misunderstood has been assessed and found lacking in substance as was his conspiracy theory.

77 At page 62, in respect of a comment Mr Weygers is said to have made to Ms Horrocks, Mr Burgess notes that Mr Weygers did not have a recollection of Ms Horrocks but stated that he spoke to a teacher in his last interview at the school and that may have been Ms Horrocks. He notes that Ms Horrocks was quite specific that she spoke with Mr Weygers. He notes Mr Weygers denies the allegation and there was no one else present. He then goes on to note that Mr Weygers' and Ms Horrocks' comments are mutually exclusive and expresses preference for Ms Horrocks' version because there was no evidence presented as to why Ms Horrocks would make a false accusation, that there was no evidence of collusive behaviour on her part, that she had never met Mr Weygers' previously, was not aware of other complaints and Mr Weygers' explanation as to why he may have been misunderstood had been assessed and found lacking in substance as was his conspiracy theory.

Consideration

78 An examination of the way Mr Burgess expressed his analysis and conclusions as to particular issues suggests that he came to his conclusions in an objective way. The method of analysis as expressed in the main part of the Second Inquiry Report suggests a proper weighing up of competing and conflicting evidence.

79 However, it concerns me greatly that in his oral evidence, Mr Burgess said he preferred the version of events of the complainants and made that preference as early as the first Inquiry Report (t 11). I will deal with that issue later.

80 In so far as the applicant claims that Mr Burgess has indicated a preference for the evidence of the complainants over that of the applicant this is a correct assertion. However he has done so on the basis of an analysis of what each of the complainants said and of Mr Weygers' explanations. He has looked at the material which might support the complainants' versions and that which might support Mr Weygers' explanations and has come to a conclusion. In comparison with the type of comment made in *Livesey*, he has not expressed any views about the credibility of the complainants or Mr Weygers. Rather he has analysed what they have said and their explanations. The consequence of this preference for the complainants' versions of events will of course be that he believed that the complainants were more credible than the applicant. However, he has not gone to the point of being critical of the applicant in the way in which their Honours did in *Livesey*.

81 In those circumstances I find that it has not been firmly established that this would constitute a ground for a perception of bias.

3. Re-Interviewing Complainants but not Applicant

82 Mr Burgess provided Mr Weygers with the documents in accordance with the outcome of the Full Bench matter. A significant number of other documents were provided by the Department to Mr Weygers. Mr Weygers, through his solicitors, put forward substantial comments and views' regarding what was contained within those documents. Mr Burgess re-interviewed the complainants to provide them with an opportunity to be heard as to Mr Weygers' response to those documents. He did not re-interview Mr Weygers.

Consideration

83 On its face this might give rise to a fair-minded lay observer reasonably apprehending that Mr Burgess may not bring an impartial mind to the resolution of the matter. It would have been desirable for Mr Burgess to have treated Mr Weygers in the same manner as he did the other witnesses. Had Mr Weygers wished to be interviewed he could have requested to do so.

84 A respondent to an inquiry may decline to be interviewed. This does not mean that an investigator should then not interview complainants and other witnesses.

85 In the circumstances, it would have been desirable, to avoid any question of partiality, for all parties to have been treated in exactly the same manner. However, Mr Weygers was represented throughout the process, made extensive submissions through his solicitors and did not ask to be interviewed. This should not now be the basis for saying he may have been disadvantaged.

4. Maintenance of Original Findings and Burden of Proof

86 The applicant says that Mr Burgess appears to have conducted the re-opened hearing on the basis that the findings made by him in the 2006 Inquiry would stand, subject to Chan Galic convincing him otherwise. Reference is made to pages 1, 54, 67, 69, 70, 74, 75 and 76 of the Second Inquiry Report.

Consideration

87 The structure of the Second Inquiry Report is as follows:

1.0, The Executive summary which sets out the findings of the Second Inquiry, commences with the following two paragraphs:

> I have conducted a thorough re-examination of relevant evidence and submissions on behalf of Mr Peter Weygers regarding findings of a breach of discipline by Mr Weygers in January 2006.
>
> I find that none of the submissions contained in Chan Galic's correspondence of 11 March 2010 and 24 August 2010 alter any of the original findings of the Inquiry Report of January 2006.'

2.0 sets out 'Details and Nature of the Allegations' against Mr Weygers.

3.0 sets out 'Finding of Inquiry January 2006' noting '(t)he following finding was made in the Inquiry Report of January 2006' and they are listed.

4.0 sets out the 'Investigation Plan' in which Mr Burgess assessed the submissions of Chan Galic of 11 March 2010 and 24 August 2010 and re-interviewed the complainants. He noted the recording of comments made during interviews, and copies of statements were appended.

5.0 sets out 'Interview Statements and Documentation' received from the complainants.

6.0 sets out 'Key Evidence', which lists the interviews, documents and correspondence referred to by the inquirer.

7.0 is the 'Finding' and is the substantial part of this report, in which Mr Burgess examines the issues raised by Chan Galic on behalf of Mr Weygers and considers them by reference to other evidence.

88 At page 54, Mr Burgess says '[i]ssued (sic) raised by Chan Galic, on behalf of Mr Weygers, in their correspondence 11 March 2010 and the above findings will be considered against the findings of the initial inquiry provided to the Department on 6 January 2006.'

89 Throughout this document, Mr Burgess comments to the effect that none of the submissions in Chan Galic's correspondence of 11 March 2010 or 24 August 2010 'alter any of the original findings of the Inquiry Report of January 2006.'

90 At page 67, under the heading of 'Consideration of Current Findings', Mr Burgess noted the following:

> The Inquiry Report submitted to Mr Alby Hutts at the Department of Education and Training on 6 January 2006 provided findings with regards to four charges of a breach of discipline by Mr Weygers. The charges were:
>
> 1. On 17 February 2004 at Glendale Primary School, Mr. Weygers sexually harassed Ms Fiona Kelly, Deputy Principal, and made inappropriate verbal comments.
> 2. On 17 February 2004 at Glendale Primary School Mr. Weygers made inappropriate verbal comments of a sexual nature to Ms Amanda Pickersgill, a teacher.
> 3. On 17 February 2004 at Glendale Primary School, Mr. Weygers made inappropriate verbal comments of a sexual nature to Ms Fiona Kelly, Deputy Principal.
> 4. On 17 February 2004 at Glendale Primary School, Mr. Weygers made inappropriate verbal comments of a sexual nature to Ms Carolyn Horrocks, a pre-primary teacher.
>
> The following findings were made:
>
> Charge 1
>
> Mr. Weygers sexually harassed Ms Fiona Kelly, Deputy Principal, and made inappropriate verbal comments;
>
> Charge 2
>
> Mr. Weygers made inappropriate verbal comments of a sexual nature to Ms Amanda Pickersgill;
>
> Charge 3
>
> Mr. Weygers made inappropriate verbal comments of a sexual nature to Ms Fiona Kelly, Deputy Principal; and
>
> Charge 4
>
> Mr. Weygers made inappropriate verbal comments of a sexual nature to Ms Carolyn Horrocks, a pre-primary teacher.

91 It is clear then that the previously nullified findings are set out at the beginning of the section in which Mr Burgess draws together the charges and his conclusions regarding evidence , and makes 'new' findings.

92 At page 69, Mr Burgess says:

> With regard to submissions contained in section A of Chan Galic's correspondence of 11 March 2010 I find that none of the submissions in section A alter any of the original findings of the Inquiry Report of January 2006.

93 At page 70, Mr Burgess says:

> With regard to submissions contained within section B of Chan Galic's correspondence of 11 March 2010 I find that none of the submissions in section B alter any of the original findings of the Inquiry Report of January 2006.

94 Similar conclusions are expressed at page 74, in regards to section C of Chan Galic's correspondence of 11 March 2010. At page 75, Mr Burgess found that 'none of the submissions in the section "submissions" on documents provided by Amanda Pickersgill" of 24 August 2010 alter any of the original findings of the Inquiry Report of January 2006.'

95 At page 76, Mr Burgess says:

> I find that where inconsistencies have been identified between witnesses' statements, the inconsistencies concerned are not material facts and do not reflect upon the credibility of witnesses.
>
> I find that none of the submissions contained in Chan Galic's correspondence of 11 March 2010 and 24 August 2010 alter any of the original findings of the Inquiry Report of January 2006.

96 Given that the findings of the 2006 Inquiry were a nullity, they should not have been reiterated in the way they were at page 67, which clearly indicates that Mr Burgess has used those findings as the starting point for the Second Inquiry. I also

refer specifically to the two opening paragraphs of the Executive Summary, which I take to mean that Mr Burgess saw his task as being to consider Mr Weygers' submissions and decide whether they altered his original conclusions, not that he set about considering the issues and making fresh findings. He set out the findings of the 2006 Inquiry in Part 3 of the report as if they remained for ratification or reaffirmation or to be overturned. He approached the exercise by way of considering what Mr Weygers put to him in submissions to decide if they upset what he had already decided in the 2006 Inquiry and found 'none of the submissions contained in Chan Galic's correspondence of 11 March 2010 or 24 August 2010 alter any of the original findings of the Inquiry Report of January 2006' (1.0 Executive Summary of 2010 Report).

97 Clearly then Mr Burgess did not work on the basis that the original findings were a nullity but on the basis that they were there for confirmation or for Mr Weygers to convince him as to why they should not stand. In those circumstances, a fair-minded lay observer might also reasonably apprehend that Mr Burgess may not bring an impartial mind to the inquiry.

