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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Unions—Application for registration—

2012 WAIRC 01031

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA
	APPLICANT
	-and-
	(THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	CECIL O'NEILL
	EDMUND FREDRICK BLACK
	JENNIFER BROZ
	KAYE ROSALIND HOSKING
	LESLIE BRUCE BANYARD
	TREVOR STEPHEN VAUGHAN
	OBJECTORS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 19 NOVEMBER 2012
FILE NO.	FBM 8 OF 2011
CITATION NO.	2012 WAIRC 01031
Result	Order issued

Order

The Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders, by consent, that —

1. All prior directions not already complied with are hereby vacated.
2. The objectors file and serve their witness statements and any documents upon which they intend to rely on or before 30 November 2012.
3. The applicant file and serve any responsive witness statements upon which it intends to rely, on or before 8 February 2013.

4. That the parties inform one another of any objections (and the grounds of those objections) to the admissibility of any of the other parties' witness statements or any part thereof, on or before 22 February 2013.

5. That any witness statements filed by the parties will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

6. That the matter be listed for further directions at 111 St Georges Terrace, Perth, in Court 3 on Level 18 on Monday, 17 December 2012, at 10:30 o'clock in the forenoon.

7. That the parties have liberty to apply on three (3) days' notice.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2012 WAIRC 01044

APPLICATION PURSUANT TO SECTION 66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2012 WAIRC 01044
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	BY WRITTEN SUBMISSIONS TUESDAY, 9 OCTOBER 2012, TUESDAY, 16 OCTOBER 2012 AND WEDNESDAY, 31 OCTOBER 2012
DELIVERED	**:**	FRIDAY, 23 NOVEMBER 2012
FILE NO.	**:**	PRES 4 OF 2012
BETWEEN	**:**	ROBERT MCJANNETT Applicant AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Respondent

CatchWords	**:**	Industrial Law (WA) - application under s 66 of the *Industrial Relations Act 1979* (WA) to conduct elections – definition of 'office' in s 7(1) of the Act considered – office of elected organiser not an office within the meaning of s 7(1) or s 71 of the Act
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1)(a), s 27(1)(c), s 62(2), s 66, s 7, s 7(1), s 71, s 71(1), s 71(2), s 71(3), s 71(4), s 71(5)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr T J Dixon
Solicitors:		
Respondent	**:**	Slater & Gordon

Case(s) referred to in reasons:

Hathaway v The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers (1995) 75 WAIG 888

Re The Construction Forestry Mining and Energy Union of Workers [2011] WAIRC 01174; (2011) 92 WAIG 1

Re The Construction Forestry Mining and Energy Union of Workers [2011] WAIRC 00422; (2011) 91 WAIG 1034

Re The Construction, Forestry, Mining and Energy Union of Workers [2011] WAIRC 01175; (2011) 92 WAIG 6

Stevens v Brodribb Sawmilling Co Pty Ltd (1985-1986) 160 CLR 16

The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers v Hathaway (1995) 75 WAIG 2680

Thompson v Reynolds [2009] WAIRC 00024; (2009) 89 WAIG 287

Case(s) also cited:

Beatts-Rattray v Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch [2009] WAIRC 01313

Brailey v Mendex Pty Ltd (1992) 73 WAIG 26

Jones v Civil Service Association Inc (2003) 84 WAIG 4

Mullen v Gisborne, President of the State School Teachers Union of Western Australia (Inc) [2010] WAIRC 00176

Pina Julia Pisconeri v Laurens & Munns [1999] WAIRC 00245

Re Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) (2010) 90 WAIG 133

Thompson v Reynolds [2009] WAIRC 00027

Reasons for Decision

Background

1 This is an application made by Robert Mcjannett for an order under s 66 of the *Industrial Relations Act 1979* (WA) (the Act) to conduct an election for offices of The Construction, Forestry, Mining and Energy Union of Workers (CFMEUW) in accordance with r 16(1), r 16(3) and r 23 of the rules of the CFMEUW. Mr Mcjannett claims that a s 71 certificate issued to the CFMEUW by the Registrar under s 71(5) of the Act on 22 December 2011 is defective and an abuse of process.

2 The s 71(5) certificate was issued after the Full Bench issued a s 71 declaration on 21 December 2011: [2011] WAIRC 01169; (2011) 92 WAIG 11. On the same day the declaration was made by the Full Bench, the Full Bench also made an order authorising the Registrar to register r 16(4A) of the rules of the CFMEUW which enables each office in the CFMEUW to be held by the person who, in accordance with the rules of the Construction and General Division, Western Australian Divisional Branch of the Construction, Forestry, Mining and Energy Union, holds the corresponding office. The certificate issued by the Registrar states as follows:

> I, the undersigned, Registrar of the Western Australian Industrial Relations Commission, acting pursuant to section 71(5) of the *Industrial Relations Act 1979*, hereby declare -
>
> (1) that the provisions of the *Industrial Relations Act 1979*, relating to elections for office within an organisation do not from 9 January 2012 apply in relation to offices in The Construction, Forestry, Mining and Energy Union of Workers; and
>
> (2) that from 9 January 2012 the persons holding office in the Construction and General Division, Western Australian Divisional Branch of the Construction, Forestry, Mining and Energy Union, an organisation registered under the provisions of the *Fair Work (Registered Organisations) Act 2009* shall for all purposes, be the officers of The Construction, Forestry, Mining and Energy Union of Workers.

3 The effect of r 16(4A) of the rules of the CFMEUW and the certificate issued by the Registrar under s 71(5) of the Act, are that the CFMEUW is not required to hold elections of its offices, as persons holding offices of the Construction and General Division, Western Australian Divisional Branch (who is the counterpart federal body of the CFMEUW) are able to hold the offices in the CFMEUW.

4 The thrust of Mr Mcjannett's application is a claim that the s 71 certificate issued by the Registrar on 22 December 2011 is void and can have no effect. The basis of Mr Mcjannett's contention is that pursuant to s 71(4) of the Act, the Full Bench before making the declaration did not determine that for every office which exists in the rules of the CFMEUW there was a corresponding office in the counterpart federal body.

5 It is implied in written submissions filed by Mr Mcjannett on 16 October 2012, that when the Full Bench considered whether the offices that existed in the counterpart federal body were the same as the offices of the CFMEUW, it only had regard to the offices of the:

> (a) CFMEUW of president, senior vice-president, vice-president, secretary, two assistant secretaries, treasurer, two trustees and two ordinary executive members;
>
> (b) counterpart federal body of divisional branch president, divisional branch senior vice-president, divisional branch vice-president, divisional branch secretary, two divisional branch assistant secretaries, divisional branch treasurer, three divisional branch trustees and five divisional branch management committee members.

6 Mr Mcjannett argues that the Full Bench failed to have regard to the office of organiser when considering whether the offices that existed in the counterpart federal body were the same as the offices of the CFMEUW.

7 Pursuant to r 16(3) of the rules of the CFMEUW six organisers are required to be elected every four years by and from the financial members of the union. Mr Mcjannett contends that pursuant to subsection (d) of the definition of 'office' in s 7(1) of the Act, organisers are an 'office' within the meaning of s 71 of the Act as elected organisers are an office for the filling of which an election is conducted. He also contends that there is no corresponding office for each office of organiser in the counterpart federal body, as there are only five organisers in the counterpart federal body.

The CFMEUW's submissions

8 The CFMEUW says the application is misconceived and should be dismissed pursuant to s 27(1)(a) of the Act as:

(a) the relevant 'offices' in a s 71 application are those offices that vote on the committee of management, whereas the position of organiser is not such an office; and

(b) the assessment required under s 71(4) of the Act does not involve a comparison of the number of corresponding offices, but rather a comparison of the functions and powers attaching to the cognate offices.

9 The CFMEUW points out there are three decisions of the Full Bench relevant to the issuance of the s 71 certificate to the CFMEUW: ***Re The Construction Forestry Mining and Energy Union of Workers*** [2011] WAIRC 01174; (2011) 92 WAIG 1 (FBM 6 of 2009); ***Re The Construction Forestry Mining and Energy Union of Workers*** [2011] WAIRC 00422; (2011) 91 WAIG 1034 (FBM 15 of 2010) and ***Re The Construction, Forestry, Mining and Energy Union of Workers*** [2011] WAIRC 01175; (2011) 92 WAIG 6 (FBM 7 of 2011).

10 FBM 6 of 2009 was an application by the CFMEUW pursuant to s 62(2) and s 71(5) of the Act for the Full Bench to authorise registration of alteration to registered rules to insert r 16(4A) to give effect to a s 71 certificate issued by the Registrar. On 2 February 2010, the CFMEUW made an application that FBM 6 of 2009 be adjourned sine die until an application for a declaration could be filed and heard.

11 The first application for a declaration under s 71(2) and s 71(4) of the Act was FBM 15 of 2010. Mr Mcjannett filed an objection to FBM 6 of 2009, but did not seek to intervene in FBM 15 of 2010. On 16 June 2011, the Full Bench issued its decision in FBM 15 of 2010 and dismissed the application: [2011] WAIRC 00422; (2011) 91 WAIG 1034. The CFMEUW filed a fresh application for a declaration under s 71(2), s 71(3) and s 71(4) of the Act on 24 October 2011 in FBM 7 of 2011. Prior to the hearing of FBM 6 of 2009, Mr Mcjannett sought to withdraw his objection to this application by filing a notice of withdrawal of discontinuance of 9 December 2011 and at the same time he filed an application to intervene in FBM 7 of 2011. The application to intervene was dismissed by the Full Bench, as it was not satisfied that Mr Mcjannett had shown sufficient interest in the proceedings.

12 The CFMEUW points out that at no stage in Mr Mcjannett's notice of objection in FBM 6 of 2009 or in his affidavit in support of the objection, or in his application to intervene in FBM 7 of 2011 were the issues now sought to be canvassed by Mr Mcjannett, raised in those proceedings.

13 The CFMEUW points out that Mr Mcjannett has not put in issue in these proceedings that organisers are employed. They say this is consistent with the findings made by Ritter AP in ***Thompson v Reynolds*** [2009] WAIRC 00024; (2009) 89 WAIG 287 who had evidence before him that organisers are employees of the CFMEUW: [127](a), [127](h) and [193].

14 In any event, the CFMEUW says the Full Bench when making its declaration under s 71 of the Act in FBM 7 of 2011 clearly proceeded on the basis that organisers were employees based on the evidence and issues before it. Also, the Full Bench in FBM 15 of 2010 considered the position of the organisers and correctly excluded those positions from its analysis as to whether for the purposes of s 71(4) there was a corresponding office in the counterpart federal body: [20] and [41]. This reasoning they say was applied by the Full Bench in FBM 7 of 2011: [23]. It also says in these proceedings before the Commission as presently constituted, it is not open to Mr Mcjannett to collaterally attack the basis for the decision of the Full Bench under s 71.

15 The CFMEUW points out that the purpose underlying the introduction of s 71 of the Act and the insertion of r 16(4A) into the rules of the CFMEUW is to obviate the need for two sets of elections and Mr Mcjannett's application seeks to frustrate that purpose. They also point out the counterpart federal body does not have a fixed number of organisers, as the number of organisers in the counterpart federal body is able to be varied by a decision of the committee of management: r 37(iv) of the rules of the Construction, Forestry, Mining and Energy Union, Construction and General Division and Construction and General Divisional Branches. They also state the incumbent organisers in the CFMEUW hold office until 9 July 2013 as the Western Australian Electoral Commission's certificate of results dated 19 June 2009 declared the positions of elected organisers' terms expire on 9 July 2013.

16 The CFMEUW says that nothing arises from the present application such as to call into question the validity of the s 71 certificate, or the need to have an election for the offices (however defined) in the CFMEUW.

17 The CFMEUW reserves all its rights with respect to an order for costs under s 27(1)(c) of the Act.

What offices are covered by the s 71 certificate?

18 This issue turns solely upon an interpretation of s 7(1) and the definition of 'office' in the Act and an interpretation of the rules of the CFMEUW that creates each office. Section 7(1) defines an 'office' in relation to an organisation to mean:

(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;

19 As r 16(3) of the rules of the CFMEUW requires the positions of organisers to be filled by an election, if no regard is had to the proviso that excludes particular offices, it is apparent that the position of organiser could be described as an 'office' within the meaning of subsection (d) of the definition of 'office' in s 7(1) of the Act.

20 Mr Mcjannett in his submissions contends that whether the office of organiser has a vote on the committee of management of the CFMEUW is irrelevant as there is no mention in s 71 of the Act of a management committee or in the rules of the CFMEUW. Mr Mcjannett also argues that the Full Bench erred in their decision in FBM 15 of 2010 at [20] where they found that pursuant to s 7(1) of the Act, the only offices to be considered in a s 71 application are those offices that have a vote on the committee of management of the organisation.

Conclusion

21 Leaving aside the issue whether it is open in an application made under s 66 of the Act to make a collateral attack on a recent decision made by a Full Bench, there are two important issues raised in this application. The first is what 'offices' comprise the committee of management of the CFMEUW. Whilst Mr Mcjannett in his submissions appears to contend there is no committee of management of the CFMEU within the meaning of the definition of office in s 7(1) of the Act, a proper analysis of the rules of the CFMEUW reveals otherwise. Importantly, r 16(7) provides:

> In all matters that shall arise between General Meetings of the Union and subject to the control of General Meetings of the Union the Executive shall have the control and conduct of the business of the Union and shall act on its behalf in all matters. It shall have the daily management of the business of the Union. It shall be bound to observe the decisions of General Meetings of the Union.

22 Under r 2(1), the executive can determine the registered address of the union and under r 10(2) it is empowered to set entrance fees exceeding $20, set annual rates of contributions pursuant to r 10(9)(a) and cancel the whole or part of a member's contributions or arrears on grounds of distress or sickness: r 10(10). The executive also has the power to:

(a) consider whether a person will be accepted as a member of the CFMEUW: r 10(4) and r 10(5);

(b) determine investments in securities and equities: r 12;

(c) call for and examine the books and vouchers of the union at any time: r 16(10);

(d) expend union funds for administrative expenses and current wages: r 16(8);

(e) appoint special organisers: r 17;

(f) establish, abolish or alter sub-committees: r 18(1);

(g) appoint and dismiss members of sub-committees and determine the functions of sub-committees: r 18(3) and r 18(4);

(h) appoint delegates to Unions WA: r 19;

(i) approve health and safety delegates appointed by the secretary and determine functions of health and safety delegates: r 20;

(j) approve workplace delegates and payments to workplace delegates from contributions: r 21;

(k) appoint a returning officer: r 23(5) and r 24(6)(b);

(l) provide an honorarium and payment of expenses to the returning officers and assistants appointed by the returning officers: r 23(32);

(m) direct organisers: r 25(4)(b);

(n) fix time, place of monthly meetings and hours of business of the general meetings: r 26(1) and r 26(3);

(o) resolve to hold a special general meeting: r 26(5);

(p) provide executive reports for consideration and adoption to each general meeting: r 27(1)(b);

(q) appoint persons to represent the union before the Commission or any other court or tribunal: r 28;

(r) appoint persons to make agreements under seal on behalf of the union: r 28 and r 30;

(s) authorise a person to recover fees, fines, levies and contributions in a court: r 29;

(t) subject to an appeal to a special general meeting or a general meeting settle any dispute between the union and its members or between members: r 34;

(u) find any member guilty of misconduct: r 35(2).

23 When these specific powers are considered together with the general power in r 16(7) that vests the control and conduct of the business of the union and the daily management of the business of the union in the executive, subject only to the decisions of the general meetings, it is clear that the executive is the committee of management of the CFMEUW.

24 The second issue is whether the 'office' of organiser created by r 16(3) is an 'office' within the meaning of s 7, s 71(1), s 71(4) and s 71(5) of the Act. The organisers who hold office by election under r 16(3) of the rules of the CFMEUW, as distinguished from special organisers appointed by the executive and thus not by election under r 17, can be prima facie characterised as 'an office within the organisation for the filling of which an election is conducted within the organisation' within the meaning of subsection (d) of the definition of 'office' in s 7(1) of the Act, if no regard is had to the proviso that contains conditions of exclusion. However, the 'office' of an elected organiser cannot be so characterised if this office is an employee and does not have a vote on the committee of management of the CFMEUW.

25 Rule 16(4) contemplates that organisers may also hold a position on the executive and if that is the case he or she shall only be entitled to one salary being the higher salary of the two positions. However, this provision does not have the effect that an organiser is a member of the executive. This provision simply contemplates a person may hold more than one office. This factual circumstance arose prior to 2004 when the CFMEUW was first registered: r 39(3)(d).

26 In ***Hathaway v The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers*** (1995) 75 WAIG 888, the applicant sought a declaration that the general secretary of the respondent be declared an 'office' within the meaning of s 7(1) of the Act. President Sharkey granted the declaration sought as he found the office of general secretary created under the rules of the respondent did not vote on the committee of management, but that the office of general secretary was not an employee. Importantly, Sharkey P found an 'office' can only be excluded by operation of the proviso to the definition of 'office' in s 7, if it is an office of any person who is an employee and does not have a vote on the committee of management. Thus, both requisites of the proviso must apply (892). Whilst the decision of Sharkey P was overturned on appeal to the Industrial Appeal Court, the finding on this issue was not overturned: ***The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers v Hathaway*** (1995) 75 WAIG 2680.

27 In this matter it cannot be said that the elected organisers appointed under r 16(3) have a vote on the committee of management as they are not a member of the executive. The executive is constituted under r 16(1) by a president, secretary, two assistant secretaries, senior vice-president, vice-president, two trustees and two ordinary executive members.

28 Turning to the question whether the elected office of organiser is an office of a person who is an employee, the answer to this question, in my opinion, cannot turn on a matter of evidence. The issue turns solely on a proper construction of the rules of the CFMEUW as it is the creation of the 'office' by operation of the rules and not the specific terms of appointment of particular officers who have been elected to a position of organiser that is relevant. This was the approach that was adopted by the Industrial Appeal Court in ***Hathaway***. In that case, after examining the degree of control exercised over the position of general secretary by the executive committee by operation of the relevant rules of the organisation, the Industrial Appeal Court held the general secretary was an employee and set aside the order made by Sharkey P. They found that when the control test enunciated in ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1985-1986) 160 CLR 16, 24 was applied to the duties and functions of the general secretary that were set out in the rules of the organisation it was clear that a contract of employment could be readily inferred. In particular, Franklyn J with whom Kennedy and Rowland JJ agreed found (2683):

> The rules make it quite clear that save for duties of a very subordinate nature, the General Secretary is subject to the control and direction of the General Committee and the Delegate Meeting. He has virtually no discretionary powers whatsoever and, by virtue of his appointment in my opinion, the facts lead only to the conclusion that he is an employee. Consequently, in my opinion, the General Secretary is not relevantly an officer for the purposes of s 7 or s 56 of the Act. He is an employee.

29 When the rules of the CFMEUW are examined, it is apparent that an elected organiser has no independent discretion in the exercise of his or her duties. The duties of the organisers are set out in r 25(4) which provides as follows:

(a) The Organisers shall assist the Secretary in organising, collecting Union fees, and all general Union business;

(b) The Organisers shall be under the direct supervision of the Secretary, who shall be subject to the direction of the Executive, and the Organisers shall carry out such duties as are allotted to them.

30 Importantly, there is no distinction between the duties or supervision of elected organisers and special organisers appointed under r 17. All organisers are paid a salary fixed from time to time by a general meeting: r 16(4).

31 As the executive has ultimate control over the performance of duties of the organisers and the secretary has day-to-day supervision of their duties, a contract of employment between the organisers and the CFMEUW can readily be inferred.

32 As elected organisers have no vote on the committee of management of the CFMEUW and the rules of the CFMEUW create the office of elected organiser as an employee, the office of elected organiser is not an 'office' within the meaning of s 7(1) , s 71(1), s 71(4) or s 71(5) of the Act. As the office of an elected organiser is not an 'office' within the meaning of these provisions, it follows that the s 71 certificate issued by the Registrar has no application to these positions. It also follows that it is not necessary to consider the position of organiser created by the rules that apply to the counterpart federal body, as s 71(4) of the Act only requires an examination of the question whether there is any corresponding office in the counterpart federal body for every office in the state organisation.

33 For these reasons, an order will be made that the application be dismissed. If the CFMEUW wishes to make an application for costs and expenses it is required to do so within seven days of the date of delivery of these reasons for decision.

2012 WAIRC 01047

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	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	PRES 4 OF 2012
CITATION NO.	2012 WAIRC 01047

Result	Application dismissed
Appearances	
Applicant	In person
Respondent	Mr T J Dixon (of counsel)

Order

HAVING heard Mr R Mcjannett, the applicant, in person and Mr T J Dixon (of counsel) on behalf of the respondent, by written submissions, and reasons for decision having been delivered on Friday, 23 November 2012, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be and is hereby dismissed.

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

2012 WAIRC 01089

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON JOHN SMITH
	APPLICANT
	-and-
	STATE SCHOOL TEACHER'S UNION OF WA (INC)
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	FRIDAY, 7 DECEMBER 2012
FILE NO/S	PRES 3 OF 2012
CITATION NO.	2012 WAIRC 01089

Result	Application dismissed
Appearances	
Applicant	In person
Respondent	Mr S Millman (of counsel)

Order

This matter having come on for hearing for directions before me on 12 September 2012, 19 September 2012 and 7 December 2012, and having heard the applicant in person, and Mr S Millman (of counsel) on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be and is hereby dismissed.

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2012 WAIRC 01034

INTERPRETATION OF CLAUSE 6 OF THE PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	MR TERRY MURPHY, DIRECTOR GENERAL, DEPARTMENT OF CHILD PROTECTION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 20 NOVEMBER 2012
FILE NO/S	APPL 65 OF 2012
CITATION NO.	2012 WAIRC 01034

Result	Application discontinued by leave
Representation	
Applicant	Mr D Wayda
Respondent	Ms H Dooley as agent and with her Mr H Falconer as agent

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2012 WAIRC 00961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 31 OCTOBER 2012
FILE NO/S	APPL 36 OF 2012
CITATION NO.	2012 WAIRC 00961

Result	Application discontinued
Representation	
Applicant	Mr C Fogliani
Respondent	Mr R Farrell

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 00940

INTERPRETATION OF CLAUSE 15.1 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) ENTERPRISE ORDER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00940
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 13 AUGUST 2012
DELIVERED	**:**	THURSDAY, 18 OCTOBER 2012
FILE NO.	**:**	APPL 27 OF 2012
BETWEEN	**:**	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Applicant
		AND
		THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

Respondent

Catchwords	:	Industrial law (WA) - Enterprise order interpretation - Meaning of the word 'permit' - Relevant principles applied - Declaration issued.
Legislation	:	Industrial Relations Act 1979 s 46
Result	:	Declaration issued
Representation:		
Applicant	:	Mr D Matthews of counsel
Respondent	:	Mr C Fogliani

Case(s) referred to in reasons:

Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66;

Broadhurst v Larkin [1954] VLR 541;

Broom v Morgan [1953] 1 QB 597;

Chappel v A Ross & Sons Pty Ltd [1969] VR 376;

Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151

The Corporation of The City of Adelaide v The Australasian Performing Right Association Ltd (1928) 40 CLR 481;

Dallikavak v Minister for Immigration and Ethnic Affairs (1985) 61 ALR 471;

Douglas-Brown v Commissioner of Police (1995) 13 WAR 441;

Gray's Haulage Co Ltd v Arnold [1966] 1 WLR 534;

Hardt v Environment Protection Authority [2007] NSWCCA 338;

Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health (2011) 91 WAIG 291

Lyver v State of Victoria [1983] 2 VR 475;

Quarman v Burnett (1840) 151 ER 509;

Thompson v Goold & Co [1910] AC 409;

AW and IA Young v Australian Workers' Union (1974) 5 ALR 347;

Reasons for Decision

1 The Union and the Authority are parties to the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011. An issue has arisen between the parties as to how the shift break provision in cl 15.1 of the Order should be interpreted. It concerns railcar drivers working past their rostered 20 minute shift break which is to be taken between the third and fifth hours of duty. Recently, according to the Authority, instances have occurred where railcar drivers have not completed their duties because to do so, would have entailed them working beyond the fifth hour of their shift without commencing a rostered shift break.

2 The Authority contends that this is contrary to previous practice, when a railcar driver would keep working to complete rostered duties, before taking their break, where this could not be reasonably avoided. In such cases, the railcar drivers have always taken the full 20 minute break, despite it commencing later in the shift.

3 Because of the view said to be adopted by the Union, the Authority says some railcar drivers are refusing to work beyond five hours, regardless of the circumstances. The present situation therefore needs to be clarified. Accordingly, the Authority has sought an interpretation of cl 15.1 of the Order. A number of questions have been posed and they are:

1. What is the meaning of the word 'permit' in clause 15.1 and in particular is the following required to be proved before it can be said that the PTA 'permitted' a driver to work beyond the five hour mark of a shift:
   a. that the PTA knew or had reasonable grounds to anticipate that the driver would be working beyond the five hour mark of a shift; and
   b. that the PTA failed to take reasonable steps to prevent the driver working beyond the five hour mark.
2. Is the interpretation of clause 15.1 that it means a rail car driver must stop working at the point when five hours have elapsed since the commencement of the shift correct?
3. Is the interpretation of clause 15.1 that, whenever a rail car driver reaches the five hour mark of his shift without completing his rostered work for that five hour portion of the shift, the PTA has 'permitted a rail car driver to continue longer than five hours without having commenced a break' correct?
4. In light of the answers to questions 1, 2 and 3 above, should not the true interpretation of clause 15.1 be that 'where it is reasonably practicable to prevent it, the PTA will not permit a rail car driver to continue longer than five hours without having commenced a break'?
5. Is it not the case that an interpretation of clause 15.1 that a rail car driver may not perform work once the five hour mark of a shift has been reached, regardless of the circumstances would lead to:

a. inconvenience;

b. injustice;

c. an outcome which not an industrially sensible one?

[sic]

4 As the application concerns the meaning of cl 15.1 of the Order, it is convenient to set it out now. It provides as follows:

> 15.1 An employee who works a shift which is greater than five hours in duration shall be entitled to a paid shift break of twenty (20) minutes in duration. Shift breaks shall be rostered to commence between the completion of the third hour and the completion of the fifth hour of duty. An employee shall not be permitted to continue longer than five (5) hours on a shift without having commenced a shift break during that shift.

5 Before I deal with the questions raised in the application, I will comment on some principles in relation to the interpretation of industrial instruments.

Principles of interpretation

6 In a decision of the Full Bench of the Commission in *Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health* (2011) 91 WAIG 291 I said at pars 101-104:

> 101 The Agreement, as a legal instrument, is subject to the usual principles of interpretation. There has been over many years, judicial acceptance that in the case of industrial instruments, such as awards or industrial agreements, a 'generous' approach to interpretation should be applied. In ***George A Bond & Co Ltd (in liquidation) v McKenzie*** [1929] AR (NSW) 498 Street J said at 503 – 504:
>
> > … speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relations as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between the parties, couched in terms intelligible to themselves but often framed without careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.
>
> 102 As to the interpretation of industrial agreements in this jurisdiction, in ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union*** (1987) 67 WAIG 1097 Brinsden J observed at 1098:
>
> > The meaning of a provision in the Agreement is to be obtained by considering the terms of the Agreement as a whole. If the terms are clear and unambiguous it is not permissible to look to extrinsic material to qualify the meaning of the particular provision being considered. Therefore, when the issue is which of two or more possible meanings is to be given a contractual provision it is not permissible to look at actual intentions, aspirations, or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract but to look at only the objective framework of facts within which the contract came into existence, and to the parties presumed intentions in that setting. Should a consideration of the whole terms of this Agreement expose an ambiguity in the construction of Clause 6(9) then resort may be made to extrinsic material and in certain circumstances any trade custom or usage.
>
> 103 In the same case, Kennedy J said that in the interpretation of agreements, a broad approach to the meaning of the agreement should be adopted, and too literal adherence to the technical meaning of words should be avoided.
>
> 104 More recent expressions of the generous approach to the interpretation of industrial instruments were adopted by Madgwick J in ***Kucks v CSR Limited*** (1996) 66 IR 182, considered and approved by Kirby and Callinan JJ in ***Amcor Limited v CFMEU*** (2005) 222 CLR 241 at 270-271; 282-283.

7 It was also said by Kirby J in *Amcor*, that it should be remembered that interpretation is essentially a text based activity. I adopt and apply what I said in *Minister for Health* for the purposes of determining this matter.

Question one

8 As a consequence of the written and oral submissions of the parties, they now agree, subject to the insertion of the words "or suspects" after the word "anticipates", and the insertion of the words "or likely to be" after the words "would be" in par 1a, that the answer to this question is "yes". This is based on the common acceptance of the meaning of "permit", as not imposing strict liability. That is plainly correct. The approach, as accepted by both parties, is contained in the oft quoted decision of Knox CJ in *The Corporation of The City of Adelaide v The Australasian Performing Right Association Ltd* (1928) 40 CLR 481, where, at 487 it was said:

> I agree with the learned Judges of the Supreme Court in thinking that indifference or omission is "permission" within the plain meaning of that word where the party charged (1) knows or has reason to anticipate or suspect that the particular act is to be or is likely to be done, (2) has the power to prevent it, (3) makes default in some duty of control or interference arising under the circumstances of the case, and (4) thereby fails to prevent it. This statement of the legal position was not challenged in argument before this Court.

9 This approach has been considered and developed in a number of cases referred to by the Authority: *Hardt v Environment Protection Authority* [2007] NSWCCA 338; *Gray's Haulage Co Ltd v Arnold* [1966] 1 WLR 534; *Lyver v State of Victoria*

[1983] 2 VR 475; *Chappell v A Ross & Sons Pty Ltd* [1969] VR 376; *Douglas-Brown v Commissioner of Police* (1995) 13 WAR 441; *Broadhurst v Larkin* [1954] VLR 541.

10 In *City of Adelaide*, four elements in relation to the concept of "permission" were expressed by Knox CJ. They are:

(a) Knowledge of conduct;

(b) Power to prevent the conduct;

(c) The failure to control or interfere with the conduct; and

(d) Thereby a failure to prevent the conduct.

11 *Chappell* was a decision of the Full Court of the Supreme Court of Victoria, on appeal from a decision of the court of petty sessions, convicting the appellant of an offence under s 37H(2) of the Motor Car Act 1958. By that legislation, it was then provided that a person who "causes or permits any other person to drive any motor car in Victoria otherwise than in accordance with the requirements of this Division shall be guilty of an offence against this Division." The central issue was the meaning of "permits" for the purposes of the statutory provision in question, and the element of "knowledge" in constituting permission. In this respect, Winneke CJ and Smith J observed at 382:

> We think that in accordance with the natural use of language it involves not only a right or capacity on the part of the permittor to prevent the contravention, but also a state of mind amounting to consent to, or acquiescence in, the contravention. And consent or acquiescence must include an element of knowledge or foresight. Actual knowledge that the contravention is being or will be permitted would plainly be sufficient. Likewise, we think a belief that a contravention is highly likely or probable would suffice. The weight of judicial authority, in our opinion, supports this view. For these reasons, 'permission', in our opinion, cannot be equated with a careless or negligent failure to prevent a contravention.

12 In that case, the court declined to follow an earlier Supreme Court of Victoria decision in *Broadhurst* preferring instead, the approach of the Queen's Bench Division in *Gray's Haulage*. *Gray's Haulage* was an appeal against conviction, where the defendants were charged with permitting a commercial driver to drive a vehicle for continuous periods longer than the maximum hours permitted under the Road Traffic Act 1960. Again, the question of the defendant "permitting" the driver to do so was in issue. In this respect, in upholding the appeal and quashing the conviction, Lord Parker CJ said at 536-537:

> In my judgment there is a tendency today to impute knowledge in circumstances which really do not justify knowledge being imputed. It is of the very essence of the offence of permitting someone to do something that there should be knowledge. The case that is always referred to in this connection is *James & Son Ltd. v. Smee*,[1] where in giving judgment I pointed out that knowledge is really of two kinds, actual knowledge, and knowledge which arises either from shutting one's eyes to the obvious, or, what is very much the same thing but put in another way, failing to do something or doing something not caring whether contravention takes place or not.
>
> Here there is no question of actual knowledge at all, nor is it a case where there is a shutting of eyes to the obvious as, for instance, of the records which had to be kept of hours of work showing that the driver was not complying with the statute, and they refrained from looking at those records.
>
> This, of course, goes very much further, because it is said that the mere fact that they did not take steps which would have prevented the driver from doing this amounts to a permitting. A similar case came before this court recently, *Fransman v. Sexton*[2], in which I tried to limit the tendency that there is today for extending imputing knowledge in this way. The justices there had said that knowledge could be imputed when a man failed" to take adequate steps to prevent defects occurring by an inadequate system of maintenance of vehicles." I said:
>
> > "For myself I very much doubt whether those words really do properly define what I may call the third category of knowledge."
>
> Pausing there, it is really part of the second category of knowledge.
>
> > "If they are meaning merely this, that knowledge was being imputed to this appellant because in fact he had failed to discover the defect and might have taken steps which would have revealed a defect, then in my judgment the test is completely wrong. Knowledge is not imputed by mere negligence but by something more than negligence, something which one can describe as reckless, sending out a car not caring what happens."

13 Somewhat similar observations have been made in other cases, to the effect that the "shutting of one's eyes to the obvious, constitutes knowledge in the required sense": *Lyver* per Young CJ at 478. In *Lyver*, Anderson J commented on the issue of knowledge in relation to "permitting" conduct, and said at 482-483:

> "When a statute makes it an offence to 'permit' something to be done, or to 'allow' or 'suffer' it to be done, many authorities require that the defendant should (basically) have known of the conduct in question, since a man cannot be said to permit what he does not know about. This is one of the few *mens rea* rules on which the courts have shown consistency; and even this limited tribute has to be qualified. In expressing the fault element in offences of 'permitting', the courts have used almost every variety of language …
>
> **"The best view seems to be that offences of permitting can be committed either knowingly or recklessly, and in no other way. The basis of the interpretation of the word 'permits' is that a man cannot be said to permit what he does not know …"**
>
> …the word 'permits' **connotes at least knowledge or reasonable grounds for suspicion on the part of the permittor that the thing will be done and an unwillingness to use the means available to him to prevent it …"**

> In *R. v. Souter,* [1971] 2 All E.R. 1151, at p. 1155, Edmund Davies, L.J., referring to what Lord Diplock had said, commented, "Both elements are, to my way of thinking, clearly indispensable to the concept of 'permitting'." (My emphasis)

14 Thus, from the cases, it seems that the notion of "knowledge", apart from actual knowledge, requires more than just negligence, but reckless indifference as to the outcome.

15 As to the third element in *City of Adelaide*, that being a failure to control or to interfere, in *AW and IA Young v Australian Workers' Union (1974) 5 ALR 347*, the Full Court at 349 observed that this can be met by the taking of "all reasonable steps" by the person alleged to have permitted the conduct in question.

16 With these observations in mind I turn now to the remaining questions.

Question two

17 The answer to this question must be "no". The ordinary and natural meaning of the clause does not support the conclusion that an employee must stop work at the fifth hour of a shift. The first two sentences of cl 15.1 are not controversial. The first sentence provides the entitlement to a shift break of 20 minutes for an employee who works a shift that is longer than five hours.

18 The second sentence provides for the rostering of the break between the third and fifth hour of the shift. This part of cl 15.1 places the obligation on the Authority to arrange the shift roster so that breaks can be taken in accordance with this provision.

19 The third sentence, the controversial provision, is, again, an obligation on the Authority to not "permit" an employee to continue longer than five hours on a shift without having commenced the break. On the ordinary and natural meaning of the words used, the obligation is not placed on the employee to stop working. The result may be different, if the third sentence commenced "An employee shall not continue longer …" In my view, if the sub-clause read this way, the argument that there is a prohibition on an employee working beyond five hours in a shift, would have greater force. That is not, however, what cl 15.1 says.

20 The Union argued that applying the principle that the employer is responsible for the actions of the employee, for an employee to exceed five hours without a break would be a breach of the employee's implied duty of good faith to the employer. In this respect, as to the actions of the employee being that of the employer, the Union referred to *Quarman v Burnett* (1840) 151 ER 509 and *Broom v Morgan* [1953] 1 QB 597, when read with the implied term as referred to in *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66.

21 This proposition cannot be accepted. I do not consider that the authorities relied upon by the Union assist in the resolution of the issue in this dispute. Cases such as *Broom*, concern principally, the vicarious liability of an employer to third parties for the tortious acts of an employee. That particular case concerned the injury of an employee by the conduct of a co-employee, who happened to also be the injured employee's husband. The injured employee was unable to sue her husband, flowing from the immunity in tort, of the husband from an action by his injured wife. However, the employer was held liable for the negligence of the husband, on the basis of vicarious responsibility, despite the husband's immunity from suit by his wife.

22 The tortious doctrine of vicarious liability has, as its basis, the existence of duties of care between those in a range of established relationships. Such considerations do not arise in this case.

23 The Union also relies on the contractual term of fidelity and good faith, implied into employment contracts, to the effect that by working beyond five hours, an employee is exposing the employer to liability for a penalty for breach of the Order. As a result, as the argument goes, the employee, who must be assumed to know of this consequence, breaches the implied obligation to the employer. Whilst this is an interesting argument, the implied duty concerns itself with conduct of an employee injurious to the proper performance of the *employee's contractual duties* to their employer: See generally Macken et al *Law of Employment* 7th Ed at par 5.880. The implied term does not concern itself with the consequences for the employer of failing to comply with an obligation imposed on it by an industrial instrument, albeit by "permitting" an employee to do something the industrial instrument says the employee is not permitted to do. The terms of the Order attach themselves to the contract of employment, but do not form part of it.

24 Accordingly, an employee who may work beyond five hours in a particular circumstance, does not in my view, by the terms of cl 15.1 of the Order, breach any contractual obligation owed to the employer. No liability can attach to the employee for driving for more than five hours without a break, contrary to cl 15.1. Only the Authority can be liable.

Question three

25 This question posits that whenever a railcar driver drives for five hours, has not completed his duties, and has not commenced a break, it must be correct that the Authority has "permitted" the driver to continue longer than five hours on a shift without having commenced a shift break during the shift. The answer to this question must be that, consistent with the authorities, a definitive answer will invariably depend on the facts in each case. This was pointed out in the joint judgement of Gavan Duffy and Starke JJ in *City of Adelaide* at 504.

26 How cl 15.1, in relation to the elements (1) and (3), as to "knowledge" and "reasonable steps" in *City of Adelaide*, could be applied to the operations of the Authority, will always depend on the circumstances. The apparent simplicity of the sub-clause masks the conceptual difficulties in applying it, as demonstrated in the driving cases, referred to above. This conceptual difficulty was identified by Gowan J in *Chappell*, when his Honour said at 390-391:

> That leaves, however, the difficult matter of applying to ascertained facts in relation to hours of driving, the distinction made in the English case between an employer merely failing to take steps which would have prevented the driver from driving without the prescribed rest, which does not amount to a "permitting", and his failing to do something not caring whether contravention takes place or not, which has about it the character of more than negligence and can be described

as being reckless, which can amount to "permitting". The exercise is not any the easier when it has to be applied to the subject of the driver not having in his possession at a particular time a log-book or duly completed log book.

27 Clause 15.1 requires the Authority to roster employees so that they get a break between the third and fifth hour of a shift. The fact of the roster so providing, is not in my view, of itself, sufficient to discharge the Authority's obligation under cl 15.1, to not permit an employee to drive beyond the first five hours of a shift. There is an obligation on the Authority to take all reasonable steps to prevent drivers from continuing in their duties beyond five hours in a shift. This may be achieved by appropriate supervision and control. There is also a health and safety dimension to the issue. The driving of railcars is a safety critical position within the Authority. Railcar drivers, for the purposes of the management of fatigue, need to take a break from driving for refreshment and rest.

28 Given that the metropolitan rail system runs to scheduled timetables, and the rostering of duties of drivers is detailed, the capacity to monitor train movements and the taking of breaks, with the use of technology, should be relatively high. This is in contrast to the circumstances in *Gray's Haulage* and *Chappell*, involving the work of commercial drivers in a much less controlled environment.

29 As to whether, as posited by the Union, an advice to drivers from the Authority to the effect that drivers will not be disciplined for working beyond five hours, would constitute "permission", I do not consider it could be regarded as permission in the requisite sense. Certainly on one view, such an advice would be consistent with the potential liability imposed by the clause on the Authority, and not the employee, dealt with in question two above. That is, in the event that an employee did happen to drive past the time appointed for their rest break, and exceeded the time limit in cl 15.1, it would not involve any contravention of the Order, or the contract of employment, by the driver.

30 Any railcar driver who knowingly exceeds the time limit, in spite of appropriate control measures, such as appropriate rostering, directives to drivers and checking compliance, implemented by the Authority, could only be reasonably taken to have done so of their own volition, without any actual or imputed knowledge of the Authority. Absent actual knowledge, one would think that it would be difficult to contend in such circumstances, that the Authority was "recklessly indifferent" to compliance with cl 15.1 of the Order.

Question four

31 As to this question, the Authority contends that cl 15.1 should be interpreted as if the words in the third sentence were to read "Where it is not reasonably practicable to prevent it an employee …"

32 The traditional approach to the interpretation of legislation is that words should not be read into a statute, except in the case of clear drafting error or where an interpretation leads to a capricious and irrational result, inconsistent with the manifest intention of the Parliament: *Thompson v Goold & Co* [1910] AC 409; *Dallikavak v Minister for Immigration and Ethnic Affairs* (1985) 61 ALR 471; *Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 35 ALR 151. It needs to be born in mind of course, that in terms of industrial instruments, due allowance needs to be given to the generous approach to interpretation mentioned above.

33 However, even having regard to this, there is no suggestion in this case that cl 15.1 contains an error or that for any other obvious reason, consistent with these principles words should be read into the clause. There is no other provision in the Order, or certainly none referred to by the parties, that could support the construction contended by the Authority. The Order arose from an enterprise order application before the Commission in late 2010. Clause 15.1, in its current terms, was not controversial during those proceedings and is in the form submitted by the Authority, in its counter-proposal for an enterprise order, to that advanced by the Union. It was on this basis, that the Commission included cl 15 in the Order as made.

34 There was no contention put in these proceedings, that the terms of cl 15.1 fail to properly reflect the intention of the parties, or that otherwise, the making of the Order by the Commission in relation to cl 15 was the result of an unintended error, slip or omission. Even allowing for the generous approach to the interpretation of industrial instruments, it is a step too far in my opinion, to read into the sub-clause, words not existing, that place a quite different meaning on the provision. Whilst "permitting" must be interpreted in the manner outlined above, there is nothing otherwise in cl 15.1 that is unclear or ambiguous.

35 If the sub-clause no longer reflects good operational or industrial practice, then the answer lies in its variation on the expiry of the Order, by the making of a new industrial agreement, unless it is able to be varied by consent in the meantime.

36 Accordingly, the answer to question four is "no".

Question five

37 In view of my conclusion in relation to question four, my answer to this question must also be "no".

Conclusion

38 It follows that in view of the answers to questions four and five, no basis exists for the Commission to exercise any power of amendment under s 46(1)(b) of the Act.

39 A declaration now issues.

2012 WAIRC 00947

INTERPRETATION OF CLAUSE 15.1 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) ENTERPRISE ORDER 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 23 OCTOBER 2012
FILE NO.	APPL 27 OF 2012
CITATION NO.	2012 WAIRC 00947

Result	Declaration issued
Representation	
Applicant	Mr D Matthews of counsel
Respondent	Mr C Fogliani

Declaration

HAVING HEARD Mr D Matthews of counsel on behalf of the applicant and Mr C Fogliani on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby declares –

(1) THAT the terms of cl 15.1 of the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011 do not impose a strict liability obligation.

(2) THAT on its true meaning, the word "permitted" in cl 15.1 of the Order means a circumstance where the applicant:

(a) knows or has reason to anticipate or suspect, or is recklessly indifferent, as to whether an employee will continue longer than five hours on a shift without having commenced a shift break during that shift;

(b) has the power to prevent the employee from doing so;

(c) fails to control or interfere with the employee doing so, by the taking of all reasonable steps; and

(d) thereby fails to prevent the employee from doing so.

(3) THAT cl 15.1 of the Order does not require a railcar driver to stop working at the point when five hours have elapsed since the commencement of his or her shift.

(4) THAT whether the circumstance of a railcar driver continuing longer than five hours on a shift without having commenced a shift break during that shift, constitutes a contravention or failure to comply with cl 15.1 of the Order, is a matter of fact and will depend upon the circumstances of each case.

