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FULL BENCH—Appeals against decision of Commission—

2012 WAIRC 01117

APPEAL AGAINST A DECISION OF THE PUBLIC SERVICE ARBITRATOR
GIVEN ON 3 MAY 2012 IN MATTER PSACR 1 OF 2011
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	**:**	2012 WAIRC 01117
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 25 SEPTEMBER 2012
		WRITTEN SUBMISSIONS: 28 SEPTEMBER 2012 & 24 OCTOBER 2012
DELIVERED	**:**	THURSDAY, 20 DECEMBER 2012
FILE NO.	**:**	FBA 3 OF 2012
BETWEEN	**:**	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
		Appellant
		AND
		THE DIRECTOR GENERAL OF HEALTH
		AS DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Public Service Arbitrator**
Coram	**:**	**Acting Senior Commissioner P E Scott**
Citation	**:**	**[2012] WAIRC 00261; (2012) 92 WAIG 539**
File No	**:**	**PSACR 1 of 2011**

Catchwords	:	Industrial Law (WA) - principles of interpretation of awards and industrial agreements considered - calculation of long service leave dates of accrual - purpose of long service leave considered - turns on own facts
Legislation	:	*Industrial Relations Act 1979* (WA) s 41(1), s 49;
		Workplace Agreements Act 1993 (WA) s 6(4);
		Long Service Leave Act 1958 (WA) s 4(1), s 4(3), s 5, s 6, s 6(2)(c), s 6(2)(d), s 6(2)(e), s 6(2)(f), s 6(2)(g), s 6(2)(h), s 6(2)(i), s 6(3), s 8;
		Industrial Arbitration Act 1912 (WA) s 94A;
		Minimum Conditions of Employment Act 1993 (WA);
		Industrial Relations Amendment Act 1993 (WA) s 18(2), s 18(3);
		Labour Relations Legislation Amendment Act 2006 (WA);
		Workplace Relations Act 1996 (Cth);
		Fair Work Act 2009 (Cth) s 113, s 113A;
		Industrial Relations Legislation Amendment and Repeal Act 1995 (WA) s 46(3).
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr R L Hooker
Respondent	:	Mr M J Aulfrey
Solicitors:		
Appellant	:	Slater & Gordon

Case(s) referred to in reasons:

Amcor Ltd v Construction, Forestry, Mining and Energy Union [2005] HCA 10; (2005) 222 CLR 241; (2005) 79 ALJR 703; (2005) 138 IR 286

Australian Journalists Association v Advertiser Newspapers Ltd (1982) 3 IR 144

BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (WA Branch) [2006] WASCA 124

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; (2006) 153 IR 426

City of Wanneroo v Holmes (1989) 30 IR 362

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2011] FCA 1294

Kucks v CSR Limited (1996) 66 IR 182

New South Wales Nurses' Association v Ramsay Health Care Australia Pty Ltd [2009] FMCA 579

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

United Voice WA v The Minister for Health [2012] WAIRC 00319; (2012) 92 WAIG 585

Case(s) also cited:

BHP Billiton Iron Ore Pty Ltd v The Australian Workers' Union Western Australian Branch, Industrial Union of Workers [2006] WASCA 159

Commissioner for Railways (NSW) v Agalianos [1955] HCA 27; (1955) 92 CLR 390

Reasons for Decision

SMITH AP AND BEECH CC:

The appeal

1 This is an appeal to the Full Bench pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision of the Public Service Arbitrator given on 3 May 2012 in PSACR 1 of 2011: [2012] WAIRC 00261; (2012) 92 WAIG 539.

2 The industrial dispute referred to the Public Service Arbitrator for hearing and determination was a dispute about the calculation of annual leave entitlements to one of the respondent's employees, a Ms Sal Geraghty. Ms Geraghty is employed as a staffing support officer and has been employed by the respondent since 1 August 1995 under the *Hospital Salaried Officers Award 1968* (HSO award). The parties are in dispute as to the effect of the accrual of long service leave by Ms Geraghty arising from the terms of the *Hospital Salaried Officers Metropolitan Health Services Enterprise Agreement 2001* (2001 agreement). In September 2000, Ms Geraghty entered into a state workplace agreement (WP agreement) and in accordance with that agreement cashed in 6.5444 weeks' pro-rata long service leave for 4.9083 weeks' recreational leave and was advanced two salary levels on the salary scale attached to the WP agreement. The parties were in dispute about how that

transaction should be treated under the 2001 agreement and whether service whilst covered by the WP agreement should be counted.

3 It is common ground that the resolution of the dispute depended upon the proper interpretation of the provisions of the 2001 agreement and subsequent industrial agreements registered by this Commission and the interpretation of the relevant provisions of the WP agreement.

4 Although the notice of appeal states the appeal is against the decision, when the decision and the grounds of appeal are reviewed, it is apparent that the appeal is against part of the decision. The decision provides as follows (formal parts omitted):

> A. DECLARES THAT:
>
> 1. Ms Geraghty's anniversary date for long service leave purposes is her commencement date of 1 August 1995; and
>
> 2. Ms Geraghty is entitled to long service leave ten years after 1 August 1995 excluding the relevant periods; and
>
> 3. Periods of service which are relevant periods and do not count towards the ten years of continuous service are:
>
> (a) the period of service from 1 August 1995 to 22 February 1999 which was converted to recreational leave in accordance with the Workplace Agreement; and
>
> (b) the period of employment from 25 September 2000 to 7 October 2001 which was covered by the Workplace Agreement; and
>
> (c) the period of leave without pay from 27 July 2008 to 12 June 2011.
>
> B. ORDERS THAT the matter be and is hereby otherwise dismissed.

5 The appellant says when the industrial instruments that regulate Ms Geraghty's terms and conditions of long service leave are properly construed, the periods of service in declaration A(3)(a) do count towards the 10 years of continuous service for the purposes of determining Ms Geraghty's entitlement to long service leave. It seeks an order to quash declaration A(3)(a) and for a declaration to be made that properly declares the relevant periods of service and an order requiring the respondent to rectify its records to reflect the relevant periods which count towards 10 years of continuous service.

Agreed facts

6 When the matter was heard by the Public Service Arbitrator, the parties provided a statement of agreed facts. The agreed facts which are relevant to the disposition of this appeal are as follows:

> **Industrial Instruments that applied to the employee**
>
> 13. At the time of her commencement with the Respondent the terms and conditions of the employee's employment were covered by the *Hospital Salaried Officers Award 1968* (**Award**).
>
> 14. On 19 January 1999 the Hospital Salaried Officers Metropolitan Health Service Board Enterprise Agreement 1999 (**1999 Agreement**) was registered and applied to the employee's employment.
>
> 15. On 25 September 2000 the employee signed what was known as a *Metropolitan Health Service Board – Generic Workplace Agreement* (**WP Agreement**), which determined the employee's terms and conditions of employment.
>
> 16. In June 2001 the Respondent advised employees working under the terms and conditions of a WP Agreement that they could withdraw from the WP Agreement and be covered by the applicable enterprise agreement or award.
>
> 17. The employee withdrew from the WP Agreement on 8 October 2001.
>
> 18. After withdrawing from the WP Agreement, the employee was again covered by the 1999 Agreement.
>
> 19. On 24 January 2002 the *Hospital Salaried Officers Metropolitan Health Services Enterprises Agreement 2001* (**2001 Agreement**) was registered and applied to the employees employment.
>
> 20. On 27 April 2004 the *Health Services Union – Department of Health – Health Service Salaried Officers State Industrial Agreement 2004* (**2004 Agreement**) was registered and applied to the employees employment.
>
> 21. On 14 December 2006 the *Health Services Union – WA Health State Industrial Agreement 2006* (**2006 Agreement**) was registered and applied to the employees employment.
>
> 22. On 9 December 2008 the *Health Services Union – WA Health State Industrial Agreement 2008* (**2008 Agreement**) was registered and applied to the employees employment.
>
> **Long Service Leave entitlements**
>
> 23. The Award provided for long service leave accrual of 13 weeks after 7 years of continuous service.
>
> 24. The 1999 Agreement changed long service leave accrual from 13 weeks long service leave after 7 years of continuous service to 13 weeks long service leave after 10 year [sic] of continuous service.
>
> 25. Under the terms of the 1999 Agreement, this change was effective from 1 January 1999.
>
> 26. At the time of entering the WP Agreement the employee elected to convert 6.5444 weeks of accrued pro rata long service leave to recreational leave.
>
> 27. The employee did not accrue further long service leave whilst covered by the WP Agreement.

28. In converting the pro rata long service leave entitlement to recreation leave the long service leave entitlement was discounted so that the employee lost the equivalent of 25% of her long service leave when it was converted to recreation leave.

29. The employee therefore received 4.9083 weeks of recreation leave for 6.5444 weeks of long service leave.

30. As part of electing to convert long service leave to recreation leave, the employee advanced two salary levels under the WP Agreement and stopped accruing further long service leave.

31. On the cessation of the WP Agreement, the employee's long service leave entitlements were again determined by the provisions of the 1999 Agreement.

32. Long service leave accrual under the 2001 and 2004 Agreement remained 13 weeks long service leave after 10 years of continuous service.

7 At first instance, the dispute between the parties was about how Ms Geraghty's long service leave entitlement was to be calculated and whether, as a consequence of the changes which occurred in the payment made to her, she was overpaid. In this appeal, there is no issue about overpayment. The issue is simply whether the Public Service Arbitrator erred in law in making a declaration and order about how Ms Geraghty's long service leave entitlements should be calculated.

A summary of the material provisions of the WP agreement and industrial agreements

8 Under cl 11 of the WP agreement, for each period of 10 years' continuous service an employee was entitled to 13 weeks' long service leave on full pay. A pro-rata entitlement to long service leave also accrued from the date of signing the agreement in the proportion of an entitlement after seven years to 10 years. Pursuant to cl 11.12, an employee could elect to convert pro-rata long service leave to recreational leave and have it accrued on an annual basis. At the time of conversion, any pro-rata long service leave was discounted by a factor of 25% and converted to accrued recreational leave. Under cl 11.13 of the WP agreement, an employee who elected to exercise their option under cl 11.12 ceased to accrue an entitlement towards long service leave, but was advanced by two salary levels on the salary scale applicable in schedule 1. Alternatively, employees could elect not to advance by two salary levels, but receive an additional five days' annual leave per year.

9 Prior to becoming a party to the WP agreement, Ms Geraghty's terms of employment were regulated by the *Hospital Salaried Officers Metropolitan Health Service Board Enterprise Agreement 1999* (1999 agreement). By operation of cl 17 of the 1999 agreement, cl 19 of the HSO award was replaced and as a consequence Ms Geraghty was entitled to 13 weeks' paid long service leave on the completion of 10 years of continuous service and an additional 13 weeks' paid long service for each subsequent period of seven years' continuous service. Under cl 17(14), an employee could request the agreement of the employer to be paid in lieu of taking a portion of long service leave. However, there was no entitlement under that clause to either take or to be paid for pro-rata long service leave as there was no entitlement to long service leave until the completion of 10 years' service. However, that entitlement changed for Ms Geraghty when she became a party to the WP agreement.

10 After the WP agreement ceased to have effect, Ms Geraghty's terms and conditions of employment were regulated by the 1999 agreement and later the 2001 agreement.

11 Pursuant to cl 13 of the 2001 agreement, cl 19 of the HSO award was replaced. Under cl 13(1) of the 2001 agreement, Ms Geraghty was entitled to 13 weeks' paid long service leave on the completion of 10 years of continuous service and an additional 13 weeks' paid long service leave for each subsequent period of seven years of continuous service completed by her.

12 The provisions of the 2001 agreement long service clause central to the issues raised by the appellant were cl 13(11), cl 13(12), cl 13(14) and cl 13(15) which provided as follows:

> (11) Subject to the provisions of subclauses (6), (7), (8) and (12) of this clause, the service of an employee shall not be deemed to have been broken:-
>
> (a) by resignation, where he/she resigned from the employment of an employer a party to the Award and commenced with another employer a party to the Award within one working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by an employer party to the Award from whom he/she resigned or, if no such payment has been made, within one working week of the day on which his/her resignation became effective;
>
> (b) if his/her employment was ended by his/her employer who is party to the Award, for any reason other than misconduct or unsatisfactory service but only if -
>
> (i) the employee resumed employment with an employer party to the Award not later than six months from the day on which his/her employment ended; and
>
> (ii) payment pursuant to subclause (8) of this clause has not been made; or
>
> (c) by any absence approved by the employer as leave whether with or without pay.
>
> (12) The expression 'continuous service' in this clause includes any period during which an employee is absent on full pay or part pay, from his/her duties with any employer party to the Award, but does not include-
>
> (a) any cumulative period exceeding two weeks in any one anniversary year during which the employee is absent on leave without pay;
>
> (b) Any service of the employee who resigns or is dismissed, other than service prior to such resignation or to the date of any offence in respect of which the employee is dismissed when such prior service has actually entitled the employee to long service leave, including pro-rata long service leave, under this clause.
>
> …

(14) At the request of the employee and with the agreement of the employer, an employee may be paid in lieu of taking a portion of long service leave.

(15) Any period of service during which, or for which, an employee receives or has received payment, or any other compensation, in lieu of long service leave shall not be counted as service for the purpose of determining any future entitlement to long service leave whether under this Agreement, any agreement replacing this Agreement, or under any relevant or future award. This provision shall survive the termination of this Agreement.

13 These provisions were repeated in the industrial agreement that replaced the 2001 agreement and in subsequent industrial agreements.

Findings made by the Public Service Arbitrator

14 The Public Service Arbitrator found that:

(a) Ms Geraghty's conditions of employment were covered by the HSO award from 1 August 1995 until the 1999 agreement came into operation on 19 January 1999;

(b) Ms Geraghty's employment became subject to the WP agreement from 25 September 2000 until 8 October 2001 when she withdrew from it;

(c) on the cessation of the WP agreement on 8 October 2001, Ms Geraghty's employment became subject to the 1999 agreement, then the 2001 agreement, followed by the *Health Services Union - Department of Health - Health Service Salaried Officers State Industrial Agreement 2004* (2004 agreement) and finally the *Health Services Union - WA Health State Industrial Agreement 2006* (2006 agreement);

(d) the object of long service leave is 'as a reward for long and faithful service' and 'as a means of reducing labour turnover': ***Australian Labour Law Reporter***, 32-830;

(e) it is the long and continuous service which brings about an entitlement to leave and that the relevant industrial instruments should be interpreted in this context;

(f) 'continuous service' is defined to enable particular periods where the employment contract subsisted but no work was performed, such as specified and limited periods of leave, paid or unpaid, which are to be excluded from the calculation of the period of continuous service;

(g) the 2001 agreement, 2004 agreement and 2006 agreement each recognised that where employees had been paid, or compensated in lieu of long service leave for a period of service, that period of service would also not be counted as service. While the WP agreement provided additional conditions, it did not contradict these provisions: WP agreement cl 2.2;

(h) the periods that do not count as service in each of the agreements do not bring the continuous service to an end. They are merely excluded from the calculation of service by express provisions in the HSO award and the agreements;

(i) in ***Australian Journalists Association v Advertiser Newspapers Ltd*** (1982) 3 IR 144, Evatt J observed that the term 'continuous service' was distinguished from the term 'employment' in reference to the accrual of leave. 'Continuous service' expressly recognises that the contract of service subsists even if certain periods of absence are excluded, that is, the absences do not break the contract, but do not count in the calculation of continuous service;

(j) the principle to be applied is that an employee who completes the necessary period of continuous service is entitled to a period of paid leave. Service counts from the commencement of the contract of service with certain specified periods of service being excluded from the calculation of continuous service and the period of continuous service brings an entitlement to a period of paid long service leave;

(k) the period of service under the WP agreement did not break service, as s 6(4) of the *Workplace Agreements Act 1993* (WA) provided that the workplace agreement did not displace the contract of employment;

(l) the election available to Ms Geraghty (which she took up under the WP agreement) resulted in no accrual towards long service leave during the life of the WP agreement. She received the benefit of long service leave accruals in a different way and ceased to accrue further leave for the period of the operation of the WP agreement. Consequently, time served by Ms Geraghty while the WP agreement was in force did not count for the purpose of accrual of the prescribed period of service for long service leave;

(m) Ms Geraghty received compensation in lieu of the accrual of long service leave for the period of operation of the WP agreement by being advanced by two salary levels. Also, she elected to convert pro-rata long service leave to recreational leave in accordance with cl 11.12 of the WP agreement;

(n) Ms Geraghty's service commenced on 1 August 1995 and that is the point from which the calculation of continuous service commences, subject to the exclusion of those periods referred to in the agreements. Pursuant to cl 11.13 of the WP agreement she ceased to accrue an entitlement towards long service leave, but her continuous service was not broken. During the relevant period she ceased to accrue the benefit.