Conclusion

98 In the circumstances, I find that Mr Burgess has taken the view that his task in re-opening the inquiry was to re-examine the relevant evidence and consider it by reference to submissions made on behalf of Mr Weygers. The purpose of doing so was to see whether Chan Galic's correspondence swayed him to alter any of the original findings of the 2006 Inquiry Report. He was less open to persuasion than before he made the original findings.

99 Although Mr Burgess says in his oral evidence that he went into the second inquiry with an open mind, the paragraphs above indicate that even though the Commission had found that the findings from the 2006 Inquiry Report were a nullity, they were still live for Mr Burgess. This was in the context of him having established a preference for the version of events given by the complainants over that of the applicant 'as early as the first Inquiry Report' (t 11).

100 In making this finding, I have taken account of the context in that Mr Burgess was asked to re-open his inquiry and provide Mr Weygers with an opportunity to view the original complaints, the teachers' first documents, to provide Mr Weygers with an opportunity to comment on them and then to consider those comments. This is not the same as a fresh inquiry.

101 However, the findings of 2006 Inquiry were a nullity and ought to have been treated as if they did not exist. Mr Burgess has relied upon those findings except to the extent that Mr Weygers could unseat them. In this circumstance he has placed the onus upon Mr Weygers to convince him to change his mind, and he did not change his mind.

102 An examination of Mr Burgess' report and the way in which he has analysed the evidence before him appears to suggest that what he has actually done is objectively analysed what was before him. Unfortunately he has not expressed this as being his approach. Rather he has expressed his approach as being to assume his original findings stood unless he was convinced otherwise, and he was not convinced.

103 In those circumstances, I conclude that a fair-minded lay observer who is properly informed as to the nature of proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias might reasonably apprehend that Mr Burgess may not have brought an impartial mind to the Second Inquiry, but had an interest in maintaining the original findings.

104 In these circumstances, the orders sought by the applicant ought to be granted.

2012 WAIRC 00859

APPLICATION FOR ORDERS IN RELATION TO ALLEGED BREACH OF DISCIPLINE OF APPLICANT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER HANS WEYGERS
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 SEPTEMBER 2012
FILE NO/S	APPL 38 OF 2011
CITATION NO.	2012 WAIRC 00859

Result	Application granted

Order

HAVING heard from Mr G Papamihail, with him Mr D Wee, both of counsel on behalf of the applicant and Mr R Andretich of counsel, with him Mr P Broadbent for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

ORDERS that:

1. The decision by the respondent under section 86(8)(a) of the *Public Sector Management Act 1994* ('the Act') on 25 March 2011, to find that the applicant was guilty of committing a breach of discipline under sections 80(a), 80(b)(i), 80(b)(ii) and 80(c) of the Act; and
2. The decision by the respondent under sections 86 (9)(b)(ii), 86 (3)(b)(i), 86 (3)(b)(ii), 86 (3)(b)(iii) and 86 (3)(b)(v) of the Act on 6 July 2011 to reprimand the applicant, transfer the applicant to new education region and to reduce the level of classification of the applicant from a Senior School Psychologist to a Level 2 School Psychologist.

be and are hereby overturned.

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

2012 WAIRC 00915

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ROSE MCGINN
	APPLICANT
	-v-
	GOVERNING COUNCIL OF CENTRAL INSTITUTE OF TECHNOLOGY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 8 OCTOBER 2012
FILE NO.	U 181 OF 2012
CITATION NO.	2012 WAIRC 00915

Result	Directions issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr R Bathurst and Mr P Spragg (both of counsel)

Directions

HAVING heard Mr S Millman (of counsel) on behalf of the applicant and Mr R Bathurst (of counsel) on behalf of the respondent the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs -

That the hearing be set down for 23, 24 and 25 January 2013;

That the parties provide a statement of agreed facts no later than 9 January 2013;

That the applicant file and serve on the respondent any signed witness statements upon which it intends to rely no later than Monday 3 December 2012;

That the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than Monday 17 December 2012;

That the applicant file and serve an outline of submissions on procedural issues no later than 9 January 2013;

That the respondent file and serve an outline of submissions on procedural issues no later than 16 January 2013;

That both parties will provide informal discovery by 5 November 2012; and

That the parties have liberty to apply on short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Building and Engineering Trades (Government) General Agreement 2012 AG 32/2012	27/09/2012	CHIEF EXECUTIVE OFFICER, ZOOLOGICAL PARKS AUTHORITY AND OTHERS	The Construction, Forestry, Mining and Energy Union of Workers and others	Chief Commissioner A R Beech	Agreement registered
Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2012 AG 33/2012	24/09/2012	The Independent Education Union of Western Australia, Union of Employees; The Roman Catholic Archbishop of Perth	(Not applicable)	Commissioner J L Harrison	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2012 WAIRC 00839

APPEAL AGAINST THE DECISION OF THE EMPLOYER TO TERMINATE EMPLOYMENT ON 29 NOVEMBER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KYLE MEAD-HUNTER

APPELLANT

-v-

DIRECTOR GENERAL OF HEALTH AS A DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 FOR THE METROPOLITAN HEALTH SERVICES BOARD

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON – CHAIRPERSON
MS N IRELAND - BOARD MEMBER
MR G JONES - BOARD MEMBER

DATE TUESDAY, 18 SEPTEMBER 2012

FILE NO PSAB 23 OF 2011

CITATION NO. 2012 WAIRC 00839

Result Discontinued

Representation

Appellant Mr D Ellis (of counsel)

Respondent Mr M Aulfrey (of counsel)

Order

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS on 6 March 2012 the Board convened a scheduling conference with respect to a hearing; and

WHEREAS the matter was set down for hearing on 6, 7 and 8 June 2012, which dates were later vacated at the request of the respondent; and

WHEREAS the matter was relisted for hearing on 18, 19 and 20 September 2012; and

WHEREAS on 31 August 2012 the appellant filed a Notice of Withdrawal or Discontinuance form in respect of the appeal; and

WHEREAS on 4 September 2012 the hearing was vacated;

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.

2012 WAIRC 00856

APPEAL AGAINST THE ALLEGED UNLAWFUL TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00856
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN MR G RICHARDS - BOARD MEMBER MS D GOULD - BOARD MEMBER
HEARD	**:**	THURSDAY, 19 JULY 2012
DELIVERED	**:**	THURSDAY, 20 SEPTEMBER 2012
FILE NO.	**:**	PSAB 21 OF 2011
BETWEEN	**:**	ANNE MILIANKU Appellant AND DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION Respondent

CatchWords	**:**	Public Service Appeal Board – Family Resource Employee – Decision to terminate employment – Medical fitness – Psychiatric assessment – Unprofessional conduct – Sub-standard performance issues of judgment, insight – Code of Conduct – Disciplinary process – Breach of lawful instruction
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	Mr M Shipman
Respondent	**:**	Mr E Rea and with him Ms N Ross

Reasons for Decision

ACTING SENIOR COMMISSIONER PE SCOTT AND MS D GOULD:

1 The appellant, Ms Anne Milianku, appeals against the respondent's decision to terminate her employment given on 24 November 2011. Ms Milianku says the termination of her employment was on medical grounds and that it was not justified and was unlawful. While she does not say that she was denied procedural fairness, she says she was both medically and professionally competent to perform her duties, and the behaviour alleged by the respondent is not sufficient to justify the termination. The respondent denies that the termination was solely on medical grounds. It says that Ms Milianku was unfit to perform her role due to issues of judgment, behaviour and competence which could compromise the safety of children in her care.

2 Ms Milianku was employed by the respondent as a Family Resource Employee (FRE) from 1 May 2007 until the termination of her employment. A FRE is a Level 1 position with the following responsibilities:

i. The organisation, provision and coordination of supervision services for families, children and young people.

ii. The organisation and provision of transport services for families, children and young people.

iii. The maintenance of records and statistical data requirements.

iv. The provision of timely advice and reports.

v. The participation in meetings, supervision and training as a contributing member of a team.

vi. Contributing to research and evaluation of community services.

vii. The management of Government resources in accordance with Government and Departmental policy.

viii. Providing assistance to administration staff with clerical duties.

(exhibit 4, [11])

3 The skills required of a FRE are set out in the evidence of Mr Roley Bayman as follows:

> 11. A sound knowledge of child development and age appropriate behaviours; the ability to respond appropriately, when a child and/or an adult is displaying challenging or inappropriately [sic] behaviour, to ensure child safety remains a priority; the ability to [sic] sensitive and empathetic to children, parents and foster carers before, during and after contact visits; to have an awareness around professional boundaries and maintain confidentiality between all parties; to understand specific tasks and seek advice from the referring officer or a senior officer when unsure of how best to respond to a situation and; to make sound decisions to ensure the immediate safety of their clients and themselves when presented with an unpredictable situation and there is no immediate access to a senior officer.

(exhibit 3 [11])

4 The Board has heard evidence from Ms Milianku; Dr Joe Cardaci, a Consultant Physician in Nuclear Medicine; Dr A Linde, Psychiatrist; Mr Dean Phillip Ladiges, at the time of issues relating to the appellant's employment being dealt with was Manager of Employment Services and Labour Relations; Mr Roley Bayman, District Director – Mirrabooka District Office for the respondent; Mr Peter Tulip, Assistant District Director – Mirrabooka District Office and Dr Gemma Edwards-Smith, Consultant Psychiatrist.

Background

5 A number of incidents arose during 2009 and early 2010 which lead to complaints being made about Ms Milianku's conduct.