(5) THAT the word "permitted" in cl 15.1 of the Order is not to be read as qualified by the notion of reasonable practicability.

(Sgd.) S J KENNER,

[L.S.] Commissioner.

2012 WAIRC 01051

INTERPRETATION OF CLAUSE 27 OF THE WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	MONDAY, 26 NOVEMBER 2012
FILE NO	P 18 OF 2012
CITATION NO.	2012 WAIRC 01051

Result Application discontinued
Representation
Applicant Mr P Kelly
Respondent Mr T Clark

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

INDUSTRIAL MAGISTRATE—Claims before—

2012 WAIRC 01060

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2012 WAIRC 01060
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 7 NOVEMBER 2012
DELIVERED	**:**	WEDNESDAY, 7 NOVEMBER 2012
FILE NO.	**:**	M 5 OF 2012
BETWEEN	**:**	MR PHILLIP CHEESEMAN
		CLAIMANT
		AND
		NEWRIC PTY LTD
		RESPONDENT

Catchwords	**:**	Claim for the payment of $17,524.08 being the value of long service leave entitlements which were not paid on termination of employment; Claim not denied but quantum of entitlement in issue; whether employment started on the date alleged by the Claimant; turns on its own facts.
Legislation	**:**	*Fair Work Act 2009 (Commonwealth)*
		Notional Agreement Preserving the Metal Trades (General) Award 1966
		Long Service Leave – Standard Provisions General Order 66 (Vol. 1) WAIG 1
Result	**:**	Judgement for the Claimant
Claimant	**:**	Mr Phillip Cheeseman appeared in person
Respondent	**:**	Mr Graham Gordon Director of the Respondent

REASONS FOR DECISION

(This judgement was delivered extemporaneously on 7 November 2012 and has been edited from the transcript)

The Claim

1 Mr Cheeseman alleges that the Respondent did not pay him his long service leave entitlements, upon the termination of his employment in October 2009.

2 Mr Cheeseman asserts that his entitlement to payment in lieu of long service leave arises from the provisions of the *Notional Agreement Preserving the Metal Trades (General) Award of 1966*. Indeed there is no dispute about the fact that the Claimant

and the Respondent were, at the material time, bound by the *Metal Trades (General) Award of 1966* (the Award) . The long service leave provision of that Award has application to the parties in this proceeding.

3 Mr Cheeseman alleges that he is owed $17,524.08 for 16.47 weeks of accrued long service leave. That sum is calculated at the rate of $28 per hour per hour over a 38 hour week. There is no dispute that Mr Cheeseman's rate of pay was $28 per hour at termination.

4 The Respondent does not deny that it has not paid Mr Cheeseman his long service leave entitlement but disputes the quantum of his claim. Through its Director, Mr Gordon, the Respondent suggests that Mr Cheeseman started working for it in 1992 and not January 1990 as alleged. Therefore the only issue in this case is whether Mr Cheeseman can prove that he started working for the Respondent in January of 1990. Mr Cheeseman bears the burden of proving his claim on the balance of probabilities. In the end result I am required to determine the amount which is payable to Mr Cheeseman.

When did Mr Cheeseman's entitlement begin to accrue?

5 The Respondent contends that a Taxation Declaration Form (Exhibit 2) signed by Mr Cheeseman on 24 August 1992 shows that he commenced work on that date. Mr Cheeseman says he was asked by the Respondent to sign a second Taxation Declaration Form at a time when the Respondent reorganised its records.

6 Mr Cheeseman says that he started work as an apprentice mechanic in 1986. His apprenticeship concluded in 1989. His group apprenticeship was conducted by the MTA and worked with various entities during the course of his apprenticeship. In the last two years of his apprenticeship he was placed with the Respondent. During that time the MTA paid him. Upon completing his apprenticeship in 1989, the Respondent asked him to stay on. He commenced working directly for the Respondent immediately upon the completion of his apprenticeship. That was in January of 1990. He has a memory of those events and the associated timelines. Mr Cheeseman says that he is certain of the dates relating to his apprenticeship and the commencement of his work for the Respondent. He has produced various documents supporting his contention.

7 I accept Mr Cheeseman's evidence in that regard. It is not unusual for a significant event such as the obtaining of a qualification or the starting of a first job to be etched in one's memory. Most people will recall the date of an important event in their lives. I am sure that the completion of his apprenticeship and the start of his first job following qualification are of such significance to Mr Cheeseman that he recalls the same with clarity. That is so despite the fact that when cross-examined by Mr Gordon he said that he commenced his apprenticeship in 1988. The significance of that date is that if he did commence his apprenticeship in 1988 it follows that he would have completed his training in in 1992 supporting the Respondent's contention about his start date. It is obvious however that Mr Cheeseman made a genuine mistake, a slip of the tongue, when responding to Mr Gordon. That is all it was. I am confident of that because Mr Cheeseman quickly corrected that error maintaining throughout that he commenced his apprenticeship in 1986 and gained employment with the Respondent in 1990 following the completion of his apprenticeship in 1989.

8 In addition, Mr Cheeseman has produced documents which support his claim. The documents in Exhibit 3 recovered from the Respondent with the assistance of the Fair Work Ombudsman include the Respondent's records of Mr Cheeseman's accrual of annual leave entitlements.

9 The first document in the group of documents received shows that Mr Cheeseman accrued 220.4 hours of annual leave entitlements prior to 14 January 1992. Then between 14 January 1992 and 23 December 1992 he accrued another 91.2 hours. If the Respondent did not employ Mr Cheeseman until 24 August 1992 it would not have kept such a record relating to a period predating his employment. The obligation would have rested with the MTA. The only reasonable inference to be drawn is that the document was created by the Respondent in order to comply with its employment obligations to Mr Cheeseman. The document supports and corroborates Mr Cheeseman's contention that his employment with the Respondent commenced in January of 1990.

Conclusion

10 On the balance of probabilities I am satisfied that Mr Cheeseman started work for the Respondent in January of 1990. That employment terminated in October of 2009. Mr Cheeseman's calculation of what he is owed in unpaid long service leave is entirely correct. He has not been paid $17,524.08 to which he entitled.

11 The claim has been wholly made out. Judgment will be entered for the Claimant against the Respondent in the sum of $17,524.08.

Orders

12 The following orders are made:

1. Judgement for the Claimant against the Respondent
2. The Respondent shall pay to the Claimant $17,524.08

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2012 WAIRC 01072

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01072
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 23 NOVEMBER 2012
DELIVERED	**:**	MONDAY, 3 DECEMBER 2012
FILE NO.	**:**	B 104 OF 2012
BETWEEN	**:**	GREGORY KENNETH BELL
		Applicant
		AND
		AKC HOLDINGS PTY LTD TRADING AS EYESON SAFETY AND TRAINING
		Respondent

Catchwords	**:**	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of unpaid wages, payment in lieu of notice, annual leave, reimbursement of expenses and car allowance - Application upheld in part - Order issued
Legislation	**:**	*Industrial Relation Act 1979* s 7, s 27, s 29(1)(b)(ii)
Result	**:**	Upheld in part and order issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	No appearance

Case(s) referred to in reasons:

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

(Given extemporaneously at the conclusion of the hearing, as edited by the Commissioner)

1 On 9 May 2012 Gregory Kenneth Bell (the applicant) lodged an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act) claiming that he was due benefits under his contract of employment with AKC Holdings Pty Ltd trading as Eyeson Safety and Training (the respondent).

2 The applicant claims he is due the following:

- three days' pay for 16, 17 and 18 April 2012 in the amount of $1,269.12;
- eight days' annual leave in the amount of $3,384.32;
- one month's pay in lieu of notice in the amount of $9,166.66;
- car allowance in lieu of a car being provided, based on $250 per week, in the amount of $2,875; and
- $650 reimbursement for a vacuum cleaner.

The applicant was also seeking commission on the respondent's income which he says is due to him under his contract of employment but he was unable to proceed with this claim as the respondent did not attend the hearing to confirm its income so that a quantum could be determined.

3 The respondent did not appear at the hearing. The Commission is satisfied that sufficient notice was given to the respondent of the hearing date and the hearing notice sent to the respondent has not been returned to the Commission. Furthermore, the respondent has not participated in conciliation notwithstanding the respondent's representative Mr Michael Smith indicating he was available on the date of the conference. Given the Commission's powers under s 27 of the Act the Commission formed the view that it was appropriate that the proceedings continue in the respondent's absence.

Findings and conclusions

Legal principles

4 In determining whether or not a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which he is entitled under his contract of employment. The Commission must determine the terms of the contract of employment and decide 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*** (1989) 69 WAIG 2307).

5 There is no issue in this matter and I find that the applicant was employed by the respondent under a contract of service. I find that these claims relate to industrial matters for the purposes of s 7 of the Act as they are payments the applicant claims are due to him under his employment with the respondent. There was also no evidence that the benefits the applicant is claiming arise under an award or order of this Commission. The issue to be determined therefore is whether the applicant is entitled to be paid the monies he is seeking.

6 The applicant was employed by the respondent as its South West Manager undertaking general organisation of the south west branch, overseeing staff, implementing training courses and undertaking marketing and logistics. He commenced employment on 9 January 2012 and he was terminated at a meeting held on 18 April 2012. After this meeting a letter was sent to the applicant confirming his termination (Exhibit A1).

7 I have no hesitation in accepting the evidence given by the applicant as I find that he gave his evidence honestly and to the best of his recollection.

8 The applicant gave evidence that during his employment he worked very hard to ensure the respondent's operations worked well and staff were happy working under his leadership. The applicant assisted in moving the respondent into a new building and I accept the applicant's evidence that he was applauded for his efforts. An example of this was when the respondent sought his advice in its Perth office with respect to initiatives that he generated in the south west office. The applicant's contract of employment provides for a probationary period which did not trouble the respondent once that period was finalised and I find that during the interview where the applicant was terminated his commitment to the organisation and the respondent's appreciation of his work was discussed (see Exhibit A3 notes of meeting). In the circumstances I find that the applicant was not dismissed for anything other than the respondent was seeking to manage its south west office from Perth and I therefore find that the applicant was not terminated for misconduct.

9 I find that the applicant was not paid wages for 16, 17 and 18 April 2012 which he worked prior to his termination. The applicant is therefore due three days' pay in the amount of $1,269.12 (24 hours by $52.88). I note that the applicant's payslips confirm that he worked 40 hours per week even though his contract refers to a base rate of 38 hours. The applicant's contract also refers to the applicant being required to work additional hours. On that basis I find that the applicant worked eight hours per day. I find that the applicant is entitled to pay in lieu of notice as provided for in his contract of employment. Clause 8 of the applicant's contract of employment provides that the applicant's employment may be terminated by the respondent with one month's notice in writing and the respondent may pay salary in lieu of all or part of the notice period. I have already found that the applicant was not terminated because of misconduct on his part and I find that the respondent should have therefore paid the applicant one month's pay in lieu of notice. I calculate the amount owing to the applicant to be $9,166.66, being one twelfth of $110,000. I accept the applicant's evidence and I find that he was not paid his annual leave entitlements. I find that this entitlement is $3,384.32 based on eight days at an hourly rate of $52.88. The applicant's contract of employment refers to him being provided with a car as part of his remuneration and a car was not given to him until the final week of his employment. I therefore find that the applicant is entitled to a car allowance of $250 per week for 11.5 weeks in the amount of $2,875. I find that this quantum is an appropriate amount as the applicant gave evidence, which was confirmed in his email to Mr Smith dated 18 April 2012, that a quantum of $250 per week in lieu of a car was agreed by the respondent in a discussion he had with one of the respondent's directors by the name of Alan.

10 The applicant is claiming the cost of replacing the vacuum cleaner ($650) which was used for the respondent's purposes and no longer works. I accept that this issue was discussed in the meeting held on 18 April 2012 when the applicant was terminated however it is unclear if the respondent agreed to reimburse the applicant for this amount at this meeting and that this became an agreed term of the applicant's contract of employment with the respondent. There is reference to the vacuum cleaner in the applicant's follow up email to Mr Smith on 18 April 2012 however there was no mention at the time of any agreement to pay this amount. I am therefore not able to find the applicant and the respondent agreed that the applicant was to be paid $650 for the vacuum cleaner and I find that this claim is not made out.

11 I will issue an order that the amounts of $1,269.12, $9,166.66, $3,384.32 and $2,875 be paid to the applicant by the respondent.

2012 WAIRC 01088

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY KENNETH BELL
	APPLICANT
	-v-
	AKC HOLDINGS PTY LTD TRADING AS EYESON SAFETY AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 6 DECEMBER 2012
FILE NO/S	B 104 OF 2012
CITATION NO.	2012 WAIRC 01088

Result	Upheld in part and order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING HEARD the applicant in person and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1 DECLARES that the respondent denied the applicant benefits under his contract of employment.

2 ORDERS that the respondent pay the applicant $16,695.10 gross within 14 days of the date of this order.

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

2012 WAIRC 00165

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASWANT SINGH BRAR
	APPLICANT
	-v-
	MIDLAND INFORMATION DEBT & LEGAL ADVOCACY SERVICES INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 MARCH 2012
FILE NO.	U 178 OF 2011
CITATION NO.	2012 WAIRC 00165

Result	Direction issued
Representation	
Applicant	Mr S Singh of counsel
Respondent	Mr S Kemp of counsel

Direction

HAVING heard Mr S Singh of counsel on behalf of the applicant and Mr S Kemp of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the hearing listed for Monday, the 2nd day of April 2012 and Tuesday, the 3rd day of April 2012 be and is hereby vacated.

(2) THAT the hearing be relisted on dates to be determined by the Commission.

(3) THAT the direction of 2 March 2012 be and is hereby varied as follows.

(4) THAT the applicant file and serve any witness statements upon which he intends to rely by 30 March 2012.

(5) THAT the respondent file and serve any witness statements upon which it intends to rely by 13 April 2012.

(6) THAT any witness statements filed by the parties will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

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

(8) THAT the parties file and serve an outline of submissions no later than three days prior to the date of hearing.

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

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

2012 WAIRC 00836

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00836
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 2 DECEMBER 2011, FRIDAY, 2 MARCH 2012, TUESDAY, 27 MARCH 2012, THURSDAY, 28 JUNE 2012
DELIVERED	**:**	MONDAY, 17 SEPTEMBER 2012
FILE NO.	**:**	U 178 OF 2011
BETWEEN	**:**	JASWANT SINGH BRAR
		Applicant
		AND
		MIDLAND INFORMATION DEBT & LEGAL ADVOCACY SERVICES INC
		Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment – Alleged harsh, oppressive and unfair dismissal – Summary dismissal for misconduct – Approach to be adopted in assessing the evidentiary burden on employer – Principles applied – Misconduct established – Application dismissed.
Legislation	**:**	Industrial Relations Act 1979 ss 26(1)(a), 26(1)(c) and 29(1)(b)(i).
Result	**:**	Application dismissed

Representation:

Counsel:		
Applicant	**:**	Mr N Ekanayake
Respondent	**:**	Mr S Kemp and with him Ms C Sharpe
Solicitors:		
Applicant	**:**	Magister Legal
Respondent	**:**	Jackson MacDonald

Case(s) referred to in reasons:

Adami v Maison de Luxe Ltd (1924) 35 CLR 143

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Chief Executive, Department of the Premier and Cabinet (Department of Health) v Pala [2012] SAIRComm 5

Clothier v Australian Liquor Hospitality Workers Union [2003] SAIRComm 52

Department for Administrative Services and Information v Virgin [2006] SAIRComm 11

FMWU v Cat Welfare Society Inc (1991) 71 WAIG 2014

Garbett v Midland Brick Company Pty Ltd (2003) 83 WAIG 893

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 All WLR 698

Margio v Fremantle Arts Centre Press (1990) 70 WAIG 259

Max Winkless Pty Ltd v Bell & anor (1986) 66 WAIG 847

Miles & Ors v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385 ('*Undercliffe*')

Mouritz v Shire of Esperance (1990) 70 WAIG 2130

New South Wales Nurses' Association on behalf of Debbie Rudder v Booroongen Djugun Aboriginal Corporation [2007] NSWIRComm 89

Newmont Australia Ltd v The Australian Workers Union Branch, Industrial Union of Workers (1988) 68 WAIG 677

North v Television Corporation Ltd (1976) 11 ALR 599

Pastrycooks Employees, Biscuitmakers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No.3) (1990) 35 IR 70

Shire of Esperance v Mouritz (1991) 71 WAIG 891

The Minister for Health v Drake-Brockman (2012) 92 WAIG 203

Western Mining Corporation Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1997) 77 WAIG 1079

Case(s) also cited:

Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & ors (1995) 75 WAIG 813

Vaughn v WA Access Pty Ltd (2000) 80 WAIG 3106

Gibson v Bosmac Pty Ltd (1995) 60 IR 1

Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371

Pass v Chairperson College Council South East Metropolitan College of TAFE [2002] WAIRC 6762 (21 August 2002)

The Shop, Distributive and Allied Employees' Association of Western Australia v Katies Fashion (1988) 69 WAIG 118

Reasons for Decision

1 The applicant Mr Singh is a 68 year old solicitor. He was first admitted to practice in the United Kingdom in 1975. He practiced law in Singapore from 1976 to 1989. Mr Singh migrated to Perth with his family in 1989 and worked as an Associate at the Administrative Appeal Tribunal from 1991 to 1993. From 1994 Mr Singh practiced on his own account. From 2004 Mr Singh commenced undertaking legal work for various community law centres. In 2009 Mr Singh commenced employment on a full time basis as a solicitor for the respondent, which is otherwise known as MIDLAS. This changed to part time employment from August 2010, from which time Mr Singh has worked three days per week. MIDLAS is an incorporated association that provides services, including legal services, to victims of domestic violence.

2 Events took place from about mid-August 2011 that ultimately led to Mr Singh's summary dismissal on 11 October 2011. Mr Singh took instructions from a potential client, who was a mother with two disabled sons who appeared to have been made respondent to restraining order proceedings. MIDLAS said Mr Singh was given a clear direction to not act for this client as it appeared that the client was a respondent to a restraining order action and was a perpetrator not a victim. Subsequently, in mid-September 2011, Mr Singh is alleged to have taken instructions from this client in breach of this direction. He says that only later did he realise that this was the person in respect of whom the prior direction had been given and that he had made a mistake. Mr Singh notified the client on 19 September 2011 that he could no longer act on her behalf. In view of this conduct, MIDLAS undertook an investigation, resulting in Mr Singh's summary dismissal for misconduct. He was required to leave the MIDLAS premises on the day of his dismissal on 11 October 2011.

3 Mr Singh claims he was unfairly dismissed by MIDLAS. He claims reinstatement as he has not been able to secure suitable alternative employment. Before dealing with the issues that arise in this case, I turn to some matters of principle.

Relevant principles

4 The law in relation to unfair dismissal claims in this jurisdiction is well settled. It must be established that there has been an abuse of the employer's right to dismiss an employee, such that the dismissal is rendered harsh or oppressive and warrants the intervention of the Commission: *Miles & Ors v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 ('*Undercliffe*'). It is not for the Commission to assume the role of the manager in considering whether a dismissal is unfair. The test is an objective one, in accordance with the Commission's obligations under s 26(1)(a) and (c) of the Act.

5 Additionally, contemporary standards of industrial fairness require that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his or her performance or conduct is not remedied, as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635; *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559.

6 Whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however, it may be a most important factor, depending upon the circumstances of a particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. Whilst for convenience it has been the case that the Commission and the Industrial Appeal Court have accepted the distinction between substantive and procedural fairness, it is important to recognise that such a distinction should not place an unwarranted gloss on the overall statutory test, that being whether a dismissal is harsh, oppressive or unfair: *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 per EM Heenan J at 901.

7 Mr Singh, in his submissions, contended that given that he was summarily dismissed, an evidentiary onus lay on MIDLAS to establish the facts that gave rise to his dismissal. In this respect reference was made to decisions of the Full Bench in *FMWU v Cat Welfare Society Inc* (1991) 71 WAIG 2014 and *Mouritz v Shire of Esperance* (1990) 70 WAIG 2130. It was submitted that to discharge the evidentiary onus, MIDLAS must show that, on balance, the misconduct actually occurred: *Max Winkless Pty Ltd v Bell & anor* (1986) 66 WAIG 847. Whilst apparently relying on *Max Winkless*, in terms of an opportunity to defend allegations of misconduct, Mr Singh referred to the decision of the Full Commission of the Industrial Relations Commission of South Australia in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224, in particular the observation at 229:

> Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged;

> and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

8 I will deal with the apparent tension between cases such as *Max Winkless* and the *Bi-Lo* decision, below.

9 MIDLAS submitted that it had a valid reason to terminate Mr Singh's employment for serious misconduct, as he failed to comply with a lawful and reasonable direction. It was submitted that wilful disobedience of a lawful and reasonable direction is serious misconduct and grounds for summary dismissal. A single incident of disobedience may be sufficient to support summary dismissal, where it amounts to a distinct refusal to be bound by the terms of the contract of employment: *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143.

10 The decision of the Industrial Relations Commission of South Australia in *Bi-Lo* was recently considered by the Full Bench of this Commission in *The Minister for Health v Drake-Brockman* (2012) 92 WAIG 203. In this case, the Full Bench considered the application of the principles espoused in *Bi-Lo* and whether they extend to circumstances of a summary dismissal on grounds other than dishonest conduct by an employee. The Full Bench appears to have confined the approach in *Bi-Lo* to the facts of that case, where allegations of dishonesty arose, or where damage to the employer's property may be caused. In other circumstances, not involving dishonesty, the Full Bench appears to have concluded that the employer faces the burden of a narrower test that is, establishing on balance, as a matter of fact, that the misconduct occurred. This seems to have been referrable to an earlier Full Bench decision in *Newmont Australia Ltd v The Australian Workers Union Branch, Industrial Union of Workers* (1988) 68 WAIG 677, which I note was decided prior to the adoption of *Bi-Lo* in this jurisdiction, as was *Max Winkless*.

11 If I have understood *Drake-Brockman* correctly, this constitutes a considerable departure from the approach taken by the Commission for many years previously, as illustrated by the decision of the Full Bench in *Western Mining Corporation Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079. That is, on the approach adopted by the Full Bench in *Drake-Brockman*, in misconduct cases other than for dishonesty or where there may be potential damage to property, the Commission should be required to effectively stand in the shoes of the employer, and assess whether, on the evidence led by the employer, it can be satisfied that the facts upon which the decision to summarily dismiss an employee was made, are established on the balance of probabilities.

12 The principles established previously by the Full Bench of the Commission in applying *Bi-Lo*, have been consistently applied by the Industrial Relations Commission of South Australia. The approach in *Bi-Lo* has not, however, been adopted by the Industrial Relations Commission of New South Wales. In the New South Wales jurisdiction, actual proof of misconduct is required for an employer to discharge the evidentiary onus: *New South Wales Nurses' Association on behalf of Debbie Rudder v Booroongen Djugun Aboriginal Corporation* [2007] NSWIRComm 89 per Sams DP, Boland J, Grayson DP; *Pastrycooks Employees, Biscuitmakers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No.3)* (1990) 35 IR 70 per Hungerford J.

13 Given that *Bi-Lo* has been consistently adopted and applied in this jurisdiction, and that the Full Bench has affirmed its application in *Drake-Brockman*, albeit seemingly limiting it to conduct involving dishonesty, the principles established in that decision continue to apply in some cases of summary dismissal for misconduct.

14 Whilst it is the case that the doctrine of *stare decisis* has no application in the Commission's jurisdiction generally speaking, decisions of the Full Bench and the Commission in Court Session should be followed. But for the decision in *Drake-Brockman*, which I will follow until it is reconsidered, with respect, I disagree with it on the *Bi-Lo* point. I prefer the approach previously adopted by the Commission. I have reached this conclusion for the following reasons.

15 Recent decisions of the Industrial Relations Commission of South Australia concerning the application of the *Bi-Lo* test would appear not to have been brought to the attention of the Full Bench in *Drake-Brockman*. For example, in *Chief Executive, Department of the Premier and Cabinet (Department of Health) v Pala* [2012] SAIRComm 5, the Full Commission considered the application of the *Bi-Lo* test in an appeal from a decision at first instance concerning the summary dismissal of a medical practitioner from a public hospital. The medical practitioner had been summarily dismissed for physically assaulting a patient by punching the patient in the face with a closed fist, in response to aggressive and threatening behaviour by the patient. The case did not involve any question of dishonesty or damage to the employer's property. An issue arising on the appeal was the approach of the Commission member at first instance to the evidentiary onus. Parsons DP, Doyle and McMahon CC observed at par 50:

> Finally, she referred to the four matters which must usually be demonstrated by the employer in discharging the evidentiary onus that the dismissal was based on alleged misconduct. These matters are referred to in *Bi-Lo v Hooper Pty Ltd* as follows:
>
> > "… that the employee has been given a reasonable opportunity to respond to and answer the allegations; that the employer held an honest and genuine believe, and had reasonable grounds for that belief, on the information available at the time, that the employee was guilty of the misconduct alleged; and that taking into account relevant mitigating circumstances, such misconduct justified dismissal."

16 After having considered whether the finding of misconduct should stand, the Full Commission went on to observe at par 64 as follows:

> To dismiss an employee for serious misconduct the employer must have reasonable grounds for believing that the employee committed the act of misconduct which, in this case, was particularised as punching the patient in the face at least twice. The employer must then determine whether taking into account all of the factual circumstances surrounding the alleged conduct, and the employment history and role of the employee, the misconduct justifies dismissal. The

employee's conduct must amount to a disregarding, in the sense of deliberately flouting, an essential condition of the contract of employment.

17 Further observations about the application of *Bi-Lo* were made by the Full Commission at pars 140-143 inclusive. (See also: *Clothier v Australian Liquor Hospitality Workers Union* [2003] SAIRComm 52 at par 44; *Department for Administrative Services and Information v Virgin* [2006] SAIRComm 11)

18 In my view, what *Pala* establishes, is that the approach in *Bi-Lo* is not confined to misconduct involving dishonesty, but rather, sets out an approach to be adopted by the Commission when enquiring into and dealing with an unfair dismissal claim involving summary dismissal for misconduct generally. Moreover, to require the employer to prove the misconduct actually occurred means the Commission is required to stand in the shoes of the employer, which is a course the Commission has repeatedly said it will not adopt. This would also appear to be at odds with the approach in *Undercliffe*, which involves an objective assessment as to whether the employer has abused its lawful right to dismiss an employee.

19 To illustrate the point just made, take for example a case where an employee admits misconduct and on the strength of the admission and circumstances surrounding it, the employer summarily dismisses the employee for misconduct. Subsequent proceedings are commenced in the Commission challenging the dismissal. Prior to the hearing, the employee recants and declines to give evidence. If the employer fails to establish the actual misconduct, the Commission would probably be obliged to find the dismissal to be unfair. In my view this would be a startling result.

20 In terms of justification for a misconduct dismissal, the wilful disobedience of a lawful and reasonable direction of an employer may warrant summary dismissal without notice. The act of disobedience, in failing to comply with a lawful and reasonable direction from an employer, must go to the root of the contract of employment evincing an intention that the employee no longer intends to be bound by it: *Adami*. It has been held that a single act of disobedience or misconduct will only justify dismissal if it is of such a nature that the employee is repudiating the contract of employment. It also must have the quality of "wilfulness": *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698; *North v Television Corporation Ltd* (1976) 11 ALR 599.

21 With those observations in mind I now turn to consider the issues to be determined.

Was there a direction given?

22 Amongst the services that MIDLAS provides to victims of domestic violence, are legal services. The legal services provided are funded by a grant from the WA Law Society Public Purposes Trust. It was common ground that the legal services representation only extends to the victims of domestic violence. It was contended by MIDLAS that this was a condition of the grant.

23 Mr Singh said that on 18 August 2011, when he arrived at work, he found an email from a colleague, Ms Carleo, regarding a potential client, Ms Adams. The message was brief and, formal parts omitted, read as follows:

> Restraining Order – needs assistance with paperwork – for herself and children (children have intellectual disability)
>
> Needs an appointment ASAP
>
> Julie Adams – [mobile telephone number omitted]
>
> Please call to arrange appointment

24 The same day, Mr Singh telephoned Ms Adams. He recalls that she told him that there was an issue with her disabled son causing problems with a neighbour. A violence restraining order had been served on Ms Adams and her son the day prior. A note made by Mr Singh of this conversation appears on a copy of the email from Ms Carleo at annexure JB16 to the witness statement of Ms Burch, the Executive Officer of MIDLAS. The note refers to "21 days to object". It was accepted that this meant that Ms Adams and her son were respondents to the order.

25 Mr Singh then sent an email to Ms Rogalski, a disability advocate at MIDLAS, copied to Mr McAllister, another disability advocate, and also to Ms Burch. In it, Mr Singh requested Ms Rogalski to attend a meeting with himself and Ms Adams and her son on 22 August. Shortly after Ms Burch received the email, she sent a reply to Mr Singh and the others, raising a number of questions about the case. Various email exchanges then took place. Ms Burch suggested that the matter was an "interesting case", and it would be discussed at the regular staff meeting to take place that afternoon.

26 Prior to the staff meeting, which is normally held from about 1-3pm, Ms Burch testified that there was an informal discussion between her, Mr Singh and Mr McAllister, about the case. According to Ms Burch, the circumstances of the case were discussed and it was concluded that as Ms Adams and her son were not victims, MIDLAS could not act. She said she instructed Mr Singh not to act as Ms Adams and her son had interim orders against them and they were, as a result, deemed to be "perpetrators" in this case. Ms Burch said she also drew Mr Singh's attention to the MIDLAS website, where reference is made to the organisation only acting for victims. The outcome of this conversation was not put in writing by Ms Burch. Mr Singh testified that no such instruction was given to him either then or at any time later. He did accept, however, that in the discussion with Ms Burch and Mr McAllister, it was agreed that MIDLAS should not act for Ms Adams. Mr Singh variously described this in cross-examination as a "tentative decision", and "more or less" a decision. Mr Singh also accepted that he was aware of the content of the MIDLAS web site.

27 Mr McAllister testified that whilst he was not clear on the dates, he recollected a discussion about the Adams case in a staff meeting. He was not sure if this was on 18 August but it may have been. After the discussion, Mr McAllister said it was decided, "as a team", that MIDLAS would not act for persons who had a VRO or a misconduct restraining order against them, as they were perpetrators. Ms Burch, as the Executive Officer, took the final decision that MIDLAS would not act in such cases. Mr McAllister made no reference to the specific direction Ms Burch said she gave to Mr Singh not to act, prior to the staff meeting on 18 August. The outcome of the 18 August staff meeting and the decision to not act for Ms Adams was also

referred to by Ms Wadley. She confirmed that this was the agreed outcome and that Mr Singh had raised a number of questions about acting for Ms Adams and her son.

28 Later that afternoon, Mr Singh said he had a chance meeting with Ms Adams at the Midland Courthouse. He said he had left the staff meeting early to go to the courthouse to attend to some business. Mr Singh said he found out a little more about the Adams case. On returning to the office, Mr Singh sent an email to Ms Burch as follows:

> There appears to be two MROs one on the son and the other on the mother. I met the mother in the court house as I was sealing witness summons. It was a chance meeting.
>
> As I explained in the meeting, I did not consider it appropriate to deal with the mother as she was about to see the 2 ladies in DV section at the ground level of the court house.
>
> I wonder whether he is the perpetrator, or the victim of his own unfortunate circumstances. Mental issues could be defences. Tough call on the lawyer who will represent.

29 It is said by MIDLAS that the final paragraph of the email was a hint of Mr Singh's approach to the Adams case, which ultimately led to his dismissal.

30 Events then moved on. On 1 September 2011, a further staff meeting took place. At the meeting, Ms Burch said that the Adams case was dealt with a case study on "client intake". Ms Burch said that at the meeting, she conducted a white board exercise to double-check everyone's understanding of client intake questions. Whilst Ms Adams' name was not mentioned, it was described at the meeting as a complex case, involving a range of possible services. Ms Burch testified that it was a useful illustration of issues that might arise for MIDLAS from time to time. The importance of the client intake procedure, by which clients can come to MIDLAS by telephone or personally, is to enable the appropriate questions to be asked of a potential client, to determine whether MIDLAS can act or not. The significance of this, for present purposes, is a matter that I will come to later.

31 It was Ms Burch's evidence that at the end of the meeting, she asked Mr Singh whether he had contacted Ms Adams to let her know that MIDLAS could not represent her. According to Ms Burch, Mr Singh informed her that he would do so. Mr Singh, in cross-examination, seemed to recollect the case study at the 1 September 2011 staff meeting and that a decision was taken not to give legal advice to Ms Adams. Mr Singh denied, however, that Ms Burch enquired as to whether he had telephoned Ms Adams to advise that MIDLAS could not act for her.

32 There was no independent corroboration of Ms Burch's testimony as to whether a direction not to act for Ms Adams was given to Mr Singh in the discussion on 18 August, preceding the staff meeting. Mr McAllister made no reference to it in his evidence in chief and he was not cross-examined on the issue. It therefore falls to a conflict on the evidence of Ms Burch and Mr Singh. What is agreed however is that a clear decision was taken on 18 August 2011 that MIDLAS would not act for Ms Adams. Mr Singh understood this and about that, in my view, there can be no doubt.

33 Ms Wadley also gave evidence about a discussion between herself, Ms Burch and others, on the morning of 18 August. Ms Wadley's involvement was from a tenancy perspective. She recalled discussion about a VRO or a MRO on the person's son and that MIDLAS could not act for them as they were deemed perpetrators and not victims.

34 Having carefully observed the witnesses giving their evidence in these proceedings, where there was a conflict between the evidence of Ms Burch and Mr Singh on this issue, I prefer the evidence of Ms Burch. Ms Burch was quite emphatic that a specific direction had been given to Mr Singh to not act for Ms Adams. She was consistent in her examination in chief and cross-examination on the point. This is also consistent with the acceptance by Mr Singh and Mr McAllister, that at the ensuing staff meeting on the same day, the case was discussed and it was affirmed that MIDLAS could not act for this potential client. This was also consistent with the tenor of Ms Wadley's testimony regarding discussions on the morning of 18 August.

35 Moreover, I found, with due respect, on occasions, Mr Singh's evidence to be confusing and contradictory. Mr Singh sometimes appeared to lose track of the line of questioning by counsel for MIDLAS, and on several occasions directly contradicted himself. For example, I refer to the exchange that took place in cross-examination at 85-87t.

36 I have considerable doubts as to the reliability of Mr Singh's testimony. Mr Singh also admitted in cross-examination to having problems with his memory sometimes.

Did Mr Singh fail to comply with the direction?

37 On 5 September 2011 Mr Singh received an email from Ms Adams. Attached were copies of two letters from the Midland Magistrates Court referring to two VRO applications to be heard on 23 September. The email, at annexure JB22 to Ms Burch's witness statement says:

> Hi Jaswant,
>
> I have attached for you the two letters I received from Midland court today for you to look at. Any help you can assist us with would be greatly appreciated.
>
> Many Thanks Julie Adams

38 On the same day Mr Singh also had a brief telephone conversation with Ms Adams, and he made a file note of this which is at annexure JB21 to Ms Burch's witness statement.

39 The letters from the Midland Magistrates Court to Ms Adams and her son were in the same terms and, formal parts omitted, read as follows:

> RE: Restraining Order No. MI 712/2011
>
> I refer to your objection to the above interim violence restraining order and advise the matter has been listed for final order hearing on 23rd September 2011 at 12:00pm.

> The final order hearing is unlikely to proceed on that date, so please do not bring witnesses. If the matter is unable to be resolved a date for hearing will be fixed. If a hearing date is required, you will need to let the Court know whether you are calling any witnesses and how long you anticipate the matter will take.
>
> Please be aware that if you fail to appear on 23rd September 2011 the court may make a final order/dismiss the restraining order in your absence.

40 What the letters make clear is that the Adams' were respondents to the orders. It was common ground that MIDLAS does not act for respondents.

41 There followed a series of emails between Mr Singh and Ms Adams to set up an appointment for Ms Adams to attend MIDLAS on 16 September. Copies of these emails were at annexures JB23-25 of Ms Burch's witness statement.

42 Mr Singh interviewed Ms Adams on 16 September and took extensive notes of the interview. These were at annexure JB26 to Ms Burch's witness statement. The notes refer to service of the VROs on Ms Adams and her son on 17 August 2011. I note that this was the day before the previous contact Mr Singh had with Ms Adams on 18 August. In that conversation Ms Adams referred to the serving of interim orders the day prior. Mr Singh accepted instructions to act and opened a file. Ms Adams signed all necessary authorities and an engagement letter to act. Mr Singh took copies of the VROs and put them on the file.

43 On 19 September Mr Singh said he spoke to Mr McAllister and asked him whether he could assist Ms Adams by attending the court on 23 September to support her disabled son. At that point, according to Mr Singh, Mr McAllister told him that this may be the client in respect of whom a decision had been taken that MIDLAS could not act. Mr Singh said that he forgot about the prior emails with Ms Burch and others about this matter. Mr Singh testified that he then considered that he had made a mistake in the decision to act for Ms Adams and her son. He said he telephoned Ms Adams to tell her of this. He wrote a letter to confirm that MIDLAS was ceasing to act on the same day. A copy of the letter was annexure JB29 to Ms Burch's witness statement. Ms Adams was given alternative referrals for assistance.

44 Later that afternoon, Mr Singh received an email from Ms Burch, asking whether he had seen Ms Adams the prior Friday, 16 September. Mr McAllister said that he had gone to see Ms Burch on that day, which was confirmed in the evidence of Ms Burch. Mr Singh could not recall if he replied to Ms Burch's email.

45 In September, Mr McAllister said he received a call from Mr Singh who was with a client. Mr McAllister was asked to attend the meeting but was too busy. Afterwards, he went to speak with Mr Singh. He asked Mr Singh if the client was the same mother and son that had been previously discussed at the staff meetings and it having been resolved that MIDLAS would not act for them. Importantly, Mr McAllister testified that Mr Singh confirmed that it was. Mr McAllister said he told Mr Singh that he could not act. Mr Singh replied to him that the VRO had been "placed wrongly on the client and that she was in fact the victim". Mr McAllister testified that he recalled this comment because it was very similar to the comment that Mr Singh had made in the earlier staff meeting, when discussing the Adams case.

46 On having this conversation with Mr Singh, Mr McAllister then went to speak with Ms Burch. He informed her that Mr Singh appeared to be acting for the mother and son in respect of whom, it had been previously agreed that MIDLAS would not take on as a client. The substance of this discussion was confirmed by Ms Burch in her evidence. Mr McAllister said that Ms Burch was "quite shocked" when he informed her of it. Mr McAllister said he went back to see Mr Singh and reinforced that he was not able to act. Mr McAllister was present with Mr Singh when he telephoned Ms Adams to inform her that MIDLAS had to cease acting for her.

47 Also relevant to this issue was the testimony of Ms Wadley. Whilst she was not certain of the timing, she recalled having a "case work meeting" with Mr Singh. She thought this may have been some days after the 18 August staff meeting. Ms Wadley, as the Case Manager, reviews cases with MIDLAS staff, for the purposes of compliance and risk management. According to Ms Wadley, Mr Singh raised with her the Adams case, but not by name. Ms Wadley knew who he was referring to from the prior discussion. She reaffirmed the previous decision that MIDLAS could not act for the Adams' and Ms Wadley testified that Mr Singh was "adamant" about discussing the case. Ms Wadley recalled saying to Mr Singh that regardless of whether he considered Ms Adams to be a victim or perpetrator, a decision had been made that MIDLAS would not act in the matter and that "there are rules in place". Ms Wadley confirmed in re-examination that at the time of this discussion with Mr Singh, she was not aware he had taken instructions from Ms Adams to act or had opened a file for the matter.

48 The position adopted by Mr Singh in his testimony, and in the investigation of the issue by MIDLAS prior to his dismissal, was that his decision to act for Ms Adams was a mistake. When Ms Adams contacted him on 5 September to request assistance from MIDLAS regarding the VROs, he had forgotten the prior discussion about the Adams case. Even when he met with Ms Adams on 16 September, he said he "couldn't put the face to that name" to realise this was the same person previously discussed.

49 Given my preference for the testimony of Ms Burch to that of Mr Singh on the first issue, and the inconsistencies between Mr Singh's evidence and that of Mr McAllister and Ms Wadley, I prefer the version of events as outlined by MIDLAS' witnesses. In my view, the testimony of Mr Singh that he felt sorry for Ms Adams and had pity for her and wanted to help her was telling: 73-74t. At other stages of his cross-examination, Mr Singh also said, he was "overpowered by the circumstances of this unfortunate lady": 84t.

50 The testimony of Ms Wadley, that Mr Singh argued that MIDLAS should act for Ms Adams, and that of Mr McAllister, that Mr Singh had also confirmed the identity of the client and that in Mr Singh's view, previously expressed at the staff meeting, Ms Adams was a victim not a perpetrator, combined with his evidence that he felt sympathy for and was overwhelmed by Ms Adams' circumstances, all tends to support the conclusion on balance, that contrary to the previous direction and decision, Mr Singh did knowingly assist Ms Adams by acting for her and her son. It was only when directly confronted by Mr McAllister, after Mr Singh's meeting with the client that Mr Singh appeared to have no real option but to cease to act and close the file.

51 I have considered carefully the contention that is was simply a failing of memory on Mr Singh's part, the led to him not recognising that the person who contacted him on 5 September 2011, was the same Ms Adams whom he met and discussed her case with, only some three weeks earlier. This contention may have had more force absent the other evidence of surrounding circumstances. In particular, it was apparent from the initial email from Mr Singh to Ms Burch on 18 August, that Mr Singh was questioning whether characterising Ms Adams and her son as perpetrators was appropriate. This issue seemed to have been taken up by Mr Singh at the staff meeting later that day. This was confirmed by the evidence of Mr McAllister. Additionally, the discussion between Ms Wadley and Mr Singh, prior to him commencing to act for Ms Adams, referred to above, tends to confirm the propensity of Mr Singh to have been disposed towards the Adams case and providing Ms Adams some assistance. This was a recurring theme.

52 Compelling also, was the testimony of Mr McAllister, that when he spoke to Mr Singh in September around the time Mr Singh had an appointment with Ms Adams, Mr Singh confirmed with Mr McAllister that this was the same person in respect of whom it had been decided MIDLAS would not act. Mr Singh's propensity towards Ms Adams was highlighted again in the statement made to Mr McAllister, consistent with his very first email, that the Adams' may be the victims and not the perpetrators. All of this evidence supports the conclusion of the existence of a state of mind, disposed to considerable sympathy for, and a wish to assist, Ms Adams and her son. Although this sense of compassion for one's fellow citizens is commendable in itself, this cannot be permitted to cloud the professional and contractual obligations of an employee solicitor to his or her employer.

53 Further, there were some aspects of Mr Singh's attempt to explain his course of conduct that were not satisfactory. For example, Mr Singh said in cross-examination, noted at par 34 above, that when he received a telephone call from "a" Ms Adams on 5 September, he thought it was a different person. When pressed on this, and his contention that he was "overwhelmed by the circumstances" of the Adams case, he was not able to explain how he could be overwhelmed by the circumstances of a person he asserted he had not had any prior dealings with. In my view, the better construction of these events is he was overwhelmed because of his prior knowledge of and considerable sympathy for, Ms Adams and her son and a desire to assist them.

Did MIDLAS conduct a fair procedure?

54 Ms Burch, on becoming aware that Mr Singh had seen Ms Adams, requested by email of 19 September 2011, confirmation that he had done so. Mr Singh did not reply. Also, Ms Burch noted that no "intake sheet" existed for the matter. By 5 October, there had still been no response from Mr Singh to Ms Burch. Accordingly, Ms Burch requested Mr Singh to produce the file notes relevant to the matter.

55 It was common ground that after discovering that Mr Singh had met with Ms Adams in mid-September, two meetings took place. The first took place on 6 October and involved Ms Burch, Ms Rogalski and Mr Singh. Notes were taken of the meeting and a copy subsequently produced. No issue was taken with the accuracy of the notes. Ms Burch put to Mr Singh that it appeared that he had acted contrary to her direction not to act for Ms Adams and her son. Ms Burch referred to that conduct putting the organisation at risk because the funding for MIDLAS is provided on the basis that it only acts for victims and not perpetrators of domestic violence. Also, by the time that Ms Adams was informed by Mr Singh that MIDLAS could not continue to act, only a few days remained prior to the hearing of her matter in court. It was therefore said that Ms Adams and her son were prejudiced.