15 After the first reasons for decision were delivered on 3 February 2012, the parties were asked to provide submissions about what orders should issue. After hearing submissions, the Public Service Arbitrator issued supplementary reasons for decision on 3 April 2012 in which she found:

(a) The provisions of cl 13(15) of the 2001 agreement, cl 23(19) of the 2004 agreement and cl 41(16) of the 2006 agreement applied so as to exclude the periods of service and the calculation of Ms Geraghty's entitlement to long

service leave. In particular, the period of service which Ms Geraghty converted to recreational leave was not to be counted as service for the purpose of determining any future entitlement to long service leave.

(b) The finding in (a) was consistent with the principle that the calculation of continuous service excludes periods of long service leave, or any portion of it. By converting the long service leave to recreational leave, this was a period of service during which Ms Geraghty received payment or other compensation in lieu of long service leave and accordingly it was not to be counted for the purpose of determining any future entitlement to long service leave.

Grounds of appeal

16 In ground 1 of the appeal, the appellant argues that the Public Service Arbitrator erred in law in that, having correctly concluded that Ms Geraghty was entitled to long service leave 10 years after 1 August 1995, incorrectly excluded the period of service from 1 August 1995 to 22 February 1999 which was converted to recreational leave in accordance with the WP agreement. Whilst the grounds of appeal also plead the Public Service Arbitrator incorrectly excluded the period of employment from 25 September 2000 to 7 October 2001 which was the period of time Ms Geraghty's terms and conditions of employment was regulated by the WP agreement, this part of ground 1 is not pressed.

17 Ground 2 raises a similar issue. Ground 2 raises an argument that an error of law occurred by failing to find that the two periods on a proper conception of the nature and purpose of long service leave, do count towards 10 years of continuous service, notwithstanding that the amount paid to Ms Geraghty by way of the conversion of long service leave entitlement to recreational leave needs to be brought to account in the calculation of the long service leave payment due and owing after 10 years of continuous service. Insofar as this ground also raised the period of service covered by the WP agreement, this part of ground 2 is not pressed.

The appellant's submissions

18 The central issue in this appeal is the proper approach to the construction of provisions of industrial instruments, in particular a consideration of context. The main thrust of the appellant's submissions is that the Public Service Arbitrator failed to have proper regard to industrial context of the provision of long service leave that is demonstrated in many Western Australian awards containing long service leave provisions and the *Long Service Leave Act 1958* (WA). These instruments uniformly provide for long service leave as an entitlement for the benefit of employees as a reward for long service, or put another way for long work. It is also argued that it is well established 'standard' that all periods of paid service count towards an assessment of continuous service. The appellant says regard should be had to this context when construing the meaning of the provisions of the HSO award, the 1999 agreement, the 2001 agreement and the subsequent industrial agreements that applied to the employment of Ms Geraghty.

19 On behalf of the appellant it is submitted that on any contemporary approach to interpretation of any instrument, be it statutory, contractual or industrial, 'context' is critical. Context is important not merely when an ambiguity arises but to understand the nature of the subject matter and the nature and potential scope of rights or obligations that apply in a particular case. This is particularly so where an industrial right or obligation has been conceived or evolved in successive determinations by the making of an instrument potentially reinforced by statute. Further, when an industrial instrument has been conceived and evolved over a period of time and has gathered a meaning so as to be a significant benefit to employees, that benefit ought only be constricted or restricted by the clearest or most cogent language.

20 The appellant argues the Public Service Arbitrator in her initial and primary set of reasons delivered on 3 February 2012 correctly apprehended the nature and function of long service leave and, accordingly, the appropriate construction of the disputed provisions of the relevant industrial instruments. However, after having called for consultation and further submissions regarding the form of a declaratory order, in subsequent reasons delivered on 3 April 2012 the Public Service Arbitrator changed her interpretation of the essential nature of long service leave and her construction of the relevant industrial instruments. In particular, she had regard to the language of cl 13(15) of the 2001 agreement wholly divorced from the contextual understanding that hitherto she had correctly appreciated and set out in her first reasons for decision.

21 The industrial context to which the appellant says that regard should be had when construing the industrial instruments that regulate Ms Geraghty's long service leave entitlements are as follows:

(a) Before 1958, many Western Australian state awards contained long service leave provisions. In 1958, those awards were amended by consent to provide for a long service leave scheme. Simultaneously, the Western Australian Parliament enacted the *Long Service Leave Act* in 1958 to provide minimum standards of long service leave benefits to employees who were not covered by awards.

(b) A formal determination was made by the Commission in Court Session on 23 September 1964, the content of which was similar to the benefits contained in the 1958 Act: (1976) 56 WAIG 19.

(c) On 15 December 1977, the Commission in Court Session, under s 94A of the *Industrial Arbitration Act 1912* (WA), made a General Order varying awards and industrial agreements to incorporate new long service leave provisions: (1978) 58 WAIG 120; (1978) 58 WAIG 1 (General Order).

(d) Despite substantial changes to the Western Australian industrial relations system effected by a suite of legislation in 1993, Parliament chose to expressly continue in force the General Order which took effect on 1 January 1978. This was so notwithstanding the enactment of the *Minimum Conditions of Employment Act 1993* (WA): see s 18(2) and s 18(3) of the *Industrial Relations Amendment Act 1993* (WA).

(e) In 2006, the *Labour Relations Legislation Amendment Act 2006* (WA) repealed the Long Service Leave General Order.

(f) The considerable expansion by changes effected by the *Workplace Relations Act 1996* (Cth), on the rights, entitlements and obligations of parties to most employment relationships operates with respect to long service leave only to a limited degree. The effect of s 113 and s 113A of the *Fair Work Act 2009* (Cth) is, broadly, that this legislation does not exclude state or territory laws that deal with long service leave, except in relation to employees who have entered into enterprise agreements that contain terms discounting service under prior agreements. The appellant acknowledges, however, that any Commonwealth source of industrial regulation cannot alter or affect the proper construction to be accorded to the provisions of the Western Australian industrial instruments.

22 The notion of 'continuous service' was conceived and was developed in the HSO award and the industrial instruments that are consistent with the provisions that form part of the background of this industrial context. 'Service' means and includes the performance of work. Thus, notwithstanding instruments made by this Commission regulating long service leave might otherwise change, the meaning of 'continuous service' remains constant throughout these instruments, that is, if an employee keeps performing work under a contract of employment, credit ought to be given to the service of an employee who undertakes and continues to perform work. Long service leave is a reward for ongoing 'long service'. This construction the appellant says is consistent with statutory schemes and conditions in Western Australia and in other states.

23 The appellant properly points out that the contemporary approach to construction of industrial instruments stems from ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355. In particular:

(a) Matters of purpose, general policy and context are to be taken into account in deriving the meaning of the provision from its text. The process of construction must always begin by examining the context of the provision that has been construed, even for statutory interpretation.

(b) Specifically with respect to industrial instruments, interpretation must begin with consideration of the words used in their natural meaning, but that meaning is not to be interpreted in a vacuum divorced from industrial realities: ***City of Wanneroo v Holmes*** (1989) 30 IR 362, 378; ***BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (WA Branch)*** [2006] WASCA 124 [19] - [23].

(c) Industrial instruments, given their nature and purpose (relevant to, in particular, common law contracts of employment) are to be accorded a beneficial interpretation: ***Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*** [2011] FCA 1294 [9] - [10].

(d) When construing an award or an industrial instrument provision a court or tribunal should proceed on the premise that the framers were likely of a practical mind and have regard to the long tradition of generous construction over a strictly literal approach: ***New South Wales Nurses' Association v Ramsay Health Care Australia Pty Ltd*** [2009] FMCA 579 [177]; ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; (2006) 153 IR 426 [57] (French J).

(e) As Madgwick J pointed out in ***Kucks v CSR Limited*** (1996) 66 IR 182, 184; a court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into an award. However, meanings which avoid inconvenience or injustice may reasonably be strained for.

24 The appellant says that it is appropriate to commence a task of construction of cl 13 of the 2001 agreement with the text and context through its various subclauses. It points out that cl 13(1) effects a clear presumption of an entitlement to long service leave on the completion of 10 years of continuous service. This period must, logically, commence at a time an employee commences service with a respondent bound by the industrial instrument. The applicable commencement date is apparent from the starting point in cl 13(1).

25 Clause 13(2) deals with circumstances where an employee has accrued long service leave under more generous provisions contained in earlier industrial instruments including the HSO award. Thus, in Ms Geraghty's case because the first three years and five months of service were subject to the more beneficial long service leave provisions of the HSO award, the benefit of that accrual was maintained.

26 Clause 13(3) to cl 13(10) form part of the overall scheme conferring entitlements of long service leave that have limited bearing on the present circumstances.

27 Clause 13(11) and cl 13(12) whilst not directly defining 'continuous service', deal with certain specific circumstances that bear on the meaning of that term. The appellant says that cl 13(12) creates provisions similar in character to the conception of continuous employment reflected in the repealed General Order and the *Long Service Leave Act*.

28 Clause 13(14) provides for circumstances of the kind that occurred in the case of Ms Geraghty, namely where an employee has completed a period of continuous service so as to entitle her to long service leave is able to elect, in lieu of taking some of that entitlement, to cash out long service leave for payment reflecting leave of a different character.

29 The appellant says that read against this context and the structure of cl 13 generally, the text of cl 13(15) must be construed so as to:

(a) clarify the effect of the operation of a payment in lieu, pursuant to cl 13(14), on any entitlement to future long service leave which is then accrued compatibly with the starting point provided for in cl 13(1). In particular, the appellant says the words 'any future entitlement' should be read as only applying to an entitlement to long service leave that arises after the 2001 agreement had commenced;

(b) deal with payments similar in character to that provided for in cl 13(14) or paid to Ms Geraghty under the WP agreement;

(c) evince an intention to preclude 'double dipping'; that is, that any future entitlement to long service leave must bring to account the actual payment previously received for any period the subject of an election under cl 13(14);

(d) maintain the relevant commencement date of the assessment of 'continuous service' for the purposes of any subsequent long service leave.

30 The appellant argues that the provision has to be read generously so as to not derogate from the effect of continuous service built to the commencement of the 2001 agreement and service undertaken from 1995 to 1999. The appellant concedes that cl 13(15) must be construed as preventing double dipping in the sense of taking into account a payment that was received in lieu of long service leave. In particular, the recreational leave that was received by Ms Geraghty must be deducted. However, they say the period of accrual of that leave ought not be deducted. The only deduction should be the period of leave converted to recreational leave.

31 The consequences of the appellant's argument that flow to Ms Geraghty's position is that the starting point for calculating any given period of 'continuous service' is when she commenced employment with the respondent on 1 August 1995. This meaning is derived from:

(a) a proper contextual reading of the entirety of cl 13;

(b) if there is any ambiguity in the text of cl 13 (which the appellant denies) a resolution of that ambiguity in favour of Ms Geraghty, compatibly with a beneficial interpretation of the industrial instrument; and

(c) the analogous characterisation of nationally consistent long service leave provisions that ought to be applied unless the Commission is convinced such standards are plainly ill conceived.

32 The appellant says that in her decision on 3 February 2012, the Public Service Arbitrator accurately extracted the statement of agreed facts and associated timeline and broadly summarised the applicable issues that arise for consideration. She then, in an approach which was generally correct:

(a) characterised the object of long service leave as 'a reward for long and faithful service' and 'the means of reducing labour turnover' and found that relevant industrial instruments should be interpreted in the context of that purpose and giving an appropriate contextual meaning to the term 'long service' or 'continuous service';

(b) noted that the provisions of the character of cl 13(15) of the 2001 agreement have a similar affect: that is, they cover periods of time which do not count as service for the purpose of determining an entitlement to long service leave. This it says is consistent with the observations of Evatt J in ***Australian Journalists Association v Advertiser Newspapers Ltd*** who found the industrial concept of 'continuous service' expressly recognises that the contract of service exists even if certain periods of absence are excluded and is to be distinguished from the term employment in reference to the accrual of leave;

(c) held, thus, that 'service' relevantly counts from the commencement of the contract of service with certain specified periods of service being excluded from the calculation of continuous service. Particularly, there was nothing in the HSO award, the industrial agreements or the WP agreement which indicated that the employee's period of service required for the purpose of accruing an entitlement to long service leave, is broken and must start again;

(d) concluded that cl 13(15) of the 2001 agreement was clearly designed to avoid double dipping by the employee. Hence, for the purposes of calculation of an entitlement to long service leave, Ms Geraghty's service commenced on 1 August 1995.

33 However, the appellant says the supplementary reasons for decision in addressing the dispute that then persisted, namely whether the period of long service leave that had been converted to recreational leave under the WP agreement operated as a period of exclusion in determining 'continuous service', the Public Service Arbitrator departed from the hitherto generally correct generous approach and her approach manifested error.

34 Whilst the appellant now agrees that Ms Geraghty ceased to accrue an entitlement towards long service leave for the period of the operation of the WP agreement, the appellant says the Public Service Arbitrator erred in finding that the period of service that had been converted to recreational leave should not be counted as service for the period of determining any future entitlement to long service leave.

35 The appellant concedes that there should be no double dipping and that the amount of the pro-rata long service leave converted to recreational leave on 24 September 2000 should be offset. As at that date an amount of 6.5444 weeks of pro-rata long service leave had been converted to recreational leave and discounted by 25% to 4.9083 weeks in accordance with the terms of the WP Agreement. Consequently, if the appellant's argument is successful Ms Geraghty would have been entitled to 13 weeks' long service leave on 27 July 2006 minus 6.5444 weeks: appellant's further particulars filed 28 September 2012. The effect, however, of the declaration made by the Public Service Arbitrator is calculated in a different way. Declaration A(3)(a) declares that the period of service from 1 August 1995 to 22 February 1999 (which was converted to recreational leave in accordance with the WP agreement) is a period of service that did not count towards 10 years' continuous service. In making this declaration, the appellant says the Public Service Arbitrator:

(a) departed from the correctly contextual approach she had undertaken in her earlier reasons for decision; failed to construe cl 13(15) of the 2001 agreement and its subsequent equivalents beneficially;

(b) effectively applied a construction of 'continuous service' that departed from the consistently recognised standard in Australian industrial law.