3 February 2009

6 It was reported by a client of the Department, KM, that Ms Milianku had approached her in Mirrabooka Shopping Centre and made a number of inappropriate comments in relation to KM's living arrangements, her clothing and her behaviour. It was alleged that Ms Milianku also made comments regarding what action the Department was likely to take regarding KM's son, and stated that the son would hate KM for him being in care. KM also alleged Ms Milianku was swearing throughout the exchange.

7 Ms Milianku's response at the time it was raised with her was that she recalled speaking with KM at the shopping centre but did not recall the context of the discussion, and she says that KM approached her.

11 June 2009

8 A complaint was made that a young person Ms Milianku had dealt with was suspended from school as a result of aggressive behaviour. It was alleged that Ms Milianku took a drink and sundae, which the boy's father had bought him, from the boy and threw it away when she dropped him at school.

9 Ms Milianku's explanation is that when she picked the boy up, he seemed to be in a bad mood. When they got to the school, she noticed that he had left his school bag in the car so she called out to him to come and get it. His threw his drink on the ground. She says she asked him if he could take the drink into school and he replied yes. He collected his bag and left the icecream in the car. She disposed of the icecream at the Mirrabooka office and reported the matter. Ms Milianku denies that she took the drink and icecream from the boy.

10 On 11 June 2009, the boy wrote an apology to his teacher for his aggressive behaviour, explaining that:

> The reason why I was angry today was that the DCP lady who took me to see my dad yesterday took my drink and sundae that my dad brought me away from me and threw it away. I have been upset about that ever since. I had a fight with my Foster Brother and Sister this morning before school which also made me angry. Then this morning Shannon and Bevan annoyed me too. I just took my anger out on you.

(Respondent's documents, 38)

18 June 2009

11 Ms Milianku supervised a prison visit at Wooraloo prison where it was alleged she behaved in an unprofessional manner by crying in front of the client and her child or children and discussed her own personal issues with them. It was alleged that she also informed clients about Departmental decisions regarding the children, which is beyond the scope of the responsibilities.

Counselling

12 Mr Tulip met with Ms Milianku on 6 July 2009 and provided her with a letter dated 26 June 2009 from the District Director, Mr Roley Bayman. She read the letter. It set out the above issues as well as her not being available by her mobile telephone to take calls from her coordinator. It went on to say:

> The circumstances of these complaints have been discussed with the Department's Integrity and Screening Unit and a decision has been reached not to commence disciplinary action at this time. This takes into account your acknowledgement that events taking place in your personal time are affecting your work performance and your decision to take some time off to deal with these issues.
>
> It is important that all employees of the Department conduct themselves with the highest levels of professionalism at all times and that they are cognisant of the impact of their behaviour upon clients, members of the public and other employees of the Department. As such I take this opportunity to remind you that you are expected to behave in accordance with the standards set out in the Department's Code of Conduct, the WA Public Sector Code of Ethics, Departmental policies and instructions.
>
> Further, you are not to have uninvited discussions with clients about your personal issues, or discuss Departmental decisions with anyone other than when it is appropriate and you are authorised to do so.
>
> Non-compliance with the obligations set out in this letter is likely to result in disciplinary action and this may jeopardise your future with the Department.
>
> (Respondent's documents, 39)

13 Ms Milianku gave explanations to Mr Tulip for the incidents raised in the letter. According to Mr Tulip's record of the meeting, Ms Milianku said she did not recall the content of the conversation with KM at the shopping centre, other than that KM approached her. In her witness statement Ms Milianku says KM initiated a short conversation with her about the correct process to get her child returned to her and the Department's view about her relationship with her mother. Ms Milianku says she advised KM to take the Department's advice on the matter.

14 Mr Tulip and Ms Milianku discussed her not being available by mobile phone. They discussed the incident of 11 June 2009 and Ms Milianku explained her version of the situation, set out above.

15 As to the incident on 18 June 2009, Ms Milianku denied crying in the client's presence. She explained that she may have become sad, teary and melancholy during the visit because prior to it becoming a prison, the facility had been a hospital used for TB treatment and it brought back memories of her father or grandfather having been treated there.

16 Ms Milianku denied making inappropriate comments to a client and her children, and questioned where she would have obtained the information on which they were said to be based. She denied informing clients about departmental decisions. She admitted speaking about her personal problems and acknowledged that it was not good for the client or her colleagues and was unprofessional. She 'acknowledged that she now realises that the appropriate action to take is to access professional help through counselling services which she is now doing' (Respondent's documents, 103).

17 In her evidence, Ms Milianku acknowledges that she made comments to the mother of a child in foster care, whose visit to Wooraloo prison she supervised. She said:

> 11. Around the same time I made comments to Ms [B] regarding Departmental decisions about Ms [B's] children. [sic] I told Ms [B], Ms Kordzik of DCP was angry that Lisa had been seeing her partner. I reminded her that DCP had advised her to not have any contact with her partner, who is the father of all her children and is the prisoner referred to in 6 above. I do not have access to any confidential case information.
>
> 12. During a visit with Ms [B] I spoke to her about personal financial problems I was experiencing at that time. This was reported to DCP. I was counselled by Mr Tulip. I admitted to Mr Tulip that my action was unprofessional.
>
> (exhibit 1 [11-12])

18 Mr Tulip's report, under the heading of 'Agreed Outcome', says:

> Ms Milianku was reminded there has been no investigation and no breach of discipline has been inferred, therefore no disciplinary action is being undertaken.
>
> It was agreed that due to the trauma Ms Milianku had suffered in her personal life that this had affected her work performance. Ms Milianku has acknowledged this and both parties agreed to meet regularly to review and monitor the situation in relation to work and Ms Milianku' s ongoing performance.
>
> Ms Milianku was reminded of her duties and responsibilities as a family resource worker and was advised she would receive a copy of the discussion and a copy of the public sector code of conduct, ethics and a copy of the Department of Child Protection code of conduct.
>
> Ms Milianku will continue to attend her personal appointments with her counsellor and has attended 2 sessions with prime counselling service. Ms Milianku will continue to access these services as she needs. Ms Milianku has agreed to meet with her line manager initially on a fortnightly basis to discuss her work performance and any issues arising from her work. The content of these meetings will be recorded and placed on Ms Milianku's supervision file.
>
> (Respondent's documents, 43)

19 Ms Milianku also says that as a result of the meeting she agreed to 'attend professional counselling for my personal issues and to attend a supervision session every two weeks with my line manager' (exhibit 1 [14]).

Supervision Sessions

20 Ms Milianku attended supervision sessions with Mr Tulip on 14 July, 3 August, 18 August, 1 September, 22 September, 20 October and 10 November 2009. During these sessions they discussed Public Sector Standards and the Code of Conduct, a copy of the latter being provided to Ms Milianku. They reviewed the work she was performing; discussed issues and incidents, Ms Milianku's treatment and the personal counselling she was receiving from her own counsellor and the Department's counselling provider. They also discussed the training sessions which were appropriate for her.

21 At the meeting on 3 August 2009, according to Mr Tulip's notes, 'Anne likes the idea of not working too long with the same family so she avoids being caught up in their personal problems which they tend to share with her' (Respondent's documents, 47). This approach accorded with Mr Tulip's preference for Ms Milianku not to have longer-term involvement with the same clients. Feedback about Ms Milianku's performance was to be sought from field officers.

22 At the meeting on 1 September 2009, she was 'presenting well and appears less stressed and worried' (Respondent's documents, 49). It was agreed that 'due to her progress future meetings would be three weekly, and later four weekly should she continue to make progress.

23 The notes of the meeting of 22 September 2009 indicate that feedback was being received from Ms Milianku's field officers. One issue arose which the field officer had addressed with Ms Milianku. The issue appears to have been where Ms Milianku made what she thought was a positive comment to a carer about a child's skin condition improving. The carer did not react positively. The field officer's report suggested that in making the comment about the issue, Ms Milianku 'may have overstepped the mark in her role as FRE' (Respondent's documents, 50). In her evidence, Ms Milianku said that in this case she acted according to the instructions which applied to FREs supervising visits and does not agree that she did anything wrong.

24 Mr Tulip's notes indicate that at the meeting on 20 October 2009, they discussed an incident where Ms Milianku had cut short a visit she was supervising due to the mother's behaviour. He noted:

> We discussed the difference between her role as FRE and the field officer's role and how she should discuss the interaction the children have with their mother. We discussed the difference between factual incidents between the mother and children during contact and how Anne should report these to the FO, and not be advising the FO or mother on how she feels which direction case planning should be headed as she Anne does not possess all the information.
>
> (Respondent's documents, 53)

25 At the meeting on 10 November 2011, they discussed her counselling and how it was important to continue this. They also discussed Mr Tulip's expectations of Ms Milianku in her FRE role, and Mr Tulip noted that 'in 2010 I would updating [sic] the FRE role and responsibility package and this would assist to clarify her duties' (Respondent's documents, 54).

19 January 2010

26 When she returned two girls to a house in Swan View, Ms Milianku was approached by a youth of approximately 14 years of age, who came out of the house. He said he was under State care and asked her to transport him so he could get back to his care facility to meet his curfew. He appeared drug affected, told her he had visited the house to smoke marijuana with his uncle and that he intended to steal a car to get more drugs.

27 Ms Milianku says in her evidence that she decided to transport him so as to remove him from the house where she had just left the two girls. Interestingly she did not appear to consider that she was leaving the two girls at the house where the youth had told her there were drugs present.

28 Ms Milianku did not seek advice or authorisation before transporting a 14 year old youth who she thought was drug affected. An email from Ms Kirsty Shalders, Duty Officer, to Mr Peter Tulip dated 23 February 2010 also indicates that she became aware that Ms Milianku said she had wanted to get the youth to open up to her and so started driving in what can only be described as an erratic manner, turning the radio up loud and swerving to get him to talk (Respondent's documents, 61-62).