56 Mr Singh informed Ms Burch that his decision to act for Ms Adams and her son was a mistake and was not deliberate. He requested the file to refresh his memory but Ms Burch refused, because of confidentiality issues. Given the seriousness of the issue in Ms Burch's view, Mr Singh was stood down and Ms Burch undertook to investigate the matter further.

57 Another meeting took place on 11 October. Mr Singh was accompanied by his wife on this occasion. Also present was Ms Calla, the chair of MIDLAS. Notes were again taken of the meeting and again no issue was taken with their accuracy. Mr Singh repeated his assertion previously made, that although he accepted that he acted contrary to the decision and direction not to act for Ms Adams and her son, that action was not deliberate. Mr Singh maintained that he was not able to put a "face to the name" when he made an appointment for Ms Adams to attend MIDLAS on 16 September. Mr Singh said he recalled a discussion about the case in the prior staff meeting. Mr Singh indicated to Ms Burch that he appeared to be a "victim of [his] own making". He apologised for his conduct.

58 After some time, the meeting adjourned briefly. Ms Burch and Ms Callan conferred as to what was the appropriate response. Ms Burch considered the conduct of Mr Singh to be serious, as a breach of her direction and a breach of trust. A decision was made to dismiss Mr Singh effective immediately, which decision was conveyed to him. Mr Singh collected his belongings and left the premises that afternoon.

59 From the evidence, I am satisfied that Ms Burch did put the allegations to Mr Singh in an appropriate fashion and he was given a reasonable opportunity to respond to them. This response was afforded on two occasions on 6 and 11 October. The allegations themselves were not complicated. The allegation was that Mr Singh had not complied with Ms Burch's direction, or the decision taken, to not act for Ms Adams and her son. Mr Singh consistently maintained that he accepted that a decision was taken that MIDLAS could not act for Ms Adams and her son, but he failed to comply by reason of oversight not deliberate conduct. Having regard to all of the evidence, I am satisfied that Mr Singh was given an ample opportunity to explain his position. A period of five days lapsed between the interviews. He was not placed under any time constraint in that respect.

60 As to the issue of the viewing of the file, as the evidence in these proceedings shows, it simply contained a chronology of events, by way of various emails and telephone file notes. The content of the file in my view does not shed any light on the issue of any alleged confusion as to the identity of Ms Adams. It does not alter the issue of the relevant decision, direction and non-compliance with it. If anything, the content of the file supports MIDLAS' position. In my view, nothing is apparent on the papers, as reflected in the evidence that could lend support to the contention by Mr Singh of mistaken identity that could

otherwise have influenced Ms Burch's decision. I am therefore not persuaded that the lack of access to the relevant file would have made any difference in this case.

Was Mr Singh's dismissal unfair?

61 Ultimately the Commission must assess whether MIDLAS has abused its lawful right to terminate Mr Singh's contract of employment. I am satisfied that the evidence establishes that a direction was given to Mr Singh to not act for Ms Adams and her son and Mr Singh deliberately failed to comply with it. I am also satisfied on the evidence that the issue of Mr Singh being mistaken or inadvertently engaging Ms Adams and her son as clients has been negatived by the evidence of MIDLAS. There has been a clear breach of trust in this case. I am therefore satisfied that MIDLAS has satisfied the onus upon it to establish the misconduct complained of.

62 There was a degree of persistence in the conduct of Mr Singh and it was not an isolated contact with Ms Adams. Following the initial contact in August 2011, there was an ongoing course of conduct including further telephone and email exchanges; the reviewing of documents; the making of appointments for an interview and the actual further attendance on Ms Adams in September 2011.

63 Are there any questions of mitigation in this case? Ms Burch in her testimony seemed to attach some considerable significance to MIDLAS' intake procedure, which was the subject of discussion at the August and September staff meetings. Indeed, the Adams case was used as a case study in relation to the importance of ensuring appropriate questions were asked at the intake stage, to ensure that only persons for whom MIDLAS could act were taken on. It was therefore surprising that after the 18 August discussions and staff meeting, a "red flag" was not raised against Ms Adams' name as a part of the intake procedure. That is, it is surprising that a clear direction was not given by Ms Burch to those staff of MIDLAS responsible for the initial intake, that under no circumstances should any further contact by Ms Adams lead to her being represented by the organisation. To that extent, in my opinion, there was a systemic failure by MIDLAS. Ultimately, that failure enabled Ms Adams to later re-establish contact with Mr Singh when it was clear that she could not become a client of MIDLAS.

64 Whilst this is a factor, I have weighed it in the balance as against the overall conduct of Mr Singh. Ultimately, in my view, it does not alter the outcome. Mr Singh, as a senior and experienced solicitor and as an employee of MIDLAS, was responsible for his own conduct. No doubt, as I have already observed, Mr Singh felt considerable sympathy and compassion for Ms Adams and her son and this clouded his professional judgement. It led to a serious conflict with his duty to his employer.

65 As to the delay from the time when Ms Burch became aware on about 19 September, that Mr Singh had met with Ms Adams, and the initial interview on 5 October with Mr Singh, I am not persuaded that is of itself, of any material significance. It was clear that Ms Burch was trying to establish whether Mr Singh had commenced acting for Ms Adams and he was non-responsive. In my opinion, this time interval cannot in any way be regarded as condoning Mr Singh's conduct.

66 Having regard to all of the evidence and all of the submissions, I am not persuaded that the dismissal of Mr Singh in these circumstances was harsh, oppressive or unfair.

67 Therefore the application is dismissed.

2012 WAIRC 00837

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASWANT SINGH BRAR
	APPLICANT
	-v-
	MIDLAND INFORMATION DEBT & LEGAL ADVOCACY SERVICES INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 17 SEPTEMBER 2012
FILE NO/S	U 178 OF 2011
CITATION NO.	2012 WAIRC 00837

Result	Application dismissed
Representation	
Applicant	Mr Ekanayake of counsel
Respondent	Mr S Kemp of counsel and with him Ms C Sharpe of counsel

Order

HAVING heard Mr N Ekanayake of counsel on behalf of the applicant and Mr S Kemp of counsel and with him Ms C Sharpe of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2012 WAIRC 01082

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LESLIE RICHARD BREWER
	APPLICANT
	-v-
	TROY THOMAS. HORIZONTAL FALLS SEA PLANE ADVENTURES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 4 DECEMBER 2012
FILE NO/S	B 198 OF 2012
CITATION NO.	2012 WAIRC 01082

Result Application discontinued

Order

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

AND WHEREAS at a conference at Mandurah Court House on Tuesday the 13th day of November 2012 no agreement was reached and the matter was adjourned for 14 days to allow Mr Brewer to seek legal advice and consider his position;

AND WHEREAS at a further conciliation conference by telephone on Monday the 3rd day of December 2012 no agreement was reached and the matter was adjourned for 14 days to allow Mr Brewer to consider his position;

AND WHEREAS on Tuesday the 4th Day of December 2012, the Mr Brewer advised the Commission that he would not be proceeding with his application;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 01041

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRACY LESLEY DOUGALL
	APPLICANT
	-v-
	BLOODWOOD TREE ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 22 NOVEMBER 2012
FILE NO/S	U 152 OF 2012
CITATION NO.	2012 WAIRC 01041

Result	Application discontinued
Representation	
Applicant	Dr R Whitwell (of counsel)
Respondent	Mr B Neville

Order

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

AND WHEREAS on 23 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 26 October 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,
Commissioner.

[L.S.]

2012 WAIRC 00400

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL GREENWOOD
	APPLICANT
	-v-
	JOHN BUIST NOMINEES T/AS THE SHARK BAY HOTEL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 27 JUNE 2012
FILE NO/S	B 101 OF 2011
CITATION NO.	2012 WAIRC 00400

Result	Order issued
Representation	
Applicant	Mr P Greenwood
Respondent	No appearance

Order

HAVING heard Mr P Greenwood on behalf of the applicant and no appearance on behalf of the respondent, the Western Australia Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby –

ORDERS that application B 101 of 2011 is otherwise and hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2012 WAIRC 00402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL GREENWOOD
	APPLICANT
	-v-
	JOHN BUIST NOMINEES T/AS THE SHARK BAY HOTEL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 27 JUNE 2012
FILE NO/S	U 101 OF 2011
CITATION NO.	**2012 WAIRC 00402**

Result	Order issued
Representation	
Applicant	Mr P Greenwood
Respondent	No appearance

Order

HAVING heard Mr P Greenwood on behalf of the applicant and no appearance on behalf of the respondent, the Western Australia Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby –

1. DECLARES that the applicant was unfairly dismissed from his employment with the respondent on 7 May 2011.
2. DECLARES that it is impracticable to reinstate or re-employ the applicant to his former position with the respondent.
3. ORDERS that the respondent pay an amount of $4,000 gross within 14 days of the order formerly issuing.

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

2012 WAIRC 01078

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY ALLAN HARRIS
	APPLICANT
	-v-
	NR & MS GOOCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 4 DECEMBER 2012
FILE NO/S	U 148 OF 2012, B 148 OF 2012
CITATION NO.	2012 WAIRC 01078

Result	Application discontinued
Representation	
Applicant	Mr G Harris
Respondent	Mrs M Gooch

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 00838

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ANTHONY HEWITT
	APPLICANT
	-v-
	THE DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 17 SEPTEMBER 2012
FILE NO/S	U 188 OF 2012
CITATION NO.	2012 WAIRC 00838

Result	Application dismissed
Representation	
Applicant	Mr P Hewitt
Respondent	Mr R Andretich of counsel

Order

HAVING heard the applicant on his own behalf and Mr R Andretich of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2012 WAIRC 01050

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER HOLLAND
	APPLICANT
	-v-
	CLAN WA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	U 179 OF 2012
CITATION NO.	2012 WAIRC 01050

Result	Application discontinued
Representation	
Applicant	Mr S Bibby
Respondent	Mr R Jones

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 01087

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01087
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	BY WRITTEN SUBMISSIONS: WEDNESDAY, 21 NOVEMBER 2012 AND WEDNESDAY, 28 NOVEMBER 2012
DELIVERED	**:**	WEDNESDAY, 5 DECEMBER 2012
FILE NO.	**:**	U 207 OF 2012
BETWEEN	**:**	JILLAINE JONES
		Applicant
		AND
		ECO ABROLHOS ACCOMODATION PTY LTD
		Respondent

CatchWords	:	Industrial law - termination of employment – Claim of harsh, oppressive and unfair dismissal - Whether Commission has jurisdiction-Trading corporation - Principles applied - Claim not within Commission's jurisdiction
Legislation	:	Industrial Relations Act, 1979 (WA) ss 23(1), 29(1)(b)(i)
		Fair Work Act, 2009 (Cth) ss 12, 14, 26, 27
		Australian Constitution ss 51(xx), 109
Result	:	*Application dismissed for want of jurisdiction*
Representation:		
Applicant	:	In person
Respondent	:	Mr T. Hayter (of counsel)

Case(s) referred to in reasons:

Krysti Guest v Kimberley Land Council (2009) 89 WAIG 2063 at [52] – [69]; [2009] WAIRC 00668

Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union [2007] FCAFC 177, (2007) 173 IR 276;

Tristar Steering and Suspension Ltd v IRC of NSW [2007] FCAFC 50, (2007) 161 IR 469

Reasons for Decision

1 Ms Jones's claim of unfair dismissal against Eco Abrolhos Accommodation Pty Ltd (the respondent) was filed on 26 September 2012. The respondent submitted that the application has been commenced in the wrong jurisdiction because it is a proprietary limited company which is a constitutional corporation. It has stated that it wishes to have the claim dismissed for want of jurisdiction and that the issue of jurisdiction should be determined before any further proceedings take place. Ms Jones maintained that the Commission does have the jurisdiction to deal with her claim. Accordingly the parties were advised that the Commission would decide the matter of jurisdiction and requested that submissions be made.

Finding of Facts for the Purpose of Jurisdiction

2 It is not disputed that Ms Jones was an employee of the respondent and that she has been dismissed.

3 The respondent submitted a copy of a Certificate of Registration of a Company certifying that the respondent was a registered company under the *Corporations Act 2011* from 12 August 2009. Further, the respondent states that its trading activities form a substantial part of all of the activities it undertakes. In this context, it advises that the respondent provides accommodation services to the oil and gas industry and that these are commercial services.

4 There is nothing in the material from Ms Jones which disputes these submissions. Indeed Ms Jones's own Notice of application identifies the respondent as having "Pty Ltd" after its name. Ms Jones indicated in the Notice of application that the respondent was unincorporated, however that cannot be correct: the abbreviations "Pty Ltd" mean "proprietary limited" and show that the respondent is incorporated, not unincorporated.

5 I therefore find that the Ms Jones's former employer is a corporation. Further, I find that its activities in providing accommodation services to the oil and gas industry are trading activities which form a substantial part of all of the activities it undertakes. I find that it is a trading corporation.

The Law

6 Ms Jones's application to this Commission necessarily is brought by her under s 29(1)(b)(i) of the *Industrial Relations Act 1979* which is an Act of the WA Parliament. On the face of it, Ms Jones is an "employee" as defined in s 7 of that Act and similarly the respondent is an "employer". The source of the Commission's jurisdiction is essentially s 23(1) of the Act which provides that the Commission "has cognizance of and authority to enquire into and deal with any industrial matter". However, this provides only part of the answer to the issue of jurisdiction.

7 This is because there is Commonwealth legislation, the *Fair Work Act 2009* (Fair Work Act), which is intended to apply to the exclusion of all State industrial laws so far as they would otherwise apply in relation to a national system employee or national system employer (see generally the explanations in the decisions in *Krysti Guest v Kimberley Land Council* (2009) 89 WAIG 2063 at [52] – [69]; [2009] WAIRC 00668; *Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union* [2007] FCAFC 177, (2007) 173 IR 276; *Tristar Steering and Suspension Ltd v IRC of NSW* [2007] FCAFC 50, (2007) 161 IR 469. Although those decisions all relate to the former Workplace Relations Act, I consider their reasoning is applicable to the corresponding effect of the Fair Work Act and apply them here).

8 Section 14 of the Fair Work Act defines a national system employer as including a constitutional corporation; by s 12 of the Fair Work Act, a constitutional corporation means a corporation to which paragraph 51(xx) of the Australian Constitution applies. In turn, paragraph 51(xx) of the Australian Constitution empowers the Commonwealth to make laws for the peace, order, and good government of the Commonwealth with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.

Application of the Facts to the Law

9 I have found that the respondent is a trading corporation. It follows that it is a constitutional corporation and thus it is a national system employer under s 14 of the Fair Work Act. Therefore the jurisdiction of the Commission to deal with Ms Jones's claim is excluded by ss 26 and 27 of the Fair Work Act and s 109 of the Constitution because the Commonwealth Act

applies to the exclusion of the State Act. Accordingly, this Commission has no jurisdiction to enquire into or deal with Ms Jones's claim that she was unfairly dismissed by the respondent.

10 Ms Jones's submissions of 28 November 2012 do not address these issues; rather, those submissions seem to address the events which occurred in the lead up to her dismissal. Ms Jones did send an earlier email on 26 October 2012 which set out a number of matters to do with the issue of jurisdiction, however none of those submissions go to the facts and the law which I have outlined above.

11 An email of Thursday 1 November 2012 contains a submission that section 27 of the Fair Work Act prescribes categories of State and territory laws that are not excluded. Ms Jones refers to occupational health and safety and workplace surveillance which, in Ms Jones's submission, means that the relevant State or territory law will prevail over a term of an award or enterprise agreement that is inconsistent.

12 This is a reference to ss 27(2)(c) and (m) of the Fair Work Act. The difficulty with this submission is that Ms Jones has not made a claim to this Commission about occupational health and safety or workplace surveillance; she has made a claim to this Commission that she has been unfairly dismissed. That is not one of the "non-excluded matters" in s 27(2) of the Fair Work Act. Accordingly, her submission does not provide any basis for finding that there is jurisdiction in this Commission to deal with her claim that she has been unfairly dismissed.

13 For all of the above reasons an order now issues dismissing Ms Jones's claim for want of jurisdiction.

2012 WAIRC 01080

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JILLAINE JONES
	APPLICANT
	-v-
	ECO ABROLHOS ACCOMODATION PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 5 DECEMBER 2012
FILE NO/S	U 207 OF 2012
CITATION NO.	2012 WAIRC 01080

Result Application dismissed for want of jurisdiction

Order

HAVING HEARD the applicant on her own behalf, and Mr T. Hayter (of counsel) on behalf of the respondent, in both cases by way of written submissions, I the undersigned pursuant to the powers conferred on me under section 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

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

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

2012 WAIRC 01049

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLAN EDWARD KINGSTON
	APPLICANT
	-v-
	ANDREW VAN DER HELDER
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	B 182 OF 2012
CITATION NO.	2012 WAIRC 01049

Result	Application discontinued
Representation	
Applicant	Mr A Kingston
Respondent	Mr A van der Helder

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 01061

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	THURSDAY, 29 NOVEMBER 2012
FILE NO.	U 181 OF 2012
CITATION NO.	2012 WAIRC 01061

Result	Direction amended
Representation	
Applicant	No appearance
Respondent	No appearance

Direction

WHEREAS on 8 October 2012 the Commission issued directions for the filing and serving of documents in preparation for the hearing of this matter;

AND WHEREAS the parties have reached an agreement the directions be amended and have reached agreement as to the terms of those amended directions;

AND WHEREAS the Commission is of the opinion that it is appropriate to amend the directions;

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

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 Friday 7 December 2012;

That the respondent file and serve on the applicant any signed witness statements upon which it intends to rely no later than Friday 21 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.

2012 WAIRC 01043

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH MCILVEEN
	APPLICANT
	-v-
	ANTJE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	U 127 OF 2012
CITATION NO.	2012 WAIRC 01043

Result	Application discontinued
Representation	
Applicant	Mrs J Mcilveen and Mr B J Masters (as agents)
Respondent	Ms A Buurman

Order

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

AND WHEREAS on 14 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 5 November 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2012 WAIRC 01045

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH MCILVEEN
	APPLICANT
	-v-
	ANTJE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	B 127 OF 2012
CITATION NO.	2012 WAIRC 01045

Result	Application discontinued
Representation	
Applicant	Mrs J Mcilveen and Mr B J Masters (as agents)
Respondent	Ms A Buurman

Order

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

AND WHEREAS on 14 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 5 November 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 01032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS ANDRE MORRIS
	APPLICANT
	-v-
	KRIS TURNER (PRESTIGE BUS HIRE & CHARTER WA)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 19 NOVEMBER 2012
FILE NO/S	U 210 OF 2012
CITATION NO.	2012 WAIRC 01032

Result	Application discontinued
Representation	
Applicant	Mrs A Morris
Respondent	Mr K Turner

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 01066

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN MICHAEL MORRISON
	APPLICANT
	-v-
	CHRISTIAN ABORIGINAL PARENT - DIRECTED SCHOOL.
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 30 NOVEMBER 2012
FILE NO/S	U 227 OF 2012
CITATION NO.	2012 WAIRC 01066

Result	Application discontinued
Applicant	No appearance
Respondent	Not required to attend

Order

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

AND WHEREAS on the 8th day of November 2012, the applicant advised the Commission that he would withdraw his application;

AND WHEREAS on the 8th day of November 2012 and the 12th day of November 2012, the applicant was forwarded a Notice of withdrawal or discontinuance for completion;

AND WHEREAS there has been no further contact from the applicant since that time;

AND WHEREAS on the 21st day of November 2012 the applicant was advised that the matter would be listed for mention for him to show cause as to why it should not be struck out for want of prosecution;

AND WHEREAS at the hearing on Thursday the 29th day of November 2012, there was no appearance on behalf of or by the applicant;

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

THAT this application be, and is hereby discontinued.

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

2012 WAIRC 00959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANTHONY OWEN
	APPLICANT
	-v-
	NTY PROPERTY GROUP
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 30 OCTOBER 2012
FILE NO/S	B 27 OF 2012
CITATION NO.	2012 WAIRC 00959

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance

Order

THERE having been no appearance on behalf of the applicant and there being no compulsion for the respondent to attend, 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 for want of prosecution.

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

2012 WAIRC 00929

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00929
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 25 SEPTEMBER 2012
DELIVERED	**:**	FRIDAY, 12 OCTOBER 2012
FILE NO.	**:**	U 146 OF 2012
BETWEEN	**:**	JAMES PRICE
		Applicant

AND

JACQUIE PERRY

PERRYS TRUCKING

Respondent

Catchwords	:	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Entitlement under Award - Employer the subject of bankruptcy proceedings - Application dismissed.
Legislation	:	Industrial Relations Act 1979 ss 29(1)(b)(i), 83.
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Ms J Perry

Case(s) referred to in reasons:

Emery v Commonwealth (1963) 5 FLR 209

Fryar v Systems Services Pty Ltd (1995) 60 IR 68

Hill v C A Parsons & Co Ltd [1972] Ch 305;

Miles & Ors v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385 (*Undercliffe*)

Reasons for Decision

1 Mr Price was employed as a truck driver by Perry Trucking. His duties included the delivery of bedding and furniture to a range of retailers. Mr Price started work in February 2011 and his employment came to an end in June 2012 in circumstances which are controversial. He was employed on a full time basis and was paid some $1,000 per week gross. Mr Price claims he was unfairly dismissed and seeks orders from the Commission.

2 Both parties represented themselves in the proceedings. The only witnesses called were Mr Price and Ms Perry, a co-owner of the business. Their evidence was brief.

3 Mr Price in his testimony admitted that during his employment, he had a considerable number of absences due to back pain and other difficulties. This culminated in Mr Price sending Ms Perry a text message from his mobile phone on 30 May 2012 at 5:06am. According to Ms Perry, who read the text message into evidence, it said "won't be in J back's too sore giving you two weeks' notice to find another driver". According to Ms Perry, up to this time, not only had Mr Price had a very considerable period of time off work on sick leave, but he was constantly late for work.

4 Mr Price's usual hours were 7am to 3pm but it was agreed between Ms Perry and the drivers that the drivers work considerable overtime. They would start at 6am or even earlier, at 5:30am in summer. This suited both parties. According to Ms Perry, the difficulty was Mr Price regularly arrived late, despite her insistence that he work the agreed hours. Mr Price said that this was largely because of the distance of the workplace from his residence.

5 As to the text message of 30 May 2012, when Mr Price returned to work after a further absence, Ms Perry discussed the issue with Mr Price. It seems that an agreement was reached that while Mr Price would look for another job, he would remain employed by Perry's Trucking until that time. This was on the proviso, however, according to Ms Perry, that Mr Price attended work on time and not have as many absences. Mr Price accepted in cross-examination, that he agreed with Ms Perry to be more punctual and reliable.

6 According to Ms Perry's evidence, however, that agreement was short lived. Shortly after her conversation with Mr Price, he was absent from work without reason, on 7, 11, 14, 19 and 20 June. Ms Perry testified that attempts to contact Mr Price by telephone on these occasions were unsuccessful. She said that his practice was to send her text messages and when she endeavoured to call him to discuss the message, his phone was always either switched off or on divert to voicemail. A further absence occurred on 21 June which Ms Perry described as the "last straw". She resolved to terminate Mr Price's employment.

7 As Mr Price was absent at this time and Ms Perry could not reach him by phone and she had not been provided with his current residential address, she had no way of communicating the termination to Mr Price other than through a co-worker and an advice in writing on his pay advice. A copy of the pay advice was exhibit A1. Nonetheless, although it was not directly communicated, Mr Price did receive advice that his employment was being terminated.

8 During the course of Mr Price's employment, Ms Perry gave evidence that the business regularly made advances in pay to Mr Price on his request. This also included purchases of furniture which Mr Price was required to pay off by instalments. As at the termination of his employment, Mr Price owed Perry's Trucking $290.00 for furniture purchases. This money was deducted from Mr Price's final pay, which Mr Price objected to. Not only does Mr Price say his dismissal was unfair, but he also seeks reimbursement of the $290.00 deducted.

9 Ultimately, on the evidence, Mr Price did not contest the fact that he had a very large number of absences from the workplace. I found Ms Perry's evidence in this respect cogent and she kept records of Mr Price's absences and his lateness for work,

which she referred to in her testimony. The evidence reveals what can only be fairly described as a chronic level of absenteeism and lateness for work.

10 As a small business, I accept Ms Perry's evidence that continual absences and lateness for work were very disruptive to the business. As to the notice given by Mr Price on 30 May 2012, the law is that a valid notice of resignation by an employee cannot be unilaterally withdrawn. It will operate according to its terms and bring the employment to an end when the period of notice expires: *Hill v C A Parsons & Co Ltd* [1972] Ch 305; *Fryar v Systems Services Pty Ltd* (1995) 60 IR 68. However, a valid notice of resignation may be withdrawn by consent, which in my view occurred in this case. Whilst the matter is not free from doubt, it would appear that the effect of a consensual withdrawal of notice of termination is that the former contract of employment continues, rather than the employee and employer being subject to a new contract of employment: *Emery v Commonwealth* (1963) 5 FLR 209 at 217 per Pape J.

11 In all of the circumstances of this case, in my view, Mr Price can hardly complain he has not been given a fair go all around by his employer. On any view of the evidence, his employer suffered his extensive absences and lateness from the workplace over a considerable period of time. Whilst these absences may have in part, at least, been as a result of illness or injury, some seemingly on the evidence were for unidentified reasons. The employer could not reasonably be expected to continue in employment an employee who is not able to attend the workplace consistently and reliably. Mr Price was on notice from May 2012 to remedy his previous ways and he did not do so. Indeed, on the evidence, it appears he lapsed back into the same pattern almost immediately.

12 In my view, it has not been established on balance by Mr Price, on whom the onus falls, that his contract of employment was terminated by the employer in circumstances which were harsh, oppressive or unfair such as to constitute an abuse of the employer's lawful right to dismiss: *Miles & Ors v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 (*Undercliffe*). In cases such as these, the Commission must have regard to the interests of the employer and not just those of the employee.

13 In terms of the claim by Mr Price for reimbursement of the $290.00, I am not satisfied that the Commission has jurisdiction to deal with that matter. Given that Mr Price's employment was covered by an award, in essence, Mr Price claims that he has not been paid his full wage and entitlements under the award which is a matter within the exclusive jurisdiction of the Industrial Magistrates Court under s 83 of the Act. It also may involve the contravention of a term implied into the award by the combined effect of ss5 and 17C of the Minimum Conditions of Employment Act 1993, dealing with deductions from pay, which also can only be dealt with by the Industrial Magistrates Court.

14 Finally, Ms Perry referred to the fact that Perry's Trucking has been the subject of bankruptcy proceedings in the Federal Court. She informed the Commission that a sequestration order was made in November 2011 against the business. Even if this is so, I am not persuaded that the bankruptcy of Perry's Trucking would preclude the commencement or continuation of these proceedings by Mr Price. In my view, Mr Price's unfair dismissal claim seeking reinstatement against the business, is not a claim brought by a creditor against the person or property of a bankrupt in respect of a provable debt, that could be stayed under the Bankruptcy Act 1966 (Cth).

15 For the foregoing reasons the application is dismissed.

2012 WAIRC 00930

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES PRICE
	APPLICANT
	-v-
	JACQUIE PERRY
	PERRYS TRUCKING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 12 OCTOBER 2012
FILE NO/S	U 146 OF 2012
CITATION NO.	2012 WAIRC 00930

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms J Perry

Order

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

THAT the application be and is hereby dismissed.

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

2012 WAIRC 01094

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01094
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 2 NOVEMBER 2012
DELIVERED	**:**	MONDAY, 10 DECEMBER 2012
FILE NO.	**:**	B 87 OF 2012
BETWEEN	**:**	MYRIAM SCHORN
		Applicant
		AND
		SONOLOGIC PTY LTD
		Respondent

Catchwords	**:**	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of unpaid commission - Application upheld - Order issued
Legislation	**:**	*Industrial Relation Act 1979* s 7 and s 29(1)(b)(ii)
Result	**:**	Upheld and order issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	No appearance

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 David Saab (2001) 81 WAIG 2704

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 17 April 2012 Myriam Schorn (the applicant) claimed under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act) that she was due outstanding commissions under her contract of employment with Sonologic Pty Ltd (the respondent). In its Notice of Answer and Counter-proposal the respondent disputes that the applicant is owed the commission she is claiming.

Respondent's non-attendance at the hearing

2 It is relevant to detail the timeline of events leading up to the hearing of this application.

- This application was lodged on 17 April 2012.
- A conference was held on 6 June 2012 and there was no resolution.
- On 20 June 2012 a hearing was listed for 30 August 2012.
- On 2 July 2012 the respondent notified the Commission that Mr Robert Ewens, the respondent's Managing Director who was dealing with this matter on behalf of the respondent, would be unavailable in July and August 2012 due to work commitments. The respondent therefore wanted the hearing of this application delayed for 30 days. Relevant personnel, including Mr Ewens, were also unavailable between 5 and 23 November 2012 inclusive. The applicant agreed to the hearing listed for 30 August 2012 being vacated and the hearing was vacated.
- On 12 July 2012 Mr Ewens indicated that the respondent would be available for a hearing listed between 30 October 2012 and 2 November 2012 inclusive and on 16 August 2012 this application was listed for hearing on 31 October 2012.

- On 9 October 2012 the respondent requested a further adjournment of the hearing on the basis that the applicant's claim was unclear and inaccurate.
- On 9 October 2012 the Commission requested that the applicant provide updated particulars of her claim by 12 October 2012 and the respondent was advised that if it was still seeking an adjournment due to a lack of particularity of the applicant's claim then a hearing would be set down to deal with this application.
- On 9 October 2012 the applicant provided a more detailed claim.
- On 12 October 2012 Mr Ewens wrote to the Commission claiming the applicant's claim was 'erratic, poorly formatted' and unclear and the respondent wanted 'a precise statement of claim' and if this was not provided it wanted the matter dismissed.
- On 15 October 2012 the parties were notified that it was the Commission's view that the applicant had provided sufficient details of her claim and the hearing would go ahead on 31 October 2012.
- On 17 October 2012 Mr Ewens sought a further adjournment of the hearing set down for 31 October 2012 on the basis that he was scheduled to be in New Zealand to attend to work related matters between Saturday, 26 October 2012 (sic) and Thursday 1 November 2012. At the time he reconfirmed his unavailability between 5 November 2012 and 26 November 2012. The applicant opposed the adjournment.
- On 22 October 2012 a hearing was held via video link and teleconference to deal with the respondent's application to adjourn the hearing listed for 31 October 2012. On 22 October 2012 Mr Ewens emailed confirmation of his New Zealand flight details to the Commission which was booked on 18 October 2012. These details confirm that he was leaving Australia on Saturday 27 October 2012 and returning on Wednesday 31 October 2012 not Thursday 1 November 2012 as he had previously claimed. Mr Ewens also stated that he was departing overseas for work on Sunday 4 November 2012. During these proceedings the Commission told the parties that it proposed to list the hearing of this application on 2 November 2012 if the respondent's application to adjourn the hearing was granted.
- On 23 October 2012 the Commission determined that due to Mr Ewens' unavailability on 31 October 2012 an adjournment of the hearing would be granted and the application would be listed for hearing on 2 November 2012 as previously foreshadowed to the parties. A minute of proposed order issued to this effect.
- On 26 October 2012, and at the respondent's request, a speaking to the minutes was held.
- On 26 October 2012 the order issued confirming the adjournment and a Notice of Hearing was sent to the parties relisting the hearing for the afternoon of 2 November 2012.
- On 2 November 2012 the Commission received an email from Mr Ewens. Amongst other comments in this email about the manner in which the Commission has handled this application Mr Ewens stated that the respondent was unable to attend the Commission on 2 November 2012. Mr Ewens also claimed he was now leaving for overseas on Saturday 3 November 2012, contrary to previous information given to the Commission. Mr Ewens also believed that it was not in the public interest for the Commission as constituted to deal with this application as I was biased. However no application was made by the respondent to have this issue heard and determined. Given the history of this matter, including two adjournments of the hearing of this application being granted at the respondent's request, and as the respondent confirmed it was aware of the date the hearing was to take place the Commission determined that it was appropriate that the hearing proceed in the respondent's absence.

The claim

3 The applicant worked for the respondent between 12 April 2010 and 30 June 2011 as a sales representative. Her duties included direct sales of the respondent's range of diagnostic ultrasound and associated medical products, services and accessories, the demonstration and commissioning of products sold and the production of appropriate records.

4 The applicant is claiming $8,588.15 made up of the following outstanding commissions based on a Sales Commission Report generated by the respondent:

Customer	Sales	Comm %	Comm $	Comm %	Comm $
Gough	29900	3.00%	897		
Valmadre	39980	3.00%	1199		
Ferry	30000	3.00%	900		
Colins	19300	3.00%	579		
Haylen	12500	3.00%	375		
Bowral	27650	3.00%	829.5		
Gundy Vet	33000	3.00%	990		
Hornsby	25000	1.50%	375	1.50%	375
Clear Soundview	35000	3.00%	1050		
Bakhit	49900	0.00%	0	3.00%	1497
Yoong	1440	3.00%	43.2		
Albayati	13500	3.00%	405		

Adham	25000	3.00%	750			
Chan/Willsher	30900	3.00%	927			
Bissessor	40811	1.50%	612.17			
Hammill	35198	1.50%	527.97		1.50%	527.97
Medical Technologies (Nepean)	13500	3.00%	405			
Medical Technologies (Canberra)	130732	0.00%	0		3.00%	3921.96
Nepean Geriatry	20000	3.00%	600			
	613311			113311	2.00%	2266.22
						8588.15

(Exhibit A3)

The applicant provided the following document at the hearing setting out an overview of sales she completed in 2010 - 2011 and her role with respect to these sales:

Customer	**Lead generation**	**Demo**	**Negotiation, follow up**	**Installation + training**	**Commission**
Gough	ad in Gyn journal, 1300-	Schorn	Schorn /Ewens	Schorn	3
Valmadre	Schorn (flyer in practice)	non	Ewens (personal visit)	Schorn/Schorn	3
Ferry	Word of mouth,1300	Schorn	Schorn / Ewens	Schorn/Schorn / Schorn	3
Sykes	Google ad	Ewens	Ewens	Schorn/Schorn / Schorn	System returned, but was 3
Colins	required service, 1300	non	Ewens	Schorn/Schorn	3
Haylen	conference (Ewens)	Schorn	Schorn	Schorn	3
Bowral	conference (Ewens)	Schorn	Schorn	Schorn/Schorn	3
Gundy Vet	Geerssen	Schorn	Schorn	Schorn	3
Hornsby	Schorn (approached by doc)	Schorn / Ewens + Schorn	Schorn with docs / Ewens with Lion's club / Ewens / Schorn	Schorn/?FY11/12: Sonologic	1.5
Clear Soundview	word of mouth, 1300	Schorn	Schorn	non, just delivery	3
Bakhit	First contact Schorn / conference (Ewens)	non	Schorn /Ewens	?FY 11/12	0, but Ewens acknow-ledges 1.5 in response
Yoong	Schorn (approached by doc)	non	Schorn	Schorn	3
Albayati	Google ad	Schorn	Schorn	Schorn	3
Adham	Schorn (approached by doc)	Schorn	Schorn	Schorn	3
Chan/Willsher	course (Schorn)	Schorn	Schorn	Geerssen	3
Bissessor	Google ad	Schorn	Schorn	Schorn/Brennan	1.5 (due to discount)
Hammill	conference (Ewens)	Schorn / Schorn	Schorn /Ewens	Schorn/FY11/12: Sonologic	1.5

MedTec: Transducer	Schorn (via Olympus)	non	Schorn	non, just delivery	3
MedTec: Canberra	Schorn (emailing to hep surgeons)	Applications Specialist from Aloka + Schorn	Schorn	FY11/12: Applications Specialist from Aloka	0
NSW – Nepan couches	Ewens	non	Ewens	Schorn/Schorn + Geerssen	
Adelaide / LMcEwin	?? Jones	?? Jones	?? Jones	Schorn	
Adelaide / Modbury	?? Jones	?? Jones	?? Jones	Schorn	
Qld-Toowoomba	?? Ewens	?? Ewens	?? Ewens	Schorn+Ewens /Schorn	
Vic-Wodonga / Salmon	??	??	??	Schorn	

(Exhibit A4)

Findings and conclusions

Legal Principles

6 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 David 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.

7 In determining whether or not a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which she is entitled under her contract of employment. The Commission must determine the terms of the contract of employment and decide 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***).

8 I find that this claim is an industrial matter for the purposes of s 7 of the Act as it relates to payments the applicant claims are due to her arising out of her employment with the respondent. There is no issue in this matter and I find that at all material times the applicant was an employee of the respondent and she was employed under a contract of service. There was also no evidence that the benefit the applicant is claiming arises under an award or order of this Commission.

9 There is no dispute that the applicant has not been paid the commission she is claiming as this is confirmed in the respondent's Notice of Answer and Counter-proposal. The applicant's claim arises under Clause 2 – Commission Structure of her contract of employment. This clause reads as follows.

2.Commission Structure

- Commission will be paid on all sales generated by the Salesperson as per the following schedule.
- Commission is payable in the first pay following receipt of unencumbered funds from the customer.

Commission paid on invoiced value of sales made at full end user price (Excl. GST)	**Commission rate (%)**
Commission on the first $500,000 invoice value in any financial year.	3.0%
Commission on all sales over $500,001 invoice value in any financial year.	5.0%
All discounted sales commission negotiated case by case	

(Exhibit A1)

10 I have no hesitation in accepting the evidence given by the applicant. I find that she gave her evidence honestly, in a clear, forthright and direct manner and to the best of her recollection. Her evidence was also consistent with documentation she provided at the hearing, some of which was generated by the respondent.

11 The applicant gave the following uncontradicted evidence which I accept:

- Sales were generated by a variety of methods, including the applicant receiving calls, making cold calls and contacting potential customers. Sales were also generated at conferences by other employees and after becoming

involved in these sales she was paid 3% commission on the value of the sale even though in some instances other employees assisted in finalising the sale.

- The applicant demonstrated machines to potential customers, where necessary.
- The applicant unpacked and set up machines and undertook training when appropriate.
- The applicant was paid commission on sales where she was the primary person dealing with a sale.
- The applicant was the main employee who dealt with the sales for which she is claiming commission.

12 The applicant gave the following evidence about the commission she says she is owed by the respondent in response to the respondent's contentions about each claim.

(a) Medical Technologies - $3,921.96

The respondent claims the applicant is only entitled to be paid commission on this sale based on the commission paid to the respondent as an agent of Medical Technologies and the respondent does not specify what that amount is.

The applicant received no commission for this sale and she is claiming 3% of the sale amount (as reduced by the applicant as the respondent had the incorrect sale amount in its summary of the applicant's sales). The applicant says that Mr Ewens told her that she would be paid commission for this sale when the respondent received payment and the respondent has now received payment from the Canberra hospital (see Exhibit A5). The applicant has previously been paid 3% commission on the full sale price of Medical Technologies' products. The applicant also relies on an email from Mr Ewens sent to the applicant on 14 April 2011 outlining the relationship between the respondent and Medical Technologies which does not state that there is a different commission on sales of Medical Technologies' products.

(b) Dr Bakhit - $1,497

The respondent claims that the applicant is entitled to 1.5% commission on this sale as the initial contact and most of the negotiations with this client were carried out by Mr Ewens. The installation, commissioning and training of the item sold to Dr Bakhit was also not carried out by the applicant.

The applicant is claiming the 3% commission for this sale. The applicant first contacted Dr Bakhit in mid-2010 and again in early 2011 and this sale then took place after Dr Bakhit attended and spoke to Mr Ewens at a conference. The applicant did not do a demonstration or install the product sold to Dr Bakhit as it was delivered after she left the respondent. As she made the initial contact and negotiated with Dr Bakhit which resulted in this sale taking place she maintains she is entitled to be paid the full commission.

(c) Dr Hammill - $527.97

The respondent maintains that the applicant is not entitled to be paid any more commission on this sale as the applicant's contract states that commissions will only be paid on sales that are 'generated by the salesperson'. Mr Ewens made the initial contact, he carried out the majority of the negotiations with this client and the installation carried out by the applicant was not up to the standard required by the respondent. The respondent therefore had to redo the installation and provide training sessions, which should have been done by the applicant, at extra expense to the respondent.

The applicant was paid a commission of 1.5% for this sale and she is claiming the remaining 1.5%. The applicant said that her role with respect to this sale was no different to previous sales for which she was paid 3% commission.

(d) Hornsby Hospital - $375

The respondent claims that the applicant had very little involvement in the sale, negotiations and contracting processes for this claim. The respondent states that the applicant told the respondent she had completed the installation, yet the respondent was subsequently advised by Hornsby Hospital in August 2011 that the equipment had not been installed as advised by the applicant in early June 2011. As a result Mr Ewens had to visit the hospital at short notice and at great expense to the respondent to locate these items.

The applicant was paid a commission of 1.5% for this sale and she is claiming the remaining 1.5%. The applicant said that her involvement in this sale was no different to previous sales she had made for which she was paid 3% commission. The applicant stated that she installed what was available and all items were not delivered for Hornsby Hospital for installation through no fault on her part.

(e) Payment of 2% on sales exceeding $500,000 in the financial year 2010 - 2011

The respondent claims that during the applicant's employment with the respondent her sales did not meet or exceed the $500,000 threshold.

The applicant claims that her sales for 2010 – 2011 exceeded the $500,000 threshold specified in Clause 2 - Commission Structure of her employment contract. She is therefore due an additional 2% commission on sales over $500,000 in the amount of $2,266.22. The applicant claims that the sale to Dr Sykes included in the respondent's Sales Commission Report should have been subtracted from her previous year's sales and not the 2010 – 2011 financial year. The sale to Dr Bakhit and a sale of $20,000 for Nepean Geriatry should also have been included (see Exhibit A6).

Consideration

13 I find that the applicant is due the commissions she is claiming, which have not been paid by the respondent.

14 I find that the applicant is entitled to the full 3% commission of the sales she is claiming pursuant to Clause 2 of her contract of employment. I find that the term 'generated by the sales person' should be read broadly as has been the respondent's custom and practice when regard is had to the summary of the applicant's role in sales in 2010 - 2011 for which 3% commission was

already paid. Furthermore, the applicant's summary of her role with respect to completed sales in 2010 - 2011 confirms that she played a substantial role in the sales for which she is claiming commission and I have no reason to doubt the veracity of this matrix.

15 I accept the applicant's evidence that none of her sales had been previously discounted except where agreed by her. The applicant's contract of employment provides that discounted sales are negotiated on a 'case by case' basis and there was no evidence that any negotiations took place and agreement to reduce her commission reached in relation to any reduction in the commission due to the applicant with respect to the sales on which the applicant is claiming commission.

16 I find that the applicant is due an additional 2% in commission for sales generated over $500,000 in the amount of $113,311. I accept the applicant's evidence and I find that the sale to Dr Sykes, which was deleted by the respondent in the 2010 – 2011 summary, related to the applicant's 2009 – 2010 sales. I also find that the sales to Dr Bakhit and Nepean Geriatry ($20,000) should be included as I accept the applicant's evidence that she was involved in these sales in 2010 – 2011 (see Exhibit A6).

17 An order will issue that the respondent pay the applicant $8,588.15 gross ($375, $1,497, $527.97, $3,921.96 and $2,266.22).

2012 WAIRC 01098

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MYRIAM SCHORN
	APPLICANT
	-v-
	SONOLOGIC PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 12 DECEMBER 2012
FILE NO/S	B 87 OF 2012
CITATION NO.	2012 WAIRC 01098

Result	Upheld and order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING HEARD the applicant in person and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1 DECLARES that the respondent denied the applicant benefits under her contract of employment.