Principles of construction of industrial instruments

36 It is common ground that an industrial instrument must be understood in its context. This important principle of interpretation of statutory instruments was discussed by McHugh, Gummow, Kirby and Hayne JJ in ***Project Blue Sky Inc*** [69] - [71] who said:

> 69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ). The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617, per Lord Scarman, 'in the context of the legislation read as a whole'). In *Commissioner for Railways (NSW) v Agalianos* ((1955) 92 CLR 390 at 397), Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed (*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J).
>
> 70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals (*Ross v The Queen* (1979) 141 CLR 432 at 440, per Gibbs J). Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions (See *Australian Alliance Assurance Co Ltd v Attorney-General (Q)* [1916] St R Qd 135 at 161, per Cooper CJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574, per Gummow J). Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other' (*Institute of Patent Agents v Lockwood* [1894] AC 347 at 360, per Lord Herschell LC). Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> 71 Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision (*The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ; at 419, per O'Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13, per Mason CJ). In *The Commonwealth v Baume* ((1905) 2 CLR 405 at 414) Griffith CJ cited *R v Berchet* ((1688) 1 Show KB 106 [89 ER 480]) to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.

37 Awards and industrial agreements are not legislative instruments. Such instruments are given legislative effect by enabling legislation and are not to be regarded as drafted by persons skilled in the drafting of legislation or other instruments. Thus, there are subtle but important considerations when interpreting industrial instruments when compared to the construction of legislative instruments.

38 Firstly, it is clear that the task of construction of industrial instruments is to be approached in a way that allows for a generous construction. Secondly, part of the context of construction of an industrial instrument is how it is made. Where an industrial instrument is an award, the principles to be applied were set out by French J in ***City of Wanneroo v Holmes*** (378 - 379) where his Honour said:

> The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words: *Re Clothing Trades Award* (1950) 68 CAR 597 (Aust Indus Ct, Full Ct). The words are to be read as a whole and in context: *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: *Picard v John Heine & Son Ltd* (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all: *Seymour v Stawell Timber Industries Pty Ltd* (1985) 13 IR 289 at 290; 9 FCR 241 at 244 (Northrop J) (13 IR at 299; 9 FCR at 254) (Keely J) cf 13 IR at 309; 9 FCR at 265 (Gray J). The logs of claim and arbitrator's reasons for decision may be referred to to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. Evidence of the conduct of the parties subsequent to the making of the award however, cannot be relied upon to construe it: *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444, 446, disapproving *Merchant Seamen's Guild of Australia v Sydney Steam Collier Owners and Coal Stevedores Association* (1958) 1 FLR 248. That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:
>
> > '… 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 ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that 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.' – See also *Re Crown Employees (Overtime)*

> *Award* [1969] AR(NSW) 60 at 63; *Re Hospital Employees Administrative and Clerical (State) Award* (1982) 2 IR 123.

It is of course no part of the court's task to assign a meaning in order that the award may provide what the Court thinks is appropriate – *Australian Workers Union v Graziers Association (NSW)* (1939) 40 CAR 494. Indeed it has been said that a tribunal interpreting an award must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the award making authority – *Re Health Administration Corporation; Re Public Hospital Nurses (State) Award* (1985) 12 IR 122; *Rogers Meat Co Pty Ltd v Howarth* [1960] AR(NSW) 291; *Re Government Railways and Tramways (Engineers etc) Award* [1928] AR 53 at 58 (Cantor J).

39 Justice French subsequently reaffirmed what he said in ***City of Wanneroo v Holmes*** in ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** when he observed [57]:

> It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities — *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned — see eg *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):
>
> > Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.

40 Later, Kirby and Callinan JJ in ***Amcor Ltd v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; (2005) 222 CLR 241; (2005) 79 ALJR 703; (2005) 138 IR 286 [96] and [129] favoured an even more generous contextual approach that had been expressed in ***Kucks*** by Madgwick J who had said (184):

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

41 In ***Amcor*** the industrial instrument in question was an industrial agreement. Callinan J went on to observe that [131]:

> An industrial agreement has a number of purposes, to settle disputes, to anticipate and make provision for the resolution of future disputes, to ensure fair and just treatment of both employer and employees, and generally to promote harmony in the workplace.

42 It is also relevant to consider what Madgwick J said in ***Kucks*** (184) in the following passage that immediately followed the passage considered by Kirby and Callinan JJ in ***Amcor***:

> [T]he task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

43 Counsel for the appellant, Mr Hooker, made a submission that the observation of Callinan J in ***Amcor*** about the purposes of industrial agreements should be treated with circumspection as these observations were not representative of the majority in ***Amcor***. It is our view, however, that whilst it can be acknowledged that his Honour's observations were obiter, the observations have a sound foundation. Industrial agreements, unlike awards and some award amendments, can only be consensual, yet award provisions can be made by consent or are arbitrated. Part of the context of industrial agreements is the statutory framework that enables parties to enter into industrial agreements: ***United Voice WA v The Minister for Health*** [2012] WAIRC 00319; (2012) 92 WAIG 585.

44 We agree that the terms of an industrial instrument must be read within the historical context of an operative award and past industrial instruments that apply to the class of employees whose terms and conditions of employment are covered by the industrial instrument in question. However, added to that context should be a consideration of any relevant statutory scheme.

45 The 2001 and subsequent industrial agreements were registered under s 41(1) of the Act which provides:

> An agreement with respect to any industrial matter or for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto may be made between an organisation or association of employees and any employer or organisation or association of employers.

46 Although the provisions of the now repealed General Order forms part of the history of the provision of long service leave in Western Australia to employees whose conditions of employment were covered by awards, the General Order had no application to the HSO award or to the terms and conditions of Ms Geraghty's employment. Nor can the provisions of the repealed *Workplace Relations Act* or *Fair Work Act* be said to be relevant to a consideration of the construction of long service leave provisions in the HSO award, the 2001 agreement and subsequent agreements.

47 The provisions of the *Long Service Leave Act* also have had no express application to any employee employed by the respondent who is eligible to be a member of the appellant. Leaving aside this issue, as the appellant has put an argument that the scheme of the *Long Service Leave Act* is part of a scheme to establish 'standards' of continuous service, it is important to consider the relevant provisions of that Act and its history. When the *Long Service Leave Act* was first enacted in 1958 its provisions did not apply to employees whose employment was regulated under the *Industrial Arbitration Act*: Long title and definition of 'employee' in s 4(1) of the *Long Service Leave Act* when first enacted in 1958. In 1995, by the enactment of s 46(3) of the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA) (Act No 79 of 1995), this exclusion was continued in an amendment to s 4(3) of the *Long Service Leave Act* which provided:

> (3) Where a person is, by virtue of —
>
> (a) an award or industrial agreement;
>
> (b) a workplace agreement or other agreement between the person and his employer; or
>
> (c) an enactment of the State, the Commonwealth or of another State or Territory,
>
> entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of "employee" in subsection (1).

48 This provision along with other enabling provisions in the *Workplace Agreements Act* (now repealed) enabled the respondent to enter into workplace agreements with employees that provided for long service leave entitlements. Of importance, s 4(3) of the *Long Service Leave Act* did not provide for standard long service leave conditions. When s 4(3) was first enacted it simply required and continues in its current form to require long service leave to be provided to employees that is at least equivalent to the entitlement to long service leave in the *Long Service Leave Act*.

49 The current s 5 of the *Long Service Leave Act* was also inserted by Act No 79 of 1995. This provision enables an employee and employer to agree in writing to contract out of an entitlement to long service leave by giving the employee an adequate benefit in lieu of the entitlement.

50 Under s 8 of the *Long Service Leave Act* an employee is not entitled to 13 weeks' long service leave until the employee has completed 15 years' continuous service. Whilst the accrual of pro-rata long service leave has become more generous since the *Long Service Leave Act* was first enacted in 1958, this entitlement has not changed. At the present time, pro-rata long service leave under the *Long Service Leave Act* accrues after 10 years' continuous service.

51 In this matter, the material facts disclose that the accrual of long service leave was:

> (a) 13 weeks after seven years' continuous service under the HSO award; and
>
> (b) 13 weeks after 10 years' continuous service under the 1999 industrial agreement and subsequent industrial agreements.

52 Consequently, it can be seen no uniform standard has been established for length of service to accrue long service leave. It is the case, however, that all long service leave schemes provide as a reward for continuous long service an extended period of leave. The way in which continuous service is calculated is not, however, uniform. In the *Long Service Leave Act* periods of paid leave and most absences from work that could be said to be contemplated are counted as continuous service. Section 6 of the *Long Service Leave Act* currently provides:

> (1) For the purposes of this Act employment of an employee whether before or after the commencement of this Act shall be deemed to include —
>
> (a) any period of absence from duty for —
>
> (i) annual leave;
>
> (ii) long service leave; or
>
> (iii) public holidays or half-holidays, or, where applicable to the employment, bank holidays;
>
> (b) any period of absence from duty necessitated by sickness of or injury to the employee but only to the extent of 15 working days in any year of his employment;
>
> (c) any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations under this Act in respect of long service leave or obligations under any award or industrial agreement in respect of annual leave; and
>
> (d) any period during which the employment of the employee was or is interrupted by service —
>
> (i) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia other than as a member of the British Commonwealth Occupation Forces in Japan and other than as a member of the Permanent Forces of the Commonwealth of Australia except in the circumstances referred to in section 31(2) of the *Defence Act 1903* and except in Korea or Malaya after 26 June 1950;
>
> (ii) as a member of the Civil Construction Corps established under the *National Security Act 1939-1946*; or
>
> (iii) in any of the Armed Forces under the *National Service Act 1951*, or any Act passed in substitution for, or amendment of, that Act,
>
> but only if the employee, as soon as reasonably practicable after the completion of any such service, resumed or resumes employment with the employer by whom he was last employed prior to the commencement of such service.

(2) For the purposes of this Act, the employment of an employee whether before or after the commencement of this Act shall be deemed to be continuous notwithstanding —

(a) the transmission of a business as referred to in subsections (4) and (5);

(b) any interruption referred to in subsection (1) irrespective of the duration thereof;

(c) any absence of the employee from his employment if the absence is authorised by his employer;

(d) any standing-down of an employee in accordance with the provisions of an award, industrial agreement, order or determination —

(i) in force under the *Industrial Relations Act 1979*; or

(ii) in force under the *Commonwealth Conciliation and Arbitration Act 1904*, or any Act enacted by the Parliament of the Commonwealth in amendment of, or substitution for, that Act;

(e) any absence from duty arising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute;

(f) any termination of the employment by the employer on any ground other than slackness of trade if the employee is re-employed by the same employer within a period not exceeding 2 months from the date of such termination;

(g) any termination of the employment by the employer on the ground of slackness of trade if the employee is re-employed by the same employer within a period not exceeding 6 months from the date of such termination;

(h) any reasonable absence of the employee on legitimate union business in respect of which he has requested and been refused leave;

(i) any absence of the employee from his employment after the coming into operation of this Act by reason of any cause not specified in subsection (1) or in this subsection unless the employer, during the absence or within 14 days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by that absence, in which case the absence shall be deemed to have broken the continuity of employment.

(3) Any period of absence from, or interruption of employment referred to in subsection (2)(c) to (i) inclusive shall not be counted as part of the period of an employee's employment.

(4) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called ***the transmittor***) to another employer (herein called ***the transmittee***) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee — the period of the continuous employment which the employee has had with the transmittor (including any such employment with any prior transmittor) shall be deemed to be employment of the employee with the transmittee.

(5) In subsection (4) —

transmission includes transfer, conveyance, assignment or succession, whether voluntary or by agreement or by operation of law, and ***transmitted*** has a corresponding meaning.

53 Section 6 of the *Long Service Leave Act* reflects substantially the same terms as cl 2(5) of the repealed General Order: (1978) 58 WAIG 1, 2 - 3. As the scheme of the entitlement to long service leave and continuous employment in the repealed General Order was substantially the same, we do not find it necessary to analyse the provisions of the General Order.

54 It is notable that whilst periods of absence defined in s 6(2)(c) to s 6(2)(i) of the *Long Service Leave Act* do not break service so as to render service not continuous, these periods are not counted as part of the period of an employee's employment. Thus, if any employee is stood down from work in accordance with a provision in an award for 10 days, pursuant to s 6(2)(d) the employee's service remains continuous, but those 10 days are not counted when calculating the date for accrual of long service leave: s 6(3).

55 The HSO award defines the concept of 'continuous service' differently to the *Long Service Leave Act*. When the HSO award was consolidated on 19 December 1979: (1980) 60 WAIG 66, cl 19(4) and cl 19(12) provided (70 - 71):

…

(4) Continuous service shall not include the period during which a worker is on long service leave or any period exceeding two weeks a worker is absent on leave without pay or any service a worker may have before reaching the age of eighteen years.

…

(12) The expression 'continuous services' in this clause includes any period during which a worker is absent on full pay or part pay, from his duties in the hospital service, but does not include –

(a) any period exceeding two weeks during which the worker is absent on leave without pay;

(b) any period during which the worker is taking his long service leave entitlement or any portion thereof;

(c) any service of the worker prior to his attaining the age of eighteen years;

(d) any service of the worker who resigns (except the female worker who resigns because of or with a view to marriage) or is dismissed, other than service prior to such resignation or to the date of any offence in

> respect of which he is dismissed when such prior service has actually entitled the worker to long service leave under this clause.

56 Although cl 19(5) did not refer to the term 'continuous service', cl 19(5) also provided for service that was not to be counted. This subclause did not substantially add to cl 19(12). Clause 19(5) provided:

> A worker who resigns (except a female worker who resigns because of marriage or approaching marriage) or is dismissed, shall not be entitled to long service leave or payment for long service other than that leave that had accrued to him prior to the date on which he resigned or the date of the offence for which he is dismissed.

57 The HSO award applies to more than one hospital and/or health service and to more than one statutory employer. Thus, service under cl 19(1) was deemed not to be broken by resignation from the employment of an employer party to the HSO award.

58 Clause 19(5) of the HSO award was varied on 22 January 1990: (1990) 70 WAIG 588, by deleting the provision and inserting in lieu thereof (591):

> An employee who resigns or is dismissed, shall not be entitled to long service leave or payment for long service leave other than leave that had accrued to the employee prior to the date on which the employee resigned or the date of the offence for which the employee is dismissed.

59 Also, cl 19(12)(d) was deleted and in lieu the following substituted:

> Any service of the employee who resigns or is dismissed, other than service prior to such resignation or to the date of any offence in respect of which the employee is dismissed when such prior service has actually entitled the employee to long service leave under this clause.

60 Unlike s 6 of the *Long Service Leave Act*, cl 19(12) of the HSO award excluded from 'continuous service' some periods of paid work, such as service worked prior to attaining the age of 18 years and service worked after resignation or the date of an offence if an employee was dismissed. Thus, the appellant's contention that it is a feature of all long service leave schemes that long service leave accrues for all paid service cannot be maintained. When this proposition falls, the whole of the appellant's argument falls, as this contention is a central premise of the appellant's arguments in support of its grounds of appeal.

61 In our opinion, the proper approach to the interpretation of the industrial agreements that applied to the terms and conditions of Ms Geraghty's employment is to interpret the relevant provisions in light of the historical and statutory context of the HSO award, the industrial agreements and the WP agreement.

62 It is agreed that when Ms Geraghty signed the WP agreement she elected to convert pro-rata long service leave to recreational leave and have it accrued on an annual basis. This was permitted pursuant to cl 11.12 of the WP agreement. By cl 11.13, an employee who elects to exercise this option ceases to accrue an entitlement towards long service leave but will be advanced by two salary levels.

63 In the case of Ms Geraghty, this meant that she converted 6.5444 weeks' pro-rata long service leave to recreational leave. On the evidence, the 6.5444 weeks was the pro-rata long service leave accrued during her employment to the date she made this election, a period of just over five years' service (ts 32).

64 The 6.5444 weeks' pro-rata long service leave was paid to her at the 25% discount provided for in cl 11.12(A) of the WP agreement. This resulted in Ms Geraghty receiving 4.9083 weeks of recreational leave for 6.5444 weeks of long service leave. This exhausted Ms Geraghty's pro-rata long service leave entitlement accrued from the commencement of her employment on 1 August 1995 to the date she signed the WP agreement (other than for an administrative miscalculation).