29 On 29 January 2010, Ms Milianku was counselled by Mr Tulip and Ms Lynne Klompmaker that her actions were irresponsible and she had placed herself and the youth at risk, that she was not to transport anyone without being given directions to do so and the matter was referred to the Integrity Services Unit. During the meeting, Ms Milianku accepted that there may have been a risk in transporting this boy (t 59).

30 Mr Mark Crofts, the Director of Standards and Integrity, advised Ms Milianku by letter dated 21 June 2010, five months after the incident, that having taken account of her explanations, he had decided to not take this act of suspected misconduct further. However, he said that it was dangerous for Department employees to transport clients with whom they are not familiar without prior authorisation. He also said '[a]ny future allegations of this nature are likely to result in disciplinary action and this may jeopardise [her] future'. He thanked her for her cooperation.

31 We find this letter quite extraordinary. Having decided not to take the matter further, Mr Crofts did not indicate whether Ms Milianku had been exonerated or that the matter would be otherwise dealt with. However, he says that what she did was dangerous, and says that any further allegations 'of this nature' are likely to result in disciplinary action and may jeopardise her future. This suggests strongly that he found fault on her part but not such as to take this particular matter further as a misconduct issue, and he warned her that any future incidents will have consequences. Mr Crofts' message was confused and unhelpful. We believe it has allowed Ms Milianku to believe she was exonerated.

32 We are of the view that the counselling Ms Milianku received from her line management on 29 January 2010 about this incident, during which she acknowledged the risks, was appropriate but was undermined by this letter. It is clear to us that the distinction between management and discipline or misconduct issues has been confused and in that context may have been unfair to Ms Milianku.

33 When asked by Mr Tulip subsequently what she had learned from this situation, Ms Milianku answered 'that next time I will get back in the car and that I will pick up the phone and that I will call the Police' (exhibit 1 [21]). Also of interest is that Ms Milianku seems to have focussed on what she perceived as a failure of the Department to properly investigate the allegations of there being drugs at the house and continued to press this issue to the point of creating frustration in her managers.

4 October 2010

34 **(1)** Ms Milianku was to transport a young boy of 11, Jesse, from his mother's home to a Departmental facility for him to stay overnight while his mother had respite. The boy and Ms Milianku gave conflicting accounts as to what occurred. The matter was referred to the Integrity Services Unit for possible disciplinary action. By letter dated 10 August 2011, eight months after the incident, the Director of Standards and Integrity said, amongst other things:

> It was noted that the alleged incident occurred in a stressful situation in which you acted to prevent Jesse from placing himself in harm's way.
>
> (exhibit 1, attachment 2)

The Department took no further action. As will become clear later, by this time, the respondent was considering terminating Ms Milianku's employment on the grounds of ill health.

35 **(2)** Also on 4 October 2010, Ms Milianku was driving the Department's vehicle when she pulled up outside a private residence. She says she had become lost and pulled up to check her navigation device. However, a complaint was made by a member of the public that she had parked for the purpose of examining items left there for a verge side collection.

36 The member of the public alleged Ms Milianku parked across the driveway and that when the resident spoke to her she stated 'I know where you live' and 'I'll be back' and referred to him as 'fatty'. The allegations were referred to the Integrity Services Unit as suspected acts of misconduct. Many months later, by letter dated 8 August 2011, the respondent advised Ms Milianku that the allegation of a breach of the Department's Code of Conduct by using the Departmental vehicle for private purposes on 4 October 2010, making unprofessional comments by allegedly saying to the member of the public that 'I know where you live' and 'I'll be back', and that she had breached the Code of Conduct on 5 January 2011 were all unsubstantiated. However, the allegation of making unprofessional comments by referring to the member of the public as 'fatty' or words to that effect was substantiated and Ms Milianku was reprimanded for it. In the meantime, Mr Tulip advised her not to return to the house.

37 Following the incident of 4 October 2010 involving Jesse, Ms Milianku was stood down from FRE duties, and allocated administrative duties. She was instructed by Mr Bayman not to have contact with the Department's clients. Ms Milianku asserts that Mr Bayman told her not to have contact with children, and that the Department's clients are the children, not anyone else. She continued to take this view even though in her evidence before the Board she referred to people other than children as being clients.

21 December 2010

38 As part of undertaking administrative duties, Ms Milianku was working at a cupboard under the front counter of the Mirrabooka office. A client came to the counter. Ms Milianku says the person was demanding service and approached Ms Milianku as she was the only person not already occupied with someone else. Ms Kirsty Shalders was also at the counter. Ms Milianku says she asked the client to write down her name and the name of the case manager she wished to speak to. Ms Milianku spelled the name incorrectly. It appears the client became extremely demanding. The evidence is conflicting as to who told the client they would call security if the client did not calm down. The client is said to have responded and there was then an altercation between Ms Milianku and Ms Shalders in which Ms Milianku alleged that Ms Shalders shouted at her and called her an idiot. It appears that Ms Shalders told Ms Milianku that she was going to report to Mr Tulip that Ms Milianku had not complied with the instruction not to deal with clients.

39 Ms Milianku then sought to pursue a grievance against Ms Shalders. The matter was dealt with by line management. Ms Milianku had sought to report the matter to the Integrity Services Unit and wanted to pursue a grievance.

40 Mr Bayman then spoke to Ms Milianku who asserted that his instruction not to deal with clients related only to children. She sought to be provided with a copy of his original instruction in writing.

5 January 2011

41 Ms Milianku, together with another person, returned to the house where she had parked on 4 October 2010. She says she had obtained advice from the police to the effect that there was nothing to prevent her from doing so. She says she was gathering evidence for her response to the allegation regarding her conduct on 4 October 2010. The resident from the house complained to the Department about her presence there, that her behaviour was perceived as threatening and intimidating. The matter was referred to the Integrity Services Unit for investigation. Mr Bayman instructed Ms Milianku to be discreet about these issues and the investigation.

42 In the meantime, Mr Bayman instructed Ms Milianku that should she be unhappy with the outcome of the internal process to deal with her complaint about Ms Shalders' behaviour towards her on 21 December 2010, she could take the matter further. However, by email dated 24 January 2011, he also informed her not to include the Director General in her correspondence (Respondent's documents, 92). Ms Milianku says in her evidence that in an email, Mr Bayman gave her permission to email the Director General if she was unhappy with the outcome of the internal process (t 80). However, the email was not produced. Her evidence is entirely contradicted by a further email to her from Mr Bayman dated 4 April 2011. In responding to an email to him in which Ms Milianku had copied the Director General, Mr Bayman said that he had previously instructed her not to communicate with the Director General and reminded her that her doing so was a breach of his previous instruction (Respondent's documents, 162). In an email dated 10 May 2011, Ms Milianku once again copied the Director General (Respondent's documents, 198).

43 When Mr Bayman enquired of the Integrity Services Unit as to the progress of investigation of a matter before it, Mr Marc Norton, the Manager of the Integrity Services Unit, gave him some sound advice in the context of what had been occurring. On 21 December 2010, Mr Norton wrote to Mr Bayman to the effect that it may be appropriate to return Ms Milianku to FRE duties, to meet with Mr Crofts, himself and Human Resources to establish a performance management/sub-standard performance process to ensure that all avenues were pursued to ensure Ms Milianku's shortcomings were addressed. Mr Norton invited Mr Bayman to provide the written instruction he is said to have given Ms Milianku to not engage with clients and that this could be pursued as a breach of a lawful instruction, which is an act of misconduct. There is nothing to suggest that Mr Bayman forwarded any written instruction regarding this issue and it was not pursued. In fact it was this instruction which had been part of the context of Ms Milianku's conflict with Ms Shalders (Respondent's documents, 136).

8 February 2011

44 Ms Milianku attended an interview with a Mr Fitzpatrick of the Integrity Services Unit regarding her alleged misconduct on 5 January 2011. The meeting concluded at 1:45 pm. During the meeting, according to Ms Milianku, the investigator asked for copies of the photographs she said she had taken on 5 January 2011. Ms Milianku was accompanied in that interview by a union representative. At the conclusion of the meeting, they went to the union's office and unsuccessfully attempted to download the photographs. Ms Milianku then went into the city to download them. She did not return to work that day and did not inform her employer of her intentions.

45 On 17 February 2011, Mr Bayman wrote to Ms Milianku noting that she had not returned to the office after her meeting with Mr Fitzpatrick. He said she was required to provide a medical certificate to substantiate her absence. He also set out that he had concerns about her health and medical capacity to undertake her position's duties. He was referring her for an appointment for a medical opinion regarding her ability to carry out her duties. Otherwise, she was directed to stay at home on full pay.

46 Ms Milianku was directed to attend appointments with Dr Gemma Edwards-Smith on 18 March and 13 April 2011. The Department had provided a significant amount of material to Dr Edwards-Smith prior to the first appointment. Dr Edwards-Smith provided a report to the respondent dated 4 May 2011.

47 During the appointments, Ms Milianku gave an explanation of a number of the incidents referred to above, and advised Dr Edwards-Smith of her previous psychiatric history including treatment for depression, that she had suffered a breakdown, had a medical condition and that she had Post Traumatic Stress Disorder. She had been seeing a psychiatrist, Dr Linde, who has treated her for ADHD with Dexamphetamine. Her general practitioner was treating her with antidepressants. Ms Milianku also informed Dr Edwards-Smith that she had difficulty sleeping, and was eating more, her house was in disarray. She had a history of prior trauma in her life.