2 ORDERS that the respondent pay the applicant $8,588.15 gross within 14 days of the date of this order.

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

2012 WAIRC 01046

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL JOHN SIMMONDS
	APPLICANT
	-v-
	LEIGHTON SMASH REPAIRS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	B 171 OF 2012
CITATION NO.	2012 WAIRC 01046

Result	Application discontinued
Representation	
Applicant	Mr M J Simmonds
Respondent	Mr M Vidal

Order

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

AND WHEREAS on 18 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 26 October 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2012 WAIRC 01048

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL JOHN SIMMONDS
	APPLICANT
	-v-
	LEIGHTON SMASH REPAIRS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 23 NOVEMBER 2012
FILE NO/S	U 171 OF 2012
CITATION NO.	2012 WAIRC 01048

Result	Application discontinued
Representation	
Applicant	Mr M J Simmonds
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 18 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 26 October 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2012 WAIRC 01040

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LENNY AGULAN SKINNER
	APPLICANT
	-v-
	NORTHBRIDGE DENTAL CLINIC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 22 NOVEMBER 2012
FILE NO/S	U 137 OF 2012
CITATION NO.	2012 WAIRC 01040

Result	Application discontinued
Representation	
Applicant	Ms L A Skinner
Respondent	Dr A S H Rogers

Order

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

AND WHEREAS on 5 October 2012 the Commission held a conference between the parties;

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

AND WHEREAS on 9 November 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2012 WAIRC 01042

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA BETHWYN WARDLE
	APPLICANT
	-v-
	TENANTS ADVICE SERVICE (INC)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 22 NOVEMBER 2012
FILE NO/S	U 167 OF 2012
CITATION NO.	2012 WAIRC 01042

Result	Application discontinued
Representation	
Applicant	Ms D Butler
Respondent	Ms P Matautia

Order

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

AND WHEREAS on 20 September 2012 and 28 September 2012 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 28 September 2012 agreement was able to be reached between the parties;

AND WHEREAS on 30 October 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 01096

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAN META WETTERS
	APPLICANT
	-v-
	DEPARTMENT OF HEALTH WESTERN AUSTRALIA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 11 DECEMBER 2012
FILE NO/S	U 203 OF 2010
CITATION NO.	2012 WAIRC 01096

Result	Application dismissed
Representation	
Applicant	Mr G Guidice of counsel
Respondent	Mr M Aulfrey of counsel

Order

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

WHEREAS the matter was listed for hearing commencing on the 20th August 2012; and

WHEREAS on the 16th day of August 2012 the parties sought an adjournment on the basis that they had entered into discussions with a view to settling the matter; and

WHEREAS on the 30th day of November 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 dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Bradley Kirk	Jason Napoli (Trading as Metro Style Plastering)	U 211/2012	Chief Commissioner A R Beech	Discontinued
Joshua James Delarue	Co-Operative Bulk Handling (C.B.H.) Albany Port	U 183/2012	Chief Commissioner A R Beech	Discontinued
Michelle Godinez	Shop for Shop	U 180/2011	Chief Commissioner A R Beech	Discontinued
Sandra Violae Hawkins	Mr & Mrs J Stokman	U 155/2012	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2012 WAIRC 01083

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS (AWU)
	APPLICANT
	-v-
	DEPARTMENT OF ENVIRONMENT AND CONSERVATION (DEC)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 4 DECEMBER 2012
FILE NO/S	C 56 OF 2012
CITATION NO.	2012 WAIRC 01083

Result	Order Issued in terms of agreement
Representation	
Applicant	Mr M Zoetbrood
Respondent	Ms N Hartz

Order

WHEREAS the Commission has before it a dispute between the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Department of Environment and Conservation;

AND WHEREAS a conference of the parties was convened pursuant to s 44 of the Act on 8 October 2012 and the parties continued their discussions following the conference;

AND WHEREAS the parties have reached an agreement on the matters in dispute in the terms of a Memorandum of Understanding tendered to the Commission when the conference resumed on 4 December 2012 and request that the Commission make an order in the terms of that agreement pursuant to s 44(8)(a) of the *Industrial Relations Act 1979* (the Act);

NOW THEREFORE I, pursuant to s 44(8)(a) of the Act, having heard Mr M Zoetbrood on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and Ms N Hartz on behalf of the Department of Environment and Conservation, and by consent, hereby make the following order:

Parties

1. The Parties to this Order are:
   a. the Department of Environment and Conservation (DEC); and
   b. the Australian Workers' Union West Australian Branch (AWU) Industrial Union of Workers (AWU).

Objectives

2. This Order outlines the terms of the agreement between the Parties in relation to Clause 22 - Camping Allowance and Clause 52 – Alcohol and Other Drugs Policy of the Australian Workers' Union (Western Australian Public Sector) General Agreement 2012 AG 29/2012 (the Agreement).

Time frames

3. This Order comes into effect from the beginning of the first pay period on or after Tuesday, 4 December 2012.
4. This Order will have effect for the duration of the Agreement and will cease to have effect when the Agreement ceases to have effect.
5. Any new Agreement to replace the Agreement is to include the variations contained in this Order thereby making this Order null and void.

Agreed Matters

6. The Parties have agreed that the clauses in this Order will be read in conjunction with ~~the~~ Clause 22 and Clause 52 of the Agreement. Where there is any inconsistency between the Agreement and this Order, the Order shall prevail.
7. The Parties agree the following variations to the Agreement apply:

Clause 22 - Camping Allowance

Where the accommodation provided is not considered "reasonable board and lodging" and DEC provides food to employees to prepare and cook meals - camping allowance of $40.87 per night is payable (based on "meals provided" rate of $27.37 plus Public Service Award "no cook" rate of $13.50).

Clause 52 - Alcohol and Other Drugs Policy

DEC and AWU agree the DEC Alcohol and Drug Management Policy and Guidelines 2012 will apply in place of the policy referred to at clause 52 of the Agreement. The parties agree that:

a. Random selection referred to in guideline 5.1 will be by an agreed method.

b. DEC will make self testing facilities for alcohol available to employees at each work centre.

c. Breaches of the policy will be managed in accordance with the Policy for Managing Suspected Breaches of Discipline.

d. Any further substantial amendments to the agreed policy will only be made in accordance with Clause 56 – Consultation.

Dispute Resolution

8. The dispute procedure contained in clause 57 the Agreement is to be followed.

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

2012 WAIRC 00901

DISPUTE RE SHIFT ROSTERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF CORRECTIONS
	DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 OCTOBER 2012
FILE NO	PSAC 22 OF 2012
CITATION NO.	2012 WAIRC 00901

Result	Application Discontinued
Representation	
Applicant	Mr M Shipman
Respondent	Mr N Cinquina

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,
Commissioner,
[L.S.] Public Service Arbitrator.

2012 WAIRC 01033

DISPUTE RE CLAUSE 15 OF THE PUBLIC SERVICE AND GOVERNMENT OFFICERS GENERAL AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 19 NOVEMBER 2012
FILE NO/S	PSAC 19 OF 2012
CITATION NO.	2012 WAIRC 01033

Result	Application discontinued
Representation	
Applicant	Ms S van der Merwe
Respondent	No appearance

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 01068

DISPUTE RE CONDITIONS & DUTIES OF MOTOR VEHICLE ASSESSORS BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 30 NOVEMBER 2012
FILE NO/S	PSAC 21 OF 2011
CITATION NO.	2012 WAIRC 01068

Result	Application discontinued
Representation	
Applicant	Mr M Shipman
Respondent	Mr S Barrett

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 00857

DISPUTE RE REQUEST FOR ORDER TO EXTEND LEAVE WITHOUT PAY OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
-v-	
PUBLIC TRANSPORT AUTHORITY	
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 20 SEPTEMBER 2012
FILE NO/S	CR 12 OF 2012
CITATION NO.	2012 WAIRC 00857

Result	Application discontinued
Representation	
Applicant	Mr P Laskaris of counsel
Respondent	Mr R Farrell of counsel

Order

HAVING heard Mr P Laskaris of counsel on behalf of the applicant and Mr R Farrell 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 discontinued.

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

2011 WAIRC 01164

DISPUTE RE THE DEDUCTION OF FINES FROM THE WEEKLY PAYS OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 19 DECEMBER 2011
FILE NO.	CR 64 OF 2011
CITATION NO.	2011 WAIRC 01164

Result	Direction issued
Representation	
Applicant	Mr T Kucera of counsel
Respondent	Mr R Farrell of counsel

Direction

HAVING heard Mr T Kucera of counsel on behalf of the applicant and Mr R Farrell of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the applicant file and serve on the respondent further and better particulars of its claim by 18 January 2012.

(2) THAT the respondent file and serve on the applicant particulars of its notice of answer and counter proposal by 1 February 2012.

(3) THAT the parties file a bound and paginated agreed bundle of documents to be referred to during the hearing of the matter no later than three days prior to the date of hearing.

(4) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

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

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

2012 WAIRC 00113

DISPUTE RE THE DEDUCTION OF FINES FROM THE WEEKLY PAYS OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 29 FEBRUARY 2012
FILE NO.	CR 64 OF 2011
CITATION NO.	2012 WAIRC 00113

Result	Direction issued
Representation	
Applicant	Mr P Laskaris of counsel
Respondent	Mr D Matthews of counsel

Direction

HAVING heard Mr P Laskaris of counsel on behalf of the applicant and Mr D Matthews of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the date of hearing of 16 March 2012 be and is hereby vacated and the application be re-listed on dates to be fixed by the Commission.

(2) THAT the direction issued by the Commission on 20 December 2011 be and is hereby revoked.

(3) THAT any proposed amendment to the memorandum of matters to be referred for hearing and determination be filed and served by 6 March 2012. Any such amendment shall contain full particulars.

(4) THAT if no application to amend the memorandum of matters to be referred for hearing and determination is made the applicant file and serve further and better particulars of claim by 6 March 2012.

(5) THAT the respondent file and serve a notice of answer by 20 March 2012.

(6) THAT the parties file a bound and paginated agreed bundle of documents to be referred to during the hearing of the matter no later than three days prior to the date of hearing.

(7) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

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

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

2012 WAIRC 00927

DISPUTE RE THE DEDUCTION OF FINES FROM THE WEEKLY PAYS OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00927
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 7 MAY 2012, TUESDAY, 8 MAY 2012, TUESDAY, 28 FEBRUARY 2012, THURSDAY, 7 JUNE 2012, FRIDAY, 8 JUNE 2012, MONDAY, 25 JUNE 2012, TUESDAY, 26 JUNE 2012
DELIVERED	**:**	FRIDAY, 12 OCTOBER 2012
FILE NO.	**:**	CR 64 OF 2011
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Applicant
		AND

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

Respondent

Catchwords	:	Industrial law (WA) - Disciplinary charges by employer - Alleged abuse of sick leave and taking industrial action - Challenge by employee to findings - Test to apply - Application upheld
Legislation	:	Industrial Relations Act 1979 ss 44(9), 83.
Result	:	Application upheld

Representation:

Counsel:		
Applicant	:	Mr P Laskaris of counsel
Respondent	:	Mr D Matthews of counsel
Solicitors:		
Applicant	:	Mr T Kucera, WG McNally Jones Staff Lawyers
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Bi-Lo v Hooper (1992) 53 IR 224

Minister for Health v Denise Drake-Brockman (2012) 92 WAIG 203

Opera House Investment Pty Ltd v Devon Buildings Pty Ltd (1936) 55 CLR 110

Re A Solicitor [1945] KB 368

Singh v MIDLAS [2012] WAIRC 00836

Thavarasan v The Water Corporation (2005) 86 WAIG 1434

Case(s) also cited:

Hall v General Motors-Holden's Ltd (1979) 45 FLR 272

Newmont v The Australian Workers' Union , West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677

Reasons for Decision

1 On 24 September 2010 a state of chaos existed on the Perth metropolitan rail public transport system. On that day about 95 railcar drivers, of a total of 174 railcar drivers and drivers coordinators rostered to drive on that day, failed to attend work as a part of "blue flu" industrial action. Thousands of rail commuters were affected. That day and the days preceding it, attracted widespread media coverage. Prior, on 27 August 2010, approximately 91 railcar drivers of 130 rostered to work had also taken "blue flu" industrial action, when they failed to attend for work on the grounds of illness. Around this time, the Union and the Authority were engaged in a contentious dispute concerning new terms and conditions for railcar drivers.

2 No doubt as a consequence of the events of 27 August 2010, and in anticipation of what it considered may be further such action, the Authority sought and obtained various orders from this Commission. Orders were made by the Commission on 3 September, 9 September and 23 September 2010. Those orders, the terms of which most relevant to these proceedings will be dealt with in more detail later, prohibited the taking of industrial action and varied the relevant award, to enable the Authority to require railcar drivers to provide certain evidence to support claims for sick leave.

3 Mr Swain is a railcar driver. At about 12:24am on 24 September 2010 he telephoned the Nowergup Depot, where he is based, and advised that he would not be at work for the commencement of his rostered shift at 8am that morning. Mr Swain advised he was suffering from fatigue. Later in the morning of that day, Mr Swain attended two doctors. The first doctor he attended was his own, close to where he lived, and he received a medical certificate that he was "unable to attend work" on 24 September 2010. Secondly, later in the day, Mr Swain attended a doctor nominated by the Authority, as part of a process put in place by it, to assess claims for sick leave for 24 September 2010.

4 After returning to work on 27 September, Mr Swain completed a statutory declaration referring to his absence on 24 September by reason of "sickness". The nature of the illness was not specified in the statutory declaration. A total of 12 employees claimed fatigue as the reason for their absence. Eight of them were from the Nowergup Depot.

5 Later in October 2010, Mr Swain was charged with a breach of discipline by the Authority, as were the others who claimed fatigue. It was alleged that Mr Swain was absent on 24 September without authority under the award, in that he was not entitled to sick leave. Secondly, Mr Swain was alleged, by his absence on 24 September, to have engaged in industrial action with the intention of causing disruption to the Perth metropolitan rail system, in furtherance of the industrial campaign concerning improved terms and conditions for railcar drivers. On 22 December 2010, the Authority found the charges against Mr Swain and nine other employees who had cited fatigue as the reason for their absence, proven. Charges against three of those employees were subsequently withdrawn. Mr Swain was found to have abused his sick leave entitlement, the Authority's Fatigue Management Policy, and consequently to have sought to falsely obtain a benefit under the award to which he was not

entitled. A penalty of two days' pay was imposed, although the Authority maintained subsequently, it could have dismissed Mr Swain for his conduct. The two day penalty was subsequently reduced to one day's pay.

6 In these proceedings, Mr Swain challenges both his "conviction" and the penalty imposed. He maintained that he was entitled, in accordance with the Authority's Fatigue Management Policy and the Award as varied by the orders of the Commission, to be absent on 24 September 2010. Mr Swain maintained that the Authority's conclusions that he failed to comply with the requirements of the Award to claim sick leave, and engaged in an abuse of both the Fatigue Management Policy and sick leave entitlements, were erroneous. Mr Swain seeks to recover the monies deducted from his pay, and be paid his sick leave entitlement for the absence on 24 September.

7 A number of issues arise for consideration in this case. They are:

(a) The meaning and effect of the Commission's order of 23 September 2010 in application C 33 of 2010;

(b) Whether the requirements referred to by the Authority in communications to the railcar drivers, said to give effect to the Commission's order in relation to proof required for sick leave claims, in fact did so;

(c) Whether, in terms of the order, Mr Swain was, in fact, "required" by the Authority to so comply;

(d) The meaning and effect of the Authority's Fatigue Management Policy;

(e) The test to apply in determining the claim; and

(f) Whether Mr Swain falsely claimed sick leave to which he was not entitled and took part in industrial action.

The meaning and effect of the Commission's order

8 Proceedings leading to the making of the Commission's order of 23 September 2010, the subject of these proceedings, have some history. The context of and background to its making is important, so I will traverse it. This issue was also the subject of testimony from Mr Farrell, the Authority's Manager Labour Relations, most of which was uncontroversial.

9 On 27 August 2010, an urgent s 44 compulsory conference application was made by the Authority. It referred to some 91 of 130 rostered rail car drivers not attending for work allegedly by reason of illness. Additional rail car drivers were rostered for this day to accommodate a football match which was to be played that evening. The absence of the drivers on that day caused major disruption to metropolitan train services.

10 The Commission, on the application of the Authority, made orders joining the 91 railcar drivers to the proceedings; enabled the Authority to direct employees to work extra hours; and enabled the Authority to require employees claiming sick leave on or after 27 August 2010, to support such claims with a medical certificate and a statutory declaration, otherwise an employee would not be entitled to sick leave under cl 6.4 of the Award. The effect of this order was to modify cl 6.4.7 of the Award, to remove the entitlement of an employee to not produce proof of illness or injury for absences of less than three consecutive days, where an employee has not had one week of sick leave in any year of service.

11 Mr Swain was on annual leave at this time and was not made a party to the proceedings by this order. At the time of the making of this order, the parties were engaged in what were to become tense negotiations for a new industrial agreement. The difficult negotiations were compounded by a major internal division within the railcar driver workforce, which ultimately led to the separate representation of over 200 of them by counsel, rather than the Union.

12 Further s 44 compulsory conference proceedings took place before the Commission on 1 and 3 September. By this time, it was apparent that the railcar drivers were engaging in a concerted campaign of "blue flu" industrial action, in support of claims in the industrial agreement negotiation. In proceedings on 3 September, the Commission formed the view that the industrial campaign had the potential to cause further significant disruption to metropolitan rail services. In the recitals to orders issued on 3 September, the Commission observed that in the circumstances before it, "it would be reasonable for the applicant [Authority] to require proof of absence on the ground of illness [of an employee] to a reasonable standard."

13 Orders precluding industrial action were made by the Commission. The orders of 3 September were sent to the Union's members from its database, by email at approximately 7pm that day (See tab 1.2.2 exhibit A1). Mr Swain was not a member of the Union in 2010 and said he did not receive a copy of the order of 3 September but he did become aware of it sometime after it issued.

14 On 9 September, a further s 44 compulsory conference was convened by the Commission. At the conference the Commission was informed of further possible disruption to train services by activity of railcar drivers. The outcome of the proceedings was that the order of the Commission of 3 September was extended to 8 October and additional railcar drivers were added as named parties to the proceedings, including Mr Swain. Mr Swain contends that he was not served with a copy of the 9 September order but did become aware of it.

15 On 22 September Mr Burgess, the Acting Managing Director of the Authority, wrote to railcar drivers, to foreshadow that the Authority may be placed in the position of "bluntly" communicating to railcar drivers who were then "advocating disruption" and who were continuing to engage in conduct that may have had the effect of disrupting services to customers, the consequences of this behaviour. Mr Swain says he also did not receive a copy of this communication, and in any event, denied he was one of the railcar drivers advocating any disruption.

16 The next day, on 23 September, my Associate received an email from Mr Farrell, the Authority's Manager of Labour Relations. Attached to the email was a copy of an email to be sent to all railcar drivers from Mr Appleby, the Executive Director People and Organisational Development with an outline of the Authority's proposed response to any further disruption to services which was anticipated to take place on 24 September. The email set out the possible consequences of such conduct, ranging from the docking of pay and discipline up to dismissal, and also referred to possible action by the Commission in relation to breaching orders. At this time, negotiations for a new industrial agreement had broken down and a

declaration was shortly to be made that bargaining was at an end and the matters would be referred for arbitration for an enterprise order.

17 In the document attached to the email from Mr Appleby, described as Public Transport Authority Response to Future Absences Disrupting Services, the Authority outlined that it would require "proof that would satisfy a reasonable person" if an absence was claimed to be by reason of illness. It also indicated that the Authority may require a statutory declaration by an employee specifying the nature of the illness or injury and a medical certificate from a doctor nominated by the Authority. The Authority indicated that it reserved the right to reject a medical certificate from other than an Authority nominated doctor, if "in all of the circumstances of the day it considers it reasonable to do so". Additionally, a pro-forma statutory declaration was attached to the Response. The Response also indicated that while absences of railcar drivers on 27 August 2010 were not treated as disciplinary matters, any further absences, not authorised, may be so treated.

18 Mr Swain says he did not receive the email from Mr Appleby, alternatively if he did, he says that he cannot recall it.

19 Also on 23 September, the Commission issued further orders, following compulsory conference proceedings the day before on 22 September. At those proceedings, the Commission was informed of a serious concern held by the Authority, that further absences on the grounds of claimed sickness were anticipated. The Perth Royal Show was to commence on the weekend of 25 September. These issues led the Commission to vary the order of 3 September. Given its importance for the purposes of these proceedings, I reproduce the material parts of the 23 September order in full as follows:

> (1) THAT the order of the Commission of 3 September 2010 be and is hereby varied to add further orders (2A) to (2D) as follows:
>
> (2A) That notwithstanding the terms of cl 3.2.5 of the Award, where the following numbers of employees employed at a depot or throughout Transperth Train Operations within a classification of the Award are absent from work by reason of personal ill health or injury:
>
> | | |
> |---|---|
> | Transperth Train Operations: | 15; |
> | Claisebrook Depot: | 7; |
> | Mandurah Depot: | 4; or |
> | Nowergup Depot: | 4; |
>
> the applicant may direct any employee covered by the Award at that depot or throughout Transperth Train Operations, as the case may be, to work additional hours at the additional hour rates prescribed by the Award.
>
> (2B) That notwithstanding the terms of cl 6.4.7 of the Award, where an employee employed in a classification covered by the Award is absent from work by reason of a claim of illness or injury on any day during the term of this order on which the number of such employees absent by reason of claimed illness or injury at the employee's home depot or throughout Transperth Train Operations exceeds the following numbers:
>
> | | |
> |---|---|
> | Transperth Train Operations: | 15; |
> | Claisebrook Depot: | 7; |
> | Mandurah Depot: | 4; or |
> | Nowergup Depot: | 4; |
>
> the applicant is entitled to require the employee to provide proof that would satisfy a reasonable person of the employee's entitlement to sick leave, failing which the employee will not be entitled to the benefits of cl 6.4 - Sick Leave of the Award.
>
> (2C) For the purposes of order (2B), the proof required by the employer may include:
>
> (a) A statutory declaration, confirming the nature of the employee's illness or injury which the employee notified or should have notified the officer on duty under cl 6.4.6 of the Award; and
> (b) The employee submitting to a medical examination by a medical practitioner of the employer's choice on the day for which leave is claimed, which the employee must attend. Where the employee fails without reasonable cause to attend an appointment made by the employee for the medical examination, the fee for cancellation of the medical examination may be deducted from the employee's wages.
>
> (2D) For the purposes of cl 6.5 - Carer's Leave of the Award, the proof required by the employer may include:
>
> (a) A statutory declaration, confirming the relationship between the employee and the person claiming to be injured or ill, the basis on which the employee was that person's primary caregiver and the basis on which that person was in need of immediate care and attention;
> (b) A medical certificate certifying that the person claimed to be injured or ill was in need of immediate care and attention on the day for which leave is claimed; and/or
> (c) Where the person claimed to be injured or ill is an adult, a medical certificate from a medical practitioner of the employer's choice on the day for which leave is claimed, certifying that the person claiming to be injured or ill was in need of immediate care and attention on the day for which leave is claimed. Where a medical appointment made by the employee for the medical examination is not kept, the fee for cancellation of the medical examination may be deducted from the employee's wages.
>
> (2) THAT the parties have liberty to apply on short notice.

20 Given the arguments put by the parties, I also set out the relevant parts of the Award in cl 6.4.7 as follows:

6.4.7 Proof of illness or Injury

(a) No employee shall be entitled to the benefit of this clause unless the employee produces proof that would satisfy a reasonable person, of such sickness provided the employer shall not be entitled to require proof for absences less than three (3) consecutive days unless the total of such absence in any accruing year exceeds the hours prescribed for that employee for an ordinary week work.

(b) No payment shall be made for any absence due to the employees own fault, neglect or misconduct.

(c) Where an employee is ill during the period of annual leave and produces at the time or as soon thereafter medical evidence to the satisfaction of the employer that the employee was a result of the employee's illness, confined to their place of residence or a hospital for a period of seven (7) days, the employee may with the consent of the employer, be granted at a time convenient to the employer additional leave equivalent to the period during which the employee was so confined.

21 The Union contended that the effect of order 2B is to vary the Award in cl 6.4.7(a) to enable the Authority to require proof of illness from an employee for absences of less than three days, irrespective of the period of sick leave already taken. I agree. That is plainly correct.

22 The contentious provision is order 2C. The Union submitted that the effect of this provision is such that the *requirement* to produce a statutory declaration and to submit to a medical examination *must* be communicated to an employee. If not, it is contended by the Union that order 2C has no operation. The only obligation on an employee in that circumstance was to comply with order 2B, that being to provide proof of illness "that would satisfy a reasonable person". The Union submitted that Mr Swain did so.

23 The Authority's position as to the scope of the Commission's order of 23 September was to the effect that the case at hand was not concerned with whether Mr Swain complied with the orders. Mr Swain was not disciplined for a breach of the Commission's order. The primary contention of the Authority was that nothing in the Commission's orders precluded the Authority from taking disciplinary action against any employee if the Authority considered the employee was not genuinely sick and was abusing the sick leave entitlements. This common law right to take disciplinary action was said by the Authority to exist regardless of the terms of the Award, as varied by the orders of the Commission. In any event, regardless of this contention, the Authority argued that order 2B enabled the Authority to require proof for approval of sick leave in circumstances where the Authority was not otherwise able to require it. On the Authority's view, all order 2C does is to provide some expansion of order 2B, as to what could be regarded as proof in order to satisfy a reasonable person.

24 In terms of the disciplinary action being available, this was not disputed by the Union and it is clearly so. That is, the existence of minimum requirements in order to satisfy an employer of an entitlement to sick leave under an industrial instrument does not preclude an employer from taking disciplinary action, if the employer does not think that an employee is genuinely sick.

25 Furthermore, as to the terms of the order, as a matter of construction, in my view, the controlling provision of the order of 23 September is order 2B. This simply enables the Authority to require proof to satisfy a reasonable person, to grant sick leave claims constituting single day absences. I accept that for the Authority to exercise such a right, it must "require" employees to do so. That is, it must communicate that requirement to the employee. The ordinary and natural meaning of "to require" is to "ask for; to demand, claim, insist on having …": *Shorter Oxford English Dictionary*. It is therefore axiomatic that such a request must be communicated, either orally or in writing, or both.

26 I accept also, that the effect of order 2C is to expand upon the ordinary meaning of order 2B, to indicate to the reader examples which may go to satisfying a reasonable person, of a sick leave claim. However, in my view, order 2C could never mean that just complying with the physical requirement of its terms would of itself, entitle an employee to payment. The test of a "reasonable person" must comprehend a person possessed of knowledge of all relevant circumstances at the time at which the claim is made. For example, if an employer was independently aware, from reliable and verifiable information, that an employee was not ill or injured, a false declaration from that employee would not, in my view, constitute proof to satisfy a reasonable person. Nor would, on the same basis, merely submitting to an examination by a doctor. As has been said, "the word "reasonable" has in law, the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know": *Re A Solicitor* [1945] KB 368 at 371. The test of a "reasonable person" is not dissimilar to that of the "reasonable man", who walks the corridors of the tort of negligence.

27 Having regard to these matters, it is relevant to the interpretation of the order and to its application in this case, to have regard to the prevailing circumstances known to the Authority at the material time of Mr Swain's claim for sick leave.

28 To put the issue another way, having regard to all of the circumstances of the case, and the degree of knowledge possessed by the Authority, would the Authority be satisfied of Mr Swain's entitlement to sick leave?: *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110. The reason I have set out in some detail above, the events leading to the making of the 23 September order, is to put the claim by Mr Swain for sick leave in context.

29 I turn now to consider the requirements imposed on railcar drivers in relation to claims for sick leave at the material time.

Did the Authority's requirements comply with the order?

30 The Union contended that the email from Mr Appleby sent 23 September (exhibit A1 1.3.4) did not comply with the scope of the Commission's order of 23 September. In particular, it was said that the statement in the procedure attached to Mr Appleby's email that

> the PTA may require the following proof of illness and injury
>
> …
>
> • A medical certificate from a practitioner nominated by the PTA…

was outside the scope of order 2C.

31 Also, it was contended that the content of EBA Update No 9 of 1 October 2010 (exhibit A1 1.8.3), at p 3, misrepresented the terms of order 2C, to the effect that reference is made to:

> • employees not producing such a statutory declaration and a medical certificate from a PTA nominated doctor are unlikely to have their sick leave approved, unless Operations Management have an independent basis on which to be satisfied that they were genuinely ill…

32 I accept the contention of the Union that there is an inconsistency between the terms of order 2C of the Commission's orders and the references in the various documents produced by the Authority to a requirement for "a medical certificate from a nominated PTA doctor" in exhibits A1 1.3.4 and 1.8.3. The terms of order 2C(b) did not oblige an employee to produce a medical certificate from a doctor nominated by the Authority, if so required. The terms of order 2C(b) referred to an employee, if required, "submitting to a medical examination by a medical practitioner of the employer's choice" (exhibit A1 1.3.5).

33 Additionally, it was common ground that on the night of 23 September at approximately 9pm, Mr Swain received a text message on his mobile phone containing words to the effect "Notice: Sick Leave claimed for Friday 23 Sept won't be approved without a medical certificate on day from a PTA nominated Doctor. Call Depot for details" (exhibit R1). This requirement was, in my view, also at variance with the terms of order 2C(b).

34 As noted above, it is to be accepted that order 2C is supplementary to the terms of order 2B and was indicative of the proof the Authority may have required in order to be satisfied of the legitimacy of a sick leave claim. However, as the terms of order 2C reflected the terms of an order sought by the Authority and made by this Commission, in terms of the provision by an employee of a statutory declaration and the involvement of a medical practitioner, it is to the terms of the order that reference should be made. The orders were widely communicated to all employees of the Authority and had the force of law of this State. Any person in receipt of the orders would read order 2C as the obligation imposed by the law, insofar as the subject matter dealt with was concerned. To the extent that the Authority's procedures, and other communications, imposed obligations going beyond the terms of order 2C, in terms of the subject matter specifically dealt with in the order, they were unenforceable.

35 Thus, in my opinion, it would not be open for the Authority, as a reasonable person, to insist on the provision by employees of a medical certificate from a doctor nominated by the Authority, when the Commission's order did not contemplate that as proof that may satisfy such a person, in the position of the Authority, at the material time.

36 This is not to say, of course, as was indicated in the various communications from the Authority to railcar drivers at the time, that compliance with order 2C, without more, must constitute proof to satisfy a reasonable person. This is a separate issue to that just referred to. In my opinion, the Authority was quite correct in EBA Update No 9 at p 3, to observe that sick leave claims would be considered on a case by case basis, and that the production of the required documents would be considered in all of the circumstances. In my view, there is nothing in these statements that is inconsistent with the overall tenor of the Commission's orders.

37 The consequences of my conclusion as to the scope of the orders of the Commission, in particular order 2C, and the procedures adopted by the Authority following their making, is a question that I deal with later in these reasons.

Was Mr Swain required to provide evidence of his illness?

38 Mr Swain was rostered to work at the Nowergup Depot in the week of 24 September 2010. At this time he was working as a trial driver, which means he was responsible for test driving new trains or trains having been repaired. If not undertaking test drives, Mr Swain's evidence was that he was based at the depot. At the time of the large scale absences of railcar drivers from duty on 27 August 2010, Mr Swain was on annual leave. He returned to work on 30 August. His evidence was that he was not a member of the Union at any time in 2010, did not take part in any industrial action and never advocated the taking of industrial action.

39 On his return to work from annual leave, Mr Swain testified that the environment was "tense". There was much talk and "chatter" about the action taken the prior week, and lots of "paperwork". A number of issues were being dealt with at the time in the workplace, in particular enterprise agreement negotiations regarding wages and conditions of employment for railcar drivers. There was also a major internal division within the Union, with a large number of railcar drivers seeking independent representation by a solicitor.

40 Mr Swain said he became aware of the order of the Commission of 3 September and the ban on industrial action covering the period of the Perth Royal Show. Mr Swain was emphatic that no one spoke to him about any industrial action planned for 24 September and he was not aware that any was going to take place.

41 Mr Martion, who was at the time the acting Depot Master at Nowergup, testified that there was a heightened degree of unrest amongst employees in the course of that week. Mr Martion testified that he "knew something was going on. [He] didn't have any specifics on it.": t286. When asked about whether he knew of any employees agitating in the workplace, Mr Martion indicated that he was aware there were a couple of individuals involved. He did not have any direct knowledge that Mr Swain was one of them. Mr Martion has known Mr Swain as a railcar driver for a few years, and had no experience of him being dishonest. I observe that this was consistent with the testimony of Mr Farrell, when he said that prior to the events of 24 September there was no suggestion that Mr Swain was unreliable or was a "problem" in any way.

42 There were two contentious communications in the course of that week that were the subject of evidence through Mr Swain on this issue. The first was a letter from Mr Burgess dated 22 September 2010 (exhibit A1 1.3.3). This letter was said to have been emailed to all drivers on that day. Mr Swain testified that he did not recall seeing the email either on 22 or 23 September.

43 It was common ground that there were some computers at the Nowergup Depot available for drivers to use. As a trial driver, Mr Swain had access to them and as already observed, when not undertaking trial drives, he would generally remain in or

about the depot during the day. Mr Martion testified, and it was not challenged, that the Authority records suggested that Mr Swain had no trial driving duties in the week ending 24 September. Mr Swain was cross-examined at some length about his accessing the computers at the depot. Whilst Mr Swain testified that he didn't sit around all day and check his emails, he did ultimately accept that on most days it would be unlikely if he did not do so. This would generally occur sometime in the mid-morning, crib break for example. This did not mean however, that he read all of them, on his evidence. On Mr Martion's evidence, he did not see Mr Swain on the depot computers in the course of that week.

44 The second, and arguably more contentious communication, was that contained in an email of 23 September 2010 sent to all drivers. A copy of the email was forwarded by Mr Farrell to my Associate at 12:35pm on 23 September. Mr Farrell's email indicated that the forwarded email and attachment, dealing with the Authority's requirements for claims for sick leave, was "in the process" of being emailed to all drivers. It can be assumed therefore, that the email was distributed sometime after midday on 23 September. I have already referred to this communication above. The relevant part for present purposes is that set out on p 2 of the document, noting that the Authority may require for the purposes of proof of illness and injury for a sick leave claim, a statutory declaration detailing the nature of the illness or injury and a medical certificate from a practitioner nominated by the Authority.

45 As noted above, Mr Swain could not recall either receiving or seeing this communication from Mr Appleby on 23 September. He does recollect seeing both the letter from Mr Burgess and Mr Appleby's email sometime after 23 September, but could not say when.

46 Also relevant is the General Order Book. This is a book that is kept at each depot. Under the terms of the Appendix to the Network Rules (exhibit A4), by instruction 301, all drivers and drivers (assisting) are required to peruse it when signing on for duty. A copy of the General Order Book Entries 2010 over the relevant period was tendered as exhibit R2. An entry for 23 September 2010 was described as "absent from duty requirements". It seemed common ground that a copy of Mr Appleby's email and/or the attachment to it, was in the General Order Book under this entry at that time. Mr Swain testified that as a trial driver, he did not check the General Order Book each day, as this was only required of rostered drivers. The purpose of the General Order Book is to alert drivers to material matters that they might be required to know about before commencing their shifts.

47 On the evidence, there was no independent documentary proof, such as a read receipt, that Mr Swain had received and read the email communications from Mr Burgess and Mr Appleby. The Authority's contentions in this respect, rested on it being more likely than not, given Mr Swain's access to computers, and the fact that he did not undertake trial drives during that week, that he would have seen the relevant emails.

48 Mr Swain testified that on his return to work on 27 September, he completed a statutory declaration and provided a medical certificate that he had obtained from Dr Massey, covering his absence on 24 September. Dr Massey was not a medical practitioner nominated by the Authority but rather, was a doctor Mr Swain visited close to his home. It was common ground that Mr Swain did in fact go to an Authority nominated doctor, Dr Siva, on 24 September, after first visiting Dr Massey and getting a medical certificate. Mr Swain informed Dr Siva of his visit to Dr Massey, and requested Dr Siva to give him a medical certificate to cover his absence. Mr Swain testified that Dr Siva informed him that he could not do so because Dr Massey had already given him one.

49 Of note also, in this regard, is the wording of the text message received by Mr Swain on his mobile phone at about 9pm on 23 September. Mr Swain said that from the text message, he did not realise he had to get a medical certificate from an Authority nominated doctor, but rather, he was required to visit one.

50 As already noted, the Authority seeks to draw an inference from Mr Swain's testimony that he had ample opportunity to read the emails from Mr Burgess and Mr Appleby on 22 and 23 September respectively, despite his denial that he had either received them, or recollected them. It was contended by the Authority that on the basis of this opportunity, it was more likely than not that Mr Swain did in fact see them. Furthermore, it was contended by the Authority that the fact that Mr Swain did complete a statutory declaration and did submit a medical certificate for his absence on 24 September, was consistent with him having seen these communications. I pause to note in this respect, however, it was also Mr Swain's uncontradicted testimony that as a normal practice, he did get a medical certificate for one day sick leave absences prior to 24 September. In relation to the statutory declaration, Mr Swain testified that he thought he may have been required to submit this document at the time that he made his sick leave claim at the depot on his return to work on 27 September.

51 Also, if Mr Swain was aware of the requirements in Mr Appleby's email of 23 September as alleged by the Authority, is difficult to see why Mr Swain would not have simply complied with them from the outset. He did go and see a doctor on the morning of 24 September and obtained a medical certificate. He then went to see Dr Siva, the Authority nominated doctor. If Mr Swain had known of the Authority's requirements, it is difficult to see why he would have not gone straight to Dr Siva in the first place. Likewise, it is difficult to see why Mr Swain would have failed to insert a mere reference to "fatigue" in his statutory declaration, which he submitted on his return, if he had known of the requirement to do so.

52 In the absence of evidence from the Authority to rebut Mr Swain's testimony about his usual practice in relation to sick leave claims, in my view, it is not open to conclude on balance, that the only reason that Mr Swain knew of the requirement for a medical certificate and a statutory declaration, was because of the emails from the Authority. Mr Swain's evidence that it was his practice to submit a medical certificate for single day sick leave absences prior to 24 September was significant in this regard. In that respect, submitting a medical certificate on 27 September was not unusual for Mr Swain. Given that there were pro forma statutory declaration documents prepared by the Authority and available to drivers, Mr Swain's testimony that he may have completed the statutory declaration at the time he lodged his sick leave claim at the depot, after being told to do so at the time, is also plausible.

53 A close examination of the statutory declaration made by Mr Swain is consistent with his evidence on this point. A copy of the declaration is at exhibit A1 1.4.1. It was declared on 27 September, the day Mr Swain returned to work, at the Nowergup Depot before the Acting Depot Master Mr Stephen Carver.

54 I am therefore not able to conclude on balance, that it has been established that the requirement of the Authority, as set out in Mr Appleby's email, was communicated to Mr Swain at the time it was sent to drivers and that prior to his absence on 24 September, he was aware of it.

The terms of the Fatigue Management Policy

55 The Authority has a Fatigue Management Policy (Exhibit A1 1.1.1). By its terms, the issue of fatigue is described as a shared responsibility between the Authority and its staff. It was common ground that a railcar driver occupies a safety critical position at the highest level. Such positions are those where "sudden incapacity or ill health may lead to a Serious Incident affecting the public or transport network" (see Health Management Policy p 4 exhibit A1 1.1.2).

56 For present purposes, the policy has a number of elements. The first is the definition of "fatigue" at cl 2, which is as follows:

> **Fatigue** – means a general term used to describe the feeling of being tired, drained or exhausted. It is a subjective experience that includes decline in performance and psychological impairment such as decreased reaction time, poor communication, poor judgement and mood fluctuations. Fatigue can result from long hours of work, little or poor sleep and the time of day when work is performed or sleep is obtained. It can be influenced by health and emotional issues, or by several of these factors in combination. Fatigue can accumulate over a period of time.

57 Also relevant is the definition of "recovery sleep" at cl 2. It is defined as:

> **Recovery Sleep** – means restorative sleep that reverses the effects of fatigue and is required in different amounts by each individual.

58 The obligations of personnel, managers and supervisors are also set out in the Policy in some detail. A number of those obligations are to be noted for present purposes. At cl 1.2.2 the general obligation of personnel is set out in the following terms:

> 1.2.2 Personnel must:
>
> 1.2.2.1 ensure adequate sleep is obtained between shifts and out of hours activities do not impair performance of work related activities; and
>
> 1.2.2.2 inform their supervisor when their, or any other personnel's, performance of work related activities may be impaired due to fatigue. At no time should personnel put themselves or others at risk.

59 Also at cl 4.1.3 and 4.1.4 are the general responsibilities of managers, supervisors and personnel which relevantly provide:

> 4.1.3. Managers and Supervisors shall:
>
> 4.1.3.1 take all reasonable steps to ensure that personnel within their area of responsibility are free from detrimental effects of fatigue while carrying out work related activities;
>
> …
>
> 4.1.3.6 when advised that a person is or may be affected by fatigue, take appropriate measures to assess and control the risk involved.
>
> 4.1.4. Personnel shall:
>
> …
>
> 4.1.4.2. utilise breaks between shifts to rest and obtain sufficient recovery sleep;
>
> 4.1.4.3. inform their supervisor when their performance of work related activities may be impaired due to fatigue…

60 The reporting obligations as set out in the Policy are provided at cl 4.6 as follows:

> 4.6 Reporting Fatigue
>
> 4.6.1. When the performance of a person's work related activities may be impaired due to fatigue, the matter must be reported to the relevant supervisor immediately.
>
> 4.6.2. The supervisor shall discuss the situation with the person and assess their suitability for continued duties for the duration of their shift.
>
> 4.6.3. As a guide, personnel who have had less than 5 hours recovery sleep in the last 24 hours, or less than 12 hours recovery sleep during the past 48 hours, should be deemed unfit for safety critical work.
>
> 4.6.4 Where the supervisor determines that a person should not undertake their normal duties due to fatigue, they may consider the following options:
>
> 4.6.4.1. Reassign the person to a lower risk activity;
>
> 4.6.4.1. Allow the person to obtain sleep at work before resuming the shift (where facilities exist); or
>
> 4.6.4.3. If reporting from home, allow the person to obtain further sleep before attending for the shift.

4.6.5 Personnel may be granted leave by their supervisor when they have reported that they are unable to work due to fatigue. Where leave is granted, this shall be taken as sick leave or other leave, as approved by the supervisor, where sick leave is not available.

4.6.6. The supervisor must ensure that safety is maintained during the period that personnel are unfit for duty due to fatigue. This may include:

4.6.6.1. Use of other suitably trained personnel; and

4.6.6.2 Personnel replacement using overtime / emergency duty whilst ensuring this does not adversely affect the fatigue levels of replacement personnel.

61 Self-evidently, given the nature of the work of a railcar driver, safety considerations are paramount. The Policy recognises the role fatigue can play in the maintenance of a safe rail network. Important for present purposes, is the *subjective* nature of fatigue, as set out in the definition, and that it is a self- reporting obligation. This was readily accepted by Mr Italiano, the Authority's General Manager Transperth Train Operations, in his evidence. This gives rise to difficulties in the present case, where, as I have previously outlined, the Authority had imposed obligations on employees which effectively, placed an objective gloss on the terms of its policy definition of fatigue. How that impacts on the position of Mr Swain, and its influence on the response of the Authority as a "reasonable person", as defined above, is a matter that I will come to later in these reasons in assessing the Authority's response to Mr Swain's claim for fatigue.

62 What the Policy makes clear, however, is that where a railcar driver considers that their performance as a driver *may* be impaired due to fatigue, they are obliged to immediately raise the issue with their supervisor. A failure to act may lead to disciplinary action, as was confirmed in the evidence of Mr Farrell. Mr Italiano also confirmed in his testimony, that had Mr Swain gone to work on 24 September and an incident had occurred on account of Mr Swain being fatigued, he would have been charged under the Policy and "other things".

63 Further, by cl 4.6.4 of the Policy, in my view, it is clear that the onus is on the relevant supervisor to provide the appropriate managerial response to a report of fatigue by a railcar driver. The onus is not on the driver to do so. This issue may assume some importance, in the context of the evidence of Mr Swain's telephone call to the Nowergup Depot in the early hours of the morning of 24 September, the response to him at the time and the subsequent assessment of the charges against Mr Swain.

64 I also note in passing, that a person employed on a railway in this State, may, by s 51(1) of the Government Railways Act 1904, be guilty of an offence for conduct in breach of duty or neglect of duty, which may cause personal injury. One would have thought a railcar driver who drives in breach of the Fatigue Management Policy, may well be liable for prosecution under this legislation, as may others who aid or assist in the commission of such an offence.

Test of misconduct dismissal to apply?

65 Both parties made submissions as to whether the procedure adopted by the Authority in the investigation of Mr Swain's sick leave claim was fair. Both counsel referred to the decision of the South Australian Industrial Relations Commission Full Commission in *Bi-Lo v Hooper* (1992) 53 IR 224, as most recently considered by the Full Bench of this Commission in *Minister for Health v Denise Drake-Brockman* (2012) 92 WAIG 203. The Authority contended that in the present case, as a finding of misconduct may have led to Mr Swain's dismissal, then applying *Bi-Lo* as considered by the Full Bench in *Drake-Brockman*, it had an honest and genuine belief in Mr Swain's "guilt", based upon an adequate investigation.