65 In summary:

> (a) Ms Geraghty received 4.9083 weeks' payment;
>
> (b) This payment was for the period of service 1 August 1995 to her signing the WP agreement in September 2000.

66 When Ms Geraghty withdrew from the WP agreement, her employment became regulated by the 1999 agreement. Over time, as that agreement was replaced by successive industrial agreements, a point was reached at which, on 1 August 2005, Ms Geraghty attained 10 years' employment with the respondent. The issue is how much of that employment counts as service for the purposes of a further long service leave entitlement?

67 The answer is a relatively simple task of the interpretation of the relevant parts of the subsequent agreements.

68 The terms of the 1999 agreement expressly replaced cl 19 of the HSO award. This industrial agreement applied to Ms Geraghty's employment after she withdrew from the WP agreement on 8 October 1991.

69 Clause 17 of the 1999 agreement not only provided for 13 weeks' paid long service leave on completion of 10 years of continuous service and an additional 13 weeks' paid long service leave for each subsequent period of seven years of continuous service, cl 17 also provided for payment in lieu of taking a portion of long service leave: cl 17(1) and cl 17(14).

70 Clause 17(7) of the 1999 agreement replicated cl 19(12)(d) of the HSO award. Clause 17(12) reflected in part cl 19(12) of the HSO award but made some changes. Clause 17(12) provided:

> The expression 'continuous service' in this clause includes any period during which an employee is absent on full pay or part pay, from his/her duties with any employer party to the Award, but does not include-
>
> (a) any cumulative period exceeding two weeks in any one anniversary year during which the employee is absent on leave without pay;

(b) Any service of the employee who resigns or is dismissed, other than service prior to such resignation or to the date of any offence in respect of which the employee is dismissed when such prior service has actually entitled the employee to long service leave, including pro-rata long service leave, under this clause.

71 The discriminatory provision that prohibited service prior to the age of 18 years under cl 19(12) of the HSO award was removed by the 1999 agreement and the requirement that service whilst on long service leave was not to be counted was also removed. Clause 17(12) introduced one other change. Whereas cl 19(12)(a) of the HSO award excluded each absence exceeding two weeks of leave without pay, cl 17(12) of the 1999 agreement excluded any cumulative period exceeding two weeks of leave in any one year without pay.

72 The 2001 agreement came into effect on 24 January 2002. Except for the insertion of cl 13(15), the 2001 agreement contained the same material long service leave conditions as the 1999 agreement.

73 The appellant argues that the effect of cl 13(15) of the 2001 agreement and its equivalent provisions in the subsequent industrial agreements is that the period of time Ms Geraghty converted to recreational leave should be deducted from her entitlement to long service leave. Thus, it says on 27 July 2006 the appellant would have become entitled to 13 weeks' long service leave less 6.5444 weeks that she converted to recreational leave on 24 September 2000.

74 Clause 13(15) of the 2001 and 2004 agreements provided that any period of service during which, or for which, Ms Geraghty received or had received payment or any other compensation in lieu of long service leave shall not be counted as service for the purpose of determining any future entitlement to long service leave. This language is the same in cl 41(16) of the 2006 and the 2008 agreements.

75 The first difficulty with the appellant's argument is it is not the period of long service leave that was converted that is to be deducted. It is the period of service that has been converted that is to be deducted. Nor is the provision entirely prospective. This construction is not only reflected in the express language used in cl 13(15), it is also consistent with the way in which periods of service are to be counted or excluded within the meaning of cl 13(7), cl 13(11) and cl 13(12). As discussed, when calculating dates of accrual, cl 19(12) of the HSO award, cl 17(7) of the 1999 agreement and cl 13(7) of the 2001 agreement all exclude periods of service after resignation or dismissal. Also, cl 17(12) of the 1999 agreement and cl 13(12) of the 2001 agreement excludes periods of service. These provisions do not exclude periods of long service leave that had accrued and that had been taken or converted to another benefit. If these clauses did so such a provision would be consistent with the appellant's construction of cl 17(15).

76 Secondly, the historical context of the insertion of cl 13(15) into the 2001 agreement should not be ignored. This clause was inserted after Ms Geraghty ceased to be a party to the WP agreement which was a generic document with common terms and conditions in respect of long service leave.

77 Under cl 11.12 of the WP agreement, Ms Geraghty and any other employee who was a party to the generic WP agreement could elect to convert pro-rata long service leave to a discounted rate of recreational leave. When this context is examined, the words 'payment, or any other compensation' in cl 13(15) must be construed to mean payment of money or some other benefit such as converting a period of long service leave to a discounted form of another type of leave. Without regard to the historical context of the WP agreement, it would be difficult to ascertain what the words 'any other compensation' meant as other than the rights created in the WP agreement, the only other benefits that accrued to an employee were the right to take long service leave or the right to make a request for payment in lieu. The words 'any other compensation' must be construed as a right to convert pro-rata long service leave to discounted recreational leave. Such a right would clearly be within the meaning of the word 'compensation'.

78 The proper interpretation of cl 13(15) when applied to the facts relating to Ms Geraghty are as follows:

(a) As she converted a period of service for which she received compensation, (in this case, a discounted period of annual leave), she has received 'compensation' for that period which was converted;

(b) The period of service which was converted is not to be counted as service, when determining her entitlement to long service leave after the commencement of the 2001 agreement or any subsequent agreement.

79 The language in these provisions states that it is the period of service for which Ms Geraghty received the payment that is not counted. Ms Geraghty received a payment of 4.9083 weeks' pay; but the period of service for which that payment was made was the period of service from the commencement of her employment to the signing of the WP agreement; that is the period of service for which she received the payment. Accordingly, it is that period which is not to be counted as service for the purpose of determining her future entitlement to long service leave, less the period of leave which remained to her credit by way of a calculation error. That is the decision reached by the Public Service Arbitrator in this matter and we can detect no error.

80 For these reasons, we are of the opinion the Public Service Arbitrator did not err and the grounds of appeal have not been made out.

81 In a document filed by the respondent on 24 October 2012 titled 'Respondent's Further Particulars', the respondent states:

1. In the statement of agreed facts for PSA CR 1 of 2012 [sic] at agreed facts 24 and 25 both parties agreed that:

'24. The 1999 Agreement changed long service leave accrual from 13 weeks long service leave after 7 years of continuous service to 13 weeks long service leave after 10 year [sic] of continuous service.

25. Under the terms of the 1999 Agreement, this change was effective from 1 January 1999.'

2. In the Further Particulars filed by the Appellant on 28 September 2012 the Appellant has raised in paragraph 1(a) that the change from 7 to 10 years of continuous service was from 1 April 1996 and not 1 January 1999.

3. Until receiving the further particulars the Respondent was not aware that this was an issue. However, on further investigation concedes that the date of 1 April 1996 is the correct date for the change from 7 to 10 years of continuous service.

4. In addition, by correcting the date for the change from 7 to 10 years of continuous service this also changes the amount of weeks that were not converted to recreational leave in error.

5. At the initial hearing before A/Senior Commissioner Scott in PSA CR 1 of 2011 the parties conceded that there was an error of 0.9 weeks which was not properly converted to recreational leave.

6. As the Respondent has now recalculated the amounts in line with the corrected date for the change from 7 to 10 years continuous service this error now results in a 0.5456 weeks that were not converted to recreational leave instead of the previous 0.9 weeks which was agreed at the initial hearing in PSA CR 1 of 2011.

7. It is noted that while this change in the date for the change from 7 to 10 years of continuous service does change the calculations the Respondent submits that it does not affect the overall principles before the Full Bench regarding which periods of time should be considered to be relevant periods.

RESPONDENT'S CALCULATIONS

8. Commissioner Scott's Declaration and Order issued on 3 May 2012 the relevant periods which were declared not to count towards continuous service included at declaration 3(a):

> 'the period of service from 1 August 1995 to 22 February 1999 which was converted to recreational leave in accordance with the Workplace Agreement'.

9. Due to the agreed change (as outlined above) regarding the effective date for the change from 7 to 10 years this alters the period of service which was converted to recreational leave under the Workplace Agreement.

10. The Respondent's calculations since being notified of this change now results in the period being from 1 August 1995 to 24 April 2000. Therefore the Respondent submits that should the appeal be in its favour that declaration 3(a) should be amended to:

> 'the period of service from 1 August 1995 to 24 April 2000 which was converted to recreational leave in accordance with the Workplace Agreement'.

11. The date of 24 April 2000 (instead of 22 February 1999) accounts for the change to the accrual due to the change from 7 to 10 year accrual as well as the error being 0.5456 weeks and not 0.9 weeks.

82 As the respondent did not file a cross-appeal it is not now open to the respondent to raise a contention that the Public Service Arbitrator erred in fact in making the order and declaration on 3 May 2012. In any event, a cross-appeal would not be successful as the respondent is bound by the agreed facts it put before the Public Service Arbitrator. Consequently, we are of the opinion that an order should simply be made by the Full Bench that the appeal be dismissed.

HARRISON C:

83 I have had the benefit of reading the reasons for decision of her Honour, the Acting President and Beech CC. I agree with those reasons and have nothing to add.

2012 WAIRC 01116

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPELLANT
	-and-
	THE DIRECTOR GENERAL OF HEALTH
	AS DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 20 DECEMBER 2012
FILE NO/S	FBA 3 OF 2012
CITATION NO.	2012 WAIRC 01116

Result	Appeal dismissed
Appearances	
Appellant	Mr R L Hooker (of counsel)
Respondent	Mr M J Aulfrey (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 25 September 2012, and having heard Mr R L Hooker (of counsel) on behalf of the appellant and Mr M J Aulfrey (of counsel) on behalf of the respondent and written submissions having been filed on 28 September 2012 and 24 October 2012, and reasons for decision having been delivered on 20 December 2012, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2012 WAIRC 01111

ALLEGED NON OBSERVANCE OF UNION RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2012 WAIRC 01111
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	WEDNESDAY, 19 SEPTEMBER 2012; WRITTEN SUBMISSIONS - WEDNESDAY, 17 OCTOBER 2012
DELIVERED	**:**	WEDNESDAY, 19 DECEMBER 2012
FILE NO.	**:**	PRES 3 OF 2011
BETWEEN	**:**	ROBERT MCJANNETT
		Applicant
		AND
		CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS
		Respondent

Catchwords	**:**	Industrial Law (WA) - application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) - alleged breaches of union rules - interlocutory application for orders to restrain respondent's solicitors from representing the respondent on grounds of conflict of interest - application dismissed - application made without reasonable cause - order for costs made
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7(1), s 8, s 10, s 11(1), s 12, s 13, s 14(1), s 17, s 19, s 20, s 20(10), s 21, s 22, s 27(1)(c), s 66(2), s 93, s 93(1);
		Constitution Act 1889 (WA) s 2(1);
		Interpretation Act 1984 (WA) s 10(a);
		Commonwealth Constitution (Cth) Chapter III;
		Judiciary Act 1903 (Cth) s 78B.
Result	**:**	Order for costs made
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr T J Dixon (of counsel)
Solicitors:		
Respondent	**:**	Slater & Gordon

Case(s) referred to in reasons:

Brailey v Mendex Pty Ltd (1993) 73 WAIG 26

Case(s) also cited:

Attorney General v Michael [2005] WASC 203 (16 September 2005)

Brogden v Attorney-General [2001] NZCA 208

Holland v Nude Pty Ltd t/a Nude Delicafe [2001] FWA 8012

Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; (1996) 189 CLR 51 (12 September 1996)

Lane v Morrison [2009] HCA 29 (26 August 2009)

R v Davison [1954] HCA 46; (1954) 90 CLR 353 (10 September 1954)

Sydney City Council v Reid (1994) 34 NSWLR 506

Waterside Workers' Federation of Australia v J W Alexander Ltd [1918] HCA 56; (1918) 25 CLR 434 (27 September 1918)

Reasons for Decision

Background

1 A substantive application was made by Mr Robert Mcjannett (the applicant) pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the Act) for orders under s 66(2) of the Act, on grounds that the Construction Forestry Mining and Energy Union of Workers (the respondent) had not observed the rules of the union.

2 On 2 April 2012, the respondent filed an application to summarily dismiss the substantive application. The application to dismiss was heard on 13 and 14 June 2012.

3 Prior to the hearing of the respondent's application to summarily dismiss, the applicant made an application for orders to prohibit the respondent's solicitors from acting on grounds of conflict of interest. This application was heard on 4 April 2012 and, on 10 May 2012, an order was made to dismiss the application for an interlocutory order: [2012] WAIRC 00292; (2012) 92 WAIG 517. In reasons for decision that issued on the same day I found that the President has no jurisdiction to make an order to restrain a party's solicitor from acting on alleged grounds of conflict of interest. I also found that, in any event, there was insufficient evidence that a conflict of interest could be said to have arisen at that point in time: [2012] WAIRC 00291; (2012) 92 WAIG 507.

4 The respondent's application to summarily dismiss the substantive application was ultimately successful. On 15 October 2012, I issued reasons for decision in which I found that each alleged breach should be struck out and that leave should not be granted to the applicant to re-plead his case: [2012] WAIRC 00935; (2012) 92 WAIG 1889. On 7 November 2012, I issued an order that the applicant's substantive application be dismissed and that within seven days of the date of the order the applicant pay the respondent the sum of $1,388.84 for costs and expenses: [2012] WAIRC 00989; (2012) 92 WAIG 1950.

5 After the respondent's application to dismiss the substantive application was heard, but prior to the application to dismiss being determined, on 10 September 2012, the applicant filed a second application seeking an interlocutory injunction against the respondent's solicitors to prohibit them from acting for the respondent on grounds of allegations of 'corruption'. The allegations were said to have been published by a radio station in the eastern states of Australia and in material on the internet. In an outline of submissions filed on 12 September 2012 in support of this application, the applicant stated:

> The Applicant submits that the President does have the power to make the order sought specifically for the following reasons.
>
> 1. Under the act such as section 14(1)(2) the President has wide ranging powers and all the powers bestowed upon the Commission under the act.
>
> The Applicant submits that the Commission does have the power to restrain a lawyer therefore the President subsequently has the same power.
>
> 2. As quoted by the President in her instructions the decision of Ismail-Zai v The State of Western Australia. [2007] WASCA 150. In that matter Steytler J observed that there are 3 grounds that can form the basis of the intervention by the Supreme Court to restrain lawyers from acting for parties[19]. At (b) of that decision it is stated 'Where the court acting under its inherent supervisory jurisdiction over its officers, considers it is necessary to do so in order to ensure the due administration of justice.'
>
> The Applicant submits that the President does have an obligation under her 'inherent supervisory jurisdiction' to make an order to ensure the due administration of justice.

6 The applicant's second application for orders to restrain the respondent's solicitors was listed for hearing on 19 September 2012. On 12 September 2012, the applicant filed an affidavit sworn by him in support of his application. In the applicant's affidavit he deposed that he had heard a number of allegations in an interview on radio 2GB on Friday, 20 July 2012, that involved a previous employee of the respondent's solicitors. The allegations related to events that occurred sometime in the early 1990s and did not involve any officer, employee or any other person engaged by the respondent.