48 In her conclusions, Dr Edwards-Smith makes clear that she has not automatically accepted that the incidents alleged against Ms Milianku occurred as reported. However, she notes that there are a number of issues which appear to relate to boundary issues between Ms Milianku and clients, and her judgment and conduct in the workplace appear to have been unsatisfactory.

49 Dr Edwards-Smith said she did not believe there was an issue of mental illness relevant to Ms Milianku's work capacity. However, she said that problems in the workplace such as with boundaries and judgment do not arise from depressive illness but may be related to her personality 'and subtle impairment of frontal lobe functioning that may be clarified by neuropsychological profiling', which she recommended. As to an overall prognosis, she said that she believed it would be appropriate to review Ms Milianku after neuropsychological profiling.

50 When asked for clarification, Dr Edwards-Smith said in a report dated 26 May 2011, that even if neuropsychological profiling demonstrated 'even subtle neurocognitive symptoms', that there was no remedial treatment which could be taken. She said that it appeared likely that incidents with Ms Milianku's impaired judgment were likely to continue given that she had not developed any insight into what had occurred. She concluded that Ms Milianku had significant issues as to competence to carry out her position 'not arising from mental illness' (Respondent's documents, 214-5).

51 Following Dr Edwards-Smith's supplementary report, Mr Ladiges wrote to Dr Edwards-Smith on 15 June 2011. Most significantly, his letter acknowledges that Dr Edwards-Smith's most recent report found no direct correlation between Ms Milianku's mental illness and her pattern of inappropriate behaviour and poor judgment. Accordingly, the Department sought any further comment she might make regarding such a connection (Respondent's documents, 224).

52 In her report dated 22 June 2011, Dr Edwards-Smith said that it was unlikely that Ms Milianku's issues of impairment and judgment would improve, or were amendable to treatment. She said:

> I think one has to accept that taken in its entirety, given the longitudinal history, the psychiatric conditions of Post Traumatic Stress Disorder, Attention Deficit Disorder and depression taken in context with a Personality Disorder it is unlikely that her ongoing issues with impairment and judgement will improve. She is displaying some problems with higher executive functioning of the frontal lobes, which I would suspect is arising in the context of her long-term conditions and Personality Disorder.
>
> I believe it is unlikely that the ongoing issues with poor decision-making and impairment in judgement will be amendable to treatment, and that they will have a longer-term adverse impact upon her competence to safely carry out her substantive duties as a family resource employee.

53 In her evidence, Dr Edwards-Smith clarified that she had initially recommended neuropsychological profiling as a means of determining whether there was a frontal lobe functioning problem. However, even if this was demonstrated, there was no treatment available which would overcome impaired judgment or a lack of insight, which was affecting Ms Milianku's work performance.

54 On 6 July 2011, the Director General wrote to Ms Milianku noting that since 21 February 2011 she had been directed to remain away from work while the Department sought a professional opinion as to her 'fitness for continued employment in [her] substantive position as a FRE'. The assessment was to ascertain Ms Milianku's 'capacity to undertake [her] substantive role; identify [her] present capabilities and/or restrictions; gain a determination regarding [her] fitness for continued employment' (Respondent's documents, 229). This letter noted Dr Edwards-Smith's medical reports, which were attached to the letter.

55 The letter said that the medical reports 'indicate that you are not able to undertake the full duties of a FRE in an unrestricted manner' and:

> 'it is unlikely that your ongoing issues with poor decision making and impairment in judgement will be amenable to treatment and that these issues will have a longer term adverse impact upon your competence to safely carry of [sic] the duties required of the incumbent of a FRE position.'

56 The letter goes on to note that as Ms Milianku is not a public service officer she could not be transferred into a public service position and there are no other non-public service positions that 'would match [her] skill sets and accommodate [her] medical capacity'.

57 Ms Milianku was then given the opportunity to provide the Department with reasons why her contract of employment should not be ended on the grounds of her incapacity to carry out the duties of the FRE position, and that the Department has no suitable alternative position.

58 Ms Milianku, through her union, requested and was given further time to respond. She requested further information be supplied and it was provided. She also sought and was granted the opportunity to obtain a second opinion, which was to be provided to the respondent. Ms Milianku went to her treating psychiatrist, Dr Linde, and showed him the report provided by Dr Edwards-Smith. Dr Linde has given evidence that he hurriedly read that report. He did not see any of the departmental documents which Dr Edwards-Smith had seen.

59 Dr Linde wrote the following letter dated 5 October 2011 to Ms Milianku (formal parts omitted):

> Thank you for coming today for our full hour consult. We discussed the SPECT scan. It did not show evidence of any psychosis, but only the possibility of depression and anxiety and ADHD. There was nothing in the scan that would 'explain' nor show mental illness, nor a tendency for behaviour problems.
>
> We talked about your diagnosis. Yes, we have already agreed that you had the features of ADHD - adequately controlled with Dexamphetamine. Your anxiety and depression is adequately controlled with a standard dose of Lexapro 20 mg/dAY.
>
> Yes you have had PTSD based on traumas as a child and traumas when you were about 35 years old. These were considerable.
>
> I disagree that your life has been in decline consistently - other than due to the traumas at the time.
>
> I also disagree that you have a personality disorder and that you will 'continue' to show poor judgement and decision making.
>
> On examination today you demonstrated an understanding of your own manner and reactivity tendency. These reactions were in response to events that would make anyone react. We discussed this.
>
> I do see you having the ability to learn from your own self observation.
>
> We will meet again for a consult on Wednesday, 2/11/11 at 1 pm.
>
> (Respondent's documents, 269)

60 Dr Linde said in his evidence that Dr Edwards-Smith had a difficult job to do, to make an assessment under certain time constraints. However, he would caution against making predictions about the future as she had done. He also acknowledged that unlike a forensic psychiatrist, he has a rapport to preserve with his patient, whereas the forensic psychiatrist, having undertaken an assessment and produced a report for legal purposes '[t]hey're not there to pick up the pieces afterwards' (t 185), whereas due to his ongoing treatment and relationship with his patient, he needs to be supportive.

61 Dr Linde described Ms Milianku's conditions of depression, ADHD and complex post-traumatic stress disorder, and that she had been a trauma victim from childhood and early adult life.

62 Dr Linde agrees with a number of Dr Edwards-Smith's diagnoses. He disagrees with Dr Edwards-Smith's description of Ms Milianku's life appearing to be in decline due to a number of traumas. He also disagrees with, or is wary of, a diagnosis or label of personality disorder. Dr Linde ordered a SPECT scan to be done by Dr Joe Cardaci to validate for example ADHD, and it did so. He also asked Dr Cardaci to perform a Stroop test, which was also indicative of the conditions arising from Ms Milianku's history of a rough and physically abusive childhood.

63 Dr Linde said his reason for writing the letter to Ms Milianku was to help her feel heard and to validate her. He said he had asked Ms Milianku to get her employer to write to him with questions so that he could provide a proper report, and the letter he wrote was in lieu of that. He explained why he wrote the particular comments. He specifically expressed in the letter his disagreement about Ms Milianku having a personality disorder and that she would continue to show poor judgment and decision making.

64 Dr Linde said that one of the bases for his disagreement with Dr Edwards-Smith's report 'was that Anne was upset by the report' (t 182) so he hoped to put it in context for her.

65 In summary, Dr Linde said his disagreement with Dr Edwards-Smith was made in the absence of the information available to her and in the presence of his relationship with Ms Milianku (t 185).

66 Dr Linde gave some useful insight into Ms Milianku's reaction to issues from her past as they might relate to her work, such as dealing with difficult children and those who have been physically and sexually abused. He said he had often talked to her about issues that would bring up memories in her. He has counselled her about pushing aside 'our own biases and prejudices as much as we can and – and getting on with the job. And I've also talked to her a great deal about the need for obedience up to a point' (t 188). He accepted that it would be difficult for Ms Milianku, as a driver for disturbed children and an access supervisor, to be a totally neutral party. Dr Linde said that in his opinion Ms Milianku is, '[g]lobally speaking' (t 195), fit to work.

67 Following further correspondence and meetings between representatives of the respondent and Ms Milianku and her representatives, the respondent wrote to Ms Milianku, terminating her employment.

68 The relevant parts of the letter of termination of 24 November 2011 provided as follows:

> Despite having had the opportunity to carefully examine the medical reports provided by your doctors, Dr J. Cardaci and Dr A. Linde, both of which were attached to the aforementioned correspondence, I fail to see that you could successfully return to your position of Family Resource Employee – Mirrabooka Office.
>
> The medical reports provided by your doctors lack the conclusive evidence that is evident in Dr Gemma Edwards-Smith's medical report. It would not appear that your doctors have taken all available information into consideration when providing their opinion. In particular, despite Dr Edwards-Smith stating that your behaviours are deeply entrenched, your doctor is dismissive of this opinion yet cites no concrete evidence in support. Further, your doctor gives no explanation as to your past behaviour and does little to assure the Department that you pose no risk to children.
>
> In relation to your behaviour, you have demonstrated a pattern of increasingly concerning behaviours whilst in the workplace. Despite the Department's best attempts to work through these behaviours, you have demonstrated no understanding as to how your behaviour is impacting upon your colleagues and your clients. Further, you do not appear to have made any attempt to address such behaviours as no improvement has been noticed.
>
> Of even greater concern is your refusal to take/follow any direction that is given to you from your managers. In a Department such as ours, it is crucial that directions are followed to ensure that the safety of the children in the Department's care is not compromised. The Department, in its role in child protection, has an obligation to provide the children in its care with a safe environment. Such an obligation is taken very seriously by the Department. In this context, the Department is concerned that your behaviours will compromise the safety of the children that would be in your care whilst employed as a Family Resource Employee.
>
> I have given great consideration to all information available to me at this time, including Dr Gemma Edwards-Smith's report in which she finds that: *'Based upon the available information, I* am *not of the opinion that it is likely that there is any remedial treatment that could be taken, even in the event that subtle neurocognitive symptoms were found.'*
>
> Given that the Department:
>
> - is of the opinion that you are no longer fit to carry out the work for which you were employed and could compromise the safety of the children in your care;
> - does not have any non public service positions into which you could reasonably be placed;
> - cannot, lawfully, transfer you into a public service position;
> - cannot continue to spend public money paying you to stay at home;
>
> I have, regretfully, concluded that your contract of employment must be considered to be at an end with immediate effect.
>
> (Respondent's documents, 271)

Consideration and Conclusions

69 We have deliberately recited all this evidence in this manner as a means of setting out the full context of this matter. The position of a FRE, when working with clients, in supervising visits and in providing transport, largely works alone with those clients and has no direct supervision. It is a job which requires common sense, good judgment, tact and self-control to be performed competently.