66 On the other hand, Mr Swain submitted that if *Bi-Lo* does apply in this case, it still requires a proper and thorough investigation. In a case of a possible dismissal for misconduct, as in this matter, as the submission went, then a proper investigation required the opportunity for Mr Swain to be heard orally and for the allegations to be put directly to him. Simply because a considerable number of employees were charged following the events of 24 September, did not relieve the employer from conducting a proper investigation and hearing fully from the employee. It was contended by Mr Swain, that Mr Italiano did not conduct such an investigation, and Mr Swain was therefore denied procedural fairness.

67 In *Singh v MIDLAS* [2012] WAIRC 00836 I commented on *Drake-Brockman*. Whilst it is to be followed as a Full Bench decision, I respectfully disagreed with it on the *Bi-Lo* point. I concluded there is no warrant to read *Bi-Lo* down, as being confined to cases of summary dismissal for dishonesty.

68 However, regardless, I do not consider that this case is one in which the *Bi-Lo* type of approach is appropriate. The approach in that type of case involves an allegation of unfair dismissal, following the exercise of an employer's common law right to summarily dismiss an employee for misconduct. As is well settled in this jurisdiction and the South Australian jurisdiction from which *Bi-Lo* originated, cases of that kind involve as an exercise of discretion, a consideration by the Commission as to the fairness of the employer's actions in exercising its contractual right to dismiss an employee. In this jurisdiction, that involves an objective assessment, as a discretionary decision, as to whether an employer has abused its lawful right to dismiss. In such cases, following *Drake-Brockman*, seemingly depending on what the reason for dismissal was, findings of fact must be made, either whether the misconduct alleged actually occurred or whether the employer had an honest and reasonable belief, based upon a proper investigation that it did. Once those findings of fact are made, the Commission must then, as an exercise of discretion, determine whether the dismissal is overall, harsh, oppressive or unfair.

69 This case is, in my view, of a different character. It does not involve an ultimate determination by the Commission as to whether the action of the Authority was unfair or not, as a matter of discretion. This case is in the nature of an appeal against the imposition of a penalty. The Authority says that Mr Swain committed the "offences" with which he was charged, and seeks to defend the penalty imposed as being justified. On the other hand, Mr Swain seeks to overturn the penalty imposed on him, on the basis that he was not guilty of the charges levelled against him. These are in essence all factual enquiries. There is no ultimate onus to be discharged by Mr Swain, as to the fairness of the Authority's conduct, relying upon the exercise of discretion by the Commission. This case involves an approach not unlike appeal proceedings before the Public Service Appeal Board under s 80I of the Act: *Thavarasan v The Water Corporation* (2005) 86 WAIG 1434. Whether the conclusion reached

by the Authority regarding the charges against Mr Swain involved a fair procedure is part of the consideration. This is so, as, to state the obvious, charges of the present kind upheld without an employer giving the employee any notice of them or opportunity of any kind to respond, would have to be overturned.

70 In characterising the proceedings in this way, in my view, the Commission is required to consider afresh all of the evidence led in the proceedings as to whether Mr Swain engaged in the misconduct complained of, in the nature of a hearing de novo. That is how, in essence, the parties have conducted their cases in any event.

71 Having made those general observations, I will now consider whether, on the evidence before the Commission, the charges made against Mr Swain should be upheld.

Did Mr Swain falsely claim sick leave and take part in industrial action?

72 In the week of 24 September 2010, according to Mr Swain, the atmosphere at the Nowergup Depot was tense. Issues were on foot in relation to enterprise agreement negotiations and there was a major internal conflict within the Union. Mr Swain testified that there was talk of possible layoffs of staff. He said he felt insecure and these issues occupied his thoughts at the time. This was consistent with the testimony of Mr Martion, the Depot Master, who said that at the time, the atmosphere in the depot was one of "heightened unrest". He said that some of the "usual suspects" were agitating for some form of industrial action. I note that Mr Martion, in his evidence, said he had no reason to believe that Mr Swain was one of those agitating for industrial action.

73 The nature of the work environment at the time was also confirmed by Mr Farrell in his testimony. He said the feedback that he received from managers and supervisors on the front line, was that some drivers were agitated and others were dismayed with what was occurring. Some had regrets as to what had occurred previously in August. Mr Farrell described the situation as in a "state of flux".

74 Mr Farrell was involved extensively in discussions with the Union and railcar drivers and their appointed solicitor, regarding the enterprise agreement negotiations at this time. Those negotiations were fast coming to a deadlock. The drivers' demands were well in excess of what the Authority was prepared to meet. The possibility of industrial action as a response was raised. Mr Farrell obtained "intelligence" from the workplace, that there was some prospect of industrial action on 24 and 25 September. As the Perth Royal Show and a concert were to be held that coming weekend, the Authority was very concerned as to the prospect of further disruption to metropolitan train services.

75 Mr Swain finished work at about 4pm on 23 September and went home. He saw his wife and had dinner. Later in the evening, he was preparing to retire for the night which was normally around 9 or 10pm. The text message referred to above was received on Mr Swain's mobile phone. Mr Swain said that he was already "keyed up" by the atmosphere in the depot during the week, and the text message made him more so.

76 Mr Swain said that on retiring, he tossed and turned and could not get the events of the week and his thoughts out of this mind. The text message received by him earlier was what he described as "the spanner in the works", which revived these thoughts. As he could not get back to sleep, Mr Swain testified that he got up and went downstairs. He went outside and sat on the back deck of his house. By about midnight, Mr Swain said that he realised he was not going to get to sleep easily. At 12:24am, he telephoned the Nowergup Depot. He spoke to Mr Powell, the Duty Officer, who is also a Depot Master. Mr Swain told Mr Powell that he had not been able to sleep for a number of nights and that he had not been able to get to sleep that night and felt tired and fatigued. He did not think he would be fit for work the next morning. Mr Swain told Mr Powell he was rostered off on the following Saturday and Sunday, but should be fine to attend for work on the following Monday, his next rostered shift.

77 According to Mr Swain, Mr Powell asked a number of questions, as if they were prepared. When questioned in cross-examination as to why Mr Swain did not say to Mr Powell that he could come in later, Mr Swain said that he did not think to say this and when pressed further on the issue, said that start and finish times for railcar drivers were fixed and as far as he was aware, there was no option to start later. He said that if a driver is not fit to start then you don't start.

78 I pause to observe at this point, that there was no evidence that Mr Powell or anyone else raised the option of Mr Swain starting later in order to get recovery sleep under the Fatigue Management Policy. As I have earlier mentioned, in accordance with cl 4.6.4.3 of the Policy, it was for the supervisor to consider these options and not Mr Swain. Accordingly, in my view, Mr Swain cannot be criticised for not raising such options with Mr Powell at the time.

79 Mr Swain said that he went back to bed. He woke at about 7am and said he felt tired and not rested. He said he did not have "bounce". Mr Swain said he had not had quality sleep. He did not feel he had an adequate capacity to drive a train safely on that day.

80 Because of his absence, Mr Swain made arrangements to see a doctor. His family doctor was about eight kilometres away from his home. Mr Swain did not consider himself fit to drive a car for the same reason he did not consider himself fit to drive a train. Accordingly, he rang a local doctor just around the corner from his house, and walked to the medical centre. There he saw Dr Massey. He told Dr Massey that he had sleeping problems in the previous week and Dr Massey gave him some advice to assist. Mr Swain said he told Dr Massey that he had tried those options which did not work. Dr Massey gave Mr Swain a prescription for a type of sleeping tablet, Temazepam. Dr Massey gave Mr Swain a medical certificate. The medical certificate said that Mr Swain was "unable to attend work today" (exhibit A1 1.4.1).

81 Mr Swain testified that he then went back home. When he got there, he realised that, as indicated in the text message he received the night before, he was required to visit a doctor nominated by the Authority. Mr Swain rang a colleague, Mr Devon, who picked him up and took him to the Prime Medical Centre where he saw Dr Siva. Mr Swain told Dr Siva what he had explained to Dr Massey. Dr Siva made notes. Mr Swain testified that he asked Dr Siva for a medical certificate, but was told that as he already had been given one by Dr Massey, Dr Siva could not give him another one. Mr Swain also informed Dr Siva that he had a prescription for sleeping tablets. That evening, when his wife arrived home, Mr Swain showed her the

prescription for the sleeping tablets he had been given by Dr Massey. She told him she had the same tablets so Mr Swain took one of hers and went to bed at about 9 to 10pm.

82 Mr Swain returned to work on Monday 27 September. He completed the sick leave application forms and a statutory declaration, accompanied by the medical certificate from Dr Massey. He did this before starting his shift. Mr Swain's evidence was that it was "normal practice" for him to complete these forms.

83 On 1 October 2012, Mr Swain received a letter from Mr Gearon the Operations Manager, Transperth Trains (exhibit A1 1.4.2). The letter said Mr Swain was to be reported for making a claim against his sick leave when not entitled to. That report was to Mr Italiano who is the designated "Head of Branch" for the purposes of the disciplinary provisions of the Award in cl 2.5. From the letter, Mr Swain said he got the impression that it was a "pro forma" type of document, and was not addressed to his specific circumstances. Mr Swain replied by letter of 7 October 2012 to deny the assertions in Mr Gearon's letter (exhibit A1 1.4.4). In his reply he also said he was not spoken to by anyone from the Authority to get his side of the story or to seek clarification of the documents he provided in support of his sick leave claim on 27 September.

84 The process of the laying of the charges and the consideration of them was dealt with in some detail in the evidence of Mr Farrell and Mr Italiano. As noted above, Mr Farrell in his testimony also outlined the background to the making of the various orders by the Commission in September 2010. He also outlined the steps taken by the Authority, quite understandably, to protect the operations of the metropolitan rail system from further disruptive industrial action, in particular following the events of August 2010. These included various communications to staff and the public. The communications to the staff set out the Authority's requirements in relation to any claims for sick leave. The communications to the public were an endeavour to provide as much notice as possible of any further disruptions.

85 In view of the events of 27 August 2010, the Authority obviously wanted to take all reasonable steps to prepare for, and minimise the impact of, any further action by the railcar drivers. This was prudent and responsible management. Mr Farrell described the Authority's overall response to any earlier claims for sick leave from 27 August as one of "notional disapproval".

86 After the widespread absences on 24 September, Mr Farrell met with Mr Italiano to consider which drivers should be charged under cl 2.5 of the Award. One of these was Mr Swain.

87 Mr Swain then received a letter from Mr Italiano dated 28 October 2010 (exhibit A1 1.4.5). This letter advised that Mr Swain would be charged with two disciplinary offences. On p 5 of the letter Mr Italiano said:

> Having taken all the above matters into account, I have therefore laid the following charges arising from the report:
>
> 1. That you have failed to work in accordance with your contract of employment by failing to attend work on a rostered shift when not entitled to leave; and
>
> 2. That by absenting yourself from a rostered shift with minimal notice you engaged in a campaign with other railcar drivers with the intention of causing disruption to the Perth metropolitan rail passenger transport system conducted by the PTA for the purpose, or for purposes including the purpose, of compelling the PTA to accept terms or conditions of employment or to enforce compliance by the PTA with their demands.

88 By the first charge, in my view, as was contended by the Union, the terms of the Award as varied by the orders of the Commission were brought directly into consideration. This is because the only entitlement Mr Swain had to sick leave was that conferred by the Award, as conditioned by the terms of the Commission's orders. There is no general entitlement to sick leave at common law.

89 Mr Swain was given until 5pm Tuesday 2 November 2010 to respond to the charges, and raise any matters for Mr Italiano's consideration. The letter also foreshadowed, that on his then view of the circumstances, Mr Italiano considered that a penalty by way of a fine equal to 15.2 hours' pay would be appropriate if the charges were upheld.

90 The letter further went on to provide at p 6 that:

> Where an employee has claimed to have been fatigued, if I form the view that such a claim was not genuine then the claim would not only be an abuse of the sick leave entitlement but also an abuse of the PTA's Fatigue Management Policy. Such an abuse would be of special concern to me, given the importance to the safe working of the rail system that the PTA be able to proceed on the basis that its employees are acting in good faith when invoking that policy.

91 Mr Swain's testimony was that he felt strongly offended by this letter. It accused him of being a liar and falsely claiming sick leave for an improper purpose. He said despite raising it in his letter to the Authority dated 7 October 2010 no one from the Authority had spoken to him about his absence. He testified that he went to an Authority nominated doctor as requested; completed a statutory declaration; and got a medical certificate from his own doctor to whom he went for assistance on 24 September. Mr Swain said that he considered his doctor made a professional assessment of his condition and gave him a medical certificate based upon that assessment. Mr Swain said he also assumed (wrongly, as it transpired) that the notes Dr Siva took during his consultation with Mr Swain, would be passed on to the Authority. Mr Swain said he took the view, based on the letter of 28 October from Mr Italiano, that he had been found guilty without even getting an opportunity to put his case. At the time of the charging letter, Mr Swain's pay for 24 September had been withheld.

92 Mr Swain responded to Mr Italiano's charge letter by letter of 12 November 2010 (exhibit A1 1.5.1). In the letter Mr Swain said that he considered the charge letter to be a "pro-forma" type of letter that did not apply to his circumstances. Mr Swain told Mr Italiano that he "supplied notification and documentation of [his] absence on the 24th of September as required by the award and WAIRC notices". The letter also contained some gratuitous observations not relevant to the disposition of these proceedings.

93 Compared to the events of 27 August, Mr Farrell testified that the Authority required "more detail" to be satisfied of claims for sick leave by drivers. In August, Mr Farrell recalled that a statutory declaration or a medical certificate may have been

sufficient to satisfy a claim for sick leave. However, a higher standard of proof was to be required for absences on 24 September. Notably, Mr Farrell said that for the 27 August absences, if a driver had provided a statutory declaration without specification of the nature of the illness, an opportunity was given to provide a further statutory declaration that did so. That opportunity was seemingly not afforded to Mr Swain on this occasion.

94 The decisions in relation to the charges against Mr Swain, and all other charges from the 24 September absences, were taken by Mr Italiano. Mr Italiano, acting on advice from Mr Farrell, but exercising independent decision making powers, took the view that the charges against Mr Swain were proven on balance. This was reflected in a letter to Mr Swain from Mr Italiano of 22 December 2010 (exhibit A1 1.5.2). In it, Mr Italiano referred to the charge letter and Mr Swain's response of 12 November. In concluding that the charges were upheld, Mr Italiano said:

> Although you provided a medical certificate from your own doctor, which was then sighted by the PTA nominated doctor and provided a statutory declaration, the documentation provided does not include a doctor confirming the nature of your illness. Your Doctors [sic] view of your illness would not be wholly reliant on objectively observable symptoms; that is the doctor would be reliant only on a description of symptoms provided by you.
>
> At the time of booking off you told the duty officer that you were fatigued. Not only do I consider using the excuse of fatigue as an abuse of the sick leave entitlement but also an abuse of the PTA's Fatigue Management Policy. Such an abuse is of special concern to me given the importance to the safe working of the rail system that the PTA is able to proceed on the basis that its employees are acting in good faith when invoking that policy.
>
> I find that the charges laid against you are proven. In the circumstances of that day I believe it was your intention to falsely claim sick leave, either as means to avoid the loss of pay during a day of industrial action or as a decision by you to engage in industrial action to disrupt train services to the public.

95 In his testimony, Mr Italiano said that in terms of his approach to the determination of the charges against Mr Swain, three main factors came to the fore. Firstly, were the circumstances of the day on 24 September, where more than 90 railcar drivers failed to attend for duty. Secondly, were the circumstances of Mr Swain's "book off", that being greater than seven hours prior to the commencement of his scheduled shift due to fatigue. Thirdly, Mr Italiano looked at the documents provided in support of Mr Swain's sick leave claim and whether the claim could be objectively supported and verifiable, not just from the report of the employee.

96 In terms of the documents submitted by Mr Swain in support of his claim, Mr Italiano took the view that they were not compliant with the terms of the Commission's orders, in particular order 2C made on 23 September. Mr Italiano concluded that the statutory declaration of Mr Swain did not specify the nature of his illness. At the time of his consideration of Mr Swain's claim, Mr Italiano knew that Mr Swain went to the doctor nominated by the Authority and also his own doctor, from whom he got a medical certificate. Mr Italiano also knew from Mr Farrell, that Mr Swain had booked off citing fatigue. Mr Italiano did not speak to the Duty Officer to whom Mr Swain reported the fatigue in the early hours of 24 September. Nor did Mr Italiano speak to Mr Swain at any time. Therefore, Mr Italiano, at the time he took his decision to uphold the charges, did not have any knowledge of the conversations that took place that morning.

97 When cross-examined about the Fatigue Management Policy, Mr Italiano accepted that fatigue is a subjective condition. He also accepted that there is an obligation on drivers to immediately report fatigue and to not place themselves or others at risk. Despite the terms of the Policy, and the steps taken by Mr Swain in accordance with it, Mr Italiano was not persuaded, for the three reasons referred to above, that Mr Swain's absence on 24 September was genuine.

98 I have already referred to the notion of the "reasonable person" above. Whilst the circumstances of the day on 24 September, in the context of the events occurring at the time and preceding it, were plainly able to be considered by the Authority, other factors were also at work. In my view, of most significance in terms of other factors, was the existence of the Policy. The Authority is the author of it, and ultimately responsible for its enforcement. A reasonable person in the position of the Authority must be taken to have had, at the material time, knowledge of:

(a) the subjective nature of fatigue as defined in the Policy, and it being a condition based upon self-reporting of symptoms;

(b) the risks to public safety of a driver in charge of a train driving whilst suffering fatigue;

(c) the safety critical nature of the work of a railcar driver;

(d) the obligation on a railcar driver to immediately report fatigue to a supervisor;

(e) the obligation on the supervisor concerned to consider the report of fatigue by a driver and to frame an appropriate response; and

(f) the disciplinary consequences for an employee acting in breach of the Policy.

99 In my view, these matters were also highly material to the Authority's consideration of Mr Swain's claim for sick leave. Also material, for the purposes of the test of a reasonable person in the position of the Authority at the material time, were the circumstances of Mr Swain as an employee of the Authority. All those with whom the issue was raised in evidence, agreed there was no basis to conclude that Mr Swain, by his prior conduct or reputation, was a person not to be believed, or who may be unreliable, or who had any predisposition towards those described by Mr Martion as the "usual suspects", agitating for industrial action on 24 September, or at any other time.

100 I also consider that, in the context of an allegation against Mr Swain that involved a finding of misconduct that could have led to dismissal, it was incumbent on the Authority to raise the allegations with Mr Swain in person and give him an opportunity to be heard orally. Whether Mr Swain may have taken up that opportunity to be heard is mere speculation. However, the allegations of knowingly misleading the employer and abusing an important policy in relation to rail safety were serious allegations. It is, of course, not the case that in all situations, the principles of procedural fairness require a person to be given an opportunity to be heard orally. All the circumstances of the case need to be considered. One factor of some importance is the consequence of an adverse finding, such as the impact on one's reputation. In this case that was very much a live issue. Mr Swain's honesty was at stake and he was accused of lying to his employer, conduct which could lead to dismissal. In those circumstances, in my view, at least the opportunity to be heard orally should have been extended to Mr Swain. I note in this respect, that in terms of claims for fatigue, on the evidence before the Commission, there were relatively few such claims advanced as support for sick leave absences on 24 September.

101 On balance, and having taken into account all of the evidence and submissions in this matter, in my view, it was not open for the Authority, at the time it took the decision to find the charges proven, to conclude that Mr Swain falsely claimed sick leave and deliberately abused the Fatigue Management Policy to obtain a sick leave benefit, for his absence on 24 September 2010. In this case, whilst he was not aware of the detail of the Policy at the time, Mr Swain complied with his obligations under it. Consistent with the definition of fatigue under the Policy, he considered that he was not going to be in a fit state to drive a train later that morning and he advised the Authority as he was required to do. The material supplied by Mr Swain to the Authority to support his claim for fatigue based sick leave, was in the circumstances of Mr Swain's claim, evidence that should have satisfied a reasonable person in the Authority's position, and possessed of all of the characteristics to which I have referred.

102 Having regard to the terms of the Policy, and the circumstances reported by Mr Swain to the depot on the morning in question, when viewed in the context of the evidence Mr Swain later supplied to the Authority, it was not open for Mr Italiano to reasonably conclude, as expressed in his letter of 22 December 2010, that at the time he booked off, Mr Swain abused both the Policy and his sick leave entitlement under the Award, to falsely claim a benefit he was not entitled to.

103 It was not clear in the evidence how much sleep Mr Swain got after his telephone call to the depot at 12:24am on 24 September. In accordance with the definition of "recovery sleep", however, I note in passing that a driver who self-reports fatigue under the Policy, and who has had less than five hours recovery sleep in 24 hours, is, by cl 4.6.3 of the Policy, deemed unfit for safety critical work. Also, Mr Swain did not drive the next morning to see his doctor for the same reason he considered himself not fit to drive a train. Mr Swain saw two doctors including a doctor nominated by the Authority. This was a requirement communicated by text message to him on the night of 23 September, to which Mr Swain did refer in his testimony. In this respect, one reason relied upon by Mr Italiano in the letter of 22 December 2010, to support finding the charges proven, was that Mr Swain's documents did "not include a doctor confirming the nature of your illness". This was not a conclusion open on the material then before Mr Italiano, because no such requirement was imposed on employees claiming sick leave by the Commission's order.

104 To his credit, Mr Farrell in his testimony conceded that when he later met with Mr Swain to hear Mr Swain's complaint about the finding of the charges proven, in January 2011, Mr Farrell was then prepared to accept the possibility that Mr Swain was fatigued. Mr Farrell also accepted that at the time he gave evidence in these proceedings, he realised there was no way to challenge the subjective assessment by Mr Swain that he was suffering fatigue on 24 September.

105 Whilst an attempt was made to discredit Mr Swain in his evidence, on balance, I found Mr Swain to be a credible witness. The attack on Mr Swain's credibility arose from inferences to be drawn from certain events leading up to 24 September 2010, such as access to emails in the depot; whether he was aware of the prospect of industrial action; notes on a letter from Mr Farrell to Mr Swain dated 24 January 2011; Mr Swain's explanation about taking his wife's sleeping tablets and a few other issues. I did not find Mr Swain's explanations as to these matters inherently implausible. Nor did I, having observed Mr Swain giving evidence over many hours, find him to be an evasive witness or a witness unwilling to make concessions. Importantly also, the inferences sought to be drawn against Mr Swain's credibility were in conflict with the direct evidence from the Authority's own witnesses, that Mr Swain was, by conduct and reputation, a person to be regarded as honest and reliable and one not known to cause, or be involved in, trouble in the workplace.

106 The circumstances that the Authority faced leading up to 24 September 2010 placed it in a very difficult position. On the one hand, it had to deal with the possibility of further disruption to its services and protection of the interests of the travelling public. On the other, it had to, as far as practicable not alienate those in its workforce who had no intention to be involved in, or actual involvement in, such further disruption. I also wish to emphasise that the outcome of this matter turns on its own facts specific to Mr Swain's circumstances. It is not to be regarded as a precedent for any other railcar drivers who claimed sick leave on 24 September 2010.

Conclusion

107 In my view it is not open to the Commission to order Mr Swain be paid his sick leave entitlement for the day's pay for 24 September. That is a matter of enforcement within the exclusive jurisdiction of the Industrial Magistrates Court under s 83 of the Act. The Commission will, however, for the foregoing reasons, order that the Authority's findings that the disciplinary charges against Mr Swain be upheld, be quashed.

2012 WAIRC 00936

DISPUTE RE THE DEDUCTION OF FINES FROM THE WEEKLY PAYS OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 OCTOBER 2012
FILE NO/S	CR 64 OF 2011
CITATION NO.	2012 WAIRC 00936

Result	Application upheld
Representation	
Applicant	Mr P Laskaris of counsel
Respondent	Mr D Matthews of counsel

Order

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

THAT the findings by the respondent on 22 December 2010 of disciplinary charges proven against Mr G Swain, arising from his absence from the workplace on 24 September 2010, be and are hereby quashed.

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

2012 WAIRC 00237

DISPUTE RE PERSONAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 18 APRIL 2012
FILE NO	PSACR 6 OF 2012
CITATION NO.	2012 WAIRC 00237

Result	Direction issued
Representation	
Applicant	Ms K Hagan of counsel and with her Mr W Claydon
Respondent	Mr P Budd and with him Ms I Rizmanoska

Direction

HAVING heard Ms K Hagan of counsel on behalf of the applicant and Mr P Budd on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby directs –

(1) THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely no later than 14 days prior to the hearing.

(2) THAT the applicant file and serve an outline of submissions and any list of authorities upon which it intends to rely on later than seven days prior to the date of hearing.

(3) THAT the parties file an agreed statement of facts no later than 3 days prior to the date of hearing;

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

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

2012 WAIRC 00779

DISPUTE RE PERSONAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00779
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 5 JUNE 2012
DELIVERED	**:**	THURSDAY, 23 AUGUST 2012
FILE NO.	**:**	PSACR 6 OF 2012
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Applicant AND COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES Respondent

Catchwords	**:**	Industrial law (WA) - Dispute regarding portability of sick leave credits of former member of Australian Defence Force - Whether Arbitrator has jurisdiction to deal with interpretation of industrial instrument - Whether application is for enforcement of Agreement - Whether Australian Defence Force members are employees - Consideration of terms of Agreement - Application dismissed.
Legislation	**:**	Industrial Relations Act 1979 ss 44(9), 80E(1), 83.
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Ms K Hagan
Respondent	**:**	Mr R Andretich

Case(s) referred to in reasons:

Attorney General for New South Wales v Perpetual Trustee Co (Ltd) and Ors [1955] 1 All ER 846

Commonwealth v Quince (1943) 68 CLR 227

Crewe and Sons Pty Ltd v AMWSU (1989) 69 WAIG 2623

LHMU v Roman Catholic Bishop of Bunbury Chancery Office and Others (2007) 87 WAIG 1148

Case(s) also cited:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The West Australian Government Railways Commission (2000) 80 WAIG 4494

The Construction, Forestry, Mining and Energy Union of Workers v Sanwell Pty Ltd and Anor (2004) 84 WAIG 727

The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers v Sisters of Mercy Perth (Amalgamated) and Anor (1999) 79 WAIG 3458

Reasons for Decision

1 Mr Akerman enlisted in the Royal Australian Navy in October 1984 as a sailor. He served in the Navy until 6 July 2008. On 8 July 2008, Mr Akerman commenced employment with the Department of Corrective Services as an Investigator in the Internal Investigation Unit.

2 In correspondence from about April 2009 to about September 2011, Mr Akerman and the Department have been in dispute in relation to Mr Akerman's request that the Department recognise his period of service in the Navy for sick leave purposes. This is based upon Mr Akerman's view, that the portability provisions of the Public Service Award 1992 and the then Public Service and Government Officers General Agreement extended this benefit to him. The Department refused his request. The Department's refusal to recognise Mr Akerman's request was on two main grounds they being:

(a) That a member of the Australian Defence Force, in Mr Akerman's position, did not accrue "sick leave credits" that are capable of portability; and

(b) In any event, members of the ADF are not, for the purposes of the application of the portability provisions, employees of the Commonwealth Government.

3 Mr Akerman, not being satisfied with the Department's response, caused this application to be brought before the Arbitrator. By the referral under s 44(9) of the Act, Mr Akerman seeks declarations and orders that his period of service with the Navy attract the operation of the portability provisions.

4 Three issues arise for consideration. First, do the portability provisions of the industrial instruments require Mr Akerman's service in the Navy to have been of the character of "employment", in the service of the Commonwealth Government of Australia? Second, if so, did Mr Akerman have a sick leave "credit" capable of portability? Third, and in any event, irrespective of these matters, is Mr Akerman's claim one for the enforcement of the relevant provisions of the Agreement, and hence beyond the jurisdiction of the Arbitrator?

Jurisdiction

5 The Association submitted that the matter the subject of the referral under s 44(9) of the Act was undoubtedly an industrial matter for the purposes of s 7 of the Act. It was thus contended that the Arbitrator has exclusive jurisdiction to hear and determine the matter under s 80E(1) of the Act. The Department, in its submissions, contended that to the extent that Mr Akerman seeks a declaration as to the proper interpretation of cl 21.42 of the Agreement, this is a matter of bare interpretation and must be the subject of an application under s 46 of the Act. Furthermore, the Department says that to the extent that Mr Akerman seeks orders for the recognition of portability of sick leave, this is an issue of enforcement, solely within the jurisdiction of the Industrial Magistrate's Court under s 83 of the Act. There was a further matter raised in the respondent's written outline of submissions concerning whether the application was out of time. This was not pressed.

6 As to the bare interpretation issue, it is trite that neither the Commission nor the Arbitrator, may, by a s 44(9) referral, make a bare interpretation, unconnected with any other issues: *LHMU v Roman Catholic Bishop of Bunbury Chancery Office and Others* (2007) 87 WAIG 1148. This decision of the Full Bench was raised by me with counsel at the outset of the hearing of this matter. Whether the matter before the Commission is one of bare interpretation depends on the circumstances of the case. In *Roman Catholic Bishop of Bunbury* two specific questions requiring answers were posed in the s 44(9) referral and nothing else. The Full Bench held in that case, that from the application, the memorandum of matters referred, and the submissions and declaration made, the only issue before the Commission involved a bare interpretation of the relevant industrial agreement. That is not the case in this matter.

7 It is also settled that the Commission may embark on "arbitral interpretation" for the purposes of resolving a dispute as to industrial matters. Section 44 of the Act is very broad and the powers of the Commission under it should not be read down. As part of dealing with a matter before it, the Commission may, and in many cases must, interpret and declare the meaning of an award or agreement in the resolution of a dispute: *Crewe and Sons Pty Ltd v AMWSU* (1989) 69 WAIG 2623. The decision of the Full Bench in *Crewe* was considered and affirmed in *Roman Catholic Bishop of Bunbury*.

8 The second contention of the Department, to the effect that the Commission cannot enforce the terms of the Agreement has more force. By cl 21.42 an employer "shall" credit an employee with sick leave credits, subject to the satisfaction of the preconditions in cl 21.42(a), (b) or (c). To that extent, therefore, the Association, by seeking an order that Mr Akerman's service "attract" the operation of cl 21.42, may indeed be seeking to require the Department to observe the obligation to credit Mr Akerman with sick leave credits. However, some caution needs to be taken to not overly restrict the breadth of s 44 proceedings. It is often the case that in s 44 matters, even after they have been referred for hearing, the issues in dispute enlarge or contract. Ultimately, as a matter of fact and law, whether an outcome which is said to have the effect of enforcing an award or agreement does have such an effect, will often depend on the terms of the order actually made. For example, in *Crewe*, the Commission at first instance made an order for payment of annual leave loading under an award. This was plainly an order purporting to enforce the award that was not permissible.

9 However, despite these observations, I do not find it necessary to finally resolve this issue. This is because of the conclusions I have reached as to whether Mr Akerman falls within the scope of the clause in the first instance. I deal with that question now.

Employed in the service of the Commonwealth Government

10 An issue arises as to whether the terms of cl 21.42 of the Agreement can have application to Mr Akerman. This is because, to be eligible for portability of sick leave, he must have been, at the material time, on the ordinary meaning of the language of the clause, "employed in the service of the Commonwealth". The terms of cl 21.42 of the Agreement, which are materially unchanged from the 2008 Agreement in effect when this issue first arose, are as follows:

Portability

21.42 Clause 21.44 shall apply to employees who are employed under the *Public Service Award 1992.*

(a) The employer shall credit an employee additional personal leave credits up to those held at the date that employee ceased previous employment provided:

(i) immediately prior to commencing employment in the Public Service of Western Australia, the employee was employed in the service of:

- the Commonwealth Government of Australia, or
- any other State of Australia, or
- in a State body or statutory authority prescribed by Administrative Instruction *611*; and

(ii) the employee's employment with the public service of Western Australia commenced no later than one week after ceasing previous employment, and

(iii) the personal leave credited shall be no greater than that which would have applied had the entitlement accumulated whilst employed in a State body or statutory authority prescribed by *Administrative Instruction 611*.

(b) The maximum break in employment permitted by paragraph 21.42 (a) (ii) of this clause, may be varied by the approval of the employer provided that where employment with the public service of Western Australia commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the employee ceased with the previous employer.

11 It seems common ground that Mr Akerman, as a sailor in the Navy, and thus a sworn member of the ADF, was not subject to a civil contract with the Commonwealth, as are other employees. However, Mr Akerman maintained that despite this, and by reference to s 69 of the Commonwealth Constitution, the ADF is expressly recognised as a part of the Commonwealth Government. Thus, on this basis, Mr Akerman contended that the Department's reference to, for example, the Fair Work Regulations 2010 (Cth), excluding ADF personnel from the jurisdiction of Fair Work Australia, is beside the point. For Mr Akerman, it was contended that the issue is not one of the employment status of Mr Akerman, but recognition of his service in the Commonwealth Government.

12 The legal status of a member of the armed forces, as not being one of employment, was considered by the High Court in the *Commonwealth v Quince* (1943) 68 CLR 227. At issue in this case, was the Commonwealth's capacity to sue, in an action *per quod servitium amisit*, for the loss of the services of a member of the RAF, injured in an accident caused by a civilian. It was necessary, in order to determine whether the cause of action could be brought, to consider the nature of the relationship between the Crown and a member of the defence forces. In this respect, it was said by Latham CJ at 234 – 235:

> " Enlistment in the armed forces of the Crown may be voluntary (as in the case of the Air Force, see reg. 91) or compulsory (see *Defence Act*, ss. 60, 76). As *Philp* J. said in his judgment, it is difficult to suppose that a contract exists in the case of compulsory enlistment, and it cannot be argued that the relations between the Crown and a member of the forces in such a case are different from those which exist between the Crown and the person who has enlisted voluntarily. The oath of enlistment imposes an obligation to render service, but that obligation is created by law, and does not depend upon any contract to which the airman and the Crown are parties. The airman becomes subject to military discipline; but in enforcing discipline officers in the forces are not performing or acting under a contract; they are performing duties incidental to their position. The airman cannot sue the Commonwealth for breach of contract, except that he may sue for his pay after discharge. The remedies of damages, injunction and specific performance are not available either to the airman or to the Crown. The airman, in rendering service in the military forces, is performing a national duty, now largely defined by statute, and is not performing a contract made with the Commonwealth. The Commonwealth in relation to the airman acts in pursuance of statutory and common law powers, and is not engaged in performing any contract with him. The distinction is clearly put in the case of *McArthur* v. *The King* (1), and in the case of *Goldstein* v. *New York* (2), quoted in *McArthur's Case* (3). For these reasons I am of opinion that it was rightly held that there was no contract of service between Rowland and the Commonwealth."

13 Latham CJ further observed at 236:

> " But whatever may be the position as to the relevance of the doctrine of *respondeat superior*, I agree that the relations between the Commonwealth and an airman cannot be treated as a branch of the law of master and servant depending upon the existence of a contract, though the duty of the airman is to serve and to obey orders. The source of his obligation is not to be found in a contract between the Commonwealth and the airman. "

14 The other members of the Court (Rich, Starke, McTiernan and Williams JJ) came to the same conclusion on this issue. *Quince* was considered and approved by the Privy Council in *Attorney General for New South Wales v Perpetual Trustee Co (Ltd) and Others* [1955] 1 All ER 846. It has been consistently applied by Australian courts since.

15 The common law position is recognised in the various statutory provisions governing the appointment of a member of the ADF. The terms of the Defence Act 1903 (Cth) provide in its long title that it is "An Act to Provide for the Naval and Military Defence and Protection of the Commonwealth and Several States". By s 4 a "member" includes "any officer, sailor, or airman". Section 5 applies the terms of the Defence Act to "all members of the Navy, Army and Airforce". Further, by s 58B, the responsible Minister may make determinations, providing for remuneration of members, and also in relation to leave of absence and long service leave. The Navy itself is established by s 19 of the Naval Defence Act 1910 (Cth). Entry into the Navy is, by s 24 of the Naval Defence Act, voluntary.

16 The enlistment of a member of the ADF is prescribed by Part 2 Enlistment, of the Defence (Personnel) Regulations 2002 (Cth). By reg 24, a person must, prior to acceptance for enlistment, swear an oath or make an affirmation. In Chapter 12 – General of the Regulations, it is provided in reg 117, that no act of enlistment of an enlisted member, or the appointment of an officer, creates a civil contract of any kind with the Crown or the Commonwealth.

Conclusions

17 Returning to the terms of the clause, in my view, the conclusion that Mr Akerman was not an employee of the Commonwealth during his time of military service in the Navy is fatal to his claim for portability. The clause is clear and unambiguous in its meaning. Clause 21.42(a) refers to the relevant person having "ceased previous employment". The first proviso to this in (a)(i) requires the person to have been "employed in" the "service of the Commonwealth Government of Australia".

18 In my view, this refers to those persons who, prior to employment in the Western Australian Public Service, were employees at common law, and who worked in Commonwealth departments and agencies. This is consistent with the portability of sick leave for employees in the service of other States, as also provided for in par (a) of the clause. It is also consistent with the terms of the Agreement as a whole, which concerns itself with terms and conditions of employment between employers and employees. Had it been the intention of the parties to the Agreement to include persons who were not employees within the scope of cl 21.42, then one would expect to see clear words to this effect.

19 Mr Akerman, never having been an employee and never having been "employed" by the Commonwealth, is not a person to whom cl 21.42 has application. Whilst Mr Akerman may well have served the Commonwealth, by reason of his service in the Navy, it was in the capacity of an enlisted member of the ADF and not as an employee at common law. I do not find the terms of s 69 of the Constitution to alter this conclusion. After the establishment of the Commonwealth, certain State public service departments were, by this provision, transferred to the Commonwealth, reflecting the assignment of constitutional responsibilities between the two tiers of government.

20 In view of my conclusions on this issue, it is not necessary for me to deal with the other question raised by the parties, that being whether Mr Akerman accrued a sick leave "credit". However, given the terms of the documentary materials in evidence, I have some doubts as to whether, had it been necessary to decide this issue, Mr Akerman could satisfy this element. In the certificate given to Mr Akerman on his discharge from the Navy, it is provided that:

> "SICK LEAVE:
>
> Members of the ADF are granted sick leave on an as required basis, on the advice of Medical Officers. Sick leave is not credited so ADF members do not accrue a sick leave balance. Ex-ADF members who commence Australian Public Service employment with the Department of Defence, within 2 months of leaving the ADF, are credited with 3 weeks full pay personal leave on appointment and a further 2 weeks for each completed year of ADF service."

21 This seems to suggest that at no time during a period of service in the ADF, does a member accrue a sick leave "balance" in the accepted sense. However, as raised with counsel in the course of the hearing, should the Department's contentions be successful, it is somewhat ironic that had Mr Akerman become an employee of the Commonwealth Department of Defence, even for a few short weeks, he would seemingly be entitled to portability of his sick leave "accrued" to the Department.

22 In my view, this case highlights an unjust and unfair circumstance. A person who serves their country in front line defence, and who may accordingly risk life and limb in the process, is denied portability, whereas a Commonwealth public servant is not. This is a matter that should be the subject of discussion between the State and the Commonwealth. It could be overcome by an appropriate variation to the Award, the terms of which could be included in any new industrial agreement.

23 For the foregoing reasons the application is dismissed.

2012 WAIRC 00780

DISPUTE RE PERSONAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	THURSDAY, 23 AUGUST 2012
FILE NO	PSACR 6 OF 2012
CITATION NO.	2012 WAIRC 00780

Result	Application dismissed
Representation	
Applicant	Ms K Hagan of counsel
Respondent	Mr R Andretich of counsel

Order

HAVING heard Ms K Hagan of counsel on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner,

[L.S.] Public Service Arbitrator.

PROCEDURAL DIRECTIONS AND ORDERS—

2012 WAIRC 01064

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMIRH HAIDAR VAISI RAYEGANY
	APPLICANT
	-v-
	GOVERNING COUNCIL POLYTECHNIC WEST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 30 NOVEMBER 2012
FILE NO.	U 75 OF 2011
CITATION NO.	2012 WAIRC 01064

Result Direction issued

Direction

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

WHEREAS the application was set down for a hearing for mention on the 29th day of November 2012; and

WHEREAS the Commission is of the opinion that the issuing of the directions will assist in the conduct of the hearing of the matter;

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

1. THAT by the 18th day of January 2013 both parties provide informal discovery.
2. THAT by the 7th day of February 2013 the applicant file and serve any witness statements upon whose evidence he intends to rely.
3. THAT by the 21st day of February 2013 the respondent file and serve any witness statements upon whose evidence it intends to rely.
4. THAT by the 26th day of February 2013 the applicant file and serve his outline of submissions.
5. THAT by the 1st day of March 2013 the respondent file and serve its outline of submissions.
6. THAT the matter be set down for hearing on the 7th and 8th days of March 2013.
7. THAT there be liberty to apply.

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

2012 WAIRC 01059

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER EVAN JOHN MORRIS
	APPLICANT
	-v-
	LIFT EQUIPT PTY LTD (ACN 125 331 848)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 NOVEMBER 2012
FILE NO/S	B 204 OF 2012
CITATION NO.	2012 WAIRC 01059

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr Brian Johnston and Ms M Johnston

Order

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

WHEREAS on 9 November 2012 the Commission convened a conference for the purpose of conciliating between the parties however no agreement was reached and the applicant requested the matter proceed to hearing; and

FURTHER the applicant raised an issue with respect to the matter being heard in Karratha and the parties were given the opportunity to provide written submissions about this issue; and

WHEREAS on 19 November 2012 the applicant requested that the hearing be in Perth as he is currently unemployed and cannot afford the cost of travelling to Karratha and he claims that it would be unfair if the matter was to be listed for hearing in Karratha as this would prevent him from presenting his case; and

FURTHER the applicant argues that the respondent could attend the hearing by videoconference; and

WHEREAS on 20 November 2012 the respondent requested that the matter be heard in Karratha as the respondent is a small company operating in Karratha with six employees, four of whom will be called as witnesses for the respondent, and if the matter is heard in Perth the respondent would have to close its business; and

FURTHER the respondent argues that there would be significant expense for the respondent if the matter was to be heard in Perth; and

WHEREAS when deciding where the hearing of this matter should be held I take into account any prejudice and disadvantage that would eventuate to either party; and

WHEREAS the Commission is of the view that it is inappropriate that video evidence be relied on by either party given the nature of the issues in dispute between the parties; and

WHEREAS after considering the issues raised by each party and when taking into account equity and fairness I find that the respondent will suffer a greater detriment and disadvantage than the applicant if the hearing of this matter was set down in Perth; and

WHEREAS in reaching this conclusion the Commission takes into account that the applicant worked for the respondent in Karratha;

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 of this matter be set down in Karratha on a date to be fixed.

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

2012 WAIRC 01077

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	TUESDAY, 4 DECEMBER 2012
FILE NO/S	CR 10 OF 2012
CITATION NO.	2012 WAIRC 01077

Result	Order amended
Representation	
Applicant	Ms C Collins (of counsel)
Respondent	Mr C Gleeson

Order

HAVING HEARD Ms C Collins (of counsel) on behalf of the applicant and Mr C Gleeson on behalf of the respondent, and by consent, 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. The applicant will provide to the respondent by close of business on 11 December 2012 or if that is not practicable by close of business on 18 December 2012:
   a. Name and position of the employee;
   b. How the employee was affected by the roster changes (including when their roster changed during the implementation process);
   c. What are the 'negative effects' on the employee from the roster changes; and
   d. Any suggestions how to best minimise the 'negative effects' on the employee.

   If the information is not provided until the later date then the applicant is to advise the respondent by phone. The Commission expects the earlier date to be met.
4. If the discussions referred to in clause (2) of this order have not ended by 31 January 2013 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.
5. 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.

2012 WAIRC 00692

DISPUTE RE TREATMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 24 JULY 2012
FILE NO.	CR 28 OF 2012
CITATION NO.	2012 WAIRC 00692

Result	Direction issued
Applicant	Mr C Fogliani
Respondent	Mr R Farrell

Direction

HAVING heard Mr C Fogliani on behalf of the applicant and on Mr R Farrell behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent shall file and serve upon the applicant a notice of answer by 8 August 2012.

(2) THAT the applicant and respondent file an agreed statement of facts (if any) no later than three days prior to the date of hearing.