7 Prior to the applicant's second application for an injunctive order, the respondent's solicitors filed an outline of submissions in reply to the applicant's second interlocutory application. They also filed an affidavit of Shannon Nora Walker on 18 September 2012 and an amended copy of the same affidavit on 19 September 2012. Shannon Nora Walker is a solicitor

employed by the respondent. In her affidavit, she set out a history of correspondence between officers of the Commission, the applicant and the respondent's solicitors and other persons. Of particular relevance annexed to her affidavit was:

(a) an email sent by the applicant to the Commission and a solicitor employed by the respondent's solicitors, Ms Samantha Holmes, on 22 July 2012 in which the applicant made a demand that Ms Holmes and her firm to 'recuse yourselves from representing the CFMEUW in the matter of Pres 3 of 2011 forthwith'; and

(b) a letter in response to the applicant dated 24 July 2012, in which Ms Holmes said:

> In the emails, you appear to be relying on media interviews and reports that relate to a matter which took place in the 1990s and which does not appear to relate to your application in any way.
>
> As is clear from the articles you refer to in your emails, these matters were widely reported prior to your application to have Slater & Gordon removed from the record in this case. That application was heard on 4 April 2012, and you did not raise any of these matters at that time. Your application was dismissed on 10 May 2012.
>
> Any attempt at re-arguing this matter will be a vexatious proceeding. A litigant may be said to engage in vexatious litigation if it brings multiple proceedings '*if those proceedings clearly represent an attempt to re-litigate an issue already conclusively determined against that person, particularly if this is accompanied by extravagant or scandalous allegations which the litigant has no prospect of substantiating or justifying. The Court may also take into account the development of a pattern of behaviour involving a failure to accept an inability in law to further challenge decisions in respect of which the appeal process has been exhausted, or attacking a range of defendants drawn into the widening circle of litigation solely because of an association with a defendant against whom a prior proceeding has failed. The fact that one or more proceedings have been struck out does not inevitably lead to the conclusion that the litigation has been vexatious. But this may be a strong indication*': *Brogden v Attorney-General (NZ)* [2001] NZCA 208 at [21] (emphasis added).
>
> In the email dated 21 July 2012, you state 'here is some more evidence of parralel [sic] corruption for the acting President to disregard and not put on the file'.
>
> Leaving the disrespectful language to one side, we consider that it is highly inappropriate to communicate substantive matters (which involve further 'evidence') to the Commission.
>
> As you know, the CFMEUW's strike out application in this matter was heard on 13 and 14 June 2012, and her Honour reserved judgment.
>
> If you wish to re-open your case, you should take formal steps to achieve that. We would then have a chance to respond appropriately.
>
> We also consider that your recent conduct is symptomatic of the vexatious manner in which you have proceeded in the Commission to date. To be clear, your particular conduct and the further allegations now made can be characterized as being:
>
> (i) pursued without reasonable ground;
>
> (ii) conducted in a manner so as to harass or annoy, cause delay or detriment to our client; and
>
> (iii) 'deeply buried in bizarre allegations and untenable claims': *Attorney General v Michael* [2005] WASC 203 (16 September 2005) at [53].
>
> We put you on notice that our client reserves all of its rights to bring proceedings in the Supreme Court under the *Vexatious Proceedings Restriction Act 2002* (WA) ('the Act') at any time.
>
> As part of those proceedings, our client would rely upon this letter and *inter alia* all of the materials in the CFMEUW's tender bundle in these proceedings to support a case that your conduct brings this and any future application within the section 3 definition of 'vexatious proceedings' in the Act.
>
> You will note that we have not copied this correspondence to the WAIRC. Our client remains hopeful that you will respect the fact that it has brought its application to have your matter struck out on the grounds advanced, and that it is now appropriate to await the Commission's determination of that application without any further vexation as described above.

8 When the second application for an interlocutory order was heard on 19 September 2012, the respondent through its counsel made a submission that the application be dismissed and that the applicant pay the respondent's costs. The grounds of the respondent's application for costs is that the applicant had no legitimate motivation to bring a second application for orders against a third party and that the application is obviously untenable and manifestly groundless such as to be utterly hopeless. After hearing oral submissions on behalf of the parties on 19 September 2012, Ms Walker's affidavit was received into evidence as her affidavit contained material that was relevant to the respondent's application for an order for costs.

9 As the respondent's submission in reply to the application and affidavit of Ms Walker had only been served on the applicant the day before the hearing, the applicant was afforded an opportunity to put submissions and material in writing which addressed two matters. The first related to the jurisdiction of the President to make the order sought. In particular, the applicant was afforded an opportunity to address any authoritative decisions that had not been considered when the first reasons for decision issued in which the first interlocutory application to restrain the respondent's solicitors from representing the respondent was found to be without jurisdiction. The second matter was whether an award of costs should be made against the applicant.

10 Despite the oral hearing of the applicant's application for interlocutory orders being concluded on 19 September 2012, on 24 September 2012 the applicant filed an application for leave to cross-examine Ms Walker. The stated grounds of the application were that although the respondent had filed two affidavits of Ms Walker which had been accepted into evidence, the applicant has a common law right to defend himself against the allegation that he had instituted vexatious proceedings. At about the same time the applicant made an application for an extension of time to provide his written submissions. Both applications were opposed by the respondent. In a letter to the Commission dated 25 September 2012, the respondent's solicitors pointed out:

> 1. The affidavit relied upon by the Respondent and referred to by the Applicant in his application for an extension of time:
>
> (a) contains only correspondence and materials previously sent or received by the Applicant;
>
> (b) contains correspondence from the Respondent's solicitors that put the Applicant on notice that the same correspondence would be relied upon if he persisted in making a further application; and
>
> (c) was filed along with an outline of submissions (in each case) in reply to an affidavit and submissions filed by the Applicant.
>
> Accordingly, nothing could possibly be of any 'surprise' to the Applicant in those circumstances.

11 After considering these submissions, the applicant was informed in an email sent to him on 27 September 2012 that:

> The Acting President has considered your application to cross-examine Ms Walker in respect of her affidavit filed on 19 September 2012.
>
> The Acting President has decided to refuse your application as your email sent to her chambers on 26 September 2012 at 3.27pm indicates that you wish to cross-examine the witness in respect of each paragraph of her affidavit and annexures to ascertain which part of her affidavit goes to the respondent's argument that your application is vexatious. The Acting President is of the opinion that such a cross-examination would not be of assistance in determining whether your application is vexatious as:
>
> 1. Ms Walker cannot give evidence about the truth or veracity of what is stated in the documents annexed to her affidavit.
> 2. It is evident from the matters stated by Ms Walker in her affidavit that the purpose of her affidavit is simply to put before the Commission copies of documents:
>
> a. you have either provided to the respondent or to its solicitors;
>
> b. sent to you from the respondent's solicitors.
>
> 3. It is also evident from Ms Walker's affidavit that she does not have personal knowledge of any of the matters set out in the documents annexed to her affidavit.
>
> Consequently, the affidavit of Ms Walker can only be received into evidence, and has been received into evidence, as a record of documents sent and received.
>
> The relevance of the documents to the respondent's arguments was explained when counsel for the respondent tendered the affidavit and made submissions on 19 September 2012. He stated the documents annexed to the affidavit of Ms Walker were relevant as the documents show the considerable expense the respondent has been put to in responding to your correspondence as you have continued to complain about the solicitors being on the record since the decision on the application to strike out has been reserved when in the normal course of litigation there would be no correspondence between parties when a matter is reserved.
>
> The Acting President has also considered your request to extend time to file written submissions. Your submissions should address the following issues, whether:
>
> 1. the President has jurisdiction to make the injunctive order sought by you;
> 2. the application by you constitutes an abuse of process and is frivolous and vexatious in light of the decision of the Acting President given on 10 May 2012: [2012] WAIRC 00291; (2012) 92 WAIG 507;
> 3. if an order is made to dismiss your application for an interlocutory injunction, an order should be made for costs on grounds that the application is frivolous and vexatious itself and on grounds that it is frivolous and vexatious as you as the applicant have continued to unreasonably correspond with the respondent and its solicitors about the application made under s 66 of the Act, after the respondent's application to strike out was heard and reserved.
>
> You now seek time to obtain legal advice and other documents prior to making a submission. The respondent opposes the application and points out that at the hearing of the respondent's application to strike out the respondent relied upon written and oral submissions that a finding should be made that the substantive application made by you under s 66 of the Act is vexatious and has sought orders for costs on two prior occasions.
>
> In the circumstances, the Acting President has determined that you be allowed an additional 14 days to file your submissions which will now be due to be filed and served by close of business on 17 October 2012.

12 On 17 October 2012, the applicant filed a written submission as he had been directed to do. In the submission filed on 17 October 2012, the applicant made a submission that was solely directed to the President's power to make any order, including an order for costs against him. The applicant made no submission about the jurisdiction of the President to restrain a lawyer acting for a party in the matter before the Commission. The point the applicant sought to make is that the Acting President has no power to make any order against an individual, because orders can only be made by a properly constituted

court as set out in Chapter III of the Commonwealth Constitution and only when such a court is presided over by a qualified judge who has sworn an oath of allegiance to Her Majesty Queen Elizabeth II.

13 The applicant also argues that I, as Acting President, have no power to act under the provisions of the Act as the only powers vested in the President are vested in a man and not a woman. He also argues that a President is an employee of a state authority and therefore cannot exercise judicial powers which are only vested in a court constituted under Chapter III of the Commonwealth Constitution.

14 For these reasons, the applicant says that I, as Acting President, do not have the power to make a cost order or any other adverse finding against him as he is a British subject and sovereign citizen of the Commonwealth and to do so would be considered unconstitutional or a contempt.

Conclusions

15 It is notable that contrary to the purpose of filing the interlocutory application on 10 September 2012, the applicant put forward a written submission on 17 October 2012, that the President of the Commission has no power to restrain a lawyer from acting. In any event, the applicant's application for orders in the nature of an injunction against the respondent's solicitors is utterly hopeless and without any merit whatsoever. The issue whether the President has inherent jurisdiction to make such an order was decided in the reasons for decision given on 10 May 2012. In those reasons for decision, I found [30]:

> In an application made under s 66 of the Act, the President has no power to make any orders against a third party. The President's only power to restrict a party from being represented by a legal practitioner arises out of s 31(1)(c)(iv) of the Act which provides the Commission with a discretion to allow legal practitioners to appear and be heard where a question of law is raised, or is likely in the opinion of the Commission to be raised, or argued. However, there is no room to imply under s 31(1)(c)(iv) of the Act a power to restrict the appearance of a legal practitioner on grounds of a conflict of interest, as such a power goes beyond what could necessarily be implied into any consideration of whether a question of law arises, or is likely to arise, in a matter before the Commission. In any event, it is clear that leaving aside courts in the federal system, the Supreme Court is the only state court in Western Australia that can exercise a supervisory jurisdiction over legal practitioners. In ***Murcia & Associates (a firm) v Grey*** [2001] WASCA 240; (2001) WAR 209, it was found the District Court of Western Australia has no such supervisory jurisdiction.

16 The order to dismiss the first interlocutory application was not appealed.

17 In the applicant's written submissions the applicant makes a submission that I, as Acting President, am not a properly constituted court and I have no power to make any order which could be sought by either party, including orders for costs. The applicant is correct when he says that the Commission and its members are not a 'court' constituted under Chapter III of the Commonwealth Constitution. Consequently, no matter can be said to arise under the Commonwealth Constitution so as to involve its interpretation, so as to invoke the provisions of s 78B of the *Judiciary Act 1903* (Cth). Section 78B of the *Judiciary Act* requires that where a cause pending in a court of a state involves a matter arising under the Commonwealth Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court. As the matters raised by the applicant in his written submissions, in my view, do not raise a matter arising under the Commonwealth Constitution or could properly be said to be involving its interpretation, I am of the view that there was no requirement for s 78B notices to issue prior to a determination of this interlocutory application.

18 The submission made on behalf of the applicant that the office of President or Acting President is constituted by a person who is an employee cannot be made out. The Commission is a court of record established under s 12 of the Act. The Act is made by the Western Australian Parliament pursuant to its power to make legislation for the peace, order and good government of Western Australia under s 2(1) of the *Constitution Act 1889* (WA). Members of the Commission including the President are not employees of a state authority. Under s 8 of the Act, the members of the Commission are the President, the Chief Commissioner, the Senior Commissioner and such number of other Commissioners who are respectively appointed to their offices by the Governor by the commission in Her Majesty's name. Pursuant to s 93 of the Act, the members of the Commission are supported by a government Department. Under s 93(1), the Registrar is the chief executive officer of the Registrar's Department and as such is the employer of public service officers who work in the Department. Members of the Commission are not public service officers. They are, however, entitled to paid leave of absence not less than those of a public service officer: s 20(10) of the Act. Under s 13 of the Act, all members of the Commission have, in the performance of their functions and duties, the same protection and immunity as a judge. The conditions of service and all members of the Commission are prescribed by s 20 of the Act. Members of the Commission:

(a) may resign their office in writing addressed to the Governor: s 21;

(b) must retire at the age of 65 years: s 10;

(c) hold their office during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament: s 22.

Acting appointments of the Commission can be made under s 17 of the Act. Pursuant to the definition of President in s 7(1) of the Act, references to President in provisions of the Act include an Acting President.

19 It is clear from all of the provisions referred to above that the office of President and of all of the offices of members of the Commission are not employees but are offices of the State of Western Australia.

20 As to the issue raised whether the position of President can only be held by a person who is male, it is the case that some provisions of the Act use gender specific references to male members of the Commission such as himself, he, his or him.

These references are found in a number of provisions of the Act, including s 11(1), s 14(1), s 19 and s 21. In particular, s 14(1) of the Act provides:

> The President has the jurisdiction expressly conferred on him by this Act and in the exercise of that jurisdiction he constitutes the Commission and he has and may exercise such powers of the Commission as may be necessary or appropriate thereto.

21 Other provisions in the Act refer to both genders, such as s 9(1a) which uses the words 'The President during the term of his or her office'. However, legislative provisions that refer only to the male gender apply to members of the Commission who are female. Although s 14(1) only refers to the male gender, pursuant to s 10(a) of the *Interpretation Act 1984* (WA) s 14(1) applies to persons of both gender who are appointed to the office of President. Section 10(a) of the *Interpretation Act* expressly provides that in all Acts of Parliament that words 'denoting a gender or genders include each other gender'. Consequently, the applicant's argument that the Act vests powers of a President only in a man and not a woman is not correct at law.

22 As a member of the Commission the President is expressly empowered to make an order for costs under s 27(1)(c). Section 27(1)(c) enables the President to order a party to a matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but no costs can be allowed for the services of any legal practitioner or agent.

23 In ***Brailey v Mendex Pty Ltd*** (1993) 73 WAIG 26 the Full Bench found that it is well settled in industrial law that an order for costs made under s 27(1)(c) of the Act ought not to be awarded except in extreme cases such as where proceedings have been instituted without reasonable cause.

24 This is the second interlocutory application for orders of an injunctive nature against a third party. The grounds are obviously manifestly untenable and have been instituted without reasonable cause. In any event, whilst the facts which are said to ground the second interlocutory application to restrain the respondent's solicitors have not been set out in any detail in these reasons, it is notable from the material annexed to the applicant's affidavit and the statements made by him in his affidavit that the issues he sought to raise related to unsubstantiated matters founded in hearsay that do not involve the respondent. Nor are they matters which the applicant could have personal knowledge of. The allegations made by the applicant in the application and his affidavit are made under absolute privilege. To bring such material before the Commission in these circumstances is clearly scandalous, vexatious and an abuse of the privilege given to parties to make statements in court and in court documents without fear of suit for defamation.

25 For these reasons, I will make an order that the applicant pay the respondent's costs of defending the interlocutory application made on 10 September 2012. The respondent filed a bill of costs on 20 September 2012. The total amount of costs sought is an amount of $473.44 being costs of disbursements, telephone attendances, photocopying and costs of file dividers. The total amount includes an amount of $28 for the agent's attendance at the Commission for filing of the respondent's submissions. As s 27(1)(c) does not allow the Commission to make an order for costs for the services of an agent, the amount of $28 will be deducted from the bill.

26 For these reasons, I will make an order that the applicant pay the respondent the amount of $445.44. I will not make an order to dismiss the interlocutory application made on 10 September 2012 as an order was made on 7 November 2012 to dismiss the applicant's substantive application.