70 The appellant expressly says that she does not deny that she was provided with procedural fairness in the process leading to her dismissal. However, her complaint is that the respondent has purported to make the decision to dismiss based on questions including her professional competence, however, the letter of dismissal and the discussions and processes leading up to it were focused only on medical fitness. She says the respondent has now sought to change the reason for dismissal to encompass the issue of professional competence. The appellant also relies on Dr Linde's letter to her as contradicting Dr Edwards-Smith's opinion.

71 The respondent says that following a number of incidents of inappropriate behaviour and substandard performance, attempts were made to manage and correct that performance and behaviour. However, problems continued to arise. Ms Milianku was referred for a psychiatric assessment. That assessment found no particular psychiatric condition explained the cause of these issues but concluded that the problems were issues of judgment and boundaries. The medical assessment said it could not be excluded that a more significant psychiatric illness had developed, but:

> I could not definitively exclude this, however at this stage I do not believe that this issue of mental illness is that which is the most relevant with respect to her work capacity.
>
> It appears that Ms Milianku has issues of judgement such that her competence to carry out her job was impaired and I would therefore suggest that it does appear that she does not presently have the capacity to work as a family resource worker for the Department of Child Protection.
>
> (Respondent's documents, 192)

72 In her further report of 26 May 2011, Dr Edwards-Smith again said that she did not consider that Ms Milianku's psychiatric disorders were the cause of the issues in the workplace. However she found that 'it does appear very likely that there will continue to be incidents with Ms Milianku with impaired judgement, particularly noting that she has not developed any insight into the issues that have occurred'. She concluded by saying that the issues 'predominately pertain to the competence to carry out her substantive position', and that 'it does appear that she does have significant issues with respect to her competence and her capacity to work in this position, not arising from mental illness' (Respondent's documents, 215).

73 It is clear that from February 2009 a number of issues arose relating to Ms Milianku's conduct, decision making and judgment. It was found that on 3 February 2009 Ms Milianku made inappropriate comments to a client of the respondent. On the 11 June 2009, her conduct contributed to an aggressive reaction from a young boy who, having been in her care, had been suspended by school. On the 18 June 2009, on a supervised visit to Wooraloo prison, she allowed her emotions to overcome her; she appeared to be crying and made inappropriate personal comments to clients of the Department.

74 On the 6 July 2009, Ms Milianku received counselling regarding those matters. She was then provided with an opportunity to put her explanations about those issues, including that she acknowledged the need for her to have counselling, and that it was not appropriate to speak to clients or her colleagues about her personal problems and that it was unprofessional. She agreed to participate in a series of supervision sessions over a period of five months where her work performance and particular incidents were discussed, along with discussion of her treatment and personal counselling. She was provided with advice and direction on how to deal with particular incidents. She appeared to be making progress during these meetings and additional training was discussed with her and arranged for her. Ms Milianku and Mr Tulip continued to discuss her role.

75 However, on the 19 January 2010, Ms Milianku undertook an unauthorised transportation of a young man who she had judged was drug affected. She was counselled that this was not appropriate and the matter was referred to the Integrity Services Unit. The Integrity Services Unit decided not to take disciplinary action, however said that further allegations of that nature would result in disciplinary action and may jeopardise her future employment. We conclude that whilst the Director of Standards and Integrity decided not to take the matter further as a disciplinary matter, he did not make it clear what his decision actually involved. We find that the decision to transport the youth was a demonstration for poor judgment which placed her in danger, and Ms Milianku appears to accept this.

76 On 4 October 2010, Ms Milianku was involved in two separate incidents which resulted in complaints against her. One was the difficulty she had with the young boy Jesse, 'however', the Department was investigating that matter and ultimately decided to take no action.

77 Also on the 4 October 2010, Ms Milianku parked outside the home of the member of the public and became involved in a conflict with that person. She was found to have misconducted herself in that she referred to the member of the public inappropriate terms calling him 'fatty'. She was counselled not to return to the house but did so. The complaint regarding her return to the house was dismissed as a disciplinary matter. We must say it does not seem to be a sensible thing to have done, given what had occurred before.

78 Having been stood down from FRE duties, Ms Milianku was instructed not to have any contact with clients. Although her explanation for the encounter with a member of the public on the 21 December 2010 is understandable, her explanation for having been told not to deal with children as opposed to not dealing with clients is not credible. She sought a copy of a written direction to not engage with 'clients' but does not seem to deny that she was instructed not to deal with children. Therefore some direction was given, although it may not have been in writing. During her evidence Ms Milianku referred to adults with whom she dealt as 'clients', therefore, her assertion that Mr Bayman's instruction not to deal with clients referred only to children is not credible. Further, it reinforces Mr Bayman's evidence of Ms Milianku's argumentativeness when given an instruction.

79 Ms Milianku then had an altercation with Ms Shalders and was dissatisfied with the outcome. She was told that she could take the matter further but was directed not to copy the Director General into her emails about this situation and other matters, but continued to do so notwithstanding further instruction.

80 Therefore up to that point in December 2010, there had been a series of low to moderate but continuing incidents of behaviour problems and poor performance. After that point the problems continued, including that Ms Milianku breached the instruction to not contact the Director General, and did so more than once. Of itself that breach may be minor, 'however', in the context of her poor performance and her unwillingness to take instruction, demonstrated that unreasonable steps were required to manage Ms Milianku and enable her to perform at a reasonable standard, if indeed she was capable of a reasonable standard of performance.

81 Further in February 2011, instead of returning to work after an interview with the investigator, Ms Milianku went back to the union's office and then into the city to download photographs, but did not inform her employer of her intentions.

82 It is very clear to us that Ms Milianku has a history in the performance of her FRE role of poor decision-making, becoming involved in conflicts, not following reasonable instructions and guidance, not maintaining appropriate boundaries, amongst other issues. She was not merely hard to manage; she created difficulties for the Department in its dealings with its clients and put herself and others into difficulty.

83 Mr Tulip, in particular, and Mr Bayman had attempted to counsel, advise and train Ms Milianku but problems continued to arise.

84 There was also a lack of coordination between the line management of the Department and the Integrity Services Unit, such that it appears that issues were investigated and 'resolved' as disciplinary matters without information being provided to management and, I think, leaving Ms Milianku with the impression that things had been resolved and that she was exonerated. However, it appears that decisions were made by the Integrity Services Unit related to misconduct as opposed to what might have been performance issues. However, Mr Norton gave some good advice; to undertake a performance management/sub-standard performance process. Mr Norton seems to have hit the nail on the head in saying that '[t]he situation appears to me that this person is simply not very good at her job', and that her conduct was not really of the nature and level appropriate for the Integrity Services Unit to be dealing with (Respondent's documents, 136). However, the respondent did not follow this good advice and went down the path of looking to see if there was a medical explanation for Ms Milianku's behaviour and with a view to retirement of the grounds of ill health.

85 Ms Milianku was referred to Dr Edwards-Smith for assessment as to whether she was fit to undertake her work. Dr Edwards-Smith's report indicates that there are real difficulties for Ms Milianku in performing her work. Dr Edwards-Smith looked at what the Department provided to her and took account of Ms Milianku's explanations of what was occurring in making her assessment.

86 Most telling, from our perspective, is the evidence of Dr Linde. He has treated Ms Milianku for more than five years as her psychiatrist. On its face, it was suggested that Dr Linde's report contradicted Dr Edwards-Smith's report. A proper assessment of Dr Linde's evidence indicates that what he did was to write a letter of support to Ms Milianku as his patient to assist her to feel validated. What he did not do was provide an objective, independent, assessment and report to the Department about her conditions and circumstances. He was not asked to provide such a report even though he says he asked Ms Milianku to have the Department write to him with particular questions. He was not provided with the material Dr Edwards-Smith was provided with. He also acknowledged that Dr Edwards-Smith had a job to undertake a forensic assessment and that she did so within the limited time available to her, and that whilst her role was for a particular purpose, his as Ms Milianku's psychiatrist, was to pick up the pieces afterwards, to provide reassurance and maintain the confidence in the doctor-patient relationship.

87 As to the issue of whether Dr Edwards-Smith changed her mind between her various reports as to whether or not further tests should be done, we conclude that she originally recommended neuropsychological profiling for the purpose of determining a cause for Ms Milianku's behaviour by reference to what might be evident in her brain functioning. However, the neuropsychological profiling was for the purpose of providing an explanation for the behaviour which did not help provide any assistance as to her employment. This is why she did not continue with her original recommendation for a neuropsychological profiling to be undertaken.