(3) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

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

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

2012 WAIRC 00962

DISPUTE RE TREATMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 31 OCTOBER 2012
FILE NO/S	CR 28 OF 2012
CITATION NO.	2012 WAIRC 00962

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

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

PUBLIC SERVICE APPEAL BOARD—

2012 WAIRC 00798

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPELLANT

-v-

COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G TOWNSING - BOARD MEMBER
	MR D NEWMAN - BOARD MEMBER
DATE	THURSDAY, 30 AUGUST 2012
FILE NO	PSAB 12 OF 2012
CITATION NO.	2012 WAIRC 00798

Result	Directions made
Representation	
Appellant	Mr M Shipman as agent
Respondent	Mr D Hughes and with him Ms I Rizmanoska

Direction

Having heard Mr M Shipman as agent of the appellant and Mr D Hughes and with him Ms I Rizmanoska on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT appellant file and serve further and better particulars of its grounds of appeal by 12 September 2012.

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

(3) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.

(4) THAT the parties file an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 01069

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR D NEWMAN - BOARD MEMBER
	MR G TOWNSING - BOARD MEMBER
DATE	FRIDAY, 30 NOVEMBER 2012
FILE NO	PSAB 12 OF 2012
CITATION NO.	2012 WAIRC 01069

Result	Application discontinued
Representation	
Appellant	Mr M Shipman
Respondent	Mr D Hughes

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00336

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ANTHONY HEWITT
	APPELLANT
	-v-
	DEPT OF MINES & PETROLEUM (DMP)
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G TOWNSING - BOARD MEMBER
	MR J SERICH - BOARD MEMBER
DATE	FRIDAY, 1 JUNE 2012
FILE NO	PSAB 9 OF 2012
CITATION NO.	2012 WAIRC 00336

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel

Direction

HAVING heard Mr P Hewitt in person and Mr R Andretich of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve on the respondent particulars of his grounds of appeal by 14 June 2012.

(2) THAT the respondent file and serve on the appellant a notice of answer and counter proposal within 14 days of service of the appellant's particulars of grounds of appeal.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00867

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ANTHONY HEWITT
	APPELLANT
	-v-
	DEPT OF MINES & PETROLEUM (DMP)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 25 SEPTEMBER 2012
FILE NO/S	PSAB 9 OF 2012
CITATION NO.	2012 WAIRC 00867

Result	Appeal discontinued by leave
Representation	
Applicant	Mr P Hewitt
Respondent	Mr R Andretich of counsel

Order

WHEREAS the appellant sought and was granted leave to discontinue the appeal, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00882

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHALIL IHDAYHID
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR C TOGNOLINI - BOARD MEMBER
DATE	THURSDAY, 27 SEPTEMBER 2012
FILE NO	PSAB 17 OF 2012
CITATION NO.	2012 WAIRC 00882

Result	Direction made
Representation	
Appellant	Ms K Hagan of counsel
Respondent	Mr D Matthews of counsel

Directions

HAVING heard Ms K Hagan of counsel on behalf of the appellant and Mr D Matthews of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the jurisdiction of the Appeal Board to determine the herein appeal be determined as a preliminary issue.

(2) THAT the respondent file and serve on the appellant written submissions by 4 October 2012.

(3) THAT the appellant file and serve on the respondent written submissions in reply by 11 October 2012.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00949

APPEAL AGAINST DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00949
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MR K TRENT - BOARD MEMBER MR C TOGNOLINI - BOARD MEMBER
HEARD	**:**	THURSDAY, 27 SEPTEMBER 2012; WRITTEN SUBMISSIONS 3 & 11 OCTOBER 2012

DELIVERED	**:**	FRIDAY, 26 OCTOBER 2012
FILE NO.	**:**	PSAB 17 OF 2012
BETWEEN	**:**	KHALIL IHDAYHID
		Appellant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
		Respondent

Catchwords	**:**	Industrial Law (WA) - Appeal against decision of employer to take disciplinary action - Penalty not yet imposed - Jurisdiction of Appeal Board to hear appeal - Meaning of 'decision' in s 80I Industrial Relations Act 1979 - Principles applied - Appeal dismissed.
Legislation	**:**	Public Sector Management Act 1994 ss 78(1)(b)(iv), 80A, 82A, 82A(3)(b), 82A(3)(b)(i); Industrial Relations Act 1979 ss 80, s 80I(1)(d).
Result	**:**	Appeal dismissed

Representation:

Counsel:		
Appellant	**:**	Ms K Hagan
Respondent	**:**	Mr D Matthews
Solicitors:		
Appellant	**:**	Civil Service Association of Western Australia Incorporated
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

SGS Australia v Taylor (1993) 73 WAIG 1760

Case(s) also cited:

Grantham v The Director-General, Department of Transport (2012) 92 WAIG 691

Reasons for Decision

1 This is the unanimous decision of the Appeal Board.

2 Mr Ihdayhid is a professional engineer who specialises in petroleum safety. He has been employed by the Department for some 23 years. In March 2012, various allegations of breaches of discipline were made against Mr Ihdayhid under s 80 of the Public Sector Management Act 1994. The allegations concerned the receipt by Mr Ihdayhid of emails from another employee of the Department, said to be a subordinate, attaching various cartoons which the Department considered to be offensive and defamatory to senior officers of the Department. As a consequence of a disciplinary investigation, Mr Ihdayhid was advised by letter of 31 July 2012 from Mr Sellers, the Department's Director General, that the findings of a breach of discipline had been upheld. Mr Sellers also informed Mr Ihdayhid in the letter that the Department had "provisionally decided" to take action by the reduction of Mr Ihdayhid's classification level from specified calling level 5 to specified calling level 4 and for Mr Ihdayhid to take part in counselling. Mr Sellers invited Mr Ihdayhid's response to this proposed course. Given that Mr Ihdayhid has been absent on stress leave for some time, he has yet to respond to the Department's proposed course of action. This period had been extended, ultimately, to 15 October 2012.

3 Mr Ihdayhid commenced this appeal under s 78(1)(b)(iv) of the PSM Act on 21 August 2012, from the "decision", said to have been taken by the Department on 31 July. The Department has now challenged the competency of the appeal. It says that no "decision" has yet been taken by the Department, from which an appeal can be brought. Mr Ihdayhid disputes this.

4 It is trite to observe that a court or tribunal must be satisfied that it has jurisdiction to deal with a dispute before it. A court or tribunal may raise and deal with this issue of its own motion, even if the issue is not raised by a party. There cannot be a waiver of jurisdiction and parties cannot by agreement, confer jurisdiction on the Commission where it does not otherwise exist: *SGS Australia v Taylor* (1993) 73 WAIG 1760.

5 It is therefore necessary to deal with this issue as a preliminary point. The parties have filed written submissions on the issue and it is agreed that the Appeal Board determine the matter based upon those written submissions.

Statutory scheme

6 It is convenient to set out at this juncture the relevant statutory provisions. The Appeal Board's jurisdiction under the Act is set out in s 80I of the Industrial Relations Act 1979. Specifically, s 80I(1)(d) is the relevant provision for present purposes and it provides:

> ***80I. Board's jurisdiction***

(1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —

…

(d) an appeal by a government officer, other than a person referred to in paragraph (b), under section 78 of the *Public Sector Management Act 1994* against a decision or finding referred to in subsection (1)(b) of that section;

7 The substandard performance and disciplinary matters provisions of the PSM Act are dealt with in Part 5. The relevant provision in this matter is s 78(1)(b)(iv) which is in the following terms:

78. Appeals etc. against some decisions under s. 79, 82A, 82, 87, 88 or 92

(1) Subject to subsection (3) and to section 52, an employee or former employee who —

…

(b) is aggrieved by —

…

(iv) a decision to take disciplinary action made in respect of the Government officer under section 82A(3)(b), 88(b) or 92(1),

may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979*, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.

…

8 How disciplinary matters are dealt with is set out in s 82A of the PSM Act. The meaning of "disciplinary action" is provided in s 80A. The relevant parts of these sections are as follows:

80A. Terms used

In this Division —

disciplinary action, in relation to a breach of discipline by an employee, means any one or more of the following —

(a) a reprimand;

(b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;

(c) transferring the employee to another public sector body with the consent of the employing authority of that public sector body;

(d) if the employee is not a chief executive officer or chief employee, transferring the employee to another office, post or position in the public sector body in which the employee is employed;

(e) reduction in the monetary remuneration of the employee;

(f) reduction in the level of classification of the employee;

(g) dismissal;

…

82A. Disciplinary matters, dealing with

…

(3) Subject to subsection (4) and section 89, after dealing with a matter as a disciplinary matter under this Division —

(a) if the employing authority finds that the employee has committed a section 94 breach of discipline, the employing authority must take disciplinary action by dismissing the employee; and

(b) if the employing authority finds that the employee has committed a breach of discipline that is not a section 94 breach of discipline, the employing authority must decide —

(i) to take disciplinary action, or both disciplinary action and improvement action, with respect to the employee; or

(ii) to take improvement action with respect to the employee; or

(iii) that no further action is to be taken.

…

9 We note also for completeness, that by s 90 of the PSM Act, an obligation is imposed on the relevant employing authority, to notify the employee of the outcome of a disciplinary matter.

Contentions of the parties

10 The Department submitted that for the purposes of s 78(1)(b)(iv), an appellant must be "aggrieved by a decision to take disciplinary action". It was contended that the letter from Mr Sellers of 31 July 2012, referring to "proposed" action, does not constitute the taking of disciplinary action for the purposes of ss 78(1)(b)(iv) and 82A(3)(b) of the PSM Act. The Department submitted that Mr Sellers, by his letter, has invited Mr Ihdayhid to comment on his proposed course of action. In light of Mr Ihdayhid's response, if any, the Department would then make a decision whether to take disciplinary action, consistent with the proposed course, or an alternative course, or not at all.

11 Accordingly, the Department contended that the appeal has been lodged prematurely. There is no decision to take disciplinary action for the purposes of s 78(1)(b)(iv), and therefore the appeal must be dismissed as incompetent.

12 On the other hand, Mr Ihdayhid contended that a decision has been made under s 82A(3)(b)(i) of the PSM Act. In short, Mr Ihdayhid submitted that the "decision" of the Department to take disciplinary action, is to be contrasted with the Act of imposing a disciplinary penalty. It was submitted that, given the expression of "to take", as being referable to a future act, it is clear in this case, that Mr Sellers has decided to take disciplinary action, but before doing so, seeks Mr Ihdayhid's comment, if any, in relation to the penalty which he might impose. Mr Ihdayhid drew attention to the fact that Mr Sellers, in his letter of 31 July 2012, specifically referred to having decided not to adopt the course of dismissal. This, according to Mr Ihdayhid, supported the construction that he placed on the stage which the disciplinary proceedings have reached.

13 Mr Ihdayhid referred to later correspondence from Mr Sellers of 10 October 2012, which indicates that the disciplinary process has "almost reached the end point and in relation to which Mr Ihdayhid has the opportunity to make final comments on penalty. That disciplinary process has been stalled at this stage for over two months." Whilst the letter post-dates the institution of this appeal, Mr Ihdayhid contended that it is evidence of the Department's state of mind as expressed in its letter of 31 July.

Consideration

14 For the purposes of both s 80I of the Act and s 78 of the PSM Act, there is no definition of "decision". Therefore, consistent with established principles of statutory interpretation, the words used are to be given their ordinary and natural meaning, unless their context otherwise requires: See Pearce and Geddes *Statutory Interpretation in Australia* 4th ed at par 2.10. There is no suggestion in either s 80I or s 78 respectively, when read in the context of the Act and the PSM Act as a whole, that "decision" should not be given its ordinary meaning. The Shorter Oxford Dictionary defines "decision" to mean relevantly, "**1.** the action of deciding (a contest, question, etc); settlement, determination; (with *a* and *pl*) a conclusion, judgement … **2.** the making up of one's mind; a resolution …"

15 For present purposes, the relevant decision the subject of this appeal is one purportedly made under s 82A(3)(b)(i) "to take disciplinary action". This is plain from the notice of appeal. The notice of appeal then goes on to set out in four paragraphs the general grounds relied upon to challenge the Department's decision. The crux of the issue to be determined is therefore, what is meant by the words "decision to take disciplinary action" in s 78(1)(b)(iv) of the PSM Act. It is that "decision" which is the decision referred to in s 80I(1)(d) of the Act, dealing with the jurisdiction of the Appeal Board.

16 We have dealt with the ordinary meaning of "decision". As a part of answering this question, we also need to consider the meaning of "to take", in its ordinary and natural sense. Again, the Shorter Oxford Dictionary defines "take" to relevantly mean "make, do, perform (some action). **1.** to perform, make, do (an act, action, movement, etc.) …" From the foregoing, in our view, "a decision to take disciplinary action", for the combined purposes of s 78(1)(b)(iv) of the PSM Act and s 80I(1)(d) of the Act, is a determination or resolution, finally made, to perform and to put in place, one of the various forms of action set out in s 80A(a) to (g) of the PSM Act. Therefore, based upon this analysis, can it be said that the Department has, by its letter of 31 July 2012, or any other course prior to 21 August 2012, made such a decision? In our view, the answer to this question must be "no".

17 The letter from Mr Sellers, of 31 July, is annexed to the notice of appeal. The letter refers to Mr Sellers' earlier letter of 2 March 2012, setting out the particulars of the allegations against Mr Ihdayhid. Mr Sellers refers to the report of an investigator Mr Baskwell, and a copy of Mr Baskwell's report is enclosed. Mr Sellers refers to his consideration of the report, and his conclusion that the emails are "objectively inappropriate". Mr Sellers then finds Mr Ihdayhid to have committed the eight breaches of discipline alleged. He continues as follows:

> In accordance with section 82 (3) (b) of the Act I have provisionally decided to take the following action:
>
> **Reduce the level of your classification from specified calling level 5 to specified calling level 4 and to participate in a counselling process.**
>
> My reasoning for the provisional decision to demote you is that your lack of action in relation to receiving the emails demonstrates a lack of appreciation of the responsibilities of your current level. You had a responsibility as both a supervisor and senior officer with extensive managerial experience to ensure that you and those with whom you work comply with their obligations as employees within the public sector and to take action where it appears that there has been a failure to do so. Your repeated omissions to take action in relation to Mr Fiori sending you the emails have caused me to lose confidence in your ability or willingness to discharge the responsibilities of your current level.
>
> It is also a matter of concern to me that you seem to still lack an appreciation of the inappropriateness of Mr Fiori's emails and your response to their receipt. That you maintain that the emails are harmless and silly innocent humour has led me to give close consideration to terminating your employment with the Department, an option I would have been unlikely to have considered had you admitted fault, or some fault, on your part in relation to taking no action in relation to the emails. In the end, and after long consideration, I have decided, largely because of the length of your service with the Department, to not take this action.
>
> In relation to the requirement to attend a counselling process this is done with the aim of raising your understanding and awareness of appropriate standards of behaviour and communication in the workplace. The full details of this will be given to you by the General Manager, Human Resources.

I give you the opportunity to respond to the proposed action. Please provide your response in writing to me within 10 days of the receipt of this letter.

18 In our view, from the letter of 31 July, the Department has clearly provided Mr Ihdayhid with an opportunity to comment on the course proposed by the Department, prior to its confirmation. Regardless of whether Mr Ihdayhid considers it to be so, it may well be the case that Mr Ihdayhid is able to persuade Mr Sellers to adopt one of the other options set out in ss 80A(a) to (g), or 80A(3)(b)(i) or (ii) of the PSM Act. That can only be to the advantage of Mr Ihdayhid. If not, and the Department confirms its proposed course of action as set out in the letter of 31 July, there is no loss to Mr Ihdayhid. All of his appeal rights are preserved. In our view, the fact that the Department has not decided to take the option of dismissal in s 80A(g) of the PSM Act, does not mean, as a corollary, that the Department has decided to take one of the other possible courses of action open to it. In our view, given that the Department has yet to finally decide the outcome to be implemented, on the construction of the statutory provisions we have adopted, it has not yet decided to take disciplinary action, for the purposes of s 82A(3)(b) of the PSM Act.

19 There having been no "decision" yet taken by the Department for the purposes of an appeal under s 78(1)(b)(iv) of the PSM Act and s 80I(1)(d) of the Act, the appeal is incompetent as being premature, and it must be dismissed.

2012 WAIRC 00950

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHALIL IHDAYHID
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR C TOGNOLINI - BOARD MEMBER
DATE	FRIDAY, 26 OCTOBER 2012
FILE NO	PSAB 17 OF 2012
CITATION NO.	2012 WAIRC 00950

Result	Appeal dismissed
Representation	
Appellant	Ms K Hagan of counsel
Respondent	Mr D Matthews of counsel

Order

HAVING heard Ms K Hagan of counsel on behalf of the appellant and Mr D Matthews of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 00337

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
	COMMISSIONER S J KENNER - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR E ISAILOVIC - BOARD MEMBER
DATE	FRIDAY, 1 JUNE 2012
FILE NO	PSAB 7 OF 2012
CITATION NO.	2012 WAIRC 00337

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel

Direction

HAVING heard Mr G Ross in person and Mr R Andretich of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appeal be listed for hearing on jurisdiction on a date to be fixed.

(2) THAT the appellant file and serve on the respondent an outline of submissions regarding the Appeal Board's jurisdiction to hear the appeal no later than 21 days prior to the date of hearing.

(3) THAT the respondent file and serve on the appellant an outline of submissions regarding the Appeal Board's jurisdiction to hear the appeal no later than 14 days prior to the date of hearing.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2012 WAIRC 01085

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL
	DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 5 DECEMBER 2012
FILE NO	PSA 24 OF 2011
CITATION NO.	2012 WAIRC 01085

Result	Application dismissed

Order

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

WHEREAS on the 22nd day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,

[L.S.] Public Service Arbitrator.

2012 WAIRC 01086

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRAHAM EDWARDS
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF ENVIRONMENT AND CONSERVATION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 5 DECEMBER 2012
FILE NO	PSA 14 OF 2012
CITATION NO.	2012 WAIRC 01086

Result	Application dismissed
Representation	
Applicant	Mr G Edwards on his own behalf
Respondent	Dr J Byrne Mr A Dores, Public Sector Commission

Order

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

WHEREAS on the 15th day of August 2012 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to enter into further discussion; and

WHEREAS on the 28th day of November 2012 the applicant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

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

2011 WAIRC 00826

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN DENZIL NEWMAN; CRAIG PHILLIP STEEL
	APPELLANTS
	-v-
	MR PAT ITALIANO GENERAL MANAGER TRANSPERTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	MONDAY, 15 AUGUST 2011
FILE NO	PSA 44 OF 2010, PSA 45 OF 2010
CITATION NO.	2011 WAIRC 00826

Result	Direction issued
Representation	
Appellants	In person
Respondent	Mr D Matthews of counsel

Direction

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

(1) THAT the herein appeals be joined and heard and determined together.

(2) THAT the parties file and serve written submissions by 29 August 2011 regarding the operative date of any final order which may issue in these proceedings and whether leave granted to counsel to appear for the respondent in the appeals can, and if so, should be revoked.

(Sgd.) S J KENNER,
[L.S.] Public Service Arbitrator.

2011 WAIRC 00875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00875
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 15 AUGUST 2011, FRIDAY, 17 DECEMBER 2010, TUESDAY, 21 JUNE 2011
DELIVERED	**:**	FRIDAY, 9 SEPTEMBER 2011
FILE NO.	**:**	PSA 44 OF 2010, PSA 45 OF 2010
BETWEEN	**:**	BRIAN DENZIL NEWMAN; CRAIG PHILLIP STEEL Applicants AND MR PAT ITALIANO GENERAL MANAGER TRANSPERTH; Respondent

Catchwords	**:**	Industrial Law (WA) - Public service arbitrator - Reclassification appeal - Date of assessment of work value - Operative date of order - Whether leave for counsel to appear can be revoked - Principles applied - Matter to be listed for hearing.
Legislation	**:**	Industrial Relations Act 1979 (WA) ss. 27(1)(v), 31, 80E(2)(a) and 80E(5).
Result	**:**	Matter to be listed for hearing
Representation:		
Applicants	:	In person
Respondent	**:**	Mr D Matthews

Case(s) referred to in reasons:

Ellis v Grand Lodge and Other (1998) 79 WAIG 1723;

Health Services Union of Western Australia (Union of Workers) v Director General of Health (2008) 88 WAIG 475;

Hospital Salaried Officers Association v Civil Service Association (1996) 76 WAIG 1673;

Mallet v Department of Consumer and Employment Protection (2009) 89 WAIG 705;

Martelli v Department of Corrective Services (2011) 91 WAIG 1143;

Wall v Department of Fisheries (2004) 84 WAIG 3895.

Case(s) also cited:

BHP Billiton Iron Ore Pty Ltd v CFMEU [2006] WASCA 49.

Reasons for Decision

1 Mr Newman and Mr Steel are employed as level 4 prosecutors by the Public Transport Authority. They provide a prosecutions service for the Authority's Transperth Train Operations. They have made application to the Commission constituted as a Public Service Arbitrator, challenging a decision of the Authority's internal classification panel, to not reclassify their positions from level 4 to level 6.

2 From a "for mention" hearing on 15 August 2011, three preliminary issues have arisen. They are the time at which an assessment should be made of any work value changes to the positions for the purposes of reclassification; whether any order of the Arbitrator may be retrospective in operation; and whether leave previously granted to counsel to appear for the Authority should be revoked. The first two issues are of some importance in the appeals by Mr Steel and Mr Newman, because they do not want taken into account changes to their positions that occurred from 2008, which was the time when they first sought a reclassification by the Authority.

3 I will deal with each issue in turn.

Time of assessment of reclassification

4 As counsel for the Authority noted, in a series of cases the Commission has concluded that the time for the assessment of work value changes to a particular office, said to support a reclassification claim, is the time the application to the Commission is made: *Wall v Department of Fisheries* (2004) 84 WAIG 3895; *Health Services Union of Western Australia (Union of Workers) v Director General of Health* (2008) 88 WAIG 475; *Mallet v Department of Consumer and Employment Protection* (2009) 89 WAIG 705; *Martelli v Department of Corrective Services* (2011) 91 WAIG 1143.

5 This is largely a matter of practicality as such a date is normally proximate to the time of the employer's decision to refuse a reclassification request. It is also generally proximate to the decision of the Commission as usually, these types of matters are dealt with reasonably expeditiously.

6 Partly in reliance on the Reclassification Appeals – Practice Direction, which refers to the "operative date" as normally being the date the employee formally notified the employer of the request for reclassification, Mr Steel and Mr Newman said that the date of assessment in this case should be January 2008. This was the time that they raised the issue of reclassification with their employer. Because of changes to their positions since that time, Mr Steel and Mr Newman maintained that it would be unfair not to adopt this course.

7 The difficulty in the present case is that the time referred to by Mr Steel and Mr Newman is now long in the past. The normal position with matters such as this is that a successful party will obtain an order in his or her favour, referring to the presence of extant factors warranting a reclassification of an office. There would be nothing in principle precluding an assessment of the circumstances as they existed in 2008, as long as it could be demonstrated that those considerations, if warranting reclassification, remained in existence.

8 It would be appropriate for the Commission to have regard to any changes in the time from the request for reclassification to the time at which the Commission considers the appeal, as may be raised by the Authority. To preclude consideration of these matters, would be tantamount to requiring the responsibilities of an office at a point in time, to be set in stone, and immune from subsequent review by an employer. The Commission can, and should, take all such factors into account.

Operative date of an order

9 Orders of the Commission under the Act will operate prospectively, unless the statute authorises their retrospective effect. The only provisions of the Act enabling retrospective operation are those dealing with the operation of awards in ss 39, 40 and 40B, and orders under s 44 arising from compulsory conferences.

10 Accordingly, an order under s 80E(5), concerning claims of the present kind under s 80E(2)(a) of the Act, cannot operate prior to the date of any order made. That does not, as the Authority accepts, preclude consideration in cases such as these, of circumstances in existence at an earlier time, in this case, in 2008. Necessarily however, as noted above, the Commission must also have regard to any changes to these circumstances between that time and the making of an order.

Leave for counsel to appear

11 Leave was granted to counsel for the Authority to appear at an earlier stage in these matters. This was on the basis that Mr Steel and Mr Newman also had legal representation. They no longer do. They now object to counsel for the Authority continuing to appear.

12 Leave is clearly appropriate for the purposes of the disposition of the issues dealt with in these reasons. The question is whether for the purposes of the hearing of the substantial appeals, the Authority should be permitted to continue to be represented by a legal practitioner.

13 The Commission (and the Arbitrator) has power to permit legal practitioners to appear by s 31 of the Act. Conversely, by s 27(1)(v) of the Act, the Commission has, as part of doing all such things as are necessary for the just hearing and determination of a matter, the power to revoke leave granted to a legal practitioner to appear: *Hospital Salaried Officers Association v Civil Service Association* (1996) 76 WAIG 1673; *Ellis v Grand Lodge and Other* (1998) 79 WAIG 1723.

14 In these cases I am not persuaded that leave for counsel to appear should be revoked. True it is that in most matters of this kind, it would not be necessary for counsel to appear. However, the grounds of appeal advanced by Mr Steel and Mr Newman refer to numerous alleged errors of law, including the application of legislative requirements to their respective roles as prosecutors. It is likely that matters of interpretation and the application of legislation will arise. Additionally, while now not represented, Mr Steel and Mr Newman are experienced prosecutors, versed in some aspects of the law. I do not see any material disadvantage to them in having the Authority represented by counsel.

15 The substantive appeals will now be listed for hearing.

2012 WAIRC 00770

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00770
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 9 SEPTEMBER 2011, MONDAY, 30 JANUARY 2012, TUESDAY, 31 JANUARY 2012, MONDAY, 13 FEBRUARY 2012, MONDAY, 15 AUGUST 2011, MONDAY, 20 FEBRUARY 2012, FRIDAY, 17 DECEMBER 2010, TUESDAY, 21 JUNE 2011, WRITTEN SUBMISSIONS MONDAY, 29 AUGUST 2011, THURSDAY, 19 JANUARY 2012, FRIDAY, 27 JANUARY 2012
DELIVERED	**:**	TUESDAY, 21 AUGUST 2012
FILE NO.	**:**	PSA 44 OF 2010, PSA 45 OF 2010
BETWEEN	**:**	BRIAN DENZIL NEWMAN; CRAIG PHILLIP STEEL Appellants AND MR PAT ITALIANO GENERAL MANAGER TRANSPERTH Respondent

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Catchwords	**:**	Industrial Law (WA) - Public Service Arbitrator - Reclassification Appeals - Appeals against decision of Classification Review Panel - Arbitrator not bound by decision of Appeal Panel - Application of Wage Fixing Principles - Appeals dismissed.
Legislation	**:**	Industrial Relations Act 1979 s 80E(2)
Result	**:**	Appeals dismissed
Representation:		
Appellants	:	In person
Respondent	**:**	Mr D Matthews of counsel

Reasons for Decision

1 The Public Transport Authority, for the purpose of enforcing railway legislation, maintains a prosecution service within its Security Services Branch. The level 4 position of Prosecutor is established to provide an effective and efficient prosecution service for the Transperth Train Operations Security Services Group. The two appellants are Prosecutors employed by the Authority. They have been dissatisfied with their classification as level 4 employees for a long period of time; indeed for the best part of the last decade.

2 This dissatisfaction has been reflected in a lengthy history of claims by the appellants to have their position reclassified to level 6. The position of Prosecutor was created in 1998 at a level 3/4 classification. An internal review took place in May 2001, which led to the position of Prosecutor being reclassified to level 4 and the position of Senior Prosecutor to level 5. It was recognised at the time, that the initial classification of level 3/4 for the Prosecutor position was incorrect and had not followed a detailed analysis of the role. A classification report on the position was prepared by an independent consultant in October 2001 which recommended that the revised level 4 classification was appropriate. In February 2003, a Classification Appeal Panel, under the relevant industrial instrument, rejected an appeal by the appellants against the level 4 classification determination.

3 In July 2008, a further evaluation of the position of Prosecutor was conducted by another external consultant, following a request by the appellants in January 2008 for a further review. This review also concluded that the level 4 classification was appropriate. A further appeal to an Appeal Panel was dismissed. Both Appeal Panels were constituted by former members of this Commission and a representative of each of the Union and the Authority. These two appeals are from the 2010 decision of the Appeal Panel.

Appeal panel decision 2010

4 The Appeal Panel published detailed reasons for decision in dismissing the appeals. The Appeal Panel set out the grounds for the request for reclassification by the appellants and the "points of claim" advanced in support of their cases, at pp 3-4 of their reasons for decision as follows:

> "The grounds upon which the initial request for reclassification were made are set out in the relevant information provided to the PTA with the claim in the following terms.

"The following form the grounds for our request for reclassification:

The position of Prosecutor was last classified in October 2001 at a level 4. Since this time there have been several structural and legislative changes that have increased the work value, responsibilities, duties and subsequent outcomes of the position.

These factors are in addition to the original evaluation and are mandatory in the Prosecutor's role in performing their functions of the position.

The following points of claim:

1. The introduction of The Corruption and Crime Commission Act 2003 outlining the obligation to firstly recognize, Investigate and notify matters of "Misconduct".

(Refer: Appendix 1)

2. The directive given by the Chief Executive Officer, instructing Prosecuting officers to view Video and CCTV footage prior to presenting the evidence in Court.

(Refer: Appendix 2)

3. The Introduction of The Criminal Procedures Act 2004 and The Criminal Investigations Act 2006 in complying with obligatory stipulations placed on Prosecution departments.

(Refer: Appendix 3)

4. The comparative determination analysis of Internal and external level 4/6 and 6 Positions. Showing similar duties, knowledge base, experience and responsibilities.

(Refer: Appendix 4)

6. Structural Changes Including additional offices reporting directly to the position and officers under direct control.

(Refer: Appendix 5)"

5 A number of witnesses gave evidence before the Appeal Panel, including the appellants. Mr Scudds is an experienced criminal lawyer with experience in railway prosecution matters. He gave evidence about the requirements of the Prosecutor position and compared it to the prosecution roles within the Western Australian Police, Department of Fisheries and the former Department of Planning and Infrastructure. His evidence was to the effect that he considered, based upon his experience, that the role of a Prosecutor at the Authority was more demanding than at Fisheries or the DPI and more aligned to that of a Police Prosecutor. Mr Scudds also gave evidence about the impact of changes to the Criminal Procedure Act 2004, in terms of the greater obligations on the prosecution to present their case for the defence.

6 Also called before the Appeal Panel was Mr Madden, who had experience as a Prosecutor with the Authority and also with the DPI. This evidence was to the effect that he considered the work of an Authority Prosecutor to be more difficult. Also called to testify was Mr Roderick, then a Prosecutor's Assistant at the Authority. He gave evidence about the level of supervision and on-the-job training provided by the Prosecutor position in the Branch.

7 In relation to Police Prosecutors, evidence was also adduced from Sergeant Smith. He testified that in his view there were significant similarities in the work conducted by Police and Authority Prosecutors. Sergeant Smith also gave evidence about the level of support and assistance given to Police Prosecutors. Sergeant Smith referred to the fact that Police Prosecutors are drawn from the ranks of Senior Constable to Senior Sergeant, with cases being allocated according to the degree of complexity. More complex matters are allocated to more senior Prosecutors. A point noted by the Appeal Panel in relation to this evidence, was the level of training required for appointment to a rank. Also Police Prosecutors are required to undertake what was described as "an intensive four week Police Prosecutor's course and to participate in ongoing structured training. Authority Prosecutors have no qualification prerequisite and training is unstructured 'on the job'": see p 6 reasons.

8 Having considered the evidence led by the appellants, aside from noting Mr Scudds' evidence as to procedural changes implemented by the Criminal Procedure Act 2004, the Appeal Panel was not persuaded that the evidence had "identified any change impacting on the skill requirements or the nature of the work carried out by prosecutors generally or in particular, PTA Prosecutors.": p 6 reasons.

9 The Appeal Panel referred to the evidence led by the Authority including that from Mr Ruthven, Mr Greenham, Mr Furmedge and Mr Caldwell. Additionally, as already noted, the Appeal Panel said there was insufficient change in the nature of the work, the skills required or the responsibilities of the role arising from changes to the Criminal Procedure Act 2004, such as to warrant an increase in the classification under the Work Value Principle established by this Commission.

10 Based upon all of the evidence, the Appeal Board made a number of specific findings. Firstly, it considered that the previous internal reviews, in particular that undertaken in May 2001, had properly assessed the role of Prosecutor and taken into account relevant considerations. In particular, the Appeal Panel noted that the JDF for the Prosecutor position, whilst listing the primary role and responsibilities of the position, may not identify each and every subservient function falling within that broad description. Examples cited included the provision of an advocacy service to the court and conducting legislative and case law research. The Appeal Panel concluded that these duties would fall within the general role and responsibilities of the position.

11 In relation to claims that the Corruption and Crime Commission Act 2003 introduced greater obligations on the Prosecutors to report allegations of corruption, this was rejected by the Appeal Board. The Appeal Panel concluded that the obligations imposed on the Prosecutors were no greater than any other public officer, in terms of reporting improper or criminal conduct. In relation to the effect of Prosecutors reviewing CCTV footage prior to presenting evidence in court, the Appeal Panel was not

persuaded that this involved any significant net addition to the responsibilities of the role. It concluded that such a task was already contemplated within the prosecutor's existing role requirements and did not support a reclassification.

12 In relation to the Criminal Procedure Act 2004, the requirement on Prosecutors to identify and present all possible defences as a part of their cases, prior to the defence putting its case, was acknowledged. The Appeal Panel concluded that the BIPERS review undertaken by Mr Veitch took this matter into account, albeit considering it a work volume rather than a work value issue. Whilst recognising this and that there had been an impact on the work of Prosecutors, the change to the BIPERS assessment was deemed an appropriate recognition of this factor.

13 The Appeal Panel considered the comparisons with other positions, advanced by the appellants in their cases. In particular, these comparisons involved the Police Prosecutor, and the Prosecutors at the Department of Fisheries and the DPI. The Appeal Panel noted that the JDF for the Prosecutor level 4 at the DPI was "almost identical to that of the PTA Prosecutor": p 13 reasons. Having considered the evidence of Mr Veitch and his consideration of appropriate comparative positions, the Appeal Panel was not persuaded to reach a different conclusion to that arrived at by Mr Veitch on his analysis.

14 In terms of supervision and responsibility for others, the Appeal Panel considered the evidence of Mr Ruthven for the Authority, that the then JDF, as at July 2007, showed that two administrative staff were permanently assigned to the Prosecutions section. The Appeal Panel noted that Mr Ruthven's evidence was that the JDF for the Prosecutor position was incorrect, and that in fact the two administrative staff were responsible to the level 5 Senior Prosecutor. It was the Authority's intention to rectify this in the near future. However, the Appeal Panel accepted the evidence of Mr Veitch, when conducting his BIPERS assessment, that in fact the Prosecutors were responsible for the two administrative staff. This is notwithstanding Mr Ruthven's evidence that this was in error. Despite this, however, the Appeal Panel was not persuaded that this factor had not been already taken into account in the overall assessment of the Prosecutor position and its current classification at level 4.

15 Finally, the Appeal Panel also reviewed the BIPERS assessments of the previous reviewers in 2001 and 2008, Mr Dawkins and Mr Veitch respectively. Having considered the assessments made by them, the Appeal Panel concluded that the most recent assessment by Mr Veitch supported the Authority Prosecutors being classified at level 4.

16 Having regard to all of the material before it, the Appeal Panel concluded that while there had been some changes in work requirements for the Prosecutor positions, which may shift the classification to the higher end of level 4, there had not been demonstrated such a significant net addition to the work value of the position to warrant its reclassification. Accordingly the appeals were dismissed.

Present appeals

17 These appeals brought by the appellants raise largely the same issues for consideration, as were raised before the Appeal Panel. Whilst I am not in any way bound by the decision of the Appeal Panel, given the way in which the grounds of appeal were put, and the alleged errors made by the Appeal Panel, it will be necessary for me to have due regard to the conclusions reached by the Appeal Panel, in light of the evidence and submissions put in these proceedings. The grounds of appeal advanced by the appellants are identical. They run to some eleven grounds of appeal, with various sub-grounds developed in relation to a number of them.

18 It is convenient at this point, to refer to my earlier reasons for decision of 9 September 2011 (2011 WAIRC 00875). That decision dealt with a number of preliminary issues in relation to the present appeals. One such issue was the time of assessment of reclassification. The appellants contended that the date of the assessment of any changes in work value to the position of Prosecutor should be January 2008, which was the date the employees formally notified the Authority of the request for reclassification. This led to the proceedings before the Appeal Panel and its subsequent decision in 2010. The appellants sought the 2008 assessment date because there had been some changes to the position of Prosecutor since that time. The Commission determined that given the length of time that had passed since that initial request was made, it would be inappropriate to in effect, "freeze in time", consideration only as at that date. Accordingly, the Commission indicated that it would take into account, in assessing overall the merits of the appeals, any changes which may have occurred in the role of Prosecutor up to the date of these proceedings.

The appellants' evidence

19 A number of witnesses were called by the appellants in support of their appeals. These included in the main, the witnesses who were called to give evidence before the Appeal Panel. It has been necessary to proceed in this manner because unfortunately, there was no transcript of the evidence given before the Appeal Panel. What follows is necessarily only a summary of the evidence and contentions. Further specific observations will be made about these matters when dealing with the individual grounds of appeal.

20 Mr Scudds is a barrister and solicitor of many years standing. Mr Scudds primarily practices in criminal defence work. He gave evidence about the role of Authority Prosecutors compared to the work performed by Police Prosecutors, gained from his experience in defending matters against them in open court. It was Mr Scudds' view that from his experience, the Prosecutors employed by the Authority generally displayed the same skills in terms of research and advocacy, as the Police Prosecutors. Mr Scudds accepted, however, in cross-examination, that he may have appeared in about five to ten Authority prosecutions in the last few years.

21 In terms of other public authority advocacy roles, Mr Scudds testified that he has also appeared in proceedings dealing with applications for extraordinary driver's licences which are conducted by Prosecutors from the former DPI, which is also a level 4 position. Mr Scudds' evidence was his involvement was limited to these types of applications. He did accept that he was not aware of other duties that Prosecutors from that Department may be required to undertake.

22 In terms of the obligations on Authority Prosecutors, Mr Scudds noted the changes introduced by the Criminal Procedure Act 2004, which require the prosecution to put its closing address prior to the defence. This has the effect of requiring the prosecutor to anticipate the defence case as a part of trial preparation. While this is so, Mr Scudds did also accept in cross-

examination that regardless of this change, a good prosecutor will always turn their mind to the possible defences that could arise in relation to a charge as a part of thorough trial preparation. Additionally, in the case where the defence makes an opening submission, as they now can do, this also is of assistance to the prosecution. In terms of the general comparison with the Police Prosecutor position, Mr Scudds accepted that he did not have any detailed knowledge of the salary levels for Police Prosecutors, nor the basis on which rank promotions are obtained within the WA Police.

23 In a similar vein was the evidence of Mr Pidco. Mr Pidco is presently a solicitor with the WA Police. He was a serving police officer for many years. He then qualified as a legal practitioner and commenced practice in the late 1990s. He practiced for a period of time in criminal defence work. Mr Pidco has also been engaged in law lecturing at universities and spent some time in the WA Police Prosecuting Division as a legal officer. Mr Pidco is presently a Senior Solicitor in the specialist crime portfolio within the WA Police. In terms of the comparative assessment of the work of an Authority Prosecutor and a Police Prosecutor, he saw little difference in the work involved between the two roles.

24 In Mr Pidco's view, the same degree of skill is involved in the work of both Prosecutors and both have the same obligations on them as officers of the court. The process of trial preparation by Prosecutors at the Authority and Police was seen by Mr Pidco as being largely the same. This extended also to the approach to the discontinuance of prosecutions. He referred to the Director of Public Prosecutions Prosecution Guidelines and the 2008 policy of the Authority in relation to prosecutions. When he was taken to that part of the policy dealing with the withdrawal of charges, Mr Pidco confirmed that this was a similar approach adopted by the Police Prosecutors. He also confirmed that in general, in his experience, there would usually be the opportunity afforded to a Prosecutor during a trial, to seek a short adjournment to obtain instructions where consideration of amending or withdrawing charges may arise.

25 In terms of educational requirements, Mr Pidco testified that to train a Police Prosecutor, the most important attribute was the ability to absorb and put into effect what students are taught in the Police Prosecutors' Training Course. Given Mr Pidco's involvement in teaching this course, he equated the standard of education as being similar to an Associate Diploma TAFE level course or the first year of an undergraduate non-law degree course.

26 Whilst drawing comparisons between Police Prosecutors and the work of Authority Prosecutors, Mr Pidco accepted that most Police Prosecutors are drawn from the ranks of Sergeants or Senior Constables. These officers attain positions as Prosecutors generally through promotion through the rank structure. Additionally, it is the general practice that more complex police prosecutions are given to more senior officers within the Prosecution Section. As with Mr Scudds, when questioned about the work of the DPI Prosecutor position, apart from extraordinary driver's licence matters, Mr Pidco was not aware of any other duties undertaken by this particular role.

27 In a similar comparative vein, was the evidence given by Mr McCaughey. Mr McCaughey was a former Senior Prosecutor at the Authority. He was involved in the establishment of the Prosecution Branch at the Authority from about 2001. Mr McCaughey is now retired. Prior to being employed by the Authority, Mr McCaughey was a senior officer in the WA Police. Mr McCaughey gave some general evidence about the establishment of the Prosecutions Branch and the role he played in supervising staff. Whilst he accepted that formal supervision was his responsibility, although he could not recall whether that was in his then JDF, he did give some "mentoring" responsibility to Prosecutors who would take trainees to court and discuss cases with them.

28 In terms of the work of Authority Prosecutors, Mr McCaughey testified that some case law research is involved as a part of the job of an advocate. In terms of the advocacy performed by the Authority Prosecutors, whilst acknowledging that most cases conducted by Prosecutors involved "mentions" (at least about 75%), those that go to trial would generally involve one day hearings, although there could be longer matters up to three days, from time to time. Mr McCaughey was asked about input Prosecutors had in relation to legislative amendment. He referred to the then new Public Transport Authority Act and an occasion where a difficulty was identified in initiating prosecutions. Mr McCaughey described the process where Prosecutors had some involvement in developing proposals for senior management, which in turn were transmitted to the Government, for legislative change.

29 An issue that appears to have been contentious in the past, the authority of Prosecutors to discontinue charges, was referred to by Mr McCaughey. He testified that when he was the Senior Prosecutor, he told his prosecution staff that they were able to amend or discontinue charges as long as they were able to justify their decision. This would include amendments or discontinuances which may occur on the day of the hearing. In cross-examination, Mr McCaughey was taken to an incident which occurred in 2005, where Mr McCaughey, in a document prepared by him, referred to the discontinuance of a charge which had been discussed and approved by Mr Furmedge, the senior manager responsible for the section. Whilst Mr McCaughey seemed reluctant to concede that it was the practice around this time to seek the approval of senior management before such a decision was taken, he accepted that the Authority now has a formal policy which requires prior approval.

30 In terms of any comparisons with Police Prosecutors, Mr McCaughey did acknowledge in cross-examination, that from his experience, Police Prosecutors have far less time to prepare cases for trial and regularly receive briefs very shortly before the date of a hearing. This contrasted with considerably more time available to Authority Prosecutors to prepare. Mr McCaughey also accepted that the Police Prosecutors are required to have a very wide knowledge of criminal offences and defences, in the course of their work.

31 A person with prior experience as a former DPI Prosecutor was Mr Madden. He is now a policy officer with the Authority but did occupy the position of Prosecutor for the former DPI for about four and a half years. Mr Madden testified that the vast bulk of work that he undertook as a Prosecutor with the DPI was in relation to applications for extraordinary driver's licences. This amounted to about 80% of his workload. This work was largely routine and involved gathering information about the applicant, the applicant's driving history and any extenuating circumstances to place before the court.

32 Also referred to in Mr Madden's testimony, was work done by DPI Prosecutors involving infringement notices arising from multi-nova cameras. In these cases, the penalties usually involve relatively low level fines and no offences involve a potential term of imprisonment. Other work, such as prosecutions undertaken for the Main Roads Department, described as more complex in the position JDF, were not actually undertaken by Mr Madden on his evidence. The same applied to prosecution matters arising from other transport legislation, also contained in the JDF for the level 4 Prosecutor position. That is, Mr Madden accepted that his former position was responsible for the provision of those services, however, he was not required to undertake them.