2012 WAIRC 01124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT
	APPLICANT
	-and-
	CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 20 DECEMBER 2012
FILE NO/S	PRES 3 OF 2011
CITATION NO.	2012 WAIRC 01124

Result	Order for costs made
Appearances	
Applicant	In person
Respondent	Mr T J Dixon (of counsel)

Order

This matter having come on for hearing before me on 19 September 2012, and having heard the applicant in person and Mr T J Dixon, of counsel, on behalf of the respondent, and written submissions having been filed on 17 October 2012, and reasons for decision having been delivered on 19 December 2012, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

The applicant pay the respondent the amount of $445.44.

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

AWARDS/AGREEMENTS—Variation of—

2012 WAIRC 01119

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE HON MINISTER FOR EDUCATION AND TRAINING AND OTHERS

RESPONDENTS

CORAM	COMMISSIONER S M MAYMAN
DATE	20 DECEMBER 2012
FILE NO/S	APPL 70 OF 2012
CITATION NO.	2012 WAIRC 01119

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Pyne and Mr A Harper

Order

HAVING HEARD Mr S Dane on behalf of United Voice WA and Ms N Pyne on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Cleaners and Caretakers (Government) Award 1975 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 20 December 2012.

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

SCHEDULE

1. Clause 5.1 – Special Rates and Provisions: Remove subclause 5.1 of this clause and insert the following in lieu thereof:

5.1.1 (a) All employees called upon to clean closets connected with septic tanks or sewerage shall receive an allowance of 79 cents per closet per week.

(b) For the purposes of 5.1 – Special Rates and Provisions, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

5.1.2 Employees called upon outside the ordinary working hours to wash towels shall be paid $4.90 per dozen for ordinary towels, and $3.60 per dozen for dusters, hand towels and tea towels.

5.1.3 All materials and appliances required in connection with the performance of the employee's duties shall be supplied by the employer.

5.1.4 (a) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level unless provided with an assistant.

(b) (i) When window cleaning is done from a ladder and any portion of a window to be cleaned is more than seven metres from the nearest horizontal plane, the employee shall be paid an allowance of 15 cents per window.

(ii) The allowance prescribed in 5.1.4(b)(i) shall not be paid where adequate safety equipment such as fall-arrest and restraint systems is supplied. Where such equipment is supplied, it must be used by the employee.

5.1.5 Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance of $4.60 per day.

5.1.6 An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the Principal, shall be paid an allowance according to the following scale:

		Per Day $
(a)	Evenings - Monday to Friday	
	Up to 40 rooms per week	7.80
	41 rooms to 100 per week	11.80
	Over 100 rooms per week	15.55
(b)	Saturday and Sunday	14.80

(c) An additional allowance of $4.60 shall be paid to a caretaker on each occasion they are required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing.

5.1.7 (a) Where practicable, suitable dressing accommodation shall be provided by the employer. Cleaning materials, tools and appliances shall not be kept in such rooms.

(b) All employees shall be provided with the facilities for boiling water.

(c) Employees shall be permitted to eat their meals in a convenient and clean place protected from the weather and employees shall remove all litter and foodstuffs after use.

(d) In the event of a dispute concerning the provisions of 5.1, the matter shall be resolved in accordance with the dispute resolution procedure of this award.

5.1.8 (a) Any wood chopping duties carried out by the employee shall be by agreement between the employer and the employee.

(b) Any employee performing wood chopping duties shall be paid an allowance of $17.50 per tonne to a maximum of:

(i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fireplaces such as Wonderheats.

(ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.

5.1.9 (a) An estate attendant (Homeswest) who, in their privately owned vehicle, commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid $8.80 per week for all purposes of this award.

(b) The amount and type of equipment to be carried as prescribed in 5.1.9(a) will be agreed between the union and employer.

5.1.10 The rates expressed in 5.1 shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

2. Clause 5.4 – First Aid: Remove subclause 5.4 of this clause and insert the following in lieu thereof:

5.4.1 The employer shall provide at each worksite, an adequate first aid kit for the use of the employees in case of accident, and this first aid kit shall be kept renewed and in proper condition.

5.4.2 (a) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all sites or depots where employees are employed. Such employees shall, in addition to first aid duties, be responsible, under the general supervision of the foreperson, for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

(b) Employees so appointed shall be paid the following rates in addition to their prescribed wage:

10 employees or less	In excess of 10 employees
$1.60 per day	$2.70 per day

(c) The rates expressed in 5.4.2(b) shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

3. Clause 3.2 – Overtime: Remove subclause 3.2.3(a) of this clause and insert the following in lieu thereof:

3.2.3 (a) Any employee who, without being notified the previous day, is required to continue working for more than one hour after the usual ceasing time shall be provided with a meal by the employer or be paid $12.20 in lieu of the meal.

4. Clause 10.1 – Union Parties: Remove subclause 10.1 of this clause and insert the following in lieu thereof:

10.1. - UNION PARTIES

United Voice WA

5. Clause 12 – Where to go for further information: Remove subclause 12.1 of this clause and insert the following in lieu thereof:

12.1 United Voice WA

Telephone	:	08 9388 5400
Toll Free (WA)	:	1800 199 890
Facsimile	:	9382 3986
Email	:	wa@unitedvoice.org.au
Web		www.unitedvoice.org.au

6. Clause 1.5 – Definitions: Remove subclause 1.5.18 of this clause and insert the following in lieu thereof:

1.5.18 "union" means the United Voice WA.

2012 WAIRC 01121

CULTURAL CENTRE AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE LIBRARY BOARD OF WESTERN AUSTRALIA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	20 DECEMBER 2012
FILE NO/S	APPL 72 OF 2012
CITATION NO.	2012 WAIRC 01121

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Pyne and Mr A Harper

Order

HAVING HEARD Mr S Dane on behalf of United Voice WA and Ms N Pyne on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Cultural Centre Award 1987 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 20 December 2012.

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

SCHEDULE

1. Clause 15 – Special Rates and Provisions: Remove clause 15 and insert the following in lieu thereof:

(1) The employer shall, where practicable, make suitable provisions for employees to change their clothing on the employer's premises.

(2) Uniforms and/or clean overalls shall be supplied by the employer free of charge, where the employer requires such to be worn. Such items shall always remain the property of the employer.

(3) (a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 78 cents per closet per week.

(b) For the purpose of this subclause one metre of urinal or three urinal stalls shall count as one closet.

(4) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level, unless he/she has an assistant.

(5) An allowance of $2.90 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.

(6) An allowance of $11.10 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.

(7) (a) Except as provided for in paragraph (b) of this subclause an allowance of $6.05 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.

(b) Where it is agreed between the employer and the Union in writing then an alternative arrangement may exist in respect of this subclause.

(8) (a) An employee who is required to work away from his/her usual place of work shall be paid for any fares in excess of those normally incurred in travelling from his/her home to his/her usual place of work and return, except where an allowance is paid in accordance with Clause 17. - Fares and Travelling Allowances of the Miscellaneous Government Conditions and Allowances Award No. A4 of 1992.

(b) Travelling time in excess of that normally incurred in travelling from his/her home to his/her usual place of work and return shall be paid at the rate of ordinary time.

(c) An employee who commences or completes a shift at or between the hours of 11.00pm and 5.00am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of $13.65 per shift.

2. Clause 16 – Wages: Remove subclause 16(2) of this clause and insert the following in lieu thereof:

(2) Leading Hands: In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid:

		$
(a)	if placed in charge of not less than one and more than five other employees	27.10
(b)	if placed in charge of more than six and not more than ten other employees	41.50
(c)	if placed in charge of more than 11 other employees	53.30

3. Clause 8 – Overtime: Remove subclause 8(9)(a) of this clause and insert the following in lieu thereof:

(9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $12.20 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid $7.15 for each meal so required.

4. Clause 5 – Definitions: Remove subclause 5(8) of this clause and insert the following in lieu thereof:

(8) "Union" shall mean United Voice WA.

5. Schedule A – Parties to the Award: Remove Schedule A and insert the following in lieu thereof:

The following organization is a party to this award:

United Voice WA.

2012 WAIRC 01122

GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE HON. MINISTER FOR EDUCATION AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	20 DECEMBER 2012
FILE NO/S	APPL 73 OF 2012
CITATION NO.	2012 WAIRC 01122

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Pyne and Mr A Harper

Order

HAVING HEARD Mr S Dane on behalf of United Voice WA and Ms N Pyne on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Gardeners(Government) 1986 Award No. 16 of 1983 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 20 December 2012.

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

SCHEDULE

1. Clause 16 – First Aid – Kits and Attendants: Remove subclause 16(2) of this clause and insert the following in lieu thereof:

(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:

Qualified Attendant	$ Per Day
10 employees or less	1.60
In excess of 10 employees	2.60

2. Clause 25 – Wages:

A. Remove subclause 25(3) of this clause and insert the following in lieu thereof:

(3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of $7.40 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.

B. Remove subclause 25(5) of this clause and insert the following in lieu thereof:

(5) Leading Hands

Leading Hands and Senior Gardener/Ground Attendants if placed in charge of:

(a) five and not more than ten other employees shall be paid $26.00 per week extra;

(b) more than ten but not more than 20 other employees shall be paid $38.10 per week extra;

(c) more than 20 other employees shall be paid $50.60 per week extra.

C. Remove subclause 25(10) of this clause and insert the following in lieu thereof:

(10) Toilet Cleaning Allowance (Zoological Gardens)

(a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 80 cents per closet, per week.

(b) For the purposes of this subclause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(c) All such employees shall be supplied with rubber gloves on request.

3. Clause 12 – Overtime: Remove subclause 12(2) of this clause and insert the following in lieu thereof:

(2) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours, the employee shall be provided with a meal or be paid $12.20 in lieu thereof.

4. Clause 5 – Definitions: Remove subclause 5(5) of this clause and insert the following in lieu thereof:

(5) Union shall mean United Voice WA.

5. Schedule A – Parties to the Award: Remove Schedule A and insert the following in lieu thereof:

The following organisation is a party to this award:

United Voice WA

2012 WAIRC 01120

RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE CHIEF EXECUTIVE OFFICER (EXECUTIVE DIRECTOR) OF THE DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	20 DECEMBER 2012
FILE NO/S	APPL 71 OF 2012
CITATION NO.	2012 WAIRC 01120

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Pyne and Mr A Harper

Order

HAVING HEARD Mr S Dane on behalf of United Voice WA and Ms N Pyne on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Rangers (National Parks) Consolidated Award 2000 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 20 December 2012.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

SCHEDULE

1. Clause 9 – Overtime: Remove subclause 9(7) of this clause and insert the following in lieu thereof:

(7) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $12.15 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each such meal by the employer or be paid $7.15 each meal so required.

(b) The provisions of paragraph (a) of this subclause do not apply -

(i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he/she will be required; or

(ii) to any employee who lives in the locality in which the place of work is situated who can reasonably return home for meals; or

(iii) where the overtime worked is outside the customary meal time.

(c) If an employee provides him/herself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, the employee shall be paid for each meal provided and not required, the appropriate amount prescribed in paragraph (a) of this subclause.

(d) An employee required to work continuously from midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid $6.25 breakfast.

(e) The provisions of this subclause do not operate so as to require payment of more than double time rates, or double time and one half on a holiday prescribed under this Award for any work.

2. Clause 14 – Conditions and Allowances: Remove this clause and insert the following in lieu thereof:

14. - CONDITIONS AND ALLOWANCES

(1) The provisions of the *Miscellaneous Government Conditions and Allowances Award No. A 4 of 1992* shall apply mutatis mutandis to all employees covered by this Award.

(2) Subject to the provisions of this Award, the provisions of the Public Service Award 1992 PSA No.4 of 1989 at:

(a) Clause 30. - Camping Allowance and Schedule C - Camping Allowance; and

(b) Clause 33. - Diving Allowance, Clause 34. - Flying Allowance and Schedule K - Diving, Flying and Seagoing Allowance.

as amended from time to time, shall apply mutatis mutandis to employees covered by this Award.

(3) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of $123.90 per week to offset the costs associated with living in and maintaining a caravan.

This allowance is to be moved year to year to reflect the change in CPI for Perth.

(4) The following conditions shall apply to Rangers Assistants on vermin, plant or noxious weed control who are required to use a toxic substance.

(a) The employee shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(b) The employee using such materials shall be provided with, and shall use, all safeguards as are required by the appropriate government authority or, in the absence of such requirement, such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(c) The employee using toxic substances or materials of a like nature shall be paid 61 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 55 cents per hour extra.

(d) For the purposes of this subclause toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(5) (a) An employer who requires a Rangers Assistant to use a pesticide shall:

(i) Inform the employee of any known health hazards involved; and

(ii) Ascertain from the Department of Health and Medical Services whether and, if so, what protective clothing or equipment should be worn during its use.

(b) Pending advice from that department the employer may require the pesticide to be used if the employer informs the employee of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.

(c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraphs (a) and (b) of this subclause and, where necessary, instruct the employee in its use.

(d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 68 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.

(e) An allowance is not payable under this clause if the Department of Health and Medical Services advises the employer in writing that protective clothing or equipment is not necessary.

(6) Where agreement is reached between the employer and the employee, payment of wages may be made in cash and a signature of the employee shall be obtained for such cash payment.

3. Clause 5 – Definitions: Remove subclause 5(14) of this clause and insert the following in lieu thereof:

(14) "Union" means United Voice WA.

4. Schedule A – Parties to the Award: Remove Schedule A and insert the following in lieu thereof:

The Chief Executive Officer (Executive Director) of the Department of Conservation and Land Management

The following are parties to this award:

United Voice WA

2012 WAIRC 01118

ZOOLOGICAL GARDENS EMPLOYEES AWARD 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE ZOOLOGICAL GARDENS BOARD

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE 20 DECEMBER 2012

FILE NO/S APPL 69 OF 2012

CITATION NO. 2012 WAIRC 01118

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Pyne and Mr A Harper

Order

HAVING HEARD Mr S Dane on behalf of United Voice WA and Ms N Pyne on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Zoological Gardens Employees Award 1969 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 20 December 2012.

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

SCHEDULE

1. Clause 8 – Overtime: Remove subclause 8(5)(a) of this clause and insert the following in lieu thereof:

(5) (a) An employee required to work continuous overtime for more than one and a half hours shall be supplied with a meal by the employer or be paid $12.20 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $7.15 for each meal so required.

2. Schedule A – Parties to the Award: Remove Schedule A and insert the following in lieu thereof:

The following organisation is a party to this award:

United Voice WA

NOTICES—Award/Agreement matters—

2013 WAIRC 00013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 688 of 2005

APPLICATION FOR A VARIATION TO THE AWARD TITLED

"ENROLLED NURSES AND NURSING ASSISTANTS (GOVERNMENT) AWARD"

NOTICE is given that an application was made to the Commission, on 1 July 2005, by *United Voice WA* under the *Industrial Relations Act 1979* for a variation to the above Award.

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

3. - SCOPE

This Award will operate throughout the State of Western Australia and will apply to all employees engaged in classifications described in Clause 16 - Classification and Wages, who are employed by a Board (other than an Agency Board) as defined in section 2 of the Hospitals and Health Services Act 1927 as amended.

16. - CLASSIFICATION AND WAGES

16.1 Subject to subclause 16.3, the minimum weekly rate of wage payable to employees covered by this Award shall be as per the provisions comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever are the greater.

16.2 Subject to subclause 16.3, the wage rates to apply for the purpose of the no-disadvantage test under the *Industrial Relations Act 1979* shall be as per the provisions comprising:

(a) Part A – Wages Adjusted by Arbitrated Safety Net Adjustments; or

(b) Part B – Expired Industrial Agreement Wages;

whichever are the greater.