88 In all of the circumstances we conclude, on the basis of the material before the Board, that Ms Milianku is medically fit to perform the job of a FRE. Her difficulties of poor judgment, decision-making and lack of competency are not due to any particular medical condition. In those circumstances, where the respondent's decision to terminate the employment purports to rest on medical unfitness, it is in error.

89 However, Dr Linde's evidence makes very clear that Ms Milianku's condition, including a number of psychiatric conditions, stems from abusive treatment and trauma as a child and as a young adult and other difficulties that have arisen in her life. The circumstances of her employment in dealing with dysfunctional families, young people suffering from abuse and other similar difficulties brings back to her memories of her own childhood and means that she is not able to be objective and neutral. According to Dr Linde's evidence, he has counselled her about pushing away her own biases and prejudices and getting on with the job and to be reasonably obedient. This evidence supports the view that there is a difficulty with Ms Milianku's capacity to separate herself from the clients of the Department and her own experiences, and to enable her to do the job for which she is employed. It is clear that she has difficulties making judgments on important matters associated with performance of a role which is largely undertaken without direct supervision, in circumstances where she is dealing with vulnerable people and children in particular, in challenging circumstances. She is also difficult to manage and resists direction where it conflicts with her views.

90 The role of the Board is to conduct a hearing *de novo* and not merely review the employer's decision (*Gary Mark Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266). We have commented on what appears to be a lack of co-ordination with, and confusion arising from, the findings and decisions of the Integrity Services Unit. However, we are satisfied that Ms Milianku's conduct, her lack of judgment and poor decision-making, and her resistance to direction, means that she is not competent to undertake the role of a FRE.

91 We have considered whether in light of the respondent not demonstrating what it really relied upon; that is medical unfitness, and that it did not undertake a sub-standard performance process when it should, that the appropriate decision might be to overturn the decision to terminate. However, it is clear to us that after a five month process of counselling and guidance by Mr Tulip, other problems including a refusal to comply with reasonable and lawful instructions continued. To reinstate Ms Milianku would be only for the purpose of her undergoing a sub-standard performance process, when it has been demonstrated that Ms Milianku is not suited to the work of a FRE, and to enable the respondent to deal with a demonstrated failure to follow a lawful instruction. It is highly unlikely that this process would be successful in resolving the recurring problems. We believe those problems arise from a lack of common sense, good judgment, tact and self-control. Ms Milianku's continued employment would impose an unreasonable management burden.

92 In all of the circumstances, if there have been flaws in the process in dealing with her and even if the decision to terminate is wrongly grounded by reference to medical unfitness, we would not overturn the decision and provide for Ms Milianku's reinstatement in a position for which she is clearly unsuited and, which history clearly demonstrates, she is more likely than not to continue to have problems which cause her, the Department's clients and the Department problems.

93 We would dismiss the appeal.

MR G RICHARDS:

94 After hearing the testimony of Messrs Bayman and Tulip, I am of the view that there was some variance in their individual views as to what was required of the appellant in her role as a Family Resource Employee (FRE). Further examination of their respective statements of evidence serves to reinforce my view in this regard.

95 This anomaly would have been exacerbated by the absence of precisely articulated operating procedures that were readily communicated and comprehended by field staff. Confusion at the top of an organisation invariably filters down to operational levels of the public interface, often culminating in reduced levels of competence, effectiveness, and loss of public confidence in the institutions of State.

96 The often repeated mantra that the appellant should have contacted a more senior officer to formulate an appropriate response to the evolving situation while fine in theory is somewhat impractical in the context of an evolving human situation, exacerbated by the absence of appropriate communications tools.

97 If the respondent envisaged that maintaining effective telecommunication contact with a superordinate was pivotal to field work, it would seem incumbent on the respondent to have provided an appropriate and effective means of maintaining such communication. To do otherwise, would at best prove detrimental to operational effectiveness, or at worst risk breaching any duty of care owed by the respondent to its employees and clients.

98 The respondent's ongoing inability to successfully sustain disciplinary actions against the appellant, seems to have thwarted what appears to me to have been a thinly veiled attempt to remove rather than manage an employee who was different in her behaviour and communication style; who was prepared to challenge rather that than observe status quo; and whose general demeanour might have proved confronting to her superordinates and some of her colleagues. This difference would have been amplified by the confusion in management expectations referred to earlier; the absence of precise operational procedures; the lack of official telecommunication links with field staff at the public interface, and the resilient obstinacy of the appellant which she demonstrated under cross-examination. The cumulative effect of these factors would have significantly heightened the risk of conflict in the workplace.

99 Public employees are expected to perform to agreed agency and public sector standards in discharging their official duties. Where they fail to do so, their performance may be considered to be sub-standard. However, it does not appear to me that any credible sub-standard performance process was initiated by the respondent. It is difficult to view an isolated mediation attempt by the respondent, as a genuine attempt to address all the sub-standard performance alleged of the appellant. I note in this regard the reference in correspondence from the respondent's Standards and Integrity Unit in relation to performance, which the respondent would perhaps have been well advised to consider and act upon at the time.

100 While the foregoing leads me to consider the respondent's action in terminating the appellant's employment to be a somewhat disproportionate response to the appellant's performance, I am not persuaded that restoring the appellant to employment would necessarily resolve issues that appear to have their genesis in an ongoing failure by the appellant to exercise the necessary circumspection, impartiality and self-control required of public office. I therefore concur with the decision to dismiss the appeal.

2012 WAIRC 00855

APPEAL AGAINST THE ALLEGED UNLAWFUL TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE MILIANKU
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR G RICHARDS – BOARD MEMBER
	MS D GOULD – BOARD MEMBER
DATE	THURSDAY, 20 SEPTEMBER 2012
FILE NO	PSAB 21 OF 2011
CITATION NO.	2012 WAIRC 00855

Result Appeal dismissed

Order

HAVING heard Mr M Shipman on behalf of the appellant and Mr E Rea and with him Ms N Ross on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2012 WAIRC 00921

APPLICATION FOR AN INTERIM ORDER IN RELATION TO AN APPEAL AGAINST A DECISION GIVEN ON 5 APRIL 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00921
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD THE HONOURABLE J H SMITH, ACTING PRESIDENT- CHAIRMAN MS B CONWAY - BOARD MEMBER MR E ISAILOVIC - BOARD MEMBER
HEARD	**:**	FRIDAY, 21 SEPTEMBER 2012
DELIVERED	**:**	THURSDAY, 11 OCTOBER 2012
FILE NO.	**:**	PSAB 7 OF 2012
BETWEEN	**:**	GLENN ROSS Appellant AND PETER CONRAN DIRECTOR GENERAL, DEPT OF THE PREMIER & CABINET Respondent

Catchwords	**:**	Industrial Law (WA) - application for an interim order to stay disciplinary inquiry under *Public Sector Management Act 1994* (WA) pending hearing of an appeal to Public Service Appeal Board - no jurisdiction to make the order sought - jurisdiction of Public Service Appeal Board considered.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 22B, s 26(1), s 26(3), s 27, s 27(1)(v), s 28, s 31, s 32, s 32(8), s 34(3), s 34(4), s 36, s 44, s 44(6), s 80H(3), s 80H(4), s 80I, s 80I(1)(a), s 80I(1)(b), s 80I(1)(c), s 80I(1)(d), s 80I(1)(e), s 80L(1), s 80L(2); *Public Sector Management Act 1994* (WA).
Result	**:**	Application dismissed
Representation:		
Appellant	**:**	Mr G Ross, in person
Respondent	**:**	Mr R J Andretich (of counsel)
Solicitors:		
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Re The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch [2000] WASCA 233; (2000) 80 WAIG 4577

Robe River Iron Associates v Federated Engine Drivers' and Firemens' Union of Workers of Western Australia (1986) 67 WAIG 315

Reasons for Decision

Background

1 The appellant filed a notice of appeal to the Public Service Appeal Board on 12 April 2012 against the decision of the respondent to commence disciplinary investigations on 5 April 2012. When the appeal was filed, the matter was allocated to a

single Commissioner to constitute a Public Service Appeal Board with members pursuant to s 80H(4) of the *Industrial Relations Act 1979* (WA) (the Act). An issue arose as to whether the appeal should be dealt with by a Public Service Appeal Board constituted under s 80H(3) of the Act by the President of the Commission as chairman as the appeal was brought under s 80I(1)(a) of the Act as an appeal by a public service officer against a decision of an employing authority in relation to an interpretation of a provision of the *Public Sector Management Act 1994* (WA), concerning the conditions of service of public service officers. After submissions were filed in respect of that issue on 4 July 2012, the matter was allocated to the President to convene a Public Service Appeal Board under s 80H(3).

2 At a scheduling conference before the Public Service Appeal Board on 27 August 2012, the respondent made an application to strike out the appeal on two grounds as follows:

(a) Whether the matter was lodged within time.

(b) Res judicata, issue estoppel and abuse of process.

3 The parties agreed to file submissions in respect of these issues. The respondent filed its submissions and supporting documents on 3 September 2012 and the appellant filed his submissions and supporting documents on 18 September 2012.

4 On 12 September 2012, the appellant filed an application seeking an order to require the respondent to halt from proceeding with disciplinary inquiries whilst the appeal is being heard and determined by a Public Service Appeal Board. The application for an interim order was listed for a scheduling conference on 21 September 2012. At the scheduling conference, the appellant was informed by the members of the Public Service Appeal Board that it had no jurisdiction to make the interim order sought by the appellant. These reasons set out the reasons why the Public Service Appeal Board made that finding.