33 In terms of the overall nature of the DPI Prosecutor position, Mr Madden accepted that the job was a responsible one, and involved keeping dangerous drivers off the roads. Additionally, in terms of workload, Mr Madden confirmed that on any day, he may have dealt with five or six extraordinary driver's licence applications in the ordinary course. These did not, however, generally involve the calling of witnesses, as the only evidence was in the main from the applicant seeking the extraordinary driver's licence.

34 Mr Donnelly is presently a Prosecutor at the Authority. Mr Donnelly is a legal practitioner admitted to practice in 2009. In terms of the comparison between the work of an Authority Prosecutor, and that of a Police Prosecutor, Mr Donnelly was in general agreement with the evidence of Mr Scudds and Mr Pidco.

35 Further evidence about the role of Police Prosecutors was given by Sergeant Smith. Sergeant Smith is presently a trainer in the Police Prosecutors' Course and a Police Prosecutor. Sergeant Smith outlined the process at the WA Police Prosecutions Branch for the progress of prosecution briefs internally. From the initial laying of charges, a brief is prepared. Once an initial check is performed, the brief goes to the local prosecuting office and is listed for court. If the matter is dealt with on a first appearance then that concludes the file. If the brief is listed for an extended trial, it then proceeds to a local Brief Quality Manager for further review and checking to ensure it is thorough and complete before it returns to the allocated Prosecutor. Sergeant Smith also referred to the police internal classification system for trials as "A, B, C, and D class" trials at the central prosecutions unit. An assessment is made as to the complexity of a matter, the length of the trial being one of the criteria. It is then allocated a classification. Generally "A class" trials are longer than one day.

36 In terms of the progression to a Police Prosecutor position, Sergeant Smith outlined the rank and promotional system. Prosecutors generally come from the ranks of Senior Constables and Sergeants. The position of Police Prosecutor is a promotional position, and officers can obtain a promotion through the rank system to a position of Police Prosecutor. According to Sergeant Smith, generally it would take approximately seven to 10 years of service as a police officer, before an officer could reach the level of seniority to become a Prosecutor.

37 In terms of the day to day work, Sergeant Smith testified that in the normal course, Police Prosecutors often get very little notice of a trial. He cited an example where an officer could be notified by the court that a Magistrate was ready to hear a case with as little as ten to fifteen minutes notice to attend court and conduct the trial. In terms of amending or discontinuing charges, Sergeant Smith said that there is an internal procedure where generally, a Prosecutor will speak with a WA Police solicitor to get their views on any proposed amendment or withdrawal of a charge and to approve such a course.

38 Comparative evidence with prosecutions conducted by the Department of Fisheries was adduced from Mr Schofield, who is a Supervising Fisheries and Marine Officer which is a level 4 position. Mr Schofield has been employed in that capacity since about 1993. In terms of prosecution work, Mr Schofield testified that his duties include representing the Department in the Magistrates Court. This includes for mentions and some status hearings concerning recreational fisheries offences under the Fish Resources Management Act 1994 and Regulations. Mr Schofield said that he does not appear as a Prosecutor in contested trials as these matters are briefed out to the State Solicitor's Office. This is also the case for commercial offences under the legislation.

39 In terms of background and training, Mr Schofield testified that Departmental Prosecutors are trained in-house. As to the overall breakdown in the duties of a fisheries officer, Mr Schofield said that prosecution work forms a relatively small part of his job. He confirmed that in accordance generally with the JDF for his position, about 70% of his work is associated with investigations. About 10% involves apprehension work, another 10% is prosecution work and finally, about 10% involves various leadership activities.

40 Evidence was also led from the appellants. Mr Newman commenced with the Authority as a patrol officer and in that position he completed a Certificate in Transit Security and Service and was appointed as a Railway Special Constable. Mr Newman also completed an Associate Diploma of Business and Legal Studies a few years ago. Mr Newman commenced as a Prosecutor with the then West Australian Government Railways in 1998. At this time, Mr Newman was involved in preparing the original JDF for the position. Mr Newman's evidence in chief was largely based upon a sequential development of the grounds of appeal.

41 Commencing with ground 1.6.1, that concerning amendment to statute law, Mr Newman said that as a part of the reclassification request, a classification evaluation report was prepared by Mr Veitch of Shelby Consulting. A copy of this document was tab 6 in the Authority's bundle of documents as exhibit R1. Mr Newman referred to his interview with Mr Veitch and in particular the reference to the comparative position of Police Prosecutor. Mr Newman noted that in the report of Mr Veitch at p 8, is a reference to the Police Prosecutor responsibilities and in particular that of "contributes to the amendment of statute law by undertaking research and special projects on a wide range of legal issues". It was said by Mr Newman that the report failed to have regard to the role of Authority Prosecutors in performing a similar duty.

42 Mr Newman referred to some examples of this, in particular at exhibits A13 and A14. Exhibit A13 refers to a memorandum of 3 September 2008 from Mr Greenham, the then Manager Prosecutions and Projects, to senior management of the Authority, referring to a problem identified by the Prosecutors in relation to the signing of prosecution notices under the Criminal Procedure Act 2004. A number of options are outlined in the memorandum to address the issue. A further example in exhibit A14 was an email from Mr Newman to Mr Greenham in relation to the five year review of the Public Transport Authority Act.

A number of suggestions are made by Mr Newman in relation to the legislative review. The import of this testimony was clearly directed towards establishing that from time to time, the Authority Prosecutors do contribute to the amendment of statute law. In respect of exhibit A14, however, Mr Newman did accept that the request for information on possible amendments to the Public Transport Authority Act was widely distributed to many employees within the Authority.

43 In relation to case law research, Mr Newman referred to exhibit A12 which is notes made in relation to a case the subject of a trial in the Magistrates Court. The notes refer to various authorities and a discussion of the relevant legal principles. Mr Newman also referred to another document prepared by him in August 2008 concerning a prosecution under the Road Traffic Code 2000. This again made reference to various relevant authorities. When these issues were raised with him in cross-examination, Mr Newman did agree with the proposition put to him, that it is part of the duty of an advocate for the prosecution to consider relevant cases in preparing for trial as a matter of course.

44 In terms of input into policies and procedures, Mr Newman also referred to exhibits A13 and A14 in this regard. Additionally, Mr Newman referred to a request for suggested changes to the Transit Officers Operations Manual 2012 as further example of the contributions made by Prosecutors. Whilst Mr Newman said that these documents are not prepared by the Prosecutors, the import of the evidence was that from time to time they are requested to comment on internal procedures.

45 Mr Newman also referred to what were described as complex and protracted cases that he conducted some years ago. These were listed in the submission to the Appeal Panel in 2010. This submission referred to a two day trial in 1998, a two day trail in 1999, a five day trial in 1999, a two day trial in 1999, a one day trial in 2000, a three day trial in 2000, a two day trial in 2000, a one day trial in 2000, and a five day trial in 2000. The detail of these matters was not explored in evidence. However, Mr Newman did accept in cross-examination, that the number of lengthy matters in recent years is relatively few. Additionally, in terms of present workload, given the number of Prosecutors and matters listed for trial in recent months, the Prosecutors have one to two contested trials per month. Mr Newman accepted that there has been a very significant fall off in workload of recent times.

46 As to the capacity to conduct a wide range of different prosecutions, including those that might be categorised as A, B, C and D etc, Mr Newman referred to the appointment of himself and others as Police Special Constables under s 35(5) of the Police Act 1892. Reference to this is contained at exhibit A17, in which Mr Newman's appointment as a Special Constable by the Commissioner of Police is set out. The appointment as Special Constable refers to the capacity for Mr Newman to commence prosecutions on behalf of the Authority for a range of Criminal Code (WA) offences committed on the Authority's property. Allied to this, was the contention of Mr Newman in his evidence, and indeed a thread of the cases of both the appellants, that in exercising their powers as Special Constables, they are in fact appearing for the Commissioner of Police and are accordingly accountable to him under the Police Act. I will return to this issue later in these reasons.

47 An issue on which Mr Newman placed some emphasis was the capacity for Authority Prosecutors to exercise autonomy in the discharge of their duties. Mr Newman said that in court as a Prosecutor, he has the discretion to amend or discontinue charges. A number of examples were cited by Mr Newman in this regard. He said that there have been cases where after reviewing CCTV footage, it became apparent to him that there was no reasonable prospect of obtaining a conviction. He would in those cases discuss the issue with defence counsel, which could lead to a downgrading of a charge or its discontinuance.

48 The controversial aspect of this issue relates to the Authority's Prosecutions Procedure of 2008. The evidence was that this procedure was implemented in part, following a review by the Corruption and Crime Commission of the Authority's policies concerning the withdrawal of charges. Specifically at cl 5.9 the policy provides for a procedure to be followed by Prosecutors regarding the withdrawal of charges. This procedure specifies that charges, once laid, may only be withdrawn after review and with the authority of the Manager Prosecutions and Projects. This review involves the relevant Prosecutor and/or the Senior Prosecutor. In all cases, the policy requires that the Prosecutor making a recommendation for the discontinuance of a charge, is to provide reasons in support and the discontinuance is to be noted in a discontinuance book which is kept in the Prosecution Office. The policy deals specifically with the withdrawal of charges prior to and after they have been listed in court. In the latter case, the policy refers to a withdrawal prior to the mention of the matter.

49 The policy is said to be silent as to what a Prosecutor should do when in court and it becomes apparent that the charge should be withdrawn. It seemed on Mr Newman's evidence that he did not consider that this policy had application once the Prosecutors were in a court building. This is so despite the terms of cl 5.9.1 which provides in part that "all charges that have been laid are only to be withdrawn after they have been reviewed by the Manager Prosecutions and Projects". Mr Newman's testimony on this issue referred to the difficulties that may be encountered by a Prosecutor in seeking instructions during the course of a proceeding. However, in cross-examination, Mr Newman accepted the broad thrust of Mr Pidco's evidence, that in 99% of cases, the court would grant a brief adjournment during a proceeding for a Prosecutor to obtain instructions. Indeed it was Mr Newman's evidence that he has never been refused such a request.

50 In terms of on-the-job training, Mr Newman gave evidence about a new proposed JDF that did refer to the training and mentoring of Trainee Prosecutors. However, he accepted that the JDF in question, prepared it seems in about 2010, is not the approved version and was developed during discussions with managers.

51 In terms of qualifications, whilst accepting that the current JDF does not require any prescribed qualifications as essential for appointment as a Prosecutor, Mr Newman said in reality all Prosecutors have completed at least the three month Customer Service Security Officer Special Constable course. Additionally, all Prosecutors have undertaken the Police Prosecutors' course. Mr Newman referred to this in the context of appointments in July 2006, by the Commissioner of Police, of a number of Authority Prosecutors as Police Special Constables under s 35(a) of the Police Act 1892.

52 In essence, Mr Newman said that the Appeal Panel failed to have regard to this when it took into account a comparison of the position of Authority Prosecutor with other positions in assessing work value changes. On this issue, Mr Newman, in his statement tendered as exhibit A5, referred to errors by the Appeal Panel in misdirecting itself by concluding that all of the comparative positions used in the work value assessment, "conducted prosecutions and performed an advocacy service".

Mr Newman contended that, for example, the level 4 Fisheries Officer position does not provide an advocacy service and nor does the DPI Level 4 position.

53 Further in Mr Newman's evidence, it is said that the Appeal Panel placed excessive weight upon the classification evaluation prepared by Mr Veitch in July 2008, by concluding that the Authority Prosecutors do not undertake a number of functions. These include conducting legal research and providing a court advocacy service in complex and protracted cases. The Appeal Panel therefore failed to attach any significant weight to these factors in work value terms. On Mr Newman's evidence, other factors overlooked by the Appeal Panel included the fact that the Authority Prosecutors do contribute to the amendment of statute law; make a contribution towards the continual improvement process by having input into the development and amendment of Authority policies; and appear for the Commissioner of Police, since they were appointed as Police Special Constables in 2007. In relation to these matters, Mr Newman's evidence was that Mr Veitch in his Classification Report, failed to have any proper regard to these duties of Authority Prosecutors, when comparing the position with other positions.

54 In relation to some of the evidence given before the Appeal Panel, Mr Newman said that the evidence given by Mr Scudds in relation to the difference between an Authority Prosecutor and Police and Fisheries Prosecutors, was misconstrued. The contention of Mr Newman was that Mr Scudds' evidence of there being little difference in the job requirements of the Prosecutors from the Authority, Police and Fisheries, was taken out of context. What Mr Scudds meant by this, according to Mr Newman, was that Mr Scudds was unable to indicate to the Appeal Panel as to whether the Fisheries Prosecutor was an officer of the Fisheries Department or was a solicitor from the State Solicitor's Office.

55 In relation to the withdrawal of charges issue, Mr Newman said that the Appeal Panel made errors in relation to the operation of the Authority's Prosecution Policy, which came into effect in October 2008. Those errors are said to relate to a misunderstanding of what Mr Greenham, the then Manager of Prosecutions and Projects, had stated about the policy on the withdrawal of charges. That in fact, there was no pre-existing requirement for management approval in relation to withdrawal of charges prior to the policy being made in October 2008. Furthermore, Mr Newman said that the Appeal Panel also did not have regard to the autonomy of Authority Prosecutors to withdraw charges, at the time of the commencement of the reclassification application in January 2008.

56 In terms of the complexity of work undertaken by Authority Prosecutors, Mr Newman said that the highly complex and difficult "A" grade trails conducted by Authority Prosecutors were not taken into account by the Panel. It was suggested by Mr Newman that evidence before the Panel that it may take up to four years for the Police Prosecutor to be competent enough to conduct "B" grade trials, but not "A" trials, was supportive of this contention. Allied to this issue, Mr Newman testified that there was also no consideration given by the Appeal Panel to the autonomy exercised by Authority Prosecutors as to whether to proceed with charges, substitute or amend, and negotiate with defence counsel.

57 In general terms, Mr Newman said that the Appeal Panel overly relied upon the evidence of Mr Veitch and his Report, and failed to have proper regard to the differences between the nature of the roles of an Authority Prosecutor, and the DPI, Fisheries and Police Prosecutor positions. Furthermore, it was contended by Mr Newman that the Appeal Panel failed to properly appreciate the contentions advanced by the appellants about the effect of the Corruption and Crime Commission Act 2003 on the Authority Prosecutors, in terms of the obligations that legislation places on them to identify complex issues of law to avoid the wrongful conviction of an alleged offender. Allied to this issue, Mr Newman said that the Appeal Panel also failed to recognise that the obligation on the Authority Prosecutors to review CCTV footage prior to proceeding to court has placed a further responsibility on the Prosecutors to report to the Authority any matters adverse disclosed in such footage, prior to charges being heard.

58 Finally, Mr Newman referred to wide ranging challenges to the Appeal Panel's review and assessment of the BIPERS analysis that was undertaken for their positions by Mr Veitch.

59 Some supporting evidence was given by Mr Steel, although Mr Newman was the principal witness for the appellants. Mr Steel has been an Authority Prosecutor for many years and undertook the Railway Special Constable Course. He is generally conversant with the various police offences and the powers of police officers. After he was appointed, as a part of his development, Mr Steel also completed the Police Prosecutors' course. He described it as then a requirement of the position, but which is no longer. In cross-examination, however, Mr Steel accepted that there was no requirement in the current JDF for an Authority Prosecutor to have done such a course or to complete the relevant Certificate III course. He also agreed that there is more than one way to get the required knowledge to be a Prosecutor, not only through undertaking of formal courses of training.

60 In terms of his training, Mr Steel referred to being trained by Mr McCaughey as the then Senior Prosecutor and was also assisted by Ms Brooks who was then a Prosecutor. He described this as the "unwritten understanding", at least until 2010, when it was "removed". In terms of the duration of trials, Mr Steel testified that most trials are one day or less. However, occasionally, the Authority Prosecutors do longer matters. Mr Steel also accepted that about 12 to 15 months ago, there was a "blitz" to deal with a backlog of cases in the Prosecutions Section and the work load at that time was high. Now the work load has reduced significantly to what Mr Steel described as less than normal and relatively quiet.

61 In terms of the issue of authority to withdraw charges, Mr Steel said that up until 2008, he relied upon the approach instituted by Mr McCaughey at the time, to commit to writing the reasons for the withdrawal of any charges. Mr Steel referred to the new policy being introduced in 2008 following the review by the Corruption and Crime Commission. In particular, Mr Steel referred to a particular case involving a person the subject of charges, Mr Haegsrom, in a matter in 2010. Mr Steel was involved in a "charge negotiation". He said he followed the procedures of the Authority "by the book" and received all the necessary approvals. The Corruption and Crime Commission investigated the matter and he considered that he was personally under investigation. Ultimately, however, Mr Steel said he was subsequently informed by Mr Furmedge, that he was "cleared of all the allegations", some months after the process had begun.

62 In relation to the processes undertaken by Police Prosecutors, Mr Steel made the point that his understanding is that the internal processes for a Police Prosecutor's brief involve various stages of review. This means that the final brief is generally of a higher quality than those of Authority Prosecutors, who have to remedy any defects as they are discovered.

Respondent's evidence

63 Mr Collopy is the Manager of Professional Standards and Integrity at the Authority. Mr Collopy has a military and investigative background. He has overseen the Prosecution Section since about March 2011. He provided some statistics in relation to the activity of the Prosecutions Section between that time and early 2012. Between July 2011 and January 2012 the section dealt with approximately 585 matters with 93% of those matters being mentions and 7% contested hearings. Of those, some 49% involved fare evasion matters. Of the 10 trials conducted, one was part heard and the others were one day listings. In the month of January 2012, there were 10 matters listed. The Prosecution Section has a staff of four Prosecutors including the Senior Prosecutor. Mr Collopy did concede, however, that matters going to trial are generally not ticketing matters, but involve other issues. Mr Collopy also referred to the appointment of Prosecutors as Special Constables under the Police Act to overcome the problem of prosecuting Criminal Code offences on the Authority's property. He also noted that not all Special Constables have done the Certificate III course, but some do have a policing background.

64 In terms of qualifications for the position, Mr Collopy referred to the capacity for Prosecutors to come from either "in the system" as he put it, preparing briefs and presenting matters in court and who may have done the Police Prosecutors' course as a part of their development. Alternatively, somebody may be appointed who has had previous legal experience. In Mr Collopy's view, specifying the Police Prosecutors' Course as an essential requirement would exclude those who have come from a non-policing background and would be limiting.

65 Mr Furmedge is the Director of Security Services for the Authority. In that position, Mr Furmedge is responsible for the overall security services portfolio. Mr Furmedge has a background in policing and has academic qualifications in security management and justice studies including criminal law. Mr Furmedge outlined the role of the Authority Prosecutors in general terms. The initial complaint or prosecution notice is prepared by a Transit Officer as the responsible case officer. That is then checked by a supervisor before the matter can proceed. In the case of criminal offences prosecuted by the Authority, the prosecution notice is required to be signed by a Special Constable, who are mainly supervisors.

66 Mr Furmedge referred to the issue of withdrawing charges and testified that Prosecutors do not have a general power to withdraw charges or offer no evidence in relation to them, without prior approval. Prior to 2008 when the Prosecution Policy was introduced, Mr Furmedge referred to a practice where withdrawals of matters were reviewed by the then Senior Prosecutor Mr McCaughey. Mr Furmedge said that there was a necessity to formalise the procedure, particularly after involvement of the Corruption and Crime Commission in a matter. Reference was made to internal memorandums to and from the then Manager Prosecutions and Projects, Mr Greenham, in July 2008, when the necessity for formalising the process for withdrawal of charges was highlighted.

67 The 2008 Policy applies to all prosecutions, including those initiated by Special Constables. In Mr Furmedge's experience, whilst the requirement to discontinue should be relatively rare, given the various filtering processes to ensure a brief is adequate, as far as he is aware, the Prosecutors are making contact with senior management before any decisions to withdraw or amend charges are made. In the rare case where a Prosecutor was not able to make contact with senior management while attending Court, then at least as long as a Prosecutor attempts to do so, and is able to justify their decision in relation to a charge, Mr Furmedge could see no difficulty.

68 In relation to the amendment of statute law, Mr Furmedge confirmed that as Prosecutors work at the "coalface" then naturally their views are sought as to how Magistrates are applying the legislation and the identification of possible problems with it from the Prosecutor's experience. The Prosecutor's feedback is sought on these matters, which information is then progressed internally through senior management, legal advisors and the government, in relation to any legislative change that might be necessary. Mr Furmedge saw the issue of seeking feedback from Prosecutors as simply a sound management practice.

69 In relation to the development of policies and procedures, Mr Furmedge testified that the Authority consults with Prosecutors, as with all other staff, about policies and procedures that affect them directly. This is no more than the usual internal consultation that takes place with all staff.

70 In terms of training, Mr Furmedge confirmed that there was no formal training responsibility involved in the role of Prosecutor. However, he accepted that there is a degree of mentoring where, for example, the Prosecutors will take Trainees to court with them and discuss matters that they are dealing with. In this regard, he accepted that there is a degree of on-the-job coaching and mentoring provided by Prosecutors, although it is not a formal training responsibility. The formal training responsibility was that of the Senior Prosecutor.

71 In terms of qualifications for appointment as a Prosecutor, Mr Furmedge confirmed that the completion of the Police Prosecutor training course is not an essential requirement for the position. Whilst it is an advantage to have done such a course, as with the Certificate III course, it is not essential. The requirement to hold those qualifications was seen by Mr Furmedge as a potentially limiting factor, in that candidates for appointment could come from a range of backgrounds and have been involved with legislation from other areas. Mr Furmedge did, however, accept the benefit of undertaking such courses as a part of a Prosecutor's professional development.

72 In terms of greater obligations imposed by the Corruption and Crime Commission Act, Mr Furmedge did not see any particular additional obligations imposed on Prosecutors that are not otherwise imposed on all public servants, as far as professional and ethical conduct is concerned. In terms of accountability for Prosecutors who are Special Constables, Mr Furmedge expressed the view that in the case of Criminal Code matters, the Prosecutors are not accountable to the Commissioner of Police, but rather the Authority, as the employer. The appointment as a Special Constable confers the authority to prosecute Criminal Code offences on the Authority's property. However, this is more of an administrative matter rather than any change in accountability of the Prosecutors.

73 Mr Furmedge was also cross-examined about the impact of CCTV footage and how this has affected the work of Prosecutors. In his view, the direction made by the Chief Executive Officer of the Authority for mandatory viewing of CCTV footage makes the Prosecutor's job easier not harder. In his assessment, the Prosecutors are able to use the CCTV footage to ensure that the briefs that they prepare are internally consistent and to highlight any difficulties that may be encountered if a matter was presented to the court. Mr Furmedge contrasted this to the work of Police Prosecutors, who mainly do not have the benefit of CCTV footage and who may have to orally negative various criminal defences during the course of their work.

74 In relation to changes introduced by the Criminal Procedure Act, Mr Furmedge was not of the view that pre-trial disclosure, or the requirement for Prosecutors to close their case before the defence, has imposed any additional burdens on Authority Prosecutors. In relation to pre-trial disclosure, Mr Furmedge's evidence was that given the internal review process for briefs, by the time that they are ready to be presented to the court, briefs should be robust enough to deal with any possible difficulties. Additionally, as a part of case preparation, Prosecutors would be required to anticipate various defences that might be put by the defence in court. Nor did Mr Furmedge see any additional burdens placed on Prosecutors by s 55 of the Criminal Procedure Act, in relation to ex parte hearings. This is because in his view, Prosecutors have always had the responsibility to ensure that they have a prima facie case. The absence of a defendant should make no difference to this in his view.

75 In relation to the Veitch Report of 2008, Mr Furmedge affirmed that he was consulted by Mr Veitch in relation to the review of the Prosecutor's role. He agrees with Mr Veitch's conclusion generally in relation to the additional work value of Police Prosecutors, based on the nature of their responsibilities. In this respect, Mr Furmedge referred to the additional range of offences prosecuted by Police Prosecutors; the fact that they are often required to attend court and prosecute with little or no prior notice or preparation; and that in general, Police Prosecutors do not have the benefit of CCTV footage in the preparation of their briefs.

76 Mr Veitch was examined and cross-examined extensively. Perhaps this is not surprising given that he was the author of the July 2008 Report and the latter June 2011 Report, which was more of a "desktop" review. Mr Veitch is a senior and experienced person in the field of human resources and has some 30 years' experience in job evaluation and classification in the State Government sector in particular. Mr Veitch outlined the usual methodology for conducting a classification assessment for a position within the government sector. This involves a review of the current JDF for a position which sometimes might be a few years old. Following this, interviews take place with the occupants of the position under review. This is followed by interviews with those who supervise the position. An assessment tool, the BIPERS, is then undertaken, which has a ten factor scoring system and is used extensively across government agencies.

77 The next stage involves looking for internal and external comparisons with the position under review. A work value assessment is then undertaken on the basis of the evidence and materials gathered, in terms of identifying any significant demonstrated increase in work value. The factors looked for are significant changes in a job in terms of responsibility, autonomy and decision making etc. Following this, a report is prepared and it is provided to the organisation with recommendations in relation to the classification concerned. Mr Veitch outlined the nature of the BIPERS assessment process, and what factors are taken into account and how the various ratings are achieved.

78 Specifically in relation to the Authority Prosecutors, Mr Veitch testified that he conducted two assessments of the positions, the first one in 2008 and the second, more brief review, in 2011. For the purposes of the 2008 assessment, the Report for which was tab 6 in exhibit R1, Mr Veitch outlined the process that he followed. Firstly he met with both the appellants to discuss their roles. Mr Veitch referred to the fact that the Prosecutors were reliant upon five key changes to their responsibilities, which have been referred to above in the decision of the Appeal Panel. Mr Veitch said he reviewed the responsibilities of the Prosecutor position, in light of the five factors raised by the appellants. Following this, Mr Veitch met with Mr McCaughey. He also met with Mr Greenham and Mr Furmedge to assess the position from their perspective. He then undertook a BIPERS assessment.

79 The next step involved a comparison with internal and external positions, looking for those positions which may have the closest match to that under review. Mr Veitch testified that he found a couple of positions which were a very good initial match to the Authority Prosecutor positions. In particular, was the level 4 DPI Senior Prosecutions Officer which contained seven duties of a total of 10 which were identical to that of the Authority Prosecutor. On that basis, from the perspective of comparative JDFs, Mr Veitch said he found a very strong correlation to exist. Another comparable position to the Authority Prosecutor role was the level 4 Supervising Fisheries and Marine Officer (Investigator), Department of Fisheries. From an assessment of these positions, Mr Veitch concluded that given that they were classified at level 4, the Authority Prosecutor positions were correctly classified.

80 In terms of a comparison with the level 6 Police Prosecutor position, Mr Veitch testified that whilst there were some similarities between this position and the Authority Prosecutor, there were two major differences. The first was the breadth of the Police Prosecutor role, in terms of the very broad range of offences that Police Prosecutors are required to prosecute. Additionally, Police Prosecutors generally do not have the aid of material such as CCTV footage for example. The second important distinction referred to by Mr Veitch was that the Police Prosecutor position, for salary purposes, is based on a rank structure and years of service, and not a job classification system based upon BIPERS etc, as is the case in civilian positions.

81 Accordingly, Mr Veitch referred to the fact that there could be a significant difference in remuneration between a sworn and unsworn officer, doing the same work. In Mr Veitch's assessment, this made any comparison with the Authority Prosecutors' classification level very difficult. Having heard the evidence in these proceedings relating to the work of Police Prosecutors, Mr Veitch testified that he had not altered his view in any way from that expressed in his 2008 and 2011 Reports.

82 Mr Veitch was asked about a further comparative position, that being the level 5 Senior Prosecutions officer at the then DPI. Mr Veitch said he examined this position carefully but noted that compared to the Authority Prosecutor, it undertakes some higher level work of a strategic nature and is involved in the supervision of other positions. When looked at in the context of the lower level 4 DPI position, with which many similarities were found, Mr Veitch said he concluded that the level 5 position

was probably more closely aligned to that of the Senior Prosecutor role at the Authority. In commenting specifically on the evidence given by Mr Madden, who occupied the level 4 DPI position, he noted that whilst Mr Madden's evidence was that he spent most of his time on relatively simple extraordinary driver's licence applications, for the purposes of classification review, he was focussing on all of the requirements and responsibilities of the position. Just because Mr Madden may have only been performing a small portion of the overall required duties, did not detract at all from the full range of responsibilities contained within the level 4 DPI position that an incumbent could be required to perform.

83 Similarly, a review of the level 4 Supervising Fisheries and Marine Officer Investigator position was undertaken. This position was noted as having some small prosecution component along with investigation responsibilities. Whilst it was a related activity, it was seen as a good comparison to the Authority Prosecutor role, along with the DPI level 4 position.

84 With the results of the BIPERS assessment, Mr Veitch noted that even though there was no formal supervision responsibility exercised by the Authority Prosecutors, given that there was a degree of mentoring and coaching of junior staff, Mr Veitch assigned some credit for this in his assessment.

85 The 2011 classification assessment was more of a review of the 2008 Report, in light of any changes that may have occurred. Mr Veitch testified that he was contacted by the Authority and requested to further review the position to establish whether any changes had taken place. Mr Veitch said he contacted Mr Steel, who did not wish to have any part of the further assessment. Whilst he did not specifically contact Mr Newman, Mr Veitch said that he assumed, from Mr Steel's response, that the Prosecutors did not wish to take part. Contact was also made with Mr Furmedge and Mr Collopy, to ascertain from their perspective, whether any changes had taken place which would require him to alter his conclusions reached in 2008. He was told there were no changes to the position. The only change in his report was a minor reassessment of the BIPERS score from 317 down to 307 in relation to supervisory responsibilities. Mr Veitch confirmed that he maintained the conclusion reached in both his 2008 and 2011 Reports and stood by them.

86 Mr Veitch was specifically asked about a number of factors featuring in this appeal. Firstly was the Prosecutor's contribution to the amendment of statute law. Mr Veitch said whilst he had heard the evidence given in these proceedings, it only served to confirm his view that the question of proximity to the ultimate decision is the crucial factor. That is, whilst a number of people may have an input into possible changes to legislation, it is proximity to the decision making, and hence the capacity to influence decision making, which is the most important factor. The same principle applied to the issue of developing and amending prosecuting policies and procedures. Mr Veitch said he had no doubt that from time to time the Prosecutors would, based upon their first-hand knowledge, be able to have input into policies. However, it is those ultimately responsible for the final drafting and authorisation of policy, that hold the greatest level of accountability on this factor.

87 Mr Veitch did not assign much weight to the issue of whether a Prosecutor could withdraw charges autonomously. He certainly understood that they could not. But despite this, from a classification perspective, Mr Veitch did not think any such responsibility would have other than a marginal influence overall on the work value of a position. In terms of the training and supervisory role of Prosecutors, Mr Veitch observed that he was aware of the evidence given about this factor. He differentiated between informal coaching and mentoring, where junior employees work with more senior employees, and structured training, where a person has responsibility for developing and formally assessing another officer. In terms of a general coaching and mentoring role, but not structured training, Mr Veitch did not see anything beyond level 3 or perhaps level 4, as an appropriate classification level for that sort of mentoring relationship.

Contentions of the parties

88 The appellants made a number of submissions in support of the many grounds of appeal advanced in these proceedings. There was a challenge to the process of the BIPERS assessment undertaken by Mr Veitch on the footing that the job evaluation questionnaire conducted did not meet the requirements of the BIPERS Classification Determination Manual. As the Commission understood it, a number of challenges were made in this respect. Firstly, the questionnaire was completed by the appellants but was not considered by Mr Veitch and there was no questionnaire completed by the Prosecutors' supervisors or managers. Secondly, there were no notes of the process provided to either Mr Newman or Mr Steel. Thirdly, the supervisors did not assign their assessment of the degree used for each factor or any subsequent review by high level management. Fourthly, there was no "meeting of the minds" which I take to be no comparison between the questionnaires as only one was undertaken. Finally, it is said that there was no discussion between the appellants and their supervision, in relation to the job evaluation questionnaire.

89 It was contended by the appellants that their performance of factors set out in grounds of appeal 1.6.1 to 1.6.4 inclusive, adds significantly to the work value of their position. These factors, which include the contribution to amending statute law; conducting case law research; contributing to the development of policies and procedures; and providing an advocacy service in relation to complex and protracted trials, were factors that Mr Veitch failed to take into account in both his comparisons with other positions and in his BIPERS assessment. In referring to Mr Veitch's evidence, and his acknowledgement that some of these duties were not undertaken in the comparative positions but are a feature of the Authority Prosecutor position and hence contribute to its work value, this was said to show error.

90 Specific reference was made to the development of policies and procedures. The materials tendered by the appellants were said to support the fact that there are many examples where the Prosecutors bring matters to the Authority's attention which lead to changes being made. It was contended that these matters do not feature in Mr Veitch's reports. In referring to the DPI level 4 position the appellants emphasised in particular the fact that 70% of the work undertaken is relatively straight forward, extraordinary driver's licence applications. These are brief and routine matters which do not involve Criminal Code defences, conflicting evidence and other matters arising, for example, under sentencing legislation.

91 In relation to the appointment as Special Constables under the Police Act, the appellants emphasised their view that the Prosecutors represent the Commissioner of Police in relation to Criminal Code matters. They also referred to some

inconsistencies in the evidence between Mr Collopy and Mr Furmedge in this respect. Reliance was placed on the authority imposed on the Prosecutors by s 172 of the Criminal Procedure Act 2004 (WA).

92 As to the autonomy to withdraw charges as specified in ground 1.6.7, this was said to further add to the increase in work value for the position of Prosecutors. As the Commission understands the argument, it was contended that by acting on behalf of the Commissioner of Police as a Special Constable, an Authority Prosecutor by the terms of ss136, 137 and 138 of the Police Act, is governed by the authority of the Commissioner of Police. Although employed by the Authority, there is no legislative power supporting the Authority's capacity to direct a Prosecutor to proceed or not with a Criminal Code offence. It is contended by the appellants that this hiatus places the Prosecutors in a precarious position.

93 As to the 2008 Prosecution Policy, it was submitted that whilst this provides some clarity, the relevant managers are not always available, despite the fact that as a consequence of cases into which the Corruption and Crime Commission has enquired, the onus is always on the Prosecutor to justify the withdrawal of charges. According to the appellants, these factors, along with the need to identify deficiencies in the prosecution case, have increased the work value of their position.

94 Examples of cases where these matters have arisen are referred to in the documentary evidence of the appellants. In relation to on-the-job training and mentoring of trainees, dealt with in ground 1.6.8 and in part, grounds 10, 11.1 and 11.2, it was submitted that these functions are not performed by the comparative positions at the former DPI or Fisheries Department. It was contended by the appellants that the training duty was actually removed from their responsibility, following the commencement of the present appeal. Reference is made to the June 2011 Report prepared by Mr Veitch in this regard. The removal of this responsibility was for the purpose of reducing the work value of the Prosecutor positions. It was contended that taking into account this training function, there should be a revised BIPERS score which should lead the Commission to reclassify the position to at least level 5.

95 In relation to negotiation with counsel, dealt with in ground 1.6.9, the appellants contended that this is an aspect of their work warranting higher work value responsibility, which is not performed by the comparative DPI and Fisheries level 4 positions. It was submitted that the Authority Prosecutors are required to negotiate on a regular basis in relation to both contested matters and at mentions, in relation to a range of issues. In this regard, reference was made to the evidence of Mr Donnelly, to the effect that the negotiations with counsel involve a high level of responsibility and complexity. He referred to a particular case, where negotiation led to the discontinuance of the prosecution. Other examples are referred to in the documentary evidence.

96 In relation to ground 1.6.10, that providing guidance and advice in all aspects of the criminal law and in relation to a wide range of charges and investigations, the appellants contended that this feature of the Prosecutor's work is not apparent in the comparative positions dealt with by Mr Veitch, at either the DPI or Fisheries Department. This is a factor leading to a higher work value contribution to the Authority Prosecutor position.

97 The requirement to assess the viability of proceeding with prosecutions is dealt with in ground 1.6.11. In this respect, the appellants contended that the Prosecutors are required to apply the "Statement of Prosecution Policy and Guidelines 2005" prepared by the Director of Public Prosecutions. This was confirmed in the evidence of Mr Collopy, Mr Furmedge and Mr Greenham. It was contended that this is in contrast to the comparative positions, which are not required to adhere to the general requirements of the DPP Guidelines, and thus adds to the work value of the Authority Prosecutor position.

98 The obligation to continually improve knowledge in relation to relevant statute law was advanced as a factor in ground 1.6.12. It was contended that the Prosecutors are required to maintain up-to-date knowledge of the relevant statue and case law and to use resources such as law libraries, to undertake their own independent research. This factor is not present in the comparative positions at the DPI as referred in the evidence of Mr Madden. Whilst the Fisheries Department level 4 is required to keep informed as to relevant statutes, there is no requirement to undertake ongoing legal research, as demonstrated in the evidence of Mr Schofield.

99 The reference to formal qualifications is contained in ground 1.6.13. In relation to this question, it was submitted that all Prosecutors have completed the Customer Service Security Officer course for appointment as a Special Constable. Furthermore, and in relation to ground 10.1 also, as a practical requirement, all Authority Prosecutors complete the Police Prosecutors' course following their appointment. It was contended by the appellants that without the knowledge obtained from these courses, it would be impossible for the Authority Prosecutors to effectively undertake their roles. The submission was that if such training were not required, then Authority Prosecutors would not be sent on the courses in the first place.

100 Reference was made to the evidence of Mr Pidco, who described the content of the Police Prosecutor course as being at a TAFE Diploma level or the first year of a non-law university degree. In comparison, such training is not required or generally undertaken by the DPI or Fisheries level 4 positions. It was therefore contended that such skills obtained from the completion of these courses are not required to be exercised in those particular positions. Accordingly, it was submitted that the BIPERS assessment should be revised to at least the "trade or vocational qualification" which is degree three in Factor 1, dealing with education.

101 As an overall submission, in relation to the comparative positions, it was contended that the Authority Prosecutors perform at a higher level, have greater responsibilities, and are required to possess knowledge and skills not required to be demonstrated by the DPI and Fisheries Department level 4 positions. On this basis, it was submitted that the Authority Prosecutors should be at least classified as level 5. In short, and by inference, the appellants contended that a simple comparison, line by line, of the JDFs for the DPI and Fisheries Department level 4 positions, with the Authority Prosecutor JDF, does not paint the full picture.

102 The appellants referred quite extensively to the evidence of Mr Scudds and Mr Pidco and also of Sergeant Smith, when comparing the work and responsibilities undertaken by Authority Prosecutors compared to Police Prosecutors. It was submitted that on the evidence, a finding is open that the two Prosecutors require the same knowledge and skills in relation to the work that they do. It was also submitted that the evidence in relation to the success rates for both Authority Prosecutions and Police Prosecutions are broadly similar, which supports the contention of comparability.

103 Furthermore, in relation to the comparison with the Police Prosecutors, it was contended that the Police Prosecutors have the benefit of a well-resourced prosecution service and officers receive the benefit of extensive training, as they progress through the Police rank structure. They are supported by well-trained officers. By comparison, the Authority Transit Officers, responsible for the compiling of briefs of evidence to be prosecuted by the Prosecutors, receive only minimal training, and this extends to those that are required to supervise them. The contention of the appellants was therefore, that Authority Prosecutors carry an extra burden to ensure that the briefs of evidence are adequate and are required to attend to any deficiencies themselves. Furthermore, the Authority Prosecutors do not generally have access to experienced legal practitioners for guidance and advice.

104 In relation to the Reports of Mr Veitch of 2008 and 2011, a number of criticisms were advanced. It was contended that the conclusion of Mr Veitch that Prosecutors conduct prosecutions for relatively simple cases, is not consistent with the obligation on Prosecutors to prosecute Commissioner of Police authorised offences under the Criminal Code. Reference was made to the evidence of Mr Scudds, as to the difficulties in some of the matters dealt with by Authority Prosecutors. In relation to Mr Veitch's conclusions regarding the "limited number of defences" dealt with by Authority Prosecutors, it was contended that this conclusion is inconsistent with the terms of s 36 of the Criminal Code, which extends to offences prosecuted throughout the State. It was submitted that this was also consistent with the evidence of Mr Furmedge.

105 In relation to the issue of use of CCTV footage, it was contended that Mr Veitch's conclusion that this made the Authority Prosecutor's job easier, was inconsistent with some of the documentary evidence before the Commission. In short, the appellants said that the availability of CCTV footage may work both for and against the prosecution, depending upon the facts of the case. As to Mr Veitch's conclusion that the "majority of cases prosecuted by the position relate to fare evasion", this was said to be incorrect and inconsistent with the evidence in these proceedings, including that of Mr Collopy. Additionally, the conclusion that most cases result in a fine was also inconsistent with the terms of the Sentencing Act 1995 and the evidence of Mr Furmedge.

106 Mr Veitch's conclusion that "untrained employees have filed in for the Prosecutor where necessary", is only relevant to appearances for mention, and not contested trials where legal argument may be required. This was said to be consistent with the evidence as to the Fisheries Department level 4, and the evidence of Mr Furmedge.

107 Furthermore, Mr Veitch's conclusion that the Authority Prosecutor's role was a "limited and repetitive one" was inconsistent with the proposition that no two cases have the same facts or issues arising, and therefore that conclusion was erroneous. It was submitted that Mr Furmedge's evidence was supportive of this conclusion.

108 In relation to the conclusions of Mr Veitch regarding the work of Police Prosecutors, a number of submissions were made. Firstly, the conclusion that Police Prosecutors deal with a wide range of matters was not contested by the appellants. However, this is said to be a workload or work volume issue, and not a matter of work value. The conclusion as to Police Prosecutors dealing with complex issues requiring complex defences overlooked the work of Authority Prosecutors dealing with all defences under s 36 of the Criminal Code. Mr Veitch's conclusion that a Police Prosecutor "has no supporting evidence supplied to certify the case", in relation to, for example, access to CCTV footage, is not correct, and the general lack of independent witnesses available to Authority Prosecutors makes their work at least as demanding. Furthermore, Mr Veitch's conclusion that Police Prosecutors "must investigate alleged claims", and by inference Authority Prosecutors do not, is not consistent with the evidence. The appellants contended that in relation to their matters, investigation takes place through cross-examination in court proceedings.

109 Finally, Mr Veitch's conclusion that Police Prosecutors "use a wider range of skills to extract required information, relying on sometimes conflicting evidence from witnesses", is equally applicable to the work of Authority Prosecutors, as demonstrated in the evidence of Mr Furmedge, where he agreed that as with Police prosecutions, in Authority Prosecutions, there is always conflicting evidence.

110 In relation to the BIPERS assessment conducted by Mr Veitch in his 2008 Report, the appellants took issue with every aspect of his conclusions. It was contended that in relation to scope of activity; interpersonal skills; kind of problems dealt with; instructions received; influence on results; size of organisation or unit and personnel supervised/controlled, the rankings given by Mr Veitch to the Authority Prosecutors were too low and this adversely effected their classification determination.

111 For the Authority, counsel submitted that the evidence adduced in these proceedings, and the arguments advanced by the appellants, fall well short of establishing that firstly, the position of Authority Prosecutor was incorrectly classified at level 4 at the outset, or secondly, there has been any significant increase in the work value of the position since original classification, that would warrant a reclassification.

112 Since the original classification in May 2001, which led to Authority Prosecutors being classified at level 4, there have been three occasions, including two Appeal Panels, chaired by former Commissioners of this Commission, when the level 4 classification was affirmed as being correct. Whilst submitting that the Commission as presently constituted is not, of course, bound by the previous determinations of the Appeal Panels, it is contended that in particular, the most recent determination should be accorded appropriate weight. Furthermore, the evidence of Mr Veitch, the BIPERS assessment that he undertook, and the comparisons that he reviewed, confirmed the initial classification at level 4 was correct. As a general submission, counsel for the Authority contended that Mr Veitch's evidence was thorough, cogent and was not seriously challenged by the appellants in cross-examination.

113 The Authority contended that the cases advanced by the appellants in relation to the comparative analysis undertaken by Mr Veitch and their criticisms of it, are without merit. Dealing firstly with the Police Prosecutor position, the Authority submitted that endeavouring to compare the level 6 position with the Authority Prosecutor position is erroneous. This is for a range of reasons. The Police Prosecutor position is not one which is classified in the same manner as positions are classified in the Western Australian Public Sector. The determination of classification and salary level of the Police Prosecutor position results from the WA Police rank structure. This provides that officers who have achieved generally the level of Sergeant are

seen as eligible for appointment as Police Prosecutors. The attainment of the rank of Sergeant in the WA Police is dependent upon a number of factors, including the acquisition and discharge of a broad range of skills and responsibilities, over a substantial period of time. Those skills and responsibilities, acquired through progression in the rank structure, will generally be much wider than those necessarily required in the Police Prosecutor role.