16.3 The rates contained in Part B – Expired Industrial Agreement Wages shall only apply to the employees and employers who are respondent to the *WA Health - LHMU - Enrolled Nurses and Assistants in Nursing Industrial Agreement 2007* (AG 15/08), as replaced from time to time.

PART A: WAGES ADJUSTED BY ARBITRATED SAFETY NET ADJUSTMENTS

16.4 The rates of pay in subclause 16.7 include arbitrated safety net adjustments available since December 1993.

16.5 These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in subclause 16.7, except where such absorption is contrary to the terms of an industrial agreement.

16.6 Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

16.7 Subject to subclauses 16.1, 16.2 and 16.3, the weekly rate of wage payable to employees covered by this Award will be as follows:

		Base Rate $	Arbitrated Safety Net Adjustments $	Weekly Rate $
(a)	**Enrolled Nurse Level One**			
	1st year of employment	418.80	307.60	726.40
	2nd year of employment	423.80	307.80	731.60
	3rd year of employment and thereafter	434.70	308.10	742.80
(b)	**Enrolled Nurse Level Two**			
	1st year of employment	427.60	307.90	735.50
	2nd year of employment	432.70	308.10	740.80
	3rd year of employment and thereafter	443.50	308.40	751.90
(c)	**Enrolled Nurse Level Three**	456.10	308.90	765.00
(d)	**Assistant in Nursing**			
	1st year of employment	377.40	304.10	681.50
	2nd year of employment	387.80	304.50	692.30
	3rd year of employment and thereafter	398.30	304.80	703.10

16.8 Assistant in Nursing (under 19 years of age)

The rate shall be a percentage of the total wage prescribed for an Assistant in Nursing in his/her first year of employment in paragraph 16.7(d) per week, as follows:-

Under 17 years of age	73%
Under 18 years of age	81%
Under 19 years of age	87%

16.9 Where an Assistant in Nursing undertakes duties other than providing care those duties shall be consistent with the range of duties undertaken by nurses generally in the setting in which the Assistant in Nursing is employed.

16.10 An Assistant in Nursing shall work within the limits of their competency as assessed consistent with nationally recognised training and competency standards applicable to assistants in nursing.

16.11 An Assistant in Nursing shall not be required to provide care other than under the direction of a person registered under the *Health Practitioner Regulation National Law (WA) Act 2010* and where that nurse remains professionally accountable for the care provided.

16.12 An Assistant in Nursing who has completed their first year of service and who is accepted for training as an Enrolled Nurse, will be paid not less than the employee would have received had the employee continued as an Assistant in Nursing.

16.13 An Assistant in Nursing in Training is paid in accordance with subclause 16.7 as an Assistant in Nursing in the first year of employment.

16.14 When the term "year of employment" is used in this clause it will mean all service whether full time or part time in any of the classifications contained in this Award with any hospital covered by this Award and will be calculated in periods of completed months from the date of commencement of work covered by this Award. Provided that:

(a) "Service" in this context will have the same meaning as it does in the long service leave conditions appropriate to the employee concerned, but confined to named employers party to this Award; except where the employer or the Commission deems it appropriate to include service with hospitals not a party to this Award.

(b) Employees will be paid the rates shown in this clause according to their year of employment calculated in accordance with the provisions of this subclause.

(c) Proof of previous service, if required by the employer, will rest on the employee; provided that production of the statement of employment referred to in subclause 7.7, will be sufficient proof for the purpose of this paragraph**.**

16.15 Re-registration and Length of Service

Notwithstanding the provisions of paragraph 16.14(b), an Enrolled Nurse who successfully completes a re-registration course following a break in service will commence employment on the rate prescribed as follows:

(a) Five year break in service - at third year of employment rate provided that the first and second year of service rates have previously been attained.

(b) Six year but less than eight year break in service - at second year of employment rate.

(c) Greater than eight year break in service - at the first year of employment rate.

16.16 Enrolled Community School Nurses on Days Not Required to Work

The wage rate for an enrolled community school nurse, where such a nurse is not required by the employer to present for duty on any day when the school is not open, will be calculated as follows:

Weekly wage = the normal rate for an enrolled nurse as prescribed in subclause~~s~~ 16.7 multiplied by 48.5, and divided by 52.166.

PART B – EXPIRED INDUSTRIAL AGREEMENT WAGES

16.17 The wage rates contained in subclause 16.18 have been incorporated from the *WA Health - LHMU - Enrolled Nurses and Assistants in Nursing Industrial Agreement 2007* (AG 15/08) and are not to be subject to arbitrated safety net adjustments.

16.18 Subject to subclauses 16.1, 16.2 and 16.3, the weekly rate of wage payable to employees covered by this Award will be as follows:

Enrolled Nurses

(a) The classification structure for Enrolled Nurses will be as follows:

(i) "Enrolled Nurse Level 1" is an Enrolled Nurse in the first year of employment.

(ii) "Enrolled Nurse Level 2" is an Enrolled Nurse in the second year of employment.

(iii) "Enrolled Nurse Level 3" is an Enrolled Nurse in the third year of employment.

(iv) "Enrolled Nurse Level 4" is an Enrolled Nurse in the fourth year of employment.

(v) "Advanced Skill Enrolled Nurse Level 1" (ASEN 1) is an Enrolled nurse who has:

(A) at least 3 years' experience and a post registration qualification of at least 6 months duration, relevant to their area of clinical practice; or

(B) at least 4 years' experience and sufficiently demonstrated competencies, as defined in clause 16.18(b) relevant to their area of clinical practice.

(vi) Advanced Skill Enrolled Nurse Level 2 (ASEN 2) is an Advanced Skill Enrolled Nurse in the second year of employment as an Advanced Skill Enrolled Nurse.

(b) For the purposes of clause 16.18(a):

(i) "sufficiently demonstrated competencies" means the employee has satisfied the competencies process contained in the Advanced Skill Enrolled Nurse Competencies Workbook.

(ii) The "Advanced Skill Enrolled Nurse Competencies Workbook" will be as agreed from time to time between the employer(s) and the Union.

16.19 The rates of pay for Enrolled Nurses will be as follows:

Classification	Wage rate (not to be subject to ASNAs)
EN Level 1	$850.98
EN Level 2	$869.90
EN Level 3	$888.80
EN Level 4	$907.72
ASEN 1	$945.54
ASEN 2	$983.36

16.20 The rates of pay for Assistants in Nursing will be as follows:

Classification	Wage rate (not to be subject to ASNAs)
AIN Year 1	$756.43
AIN Year 2	$775.33
AIN Year 3	$794.25

16.21 Assistant in Nursing (under 19 years of age)

The rate shall be a percentage of the total wage prescribed for an Assistant in Nursing in his/her first year of employment in subclause 16.20, as follows:-

Under 17 years of age	73%
Under 18 years of age	81%
Under 19 years of age	87%

16.22 Where an Assistant in Nursing undertakes duties other than providing care those duties shall be consistent with the range of duties undertaken by nurses generally in the setting in which the Assistant in Nursing is employed.

16.23 An Assistant in Nursing shall work within the limits of their competency as assessed consistent with nationally recognised training and competency standards applicable to assistants in nursing.

16.24 An Assistant in Nursing shall not be required to provide care other than under the direction of a person registered under the *Health Practitioner Regulation National Law (WA) Act 2010* and where that nurse remains professionally accountable for the care provided.

16.25 An Assistant in Nursing who has completed their first year of service and who is accepted for training as an Enrolled Nurse, will be paid not less than the employee would have received had the employee continued as an Assistant in Nursing.

16.26 An Assistant in Nursing in Training is paid in accordance with subclause 16.20 of this clause as an Assistant in Nursing in the first year of employment.

16.27 Enrolled Community School Nurses on Days Not Required to Work

The wage rate for an enrolled community school nurse, where such a nurse is not required by the employer to present for duty on any day when the school is not open, will be calculated as follows:

Weekly wage = the normal rate for an enrolled nurse as prescribed in subclause 16.20 multiplied by 48.5, and divided by 52.166.

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

S. BASTIAN

REGISTRAR

21 December 2012

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2012 WAIRC 01099

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MARTIN JOHN BRASSINGTON

APPLICANT

-v-

TOWN OF EAST FREMANTLE COUNCIL

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE THURSDAY, 13 DECEMBER 2012

FILE NO/S U 70 OF 2012

CITATION NO. 2012 WAIRC 01099

Result Application discontinued

Representation

Applicant Mr M J Brassington

Respondent Mr S Roffey (as agent)

Order

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

AND WHEREAS the Commission convened conferences 11 May 2012, 23 May 2012 and 11 June 2012 for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 11 June 2012 agreement was reached between the parties;

AND WHEREAS this matter was listed for hearing on 7 May 2012 for the applicant to show cause why his application should not be dismissed;

AND WHEREAS the Commission deemed it would be in the interest of the employer to consider matters relevant to fairness;

AND WHEREAS during the hearing the applicant submitted a notice of discontinuance;

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 01106

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01106
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 13 SEPTEMBER 2012, FRIDAY, 14 SEPTEMBER 2012, FRIDAY, 2 NOVEMBER 2012
DELIVERED	**:**	TUESDAY, 18 DECEMBER 2012
FILE NO.	**:**	U 50 OF 2012
BETWEEN	**:**	DAVID HARDS
		Applicant
		AND
		TOWN OF BASSENDEAN
		Respondent

Catchwords	**:**	Termination of employment - Claim of harsh, oppressive or unfair dismissal - Applicant on probation - Applicant terminated for unacceptable and disrespectful communications and insubordination - Principles considered - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	**:**	Dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr S Roffey (as agent)

Case(s) referred to in reasons:

Byrne v Australian Airlines (1995) 61 IR 32

East v Picton Press Pty Ltd (2001) 81 WAIG 1367

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

Background

1 Mr David Hards (the applicant) was employed by the Town of Bassendean (the respondent) between 23 November 2011 and 28 February 2012 as a truck driver/general hand. He previously worked with the respondent on a casual basis for approximately three weeks in October 2011. The applicant worked in the respondent's parks and gardens section. At the time of the applicant's termination he was subject to a probationary period which had been extended by the respondent for up to a

further three months on 10 February 2012 after complaints were made about the applicant's conduct and attitude by the respondent's workshop supervisor Mr Bill McCracken.

2 Mr McCracken made two written complaints about the applicant, one dated 1 February 2012 and the other dated 2 February 2012. After being notified of these complaints the applicant wrote to the respondent's Chief Executive Officer (the CEO) Mr Robert Jarvis on 4 February 2012 complaining about Mr McCracken and the manner in which two social functions were conducted. On 6 February 2012 Mr Jarvis told the applicant that an investigation would take place into the issues he had raised. After receiving this response the applicant sent another email to Mr Jarvis on 7 February 2012 containing more complaints about Mr McCracken. On 9 February 2012 Mr Jarvis invited the applicant to respond to the grievances lodged against him by Mr McCracken and he did so by email dated 12 February 2012.

3 On 23 February 2012 Mr Jarvis sent the applicant a memorandum requiring him to attend a meeting on 28 February 2012 to discuss what he described as the applicant's unacceptable and disrespectful communication contained in the emails he sent to Mr Jarvis on 4, 7 and 12 February 2012. After receiving this memorandum the applicant emailed copies of emails he sent to Mr Jarvis on 4, 12 and 23 February 2012 to the respondent's Councillors on 24 February 2012.

4 At the meeting held on 28 February 2012 Mr Jarvis terminated the applicant because he had emailed his grievances and complaints to Councillors contrary to the respondent's Employee Induction Manual. The emails he had sent Mr Jarvis also contained unacceptable and disrespectful statements about colleagues and constituted insubordination towards Mr Jarvis.

5 The applicant complains that he was unfairly terminated. The applicant maintains that it was appropriate to alert Councillors to important issues such as racism and bigotry at the Town of Bassendean. The applicant also argues that he was terminated because he made complaints about other employees which the respondent deliberately did not properly investigate.

The applicant's emails to Mr Jarvis

6 The applicant made the following claims and statements in his email to Mr Jarvis dated 4 February 2012:

- Mr McCracken should attend a communication and anger management course.
- During an incident when the applicant sought to obtain personal safety equipment Mr McCracken said to him 'what the [f***] are [you] doing here?'. When he told him that he had come to get a quote for safety equipment he was told very rudely 'that was why he was there and that, that (sic) was his job so [f***] off back to work'.
- He complained about Mr McCracken's sarcastic tone every time he attended the workshop and referred to him as a 'complete jerk'.
- He referred to Mr McCracken's 'smart-arse attitude' during another incident.
- He claimed Mr McCracken yelled at him during another incident and told him that he had '[f***]ed the chipper brakes up and melted them'. After trying to settle him down, he snapped and he stated that he gave him back exactly what he deserved. The applicant stated that he was waiting for him to throw a punch at him and if this happened he was under no illusion that Mr McCracken 'would've been going to hospital' and that he had previously attacked other employees. The applicant said 'I don't go to boxing twice a week to eat candy'.
- The applicant disputed Mr McCracken's comments to the applicant's supervisor Mr Mark Armstrong that Mr McCracken had worked out problems with other employees and come to an understanding and stated '[what] a load of shit. This person is delusional'.
- The applicant referred to an alleged assault by Mr McCracken on an employee called Max which occurred when he was not employed by the respondent. The applicant stated that this incident was discussed at a managers meeting and nothing was done about it. He then made reference to Mr McCracken by saying '[why] is this man such a protected species?'.
- The applicant referred to Mr McCracken having a part time job elsewhere and regularly using one of the respondent's vehicles to commute to this job. He referred to Mr McCracken coming straight to work after completing his other job and to Mr McCracken being 'tired, grumpy and nasty' and he claimed this was a health and safety issue.
- The applicant described Mr McCracken as 'a pathetic person'.
- The applicant stated that Mr McCracken only allows the purchase of new machinery if 'you are a mate of his'.
- The applicant stated that every repair taken to Mr McCracken is 'a major problem with lashings of cheap sarcasm for his sick ego'.
- The applicant said

  > [w]hy don't you sack the prick [Mr McCracken] and get somebody who wants to do the job with no fuss? Bill would be the biggest whinger and moaner about work I've ever encountered. He is one of the reasons why you have such a high staff turnover … The Town preaches about bullying and yet here is a perfect example waiting to be swept under the carpet again.

- The applicant stated that he would never have written this complaint if Mr McCracken had not emailed lies about him and tried to 'manipulate this situation by turning it around'.
- The applicant wanted to know when he could book his car in for a service from Mr McCracken's workshop as others do.

- The applicant stated that the 2011 Christmas party was 'mis-planned' and was insulting to asset services workers as they were told the party started at 1.00 pm but everyone else had been there since 12.00 pm. The applicant stated that this was 'a despicable mistake' and whoever was behind this should be 'ashamed of themselves'.
- He stated that asset services employees are not allowed full strength beer at functions but at a recent training session in the main office full strength beer, wine and spirits were available. He stated 'it's good for the goose but not for the gander. Talk about double standards'.
- He added the following at the end of his email:

  P.S. You owe me 4 hours off, as my typing and letter skills are limited and that's how long it has taken me to write this letter on my rostered day off. I have much more important things to do than wasting my time on this bloody Idiot who has the luxury of sending his lies and deceit in company time.

7 On 6 February 2012 Mr Jarvis responded to this email and he told the applicant that his allegations would be investigated as they were serious and that some may need to be referred to other agencies for investigation. He refuted the applicant's claims about the timing of the Christmas party and the use of the bar in the administration building.

8 In the applicant's second email dated 7 February 2012 he thanked Mr Jarvis for his quick response and he apologised for his comments about the Christmas function. The applicant then referred to Mr McCracken saying to another employee who is Muslim that he needed to buy a camel when his mower broke down and the applicant stated that Mr McCracken has a problem with immigrants. He was surprised that Mr McCracken was still working for the respondent given its 'racial policies and violence in the workplace policies'.