Jurisdiction of the Public Service Appeal Board

5 Pursuant to s 80I of the Act, the Public Service Appeal Board has jurisdiction to hear and determine appeals by public service officers and government officers against particular decisions made by employing authorities, specified in s 80I(1)(a), s 80I(1)(b), s 80I(1)(c), s 80I(1)(d) and s 80I(1)(e) of the Act and to adjust all such matters as are referred to in those sections.

6 The power of the Board to deal with an appeal is found in s 80L(1) of the Act which provides that certain provisions of Part II, Division 2 of the Act apply to proceedings before the Public Service Appeal Board as follows:

> Subject to this Division the provisions of sections 22B, 26(1) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 34(3) and (4) and 36 that apply to and in relation to the exercise of the jurisdiction under this Act of the Commission constituted by a commissioner shall apply, with such modifications as are prescribed and such other modifications as may be necessary, to the exercise by a Board of its jurisdiction under this Act.

7 There is nothing in s 22B, s 26(1) or s 26(3) of the Act which provides a source of power to make the order sought by the appellant. Under s 22B of the Act, the Public Service Appeal Board is required in the performance of its functions to act with as much speed as the requirements of the Act and a proper consideration of the matter before it permit. Under s 26(1) of the Act, the Public Service Appeal Board in the exercise of its jurisdiction:

(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and

(b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and

(c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and

(d) shall take into consideration to the extent that it is relevant —

(i) the state of the national economy;

(ii) the state of the economy of Western Australia;

(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;

(iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;

(v) any changes in productivity that have occurred or are likely to occur;

(vi) the need 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;

(vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

8 Under s 26(3) of the Act, the Public Service Appeal Board in deciding any matter before it is expressly required to provide the parties with procedural fairness in that it is not entitled to take into account any matter or information that was not raised before it without notifying the parties and affording them the opportunity of being heard in relation to that matter or information.

9 Under s 27 of the Act, the Public Service Appeal Board may make a number of interlocutory orders and determine how an appeal is to be heard. Section 27 provides as follows:

(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

(a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —

(i) that the matter or part thereof is trivial; or

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or

(iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

and

(b) take evidence on oath or affirmation; and

(c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent; and

(d) proceed to hear and determine the matter or any part thereof in the absence of any party thereto who has been duly summoned to appear or duly served with notice of the proceedings; and

(e) sit at any time and place; and

(f) adjourn to any time and place; and

[(g) deleted]

(h) direct any person, whether a witness or intending witness or not, to leave the place wherein the proceedings are being conducted; and

(ha) determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceedings and require that the cases be presented within the respective periods; and

(hb) require evidence or argument to be presented in writing, and decide the matters on which it will hear oral evidence or argument; and

(i) refer any matter to an expert and accept his report as evidence; and

(j) direct parties to be struck out or persons to be joined; and

(k) 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; and

(l) allow the amendment of any proceedings on such terms as it thinks fit; and

(m) correct, amend, or waive any error, defect, or irregularity whether in substance or in form; and

(n) extend any prescribed time or any time fixed by an order of the Commission; and

(o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings, the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing; and

(p) enter upon any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place, or premises of any kind whatsoever, wherein or in respect of which any industry is or is reputed to be carried on, or any work is being or has been done or commenced, or any matter or thing is taking or has taken place, which is the subject of a matter before the Commission or is related thereto; and

(q) inspect and view any work, material machinery, appliance, article, book, record, document, matter, or thing whatsoever being in any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises of a kind referred to in paragraph (p); and

(r) question any person who may be in or upon any such manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises in respect or in relation to any such matter or thing; and

(s) consolidate or divide proceedings relating to the same industry and all or any matters before the Commission; and

(t) with the consent of the Chief Commissioner refer the matter or any part thereof to the Commission in Court Session for hearing and determination by the Commission in Court Session; and

(u) with the consent of the President refer to the Full Bench for hearing and determination by the Full Bench any question of law, including any question of interpretation of the rules of an organisation, arising in the matter; and

(v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

(1a) Except as otherwise provided in this Act, the Commission shall, in relation to any matter before it, conduct its proceedings in public unless the Commission, at any stage of the proceedings, is of the opinion that the objects of the Act will be better served by conducting the proceedings in private.

(2) The powers contained in subsection (1)(p), (q) and (r) may, if the Commission so directs in any case, be exercised by an officer of the Commission or by an expert to whom any matter has been referred by the Commission.

10 Although s 27(1)(v) of the Act enables the Public Service Appeal Board to generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter, it is clear that that provision is not a provision that creates a substantive head of power to enable an interim order to be made to restrain a party to an appeal from carrying out any act. The Industrial Appeal Court made this plain in ***Robe River Iron Associates v Federated Engine Drivers' and Firemens' Union of Workers of Western Australia*** (1986) 67 WAIG 315 in which it held that the Commission erred in making an order in the nature of an interim injunction, pending the arbitration of a dispute under s 44 of the Act. The order was made at a time when the Commission did not have any specific powers to make interim orders under s 44 of the Act. When making the impugned order, the Commission relied on s 27(1)(v) of the Act. The Industrial Appeal Court unanimously held that the Commission did not have the power to do so. Justice Brinsden held that s 27(1)(v) of the Act does not confer substantive jurisdiction, but merely legislates the method by which the Commission may exercise the jurisdiction already conferred upon it by other sections of the Act (317). Justice Kennedy made a similar observation and found that s 27(1)(v) of the Act was limited essentially to procedural matters (318). The Industrial Appeal Court later applied these findings in ***Robe River Iron Associates*** in ***Re The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch*** [2000] WASCA 233; (2000) 80 WAIG 4577.

11 After the decision of the Industrial Appeal Court in ***Robe River Iron Associates***, Parliament enacted amendments to s 44 of the Act which enables the Commission under s 44(6) of the Act to make interim orders under s 44(6). Orders can be made under s 44(6) which operate in effect like an interlocutory injunction by enabling the status quo to remain in place, whilst a matter is heard and determined by the Commission. Similar powers to s 44(6) of the Act are also contained in s 32(8) of the Act. However, the Public Service Appeal Board has no jurisdiction to act under s 44 or s 32 of the Act, as this is not a provision specified under s 80L of the Act.

12 Section 28 of the Act is not material as it simply confers power on the Public Service Appeal Board to exercise any of the powers in s 27 at any time after an appeal has been lodged. Nor is s 31 of assistance, as s 31 and s 80L(2) deals with representation of parties. Section 34(3) and s 34(4) prohibits review by prerogative writ. Section 36 simply requires a decision of the Public Service Appeal Board be sealed, deposited and open for inspection in the office of the Registrar.

13 For these reasons, the Public Service Appeal Board has no power to deal with the applicant's application for an order to require the respondent to halt from proceeding with disciplinary inquiries while the substantive appeal is being heard by the Public Service Appeal Board in PSAB 7 of 2012. An order will now issue dismissing the appellant's application for an interim order to stay proceedings.

2012 WAIRC 00922

APPLICATION FOR AN INTERIM ORDER IN RELATION TO AN APPEAL AGAINST A DECISION GIVEN ON 5 APRIL 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROSS
	APPELLANT
	-v-
	PETER CONRAN DIRECTOR GENERAL, DEPT OF THE PREMIER & CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR E ISAILOVIC - BOARD MEMBER
DATE	THURSDAY, 11 OCTOBER 2012
FILE NO.	PSAB 7 OF 2012
CITATION NO.	2012 WAIRC 00922

Result	Application dismissed
Representation	
Appellant	In person
Respondent	Mr R J Andretich (of counsel)

Order

HAVING heard Mr G Ross, the applicant, in person and Mr R J Andretich (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:—

THAT the appellant's application for an interim order to stay proceedings be dismissed.

(Sgd.) THE HONOURABLE J H SMITH,
Acting President,
[L.S.] On behalf of the Public Service Appeal Board

2012 WAIRC 00840

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JESSIE WHITE
	APPLICANT
	-v-
	KIM SNOWBALL
	DIRECTOR GENERAL
	DEPARTMENT OF HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR S SEEDS - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
DATE	TUESDAY, 18 SEPTEMBER 2012
FILE NO.	PSAB 13 OF 2012
CITATION NO.	2012 WAIRC 00840

Result	Direction issued

Direction

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*, and

WHEREAS by letter dated the 14th day of September 2012 the appellant advised that the parties agreed to Directions issuing for the purpose of preparation for hearing of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the respondent file and serve an outline of submissions, any witness statements and any list of authorities upon which she intends to rely no later than 21 days prior to the date of the hearing.
2. THAT the appellant file and serve an outline of submissions, any witness statements and any list of authorities upon which she intends to rely no later than 14 days prior to the date of the hearing.

3. THAT the parties file an agreed statement of facts and an agreed statement of documents no later than three days prior to the date of the hearing.

4. THAT the parties have liberty to apply on short notice.

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

EMPLOYMENT DISPUTE RESOLUTION ORDERS—Notation of—

Award, order or industrial agreement varied	Parties to order		Application No.	Date of Order
N/A	Sergio Cooper JP	Carla Francis, Diana Ching, Nga Ly	APPL 38/2012	11/09/2012

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 13/2011	Dean Morton Wood	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Employer	Scott A/SC	Dismissed	19/09/2012
PSA 19/2011	Hans-Willem Van Hall	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927	Scott A/SC	Dismissed	19/09/2012
PSA 110/2007	Roberto Lunardi	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott A/SC	Appeal Granted	19/09/2012