114 It was therefore contended by the Authority, that making comparisons between the duties performed by a Police Prosecutor, with those of an Authority Prosecutor, is misleading and simplistic.

115 Furthermore, and even disregarding that factor for present purposes, the Authority submitted that there are many differences between the requirements of the Police Prosecutor and the Authority Prosecutor role. A Police Prosecutor, as a part of his or her ordinary duties, prosecutes a much broader range of offences, and hence is required to possess a broader knowledge of law, including all available defences. Police Prosecutors are required to prosecute all offences throughout the State. As the evidence disclosed, it was contended that Police Prosecutors are required to often prosecute cases with very little notice. By comparison Authority Prosecutors have a relatively large amount of time to prepare their cases.

116 Also, whilst acknowledging that it is more of a work load than work value issue, Police Prosecutors generally conduct much longer trials than Authority Prosecutors. In relation to the JDFs for the two positions, counsel for the Authority contended that the Police Prosecutor position has many more responsibilities in its JDF than the Authority Prosecutor position does. Furthermore, the contention by the appellants that the inclusion of factors such as "advocate on complex and protracted cases", "conduct legal research" and "contribute to the amendment of statute law" in their JDF (as they submitted they should be) would support their reclassification, was erroneous. This is because of the other significant differences between the JDFs, highlighting the greater responsibilities of the Police Prosecutor position.

117 In relation to the DPI Senior Prosecutions Officer level 4, the Authority contended that this was an appropriate and helpful comparison with the Authority Prosecutor position. Mr Veitch's evidence that there were seven areas of similarity between the two roles and that the JDFs were largely the same supported the conclusion that the comparisons between the JDFs for both positions was appropriate and valid. Whilst the appellants focused on the evidence of Mr Madden, that he only undertook a limited range of duties whilst in the DPI position, this was said to be irrelevant for the purposes of classification review. This was so, as Mr Veitch's evidence clearly established that the responsibilities required of the position were much broader than the duties actually performed by Mr Madden, and the responsibilities in the JDFs for both positions were broadly very similar.

118 The Authority submitted that even having regard to the assertions of the appellants, that their existing JDF should include a range of matters as set out in grounds 1.6.12 and 1.6.13, the overall similarity between the JDFs for both positions remains valid for present purposes. Furthermore, the Authority contended that the assertions of the appellants that factors such as contributing to the amendment of statute law (ground 1.6.1), contributing to the development and amendment of policy (ground 1.6.3), autonomy in court to withdraw a prosecution (ground 1.6.7), and a requirement to complete the Certificate III course (ground 1.6.13), are not maintainable on the evidence led in the present proceedings.

119 In relation to the other particularised duties, such as conduct case law research (ground 1.6.2), provide an advocacy service in relation to complex and protracted trials (ground 1.6.4), and wide range of trials (ground 1.6.5), on-the-job training (ground 1.6.8), liaise and negotiate with opposing counsel (ground 1.6.9), provide guidance and advice to officers (ground 1.6.10), assess the viability of matters (ground 1.6.11), and continuing legal education (ground 1.6.12), taken collectively, all of these responsibilities could equally be included in the DPI level 4 position JDF based on the evidence. It was contended by counsel for the Authority, that the fact that these duties are not separately particularised, particularly having regard to the evidence of Mr Veitch, may simply be a drafting preference as they are in any event, an overall part of the job in each case.

120 As to the BIPERS assessment undertaken by Mr Veitch, it was submitted by the Authority that Mr Veitch's evidence in relation to this process was not in any way challenged in the proceedings. Furthermore, there was no direct evidence led by the appellants to contradict Mr Veitch's evidence in this regard. The suggestion put to Mr Veitch in cross-examination, that he in some way failed to apply the "Classification Determination Manual: Guidelines for Assessment and Determination of Classifications", rendering his assessment ultra vires, was wrong. It was submitted by the Authority that it is the Chief Executive of the Authority who exercises the statutory power to classify. Moreover, the manual is merely a guide and does not prescribe the BIPERS assessment process.

121 The question of autonomy to withdraw charges was described by the Authority as being seemingly a central issue raised by the appellants. In referring to the evidence of Mr Veitch, the Authority submitted that even if this was so as contended by the appellants, but which is denied, this would not have effected Mr Veitch's BIPERS assessment. This is because of Mr Veitch's evidence, that the existence of such a power would be regarded as an ordinary incident of the particular position in question without fundamentally altering its nature.

122 The Authority submitted that regardless of the contentions advanced by the appellants about what they said were the legal sources of their power to withdraw charges, the reality is that the Authority has a policy in place which has been followed. This policy is a condition imposed on Authority Prosecutors by their employer and is an obligation imposed on them by their contracts of employment. It was contended by the Authority that to constantly speculate as to whether the power to withdrawal charges resides in particular pieces of legislation, is largely not to the point. It does not assist in determining any change in work value of the Authority Prosecutor's position.

123 Overall, the Authority contended that there has been little if any change in the role and responsibilities of the Authority Prosecutor position since it was correctly classified at level 4 in 2001. Whilst some emphasis was placed upon it by the appellants, the Authority submitted that Authority Prosecutors have always prosecuted general criminal matters where offences are committed on Authority property, but did so as Special Constables under the Government Railways Act 1904. The only difference now is they do so as Special Constables under the Police Act 1892, which is essentially an administrative change in authority to prosecute. Furthermore, the matters raised by the appellants, including the obligation to view CCTV footage,

changes arising from the Criminal Procedure Act 2004 and the effect of the Corruption and Crime Commission Act 2003, have not added to the work value of the Authority Prosecutor position, let alone constituting a significant net addition to work value to warrant a reclassification.

Consideration

124 It is important to always keep at the forefront of mind in this matter, that the test of whether a position should be reclassified is a need to demonstrate on the evidence, a significant net addition to the work requirements of a position to warrant the creation of a new reclassification or a higher classification. Some changes to the requirements of a position are not enough. The change to the duties and responsibilities of a position, or the conditions under which work is performed, must be substantial. This is the essence of the work value principle of the Commission's Wage Fixing Principles, repeatedly applied in matters of this kind. The test is a strict one, to guard against over classification.

125 The appellants have set out many "grounds of appeal", alleging various errors based on the evidence before the Appeal Panel. As I have observed, there was no transcript of the proceedings before the Appeal Panel which makes the consideration of their complaints difficult, as an appeal in the traditional sense. What the Commission can do is assess the issues raised by the appellants, on the evidence in these proceedings, to determine, in light of the Appeal Panel's conclusions, whether a reclassification is warranted. Indeed, as the case for the appellants developed, in part it departed from the articulated grounds of appeal. In essence, the complaints really related to an alleged failure to have regard to significant differences, in work value terms, between the Authority Prosecutor positions, and those used for comparative purposes by Mr Veitch in his Classification Report.

126 Additionally, the appellants relied on the factors raised before the Appeal Panel, including the obligations imposed by the CCC Act; changes introduced by the Criminal Procedure Act; the viewing of CCTV footage; and the requirement to supervise staff, as supporting their claim to an increase in work value.

127 I will approach the determination of the appeals in this way also.

Ground 1 – Duties and Responsibilities

128 The appellants abandoned grounds 1.1 to 1.5 at the outset of the hearing. The remaining grounds in 1.6.1 to 1.6.13 focus on a range of functions that the appellants say they perform and are not in the JDF for their position, and are thus not formally recognised. Others are said to not have been taken into account by Mr Veitch in his assessment of the position.

129 In general terms it is asserted by the appellants that the Appeal Panel failed to have regard to a range of responsibilities that are part of the role of an Authority Prosecutor, and the Appeal Panel failed to properly assess the work value of the comparative positions. These contentions broadly encompassed grounds 1.6.2, 1.6.4, 1.6.5, 1.6.8, 1.6.9, 1.6.10, 1.6.11 and 1.6.12 of the grounds of appeal. As to grounds 1.6.2 and 2.1 (conduct case law research) and 1.6.4 (conduct an advocacy service) specifically, these two issues were specifically identified by the Appeal Panel at pp 4-5 of its reasons.

130 At p 11 of its reasons, the Appeal Panel, in the context of the appellants' then claim that their positions were never properly assessed, concluded that such responsibilities fairly fall within the overall duties in the position JDF of "provides an effective and efficient prosecution service for the Transperth Transit Operations Security Service Group". This conclusion was plainly correct. Such responsibilities are part of the role of an advocate and prosecutor. It is not necessary to separately identify in the JDF each of these responsibilities. In my view, they are a subset of the overall responsibilities. No error or change has been identified. These responsibilities have always been part of the role and it is difficult to see how the job of an Authority Prosecutor could be effectively performed, without these functions being encompassed within it.

131 The approach to these matters adopted by the appellants highlights the problem they face. It seemed on the contentions advanced by the appellants that the fact that these responsibilities were not identified in the DPI or Department of Fisheries position JDFs, meant that their own positions carried a higher work value. Similarly, as above, the failure to identify these particular duties in the Authority Prosecutor JDF meant that they were under-classified. It followed, on this, submission that Mr Veitch, in not separately valuing these aspects of the Authority Prosecutor role, failed to have regard to relevant considerations in assessing the overall work value of the position. He also failed to have regard to the lesser work value of the comparator level 4 DPI and Fisheries positions.

132 The problem with this approach is that the specific sub-functions could equally be expressed in either or all of the JDFs for the Authority, the DPI and Fisheries prosecution positions. That is, it is to be assumed, as Mr Veitch stated in his testimony, that these functions are a "given" as part of the overall requirements of a prosecutor's role. In his testimony, Mr Veitch considered that because of this, the inclusion of all or some of these sub-functions would not alter his overall assessment of work value. In my view, this conclusion was correct and nothing has been put by the appellants to cause me to not accept Mr Veitch's conclusions in this regard.

133 Further, the failure to specify such functions separately in the JDF for the Authority Prosecutor provides no support for the proposition that the positions were not properly assessed in work value terms, from the outset.

134 A number of other separate aspects of the Authority Prosecutor role were identified by the appellants as said to support a reclassification. These included ground 1.6.1 (contribution to the amendment of statute law); ground 1.6.3 (contributes to the development and amendment of policy); ground 1.6.7 (autonomy in court to decide not to proceed with any charge); ground 1.6.13 (requirement to complete the Certificate III course).

135 Dealing first with the issue of contributing to the amendment of statute law. I have already outlined the evidence in relation to this matter. The appellants referred to two occasions when they were required to provide input to the review of legislation. The first involved an issue identified by the Prosecution Section in 2008 in relation to the signing of prosecution notices under the Criminal Procedure Act 2004. This led to written advice from Mr Greenham to senior Authority management, to alert them to the problem and to propose various options to resolve the issue. The second related to a five yearly review of the

Public Transport Authority Act in 2009. Views were sought across all relevant areas of the organisation as to problems identified with the operation of the legislation and suggested changes to address them.

136 As to the latter issue, it is important to note that the input into the legislative review was sought across the Authority. Each relevant area of its operations made some contribution. The Prosecutions Section was involved only as to security related issues. There were other issues raised from different sections of the organisation. There is nothing unusual or particularly significant about the Prosecutors' involvement. The evidence before the Commission was that this process took place as part of a regular legislative review and all areas of the Authority were involved. Once identified, issues were forwarded to senior management. It is from that level of responsibility that proposals for amendment to the legislation were taken to government. The Prosecutors did not have any particular overall responsibility for the implementation of reform. They were contributors, as were many others in the Authority. I do not consider that this involvement carries any particular work value component.

137 I agree with the conclusions reached by Mr Veitch in his testimony, that such a factor is given substantial weight only in circumstances where the office has a close and influential effect on the ultimate decisions taken to implement change. That is not the case with the input from the Prosecution Section, undoubtedly helpful though it was.

138 As to the contribution to the development and amendment of policy and procedures, an example referred to by the appellants was a revision of the Authority Transit Officer Operations Manual. Mr Collopy sought comment from a range of persons within the Authority, as to "possible omissions or major corrections". Again, as with the review of the Authority legislation, whilst no doubt the contribution by the Prosecutors was valuable and helpful, this process does no more than reflect sound management, to obtain the views of those dealing first hand with these sorts of issues in the workplace. This is not a factor in my view, evidencing any particular work value factor which may have been overlooked in the past.

139 Also, I accept Mr Veitch's assessment on this issue that it is ultimately those responsible for the final formulation and approval of a policy, who carry the major accountability. Whilst this factor was not specifically identified and addressed by the Appeal Panel, it does not advance the appellants' case for reclassification in my view.

140 The next issue relied on by the appellants, and about which much evidence and many submissions were devoted, was the autonomy said to be possessed by the prosecutors to withdraw or amend a prosecution. I have summarised the evidence and submissions on this question earlier in these reasons. In support of this issue, many documents were referred to by the appellants dealing with cases conducted by them, in which a charge had been amended withdrawn or where no evidence was offered to the court. This issue is also linked to grounds 1.6.6 and 2.6, which deal with the issue of the appellants appearing for the Commissioner of Police as a Special Constable, when prosecuting Criminal Code offences on the Authority's property.

141 This issue also concerns the terms of a policy introduced by the Authority in 2008 entitled the "PTA Prosecution Procedure (TTO)". The purpose of the Procedure is "to provide for the uniform management of information contained in court briefs of evidences (sic) held by the PTA of WA and the obligations of employees representing the PTA in the lower courts of the WA judicial system".

142 On the evidence, this policy was developed and introduced following a review by the Crime and Corruption Commission into the Authority's approach to prosecutions, and the need for a formalised and transparent approach. The relevant part of the Procedure for present purposes is cl 5.9, dealing with the withdrawal of charges and is in the following terms:

> "5.9 **Withdrawal Of Charges**
>
> 5.9.1 All charges that have been laid are only to be withdrawn after they have been reviewed by the Manager Prosecutions & Projects. The review will involve consultation with the Senior Prosecutor and/or nominated prosecutor and the case officer. Where applicable, legal authorities will be considered.
>
> 5.9.2 Where applicable and if practicable, consultation with the PTA Solicitor and/or the State Solicitors Office may be sought prior to any decision to withdraw a particular charge. This should only be considered where the charge is indictable and it involves a high degree of complexity in the supporting evidence.
>
> 5.9.3 If a recommendation for discontinuance is supported the Manager Prosecutions & Projects will bring it to the attention of the Manager Security.
>
> 5.9.4 If the charges have already been listed by the courts, prior to the mention the defendant or the defence lawyer/solicitor will be advised. The advice will be in the form of written notification. Any such notification is to be placed upon the brief.
>
> 5.9.5 If the charges have not yet been listed for court, that is a summons matter that is to be compiled by the prosecutions office, after the review as detailed in 5.7 has been conducted, the accused will be notified in writing that the PTA will not precede with the charges. This written notification will be done by the prosecutions office.
>
> 5.9.6 In all other cases of matters being referred to summons by a case officer the withdrawal of charges is to be progressed consistent with Section 7, clause 10 of the Transit Officer Manual.
>
> 5.9.7 In all circumstances the prosecutor making the recommendation for discontinuance will provide the reasons supporting the recommendation, such reasons must be supported at law or to be in the public interest. If the recommendation is approved a notation is to be placed onto the court brief and an entry is to be made in the discontinuation book that is kept in the Prosecution Office."

143 As I understood the contentions of the appellants, by their appointments as Special Constables under Part II of the Police Act 1892, and as representing the Commissioner of Police in prosecutions under the Criminal Code on Authority property, the Prosecutors are, whilst employees of the Authority, subject to the legislative authority of the Police Act and the Criminal

Procedure Act. In this situation, the Authority has no legislative authority over Prosecutors in relation to such matters. This is said to create a level of tension between their duties as employees and their obligations to the Commissioner of Police, as the argument ran. It was said that these responsibilities substantially add to the work value of their positions and Mr Veitch failed to understand or have proper regard, or indeed any regard, to these factors. The appellants also said that while the 2008 Procedure does provide some relief, it is not always possible to comply with it when in court. There was a further contention by the appellants that the terms of cl 5.9 of the Procedure are not clear and that it does not apply once a Prosecutor enters a court building. This is referred to above in Mr Newman's evidence. I did not understand this argument. In my view, the terms of cl 5.9.1 are clear and unambiguous. It applies to all charges, once laid, irrespective of the stage reached in a particular prosecution.

144 Whilst the appellants made much of their appointment as Special Constables for the purposes of this issue, from all of the evidence it is clear that this step was taken by the Authority to overcome technical difficulties with the prosecution by the Authority of Criminal Code offences committed on Authority property. The appointment as a Special Constable does not make the Prosecutors police officers or members of the Police Force for the purposes of the Police Act: ss 34; 37 Police Act. This is subject to the protection from personal liability and recovery of damages for corrupt or malicious conduct, which is extended to Special Constables, by ss 137 and 138 of the Police Act.

145 Regardless, however, of the consequences of the application of the Police Act and other legislation, the fact remains that as employees of the Authority, the appellants are subject to, and are obliged to comply with, the 2008 Procedure. The evidence was that it is followed and there was no serious contention put that, in the event in the course of a defended trial, an amendment to a charge was necessary, the presiding Magistrate would not grant a brief adjournment in order for the Prosecutor to take instructions from senior management. This would enable the Prosecutor to obtain approval from the senior management of the Authority to take whatever steps the Prosecutor considered appropriate.

146 Even prior to the formal Procedure in 2008, it seems there was a practice in place whereby decisions to amend or withdraw charges were required to be subsequently justified in writing. In this regard I refer to the evidence of Mr McCaughey and confirmed in the testimony of Mr Furmedge. The appellants are also subject to the direction and control of the Authority as their employer, under their contracts of employment.

147 Given that ultimately the responsibility under the Procedure rests with the senior management of the Authority to approve the withdrawal of charges, I am not persuaded that there is any particular additional work value involved for a Prosecutor. Despite this, I refer to the uncontradicted testimony of Mr Veitch, to the effect that even if the Prosecutors had such autonomy, he considered that it would be part of the overall responsibilities of a Prosecutor and would not alter the nature of the position. It would not, on Mr Veitch's assessment, cause a review of the BIPERS score he arrived at, on his review of the position. These issues were specifically referred to by the Appeal Panel and no error is disclosed in my view.

148 The current JDF for the level 4 Authority Prosecutor position does still provide for subordinate positions to be directly responsible to the position. The current JDF has been in place since 2007. It is under review. This issue has been contentious. At the time of the 2008 classification review undertaken by Mr Veitch, the two Prosecutions Assistants were claimed to be responsible to the then three Prosecutor positions, with an overall responsibility for about .6 FTE positions. Mr Veitch in his BIPERS assessment concluded that even taking into account the supervision of 1-2 staff, this would have a minimal overall impact on work value and amount to a possible ten point rating in the overall score.

149 In the Appeal Panel decision, the Panel accepted Mr Veitch's assessment that there was, for the purposes of the BIPERS, an appropriate rating for supervision of staff, even though this was contested by the appellants before the Appeal Panel. It said the 2007 JDF was in error, having been based on an earlier JDF in 2003. Despite this, the Appeal Panel concluded it was appropriate for Mr Veitch to give this a rating.

150 In the "desktop" review undertaken by Mr Veitch in 2011, reference was made to Mr Furmedge's observation that this issue was contentious before the Appeal Panel as in those proceedings, the Authority contended that the inclusion of supervision in the appellants' JDF was in error. It was said that it has since been removed to reflect the actual position. This led to a revision downwards of the BIPERS score from 317 to 307, to reflect the removal of supervision and the training of staff. However, despite all of this, the approved JDF effective 26 March 2007, in evidence and annexed to both the 2008 and 2011 Classification Review Reports, still refers to two positions of Prosecutor Assistants as being under the responsibility of the Prosecutor. The evidence also refers to the on–the-job training and mentoring role of the Prosecutor in relation to trainees. I therefore consider it appropriate to restore this factor to the overall BIPERS score.

151 The present 2007 JDF does not require a specific qualification for appointment as a Prosecutor. The evidence of Mr Newman was to the effect that he completed the Certificate III course and that by now, all have completed the Police Prosecutors' course. An assessment is to be made of the current requirements of the position and whether any change in work value has occurred. In my view, the requirements of the position have not changed in this respect. Whilst no doubt, as the Authority acknowledged in its testimony, the completion of the relevant courses is an advantage, in terms of the professional development of a Prosecutor, a requirement for such is not a pre-requisite for appointment. Candidates for appointment may come from a range of backgrounds.

152 I accept that a candidate for appointment who has practical experience in the application of legislation, and developed advocacy skills, but who may not have formal qualifications, may be suitable for appointment. I am also not persuaded that appointment as a Police Special Constable, as opposed to the prior appointments as Railway Special Constables, has materially changed the position.

153 Apart from three further discrete issues raised by the appellants, they being the impact of the Corruption and Crime Commission Act; viewing CCTV footage; and the procedural requirements of the Criminal Procedure Act, the remainder of the appellants' contentions largely centred on the comparative positions used by Mr Veitch in his analysis.

Ground 2 – Comparative Positions (2.1 – 2.6)

154 A major plank in the appellant s case in this respect was the comparison with the position of Police Prosecutor at the WA Police. This also seemed to be a key part of the attack by the appellants in the Appeal Panel proceedings. Similarly, is the contention of the appellants that the comparisons by Mr Veitch, relied upon by the Appeal Panel, as to the DPI level 4 and the Department of Fisheries level 4 positions, were erroneous. This is also touched on in ground 7 in general terms, repeating the assertions made elsewhere in the grounds of appeal.

155 Police Prosecutor positions are presently classified as level 6. However, of significance for present purposes, is the fact that Police Prosecutors classification levels are based on the WA Police rank system. That is, on the evidence, those appointed to Police Prosecutor positions are generally drawn from the rank of Sergeant, an officer having progressed from a police cadet to that level. Progression to that level requires the officer to have undergone the necessary training and to have a level of experience to enable the officer to occupy a number of operational positions within the WA Police. A Police Prosecutor may be re-deployed to an operational role if necessary. A broad range of skills is required and on Sergeant Smith's testimony, candidates for appointment as Police Prosecutors are unlikely to have had less than seven to 10 years of experience as a police officer.

156 Thus, the attainment of a "level 6" classification for a police officer, based on the rank structure, is very different to the attainment of a "level 6" classification for a public servant. This point was illustrated on the unchallenged testimony from Mr Veitch, to the effect that there could be a substantial difference in the remuneration between a sworn and unsworn officer within the WA Police, doing the same work.

157 It is to be accepted that at first blush, when looking at an Authority Prosecutor and Police Prosecutor appearing in court on a matter, substantial similarities in the work done may exist. That is, both prosecutor positions involve criminal advocacy work in the lower courts. This much was referred to in the evidence of Mr Scudds and Mr Pidco. This point was also made in the Authority's submission. However attractive this superficial comparison may be, a closer analysis of the positions reveals substantial differences. Leaving aside the issue of rank structure, the Police Prosecutor JDF shows the position to have a much broader role than the Authority Prosecutor position. The Perth Prosecution Division of the WA Police "has a state-wide strategic management and co-ordination role for all prosecution officers and is able to provide a diverse working environment in the Perth Magistrate's Court, Perth Children's Court, metropolitan courts and major country court locations throughout the State". (JDF April 2007 Annexure 3 to Mr Veitch's 2011 Report).

158 In the discharge of their responsibilities, a Police Prosecutor must also be able to prosecute the full range of criminal offences throughout the State, requiring knowledge of all the relevant offences and defences. On the evidence, Police Prosecutors often have very little time to prepare for trial and may be called upon to prosecute a matter in court with less than one hour's notice. Also, on Sergeant Smith's evidence, Police Prosecutors are called upon to conduct "A class" trials, those of some complexity, regularly. These matters are generally assigned to more senior and experienced prosecutors.

159 A detailed examination of the current JDF for a Police Prosecutor also reveals other substantial differences in the position. In terms of overall accountabilities/duties, the prosecuting aspects of the role are broad. This includes preparing reports on appeals and amendment of statutes and research in relation to this. A Police Prosecutor liaises with other Divisions of the WA Police and provides advice and guidance on prosecution matters. There is a substantial leadership and management role involving the formal training and development of staff, formal supervision and appraisal of subordinate staff and other duties.

160 Having considered all of the evidence in relation to this aspect of the appellants' case, I am not persuaded that the Appeal Panel was in error in the conclusions it reached. Nor am I persuaded to any extent, that Mr Veitch's testimony in both his initial 2008 assessment and his subsequent review in 2011 should not be accepted, as to the higher work value of the Police Prosecutor position.

161 The further comparisons upon which reliance was placed by Mr Veitch, and in relation to which the appellants challenged Mr Veitch's assessment, were the Senior Prosecutions Officer level 4 position at the DPI and the level 4 Supervising Fisheries Officer (Investigation) at the Department of Fisheries. As noted, Mr Veitch, from a consideration of the JDFs, found the DPI level 4 position a particularly good fit, with alignment on seven out of 10 duties for both positions. A review of the JDFs for both the Authority and DPI positions shows a very considerable degree of alignment. Indeed, on Mr Veitch's testimony, he thought that the Authority position JDF was probably based on the DPI level 4 role, because there was such a close correlation between them.

162 The process adopted by Mr Veitch as a senior and experienced consultant engaging in this work, of undertaking a comparison of the JDFs for the comparative positions, and the Authority Prosecutor position, is of itself unexceptional. The comparison undertaken was revealing. The JDFs for both positions have much in common in terms of key responsibilities. Both positions provide an effective prosecutions service for their respective agencies. The identified duties in each of the JDFs are very closely aligned. In my view, this comparison was a legitimate and useful tool in the overall assessment of the work value of the Authority Prosecutor positions. I see no error by Mr Veitch in his approach, or in turn, by the Appeal Panel.

163 A key point made by the appellants as to the DPI level 4 position was that on the evidence of Mr Madden, summarised above, the scope of the work performed in the position is narrow and focussed on extraordinary driver's licence applications. Therefore the argument developed that the Authority Prosecutor position, performing in practice a broader range of prosecution matters, is intrinsically of higher work value. However, with respect, there is a fundamental misconception with this argument. The fact that an officer, as an occupant of an office, may only, at any given point of time, perform some duties required of an office, does not indicate the work value of the office. The work value factors relevant to a position are the duties and responsibilities that may be required to be performed by the holder of the office. Plainly on Mr Madden's evidence, he was only required to perform a limited range of the duties that may be required of the DPI Prosecutor position. However, he may have at any time, been required to perform the full range of duties, which are closely aligned to that for the Authority Prosecutor position.

164 For example, the first duty of the DPI Prosecutor position is to conduct prosecutions including contested hearings in the Magistrates Court and the State Administrative Tribunal under a range of different legislation. The fact that Mr Madden did not undertake this work at the time is irrelevant to the work value considerations that arise in relation to this issue. Similarly, is the requirement to conduct prosecutions in various courts and the State Administrative Tribunal on behalf of Main Roads WA, which duties were also not performed by Mr Madden. Mr Veitch's conclusions in this regard, in his evidence, were entirely correct from a work value perspective in my view.

165 As to the Department of Fisheries level 4 position, the appellants made much of the fact, not controversial, that prosecution work was a relatively small component of the overall duties of the office. This was the evidence of Mr Schofield. This is also consistent with the JDF for the position, which indicates that prosecution related activity accounts for approximately 10% of the overall duties. The bulk of the responsibilities of this position relate to investigation work, which on the JDF represents approximately 70% of the duties of the position. From the JDF, the investigation duties of the position are relatively high level. The position is also responsible for the apprehension of offenders and has a substantial supervisory and management role.

166 In my view, even though the prosecution component of this position is relatively small, given the investigative functions, the position for comparative purposes as a level 4 office, was appropriate. As Mr Veitch observed in his evidence, it "added weight" to his assessment, given the position had a similar level of responsibility. There was no error in this approach by Mr Veitch, or in the Appeal Panel's conclusions in relation to this issue.

Ground 3 – Position Not Properly Initially Evaluated (3.1 – 3.3)

167 This ground asserts that the previous Appeal Panel in February 2003 did not properly consider whether the Authority Prosecutor position was properly classified as level 4, and that the 2010 Appeal Panel could not have concluded that it was. Whilst the 2003 Appeal Panel regrettably, did not publish reasons for rejecting the appeals, the fact remains that the 2010 Appeal Panel considered all of the relevant material in relation to this issue and concluded that there was no substance to the allegations. As dealt with above, the fact that the JDF for the Authority Prosecutor does not list each and every task the appellants say should be in it, does not mean that the responsibilities claimed are not comprehended by the position. The Appeal Panel in 2010 made no error in this regard. Nor has anything been established in these proceedings, to call that conclusion into question.

Ground 4 – Assessment of Mr Scudds' Evidence

168 This ground was not pressed by the appellants. In any event, in the absence of a transcript of the Appeal Panel proceedings the allegation cannot be evaluated. The Commission has had the benefit of Mr Scudds' testimony in these proceedings, all of which has been taken into account.

Ground 5 – Withdrawal of Charges and Autonomy of Prosecutors (5.1 – 5.3)

169 This ground, as set out in subgrounds 5.1 – 5.3 has been dealt with earlier in these reasons and is not necessary to consider further.

Ground 6 – Conduct of Complex Trials and Decision to Institute/Amend Charges (6.1 – 6.2)

170 The question of "A" grade trials and the complexity of trial work has been broadly dealt with earlier in these reasons in relation to the comparison with the work of Police Prosecutors. Whilst the Appeal Panel in 2010 may not have specifically referred to "A, B, C or D" class trials, in my view, it satisfactorily dealt with the key points in relation to comparisons between the Authority Prosecutor and Police Prosecutor positions, and their relative work value.

171 In any event, even though it is more of a work volume issue, the evidence supports the conclusion that Police Prosecutors are required to conduct a higher volume of longer cases than are the appellants. Such work is more the norm for Police Prosecutors, where it is far less frequent for the appellants, based on their own oral and documentary evidence.

172 As already noted, the issue of autonomy to withdraw or amend charges, and liaison with the opposing counsel etc., has been considered earlier in these reasons.

Ground 7 – Weight to be Attached to the Evidence of Mr Veitch

173 This ground seemed to be a broad "catch all" attack on the credibility of the evidence and reports of Mr Veitch in the Appeal Panel proceedings. Most of the issues, to the extent reference was made to grounds 1.6.1 to 1.6.13 inclusive, have been dealt with earlier in these reasons. However, as a general observation, to the extent that this ground and the grounds of appeal and submissions generally raise this issue, I reject it. On the contrary, I found Mr Veitch to be a very credible witness. He has extensive experience in classification matters in the public sector. Mr Veitch's explanations for the conclusions he reached in his classification assessments for the appellants' position were cogent. His testimony was not seriously challenged in cross-examination. Nor was it challenged by the calling of expert evidence in rebuttal by the appellants, as pointed out by the Authority in its submissions. Just because the appellants disagree with the conclusions reached, does not make them wrong.

Ground 8 – Corruption and Crime Commission Act

174 By this ground, it was asserted that the Appeal Panel misunderstood the appellants' claim in relation to the effect of the Corruption and Crime Commission Act. In my view this was not so and this remains the position in these proceedings. Nothing in the submissions or evidence in these proceedings about the Corruption and Crime Commission Act has any effect on the work value of the appellants' position. Obligations on public officers to report unlawful or corrupt conduct has universal application and it does not place any special burden on the appellants.

Ground 9 – CCTV and video footage

175 This ground alleges that the Appeal Panel was in error in failing to recognise that the Authority's direction to view CCTV footage in all prosecutions places an extra burden on them to report potential adverse findings to the organisation. It is therefore contended that this increases the work value of the appellants' position.

176 I accept on the evidence, that the capacity to view CCTV footage prior to a trial, may, but not in all cases, make the job of a Prosecutor easier. It will depend on the circumstances of the case whether this is so. I refer to the testimony of Mr Scudds in this respect. However, I fail to see how this task increases the work value of the position. Either way, thorough case preparation by an advocate, whether as acting for the prosecution or for the defence, means a review of all of the available evidence. This naturally would include any CCTV or other video footage, if available. In my opinion, the Appeal Panel's conclusion in relation to this issue was entirely correct. Tasks of this kind are comprehended within the overall requirements of the position of Authority Prosecutor.

Ground 10 – BIPERS Assessment (Factors 1-9)

177 A BIPERS assessment is a standard tool used in public sector classification determination. It contains ten factors against which a ranking is given for a position. The factors include education; experience; scope of activities; interpersonal skills; kinds of problems; instructions received; influence on results; size of organisation; number of people supervised; and subordination level. Each factor is given a rating score. The overall score is then compared to a range of scores that are assigned to various classification levels. By their nature, there is a degree of subjectivity in the process, as demonstrated by the somewhat different scores awarded by Mr Dawkins in 2001 and in turn Mr Veitch, in 2008. Importantly, a BIPERS assessment is only one tool in the overall process of classification assessment.

178 Mr Veitch testified that for the purposes of an overall ranking, the accepted approach is to only move a classification by one level if it is well into the next range. On his evidence at least half way. Mr Veitch confirmed that the BIPERS assessment is only one part of the classification assessment process that he adopts.

179 The Appeal Panel noted the divergence between the BIPERS assessment undertaken by Mr Dawkins in 2001 and by Mr Veitch in 2008. The appellants have in these proceedings challenged most of the ratings, as they did before the Appeal Panel. The Appeal Panel noted that Mr Dawkins rated the Authority Prosecutor overall score as 286, which is five points into the level 4 classification band. Mr Veitch rated the position as 317, which is 2 points into the level 5 band. Later, in his 2011 desktop review, Mr Veitch gave the position an overall score of 307 to reflect the reduction by 10 points for the removal of the supervision factor.

180 As to Factor 1 – Education, Mr Dawkins rated the position as Degree 3, reflecting a year 12 or a trade/vocational qualification at certificate level. Mr Veitch rated it as a Degree 2, reflecting a year 10 certificate of education or equivalent. The appellants contended that Mr Dawkins' assessment was correct and the position should be scored at Degree 3. This was based on the contention that in practice, all Prosecutors have done the Certificate III course and have also now completed the Police Prosecutors' course. Reference was made to the appointment of Authority Prosecutors as Special Constables under the Police Act, in this regard.

181 The Appeal Panel concluded that as the JDF for the position does not specify a minimum educational requirement for a Prosecutor, the assessment by Mr Veitch was appropriate. This remains the case now. Whilst possession of or progress towards a post-secondary or tertiary qualification is seen as desirable, it is not specified as essential. What is specified as essential is demonstrated experience and understanding of prosecution procedures.

182 Mr Veitch in these proceedings stood by his assessment of this factor in his testimony. It is the case, as observed by the Appeal Panel in its decision, that it might be open to question why the JDF does not specify a minimum education requirement. However, the fact that it does not, does not lead me to consider Mr Veitch's assessment to have been erroneous.

183 As to Factor 3 – Scope of Activities, both Mr Dawkins and Mr Veitch rated this at Degree 3. The appellants assert is should be rated at Degree 4. They refer to a number of activities of the position which they say lead to a Degree 4 assessment. Despite the written submissions of the appellants on this question, Mr Veitch was not cross-examined about his assessment on this factor and nor was there any contradictory evidence led. There is no basis upon which the Commission can conclude that Mr Veitch's assessment on this factor was erroneous.

184 The next issue was Factor 4 – Interpersonal Skills. Mr Veitch rated this Degree 5 and the appellants contended that it should be rated higher at Degree 7. The earlier assessment done by Mr Dawkins also rated this matter at Degree 5, consistent with Mr Veitch's analysis. The thrust of the appellants' contentions was that because they communicated, through advocacy, with magistrates and opposing counsel, this constituted high level communications that affected the Authority at the highest level. Mr Veitch's assessment of this factor was that the use of the concept "external" for communications purposes, is where for example, chief executives and very senior managers of agencies deal with persons outside of their department or agencies on matters with major implications for the organisation, for at least 25 per cent of their time. An example cited by Mr Veitch, was where a senior executive would negotiate on an issue across multiple agencies with significant long term implications for the organisation. Whilst Mr Veitch was cross-examined quite extensively about this matter, I am not persuaded that his evidence or conclusions were broken down or established to be erroneous. He gave a full explanation of the reasons for his assessment and in my view, the appellants have not established to the contrary.

185 In relation to Factor 5 – Kind of Problems, whilst Mr Veitch rated this at Degree 9, this was significantly higher than the rating given by Mr Dawkins who rated it at Degree 6. The appellants contended that the appropriate rating was a Degree 11. This was on the basis that it is consistent with the criterion of working on assignments of an analytical nature etc. A similar claim was made before the Appeal Panel where the appellants challenged Mr Veitch's assessment of this factor at Degree 9. Degree 9 as referred to by the Appeal Panel, applies to "work of mostly a non-routine nature, requires the development and improvement of methods and, as a rule, results in reports or extensive syntheses." The Appeal Panel agreed that the higher rating awarded by Mr Veitch on this factor was more appropriate than the lower rating awarded by Mr Dawkins, in recognition of the changes introduced by the Criminal Procedures Act 2004 and the Criminal Investigation Act 2006. The Appeal Panel also concluded that the higher level ratings, of Degree 10-12 would normally only be awarded to the most senior managers and chief executives, being at the maximum of the range.

186 On the basis of all of the evidence, I am not persuaded that Mr Veitch's assessment, upheld by the Appeal Panel in 2010, has been established to be erroneous.

187 The next, Factor 6 – Instructions Received, was awarded a Degree 8 by Mr Veitch. Mr Dawkins in his 2001 review awarded this at Degree 7. The appellants contended that, consistent with the argument about autonomy to decide how to proceed with a prosecution, it should be awarded at least a Degree 9. This was also linked on the appellants' submission, to the issue of their conducting prosecutions on behalf of the Commissioner of Police as Special Constables. When this factor was put to Mr Veitch in cross-examination, he explained that he assigned the Degree 8 rating to this factor as a mid-point range.

188 That is, the capacity to make independent judgements and autonomous decision making was not at the low level nor was it at the very high end. Mr Veitch reached this view because the appellants had some autonomy but in view of the 2008 Procedure in relation to withdrawing charges, ultimately the responsibility for decision making on this issue rests with senior management. Additionally, given the circumstance where an Authority Prosecutor may need to make a final decision themselves, albeit justifying it after the event was a relatively infrequent occurrence, he considered the mid-point rating to be appropriate.

189 In my opinion this assessment has not been shown to be incorrect. The overarching effect of the 2008 Procedure is a relevant consideration. Whilst the Prosecutors do exercise some autonomy, it is not complete. There was no error demonstrated in relation to this matter.

190 The next factor was Factor 7 – Influence on Results. Mr Veitch rated this at Degree 4 and the appellants considered that it should be rated at Degree 6. Mr Dawkins in his assessment rated it at Degree 4, consistent with Mr Veitch. The appellants contended that their function is at "the pinnacle of law-enforcement", and a part of maintaining a safe rail system and protecting the revenue for the Authority. Mr Veitch in his testimony said that he assessed this factor by looking at upper and lower levels. Degrees 5 and 6 deal with primarily advisory and consultative functions which was not applicable. Degree 6 involves "considerable influence on output of the function, with the function being security". Mr Veitch did not consider that Degrees 5 or 6 would be applicable.

191 However the rating below that of Degree 4, which involved four aspects of "responsible, coordination, control and development" as a discreet area, was appropriate. According to Mr Veitch, the position has authority to coordinate assignments which are at least partly routine. He considered that was the appropriate level for influence on results. Given the rating Mr Veitch accorded to this factor was consistent with Mr Dawkins, and given his explanation in his evidence, I am not persuaded that that rating was erroneous.

192 As to Factor 8 – Size of Organisational Unit, Mr Veitch assigned this factor at Degree 5. The appellants considered that this factor should be considered in the context of the fact that prosecutors represent WA Police when dealing with Commissioner of Police authorised offences. With the WA Police being a much larger organisation than the Authority, this warrants a higher rating on this factor. Mr Veitch said this factor was simply based on the number of employees of the organisation and is not variable. In my view it cannot be disturbed.

193 Finally, as to Factor 9 – Personnel Supervised/Controlled Mr Veitch, as already referred to earlier, assigned this factor at Degree 2 in his 2008 Report, but scaled it back to Degree 1 in his 2011 desktop review. This was because of what was said to be the removal of the "contentious reference to supervising or regularly straining staff." (sic). As I have already indicated, in my view, the 2008 assessment should be restored at Degree 2.

194 Accordingly, overall, in my view, the BIPERS assessment score should be restored to the assessment made by Mr Veitch in 2008, that being a score of 317. This returns the BIPERS assessment to two points above the top of the level 4 point range, at the level of Mr Veitch's 2008 Report. This does not, however, affect overall, the integrity of the conclusions reached by Mr Veitch in his 2008 Report, upheld by the Appeal Panel.

195 As to the appellants' challenge to the procedure adopted by Mr Veitch in performing the BIPERS assessment, I am not satisfied on the evidence that there has been any material flaw in how the BIPERS assessment was conducted. The manual referred to is only a guide. It does not mandate any process, the non-observance of which would, without any more, invalidate the process. Mr Veitch followed established practice for conducting the assessment and the appellants have not established that they were dealt with unfairly in any way.

Conclusion

196 Despite the minor adjustment to the BIPERS assessment just referred to, having considered all of the oral and documentary evidence, I am not persuaded that the appellants have established that their position should be reclassified above level 4. The evidence has not established that there has been any significant change to the position of Authority Prosecutor since the review was undertaken by Mr Dawkins in 2001. More particularly, for the purposes of this appeal, it has not been established in my view, on balance, that the assessment by Mr Veitch, and the consideration of the appellants' case by the Appeal Panel, has been shown to be erroneous. Nor am I persuaded on all of the evidence, that it has been established by the appellants that the position of Authority Prosecutor was incorrectly classified at level 4 in the first instance. Whilst no doubt, as the Authority said in its written submissions, the appellants have an "earnest and commendable view of the importance of their job", they have not been able to establish a case for reclassification, consistent with established principles.

197 Accordingly, I would dismiss the appeals.

2012 WAIRC 00771

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRIAN DENZIL NEWMAN;
CRAIG PHILLIP STEEL

APPELLANTS

-v-

MR PAT ITALIANO
GENERAL MANAGER TRANSPERTH

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER
DATE TUESDAY, 21 AUGUST 2012
FILE NO PSA 44 OF 2010, PSA 45 OF 2010
CITATION NO. 2012 WAIRC 00771

Result Appeals dismissed
Representation
Appellants In person
Respondent Mr D Matthews of counsel

Order

HAVING heard the appellants in person and Mr D Matthews of counsel on behalf of the respondent the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the appeals be and are hereby dismissed.

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

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2012 WAIRC 01091

REFERRAL OF DISPUTE RE S. 35C OF THE OS&H ACT 1984

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES SIGLINDE REYNOLDS

APPLICANT

-v-

DEPARTMENT OF CORRECTIVE SERVICES (REPRESENTING THE MINISTER)

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE FRIDAY, 7 DECEMBER 2012
FILE NO/S OSHT 1 OF 2012
CITATION NO. 2012 WAIRC 01091

Result Application discontinued
Representation
Applicant Mr R J Walker (as agent)
Respondent Ms T Borwick

Order

WHEREAS this is an application pursuant to s 35C of the *Occupational Safety and Health Act 1984*;
AND WHEREAS the parties met on 16 August 2012;
AND WHEREAS at the conclusion of the meeting no agreement was able to be reached;
AND WHEREAS on 28 November 2012 the applicant filed a Notice of withdrawal or discontinuance in respect of the application;
NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2012 WAIRC 00900

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	JASON MORRIS RELOCATIONS PTY LTD
	APPLICANT
	-v-
	IRON MOUNTAIN AUSTRALIA PTY LTD T/AS ALLIED PICKFORDS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 27 SEPTEMBER 2012
FILE NO/S	RFT 3 OF 2012
CITATION NO.	2012 WAIRC 00900

Result	Application discontinued
Applicant	Ms M Papa
Respondent	Mr N Cinquina

Order

HAVING heard Ms M Papa on behalf of the applicant and Mr N Cinquina 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 discontinued.

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

2012 WAIRC 01052

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	OJ WESTON PTY LTD
	APPLICANT
	-v-
	TOLL AUTO
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 26 NOVEMBER 2012
FILE NO/S	RFT 10 OF 2012
CITATION NO.	2012 WAIRC 01052

Result	Application discontinued
Representation	
Applicant	Mr O Weston
Respondent	Mr D Sloan

Order

WHEREAS the applicant filed a notice of discontinuance, the Tribunal, 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.