9 On 12 February 2012 the applicant wrote to Mr Jarvis in response to a letter setting out Mr McCracken's complaints against him. These complaints were as follows:

1. Bill McCracken has stated that on the 1/2/12 you were ill-mannered and impudent towards him when he asked the whereabouts of the ignition key. Bill McCracken has also stated he is concerned in regards to you not following the unserviceable equipment reporting procedure.
2. Bill McCracken has stated that on the 2/2/12 that it had been brought to his attention that you were observed boasting to peers of 'serving it up to the Workshop Supervisor' in regards to the above matter and that you were hoping that this would elicit a response from Bill McCracken which would result in disciplinary action being taken against him leading to possible termination.

In response the applicant made the following claims and statements:

- The applicant claimed this letter was undated which was untrue.
- The applicant described Mr McCracken's allegation that he was ill mannered and impudent as pathetic.
- The applicant stated that when someone spoke to Mr McCracken about something the applicant said to another employee this person must be a 'snivelling shit stirrer' and he stated that he was hoping that the respondent would sack Mr McCracken. He also stated that Mr McCracken's complaints against him were 'pretty pathetic'.
- The applicant referred to a private car being serviced by Mr McCracken and a boat being at the workshop. The applicant referred to Mr McCracken being seen working on another employee's camper van and on keg/beer accessories on the lathe and he claimed that Mr McCracken lets this 'enterprise' go on. He also stated that these activities were well known by yard management.
- The applicant stated that even though the allegations against him were false he understood why the respondent had extended his probation. However he felt he would be unfairly dismissed because of Mr McCracken's 'pathetic complaint' and he stated that 'the management don't seem to like these instances pointed out to them'.
- The applicant stated that his allegations about Mr McCracken punching another employee in the face were true and if the respondent chose not to dismiss Mr McCracken then the respondent could not sack anyone else for these activities in the future.
- The applicant referred to a meeting he had with Mr Jarvis on 8 February 2012 in front of the administration building when he told him that the applicant's reply to his email 'smacked of cynicism'. The applicant could tell that Mr Jarvis was not very happy meeting him and he then questioned why Mr Jarvis responded about alcohol use and his claims about the Christmas party when there were other much more important issues to deal with.
- The applicant referred to Mr Jarvis not appreciating complaints being made about abuse, violence, racism, bigotry and harassment and he stated that he knew he would be dismissed at the end of his 'impartial investigation'.
- The applicant stated that Mr Jarvis' 'nasty little outburst' and another manager's cold manner towards him left him shocked and with little confidence in Mr Jarvis' management.
- The applicant wanted to know why Mr McCracken opened the applicant's locker when it was unlocked. When he approached Mr McCracken about this he claimed that he told him he had been looking for a spare locker for another employee. Maybe it was a genuine mistake but he had his suspicions.
- The applicant questioned whether Mr McCracken had declared his secondary employment and relied on the respondent's Code of Conduct in this regard.
- The applicant referred to a comment made about his wife by another employee Mr Robert Webb when he previously worked for the respondent and he stated it was disgusting and unbelievable. He then stated:

> I don't mind him attacking me personally but leave my [f***]ing family out of his nasty little quips. I dealt with this matter in my own way, but take my word for it Bob it's better to talk about it than bottle it up and later explode. This event was over a year ago now so it's not worth pursuing but I now wish I had of.

- He stated that this same employee had a bad habit of blaming others for his mistakes and the previous week he hit a children's school bus when driving one of the respondent's vehicles.
- The applicant stated that Mr McCracken's allegations against him were trivial, he had done nothing wrong, he had been abused twice by Mr McCracken in front of a witness, Mr McCracken hated fixing broken equipment and he stated that after Mr McCracken had abused him he lost his temper and retaliated. Mr McCracken then went to 'HR with a pathetic complaint about him'. The applicant referred to Mr McCracken as 'a sooky buba (sic)' and stated '[u]nfortunately for Bill if you come at me I will return the favour 10 fold and throw everything at you including the kitchen sink, so you better be squeaky clean and Bill is far from that'.
- The applicant finished by stating:

> Good luck with your investigation Bob. And try not to focus on the alcohol too much as it was only an observation. I hope it is fair and impartial investigation but I have my doubts and I can't but wonder how many lies will be told to you in your investigation as many personal (sic) duck for cover.
>
> I further require a copy of my allegations sent to Bill by you Bob, as I would like to make sure that nothing has been omitted as to be quite honest with you Bob I don't trust the Town of Bassendean management (Excepting (sic) Mark Armstrong). I believe that under the FREEDOM OF INFORMATION ACT, I'm entitled to this information and will be applying for it.

10 The applicant stated the following in his email to Mr Jarvis dated 23 February 2012 (verbatim):

> Thank you for your letter dated 23rd February 2012. I look forward to the formal meeting on this date, but can't help but wonder Bob whether you mean to discuss my UNACCEPTABLE AND DISRESPECTFUL COMMUNCIATION, or to dismiss me from your workforce for bringing to your attention in an acceptable and honest way through my communcation to both you and Renae the racial, voilence, and abuse in your workplace. I would further like to point out to you that The Town Of Bassendean hold regular meetings in the Admin building on BULLYING IN THE WORKPLACE, which is my main greivance against Bill McCraken. The Town Of Bassendean has a major proplem with Bullying, abuse, and violence in the workplace and I can't help but wonder Bob if your just going to sweep it under the carpet. What is the point of Renae holding these meetings and incouraging the workforce to report these matters as I have done only to be dismissed for bringing it too your attention Bob. It actually dosn't matter how I correspond it to you Bob but that it is corresponded to you so you can act and lead by stamping it out in the workforce instead of just concentrating on how you can best get rid of me. But then again maybe thats·what would be convienent for you. Nobody reporting such matters and you can go through life oblivious to whats right under your nose. It won't exactly make the men feel very confident in reporting these matters to your Human Resourses in the future, Bob, if you dismiss the last person who reported the matter to you and bought it to your attention. The men would be extremely nervous. You may wish to cancel all future meetings of this subject as the workforce would only laugh at any such future meetings Bob. (As they do now anyway) To be quite honest with you Bob I would've thought you'd wish to discuss what you intend to do with your violent and abusive Supervisor instead of my blunt but honest communication to you.
>
> I suspected that your investigation· would be very one sided and as the men return from your interview room it has occured to me that your short questions for them are minupulated to reflect what you want to hear. So much for a fair and impartial investigation Bob. And yes the men will always come back and talk as its human nature, just as the few supporters of Bill McCracken run back and tell him everything you say. I could give you a list of questions that you should be asking instead of dancing around the subject but I suspect I will be asking those myself in the future. One example for you Bob would go simply like this, AJ have you ever been called a terrorist by Bill or anybody else in the workforce? There are many other questions that should have been asked that have not been asked that address the points in my letters to you. That simple Bob, cut to the chase and you would've got an honest answer instead of beating around the bush!
>
> Finally Bob and Renae, just a little tid bit for the weekend for you. Sabash had trouble starting the Toro motor mower the other day so Bill fired it up with a jumper start. When Sabash got the machine to a park it wouldn't fire up so he took it back to Bill, who promptly put the jumper leads on the wrong polarity, which I believe then burnt out the wiring. He complains constantly about us wreaking machinery, so I couldn't help but laugh. Wonder how much that cost the council? Don't worry he will just blame Sabash.
>
> I'm looking forward to the23rd Bob, see you then.
>
> (Exhibit R1 document 21)

Submissions

Applicant

11 The applicant argues that his termination was unfair for a number of reasons. The respondent failed to advise him of the correct procedures for lodging a grievance thus denying him procedural fairness, the respondent only followed policies and procedures when it suited them, the respondent does not take racism seriously, the respondent breached the dispute settlement procedure in the enterprise agreement given the manner it investigated his complaints and the respondent did not use its workplace bullying procedures to deal with the applicant's complaints. The applicant also claims he was disadvantaged and victimised because he blew the whistle on other employees.

12 The applicant submitted that Mr Jarvis falsified one email (Exhibit R1 document 13 which is an email from Mr Jarvis to Mr Stewert-Dawkins and Ms Renae Galambos dated 8 February 2012). The applicant also submitted that Mr Jarvis was deceptive when giving evidence. The applicant stated that Mr Max George lied to Mr Jarvis during the investigation, the investigation was biased because witnesses who gave evidence in support of his claims were not asked as many questions as employees who did not support him and the investigation was unfair, one sided and was designed to terminate the applicant. Questions were not asked about the assault he raised and Mr Webb and Mr McCracken made inappropriate comments about him which were not investigated. The respondent did not investigate several examples of inappropriate activities occurring such as servicing private cars during work time and work being conducted on a boat at the respondent's work shop. The applicant stated that during his employment he was intimidated, bullied, harassed, victimised, abused, racially slurred, isolated, offended and ignored and this behaviour was continued by Mr Jarvis, Ms Galambos and Mr Ken Cardy.

13 The applicant argued that as his complaints related to bullying, harassment, bigotry, violence, abuse and racial slurs his complaints were not inappropriate and it should also not have mattered how he reported these issues. The applicant argues that the problems at the Town of Bassendean were unique and needed to be brought to the attention of Councillors given the CEO and Ms Galambos were not dealing with the issues and were 'sweeping [his] allegations under the carpet'.

Respondent

14 The respondent submits that it had good reason to terminate the applicant because of his unacceptable and disrespectful communications as well as his inappropriate comments about colleagues established that he was unsuitable for ongoing employment with the respondent.

15 The applicant breached the respondent's Code of Conduct which requires that employees treat others with respect and fairness, when he sent his emails to Mr Jarvis. The applicant also breached the terms of the Employee Induction Manual which provides that all business communications with Councillors be through the CEO. When he did so he breached his duty of fidelity to the respondent and destroyed or seriously damaged the relationship of trust and confidence between him and the respondent. The respondent also argues that when the applicant made damaging claims against Mr Jarvis in his email to Councillors this amounted to insubordination.

16 The respondent submits that the applicant's email to Councillors and his attempt to influence a workplace investigation which was not yet finished and his attempt to undermine Mr Jarvis was incompatible with his duties to the respondent and was destructive of the confidence necessary to sustain the employment relationship. When the applicant referred to Mr Jarvis running a 'kangaroo court' and he questioned the integrity of the ongoing investigation he irreparably damaged the mutual trust and confidence required in every employment relationship.

17 The respondent disputes the applicant's claim that he was dismissed because he made complaints against colleagues and the respondent argues that the investigation into his allegations was not relevant to his dismissal. If the investigation is to be taken into account the respondent argues it was conducted in a reasonable and fair manner, it was comprehensive and sufficient to ascertain an outcome and the applicant was going to be interviewed after the investigation finished but this did not take place because he was terminated.

18 The respondent maintains that the applicant was afforded procedural fairness during the process of his termination. Mr Jarvis expressed his disappointment about the nature of the applicant's communications during a discussion with him on 8 February 2012 and the applicant was notified in writing on 23 February 2012 that the respondent wanted to discuss his unacceptable and disrespectful comments in the emails he sent to Mr Jarvis at the meeting to be held on 28 February 2012. At this meeting the applicant had the opportunity to respond to this allegation as well as the allegation that his email to Councillors was unacceptable, disrespectful and insubordinate and in response the applicant was unrepentant about his communications to Mr Jarvis and Councillors.

Consideration

Legal Principles

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

20 The law relating to unfair dismissals when an employee is on probation was considered by the Full Bench in ***East v Picton Press Pty Ltd*** (2001) 81 WAIG 1367. In this decision, the President set out the following relevant principles [39]:

1. During the probationary period the employer retains the right to see whether he/she wants the employee or not in his/her employment.
2. Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct.
3. A probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post and the employer must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to terminate the employee with the appropriate notice provided there is good reason to do so.

4. An employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve.

5. A probationary employee can seek reinstatement, but an employer is entitled to terminate a probationary employee more easily. Length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. Any genuine question of compatibility between employer, employee and other employees can also be assessed.

6. Probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer.

Was the applicant unfairly terminated?

21 A period of probation is an opportunity to assess whether an employee's conduct reflects a compatible employment relationship which can be sustained in the long term. I find that the applicant's conduct during his probationary period was incompatible with behaviour required of an employee in an ongoing employment relationship. I find that during the applicant's employment with the respondent the applicant breached the requirement on him to treat colleagues and his employer fairly and in a respectful manner and I find that the applicant's unwarranted attacks on his CEO Mr Jarvis, destroyed the necessary trust and confidence required between an employee and employer. Given this conduct and when taking into account equity and fairness and the applicant being on probation I find that the respondent had good reason to terminate the applicant.

22 The applicant conceded that he forwarded copies of three emails he sent to Mr Jarvis dated 4, 12 and 23 February 2012 to Councillors. The content of these emails has already been outlined in this decision. The applicant stated the following to Councillors when he sent these emails:

> To Whom It May Concern,
>
> The following correspondence that follows is between Bob Jarvis, and David Hards who are both employees of the Town of Bassendean. It concerns violence, bigotry, abuse, harassment and racial discrimination which is prevalent at the Town of Bassendean. I don't know whether you Councillors are aware of these problems and I believe you have a right to know the Kangaroo court that Bob Jarvis is running at the Town of Bassendean as he "investigates" these allegations. My letters to him are blunt which unfortunately is just my personality. I have been summoned to meet with him on Tuesday, where I am under no illusion I will be dismissed for bringing this problem to his and HR's attention.
>
> …
>
> To Whom It May Concern, You will have to ask Bob Jarvis for his replies to these letters, they are very short and uninformative. There is no doubt in my mind by bring (sic) these problems to the attention of HR and Bob Jarvis that I will be dismissed from the workforce, whereas Bill McCracken who is the main problem at the council depot will still be employed there in the future. Disgraceful!
>
> (Exhibit R1 document 23)

23 The respondent's Employee Induction Manual, which the applicant conceded was given to him at his induction on or about 2 February 2012, requires that all business communications with Councillors must be through the CEO. I find that the applicant committed a breach of the requirement not to contact Councillors directly about work related issues when he forwarded the correspondence he sent to Mr Jarvis to Councillors on 24 February 2012. Furthermore, I find that this breach was serious as the applicant made unwarranted and untrue accusations about Mr Jarvis and his capacity as a CEO to Councillors. I find that the applicant sent the emails to Councillors in an attempt to inappropriately undermine and indirectly pressure Mr Jarvis with respect to the conduct and outcome of his investigation into the applicant's grievances and complaints and the applicant continuing as an employee and I find that the applicant's negative comments about Mr Jarvis constituted insubordination as there was no basis for him to conclude that Mr Jarvis was conducting a 'Kangaroo court' when investigating his allegations. Nor did the applicant provide any evidence to Councillors confirming that a decision had already been made to terminate him as at 24 February 2012, as claimed by the applicant. I also note that when the applicant forwarded his grievances to Councillors he neglected to include Mr Jarvis' responses to his emails confirming that his complaints were being taken seriously which in my view was deliberately done to further undermine Mr Jarvis.

24 I find that the applicant breached the respondent's Code of Conduct, which requires that employees treat colleagues with respect and fairness, when he wrote derogatory, unwarranted and unnecessary comments about colleagues, including Mr Jarvis, in the four emails he sent Mr Jarvis. The language used by the applicant and claims made by him when making his complaints have already been outlined in this decision. I find that the respondent had good reason to regard the content and tone of the applicant's four emails to Mr Jarvis as being inappropriate and disrespectful. I find that the applicant used offensive language and made derogatory comments about Mr McCracken and I find that some of his comments about Mr McCracken were confrontational and indicated hostility towards another employee which cannot be tolerated at a workplace. It was also the case that the applicant raised matters that had not been complained about by the employee concerned and I find this to be unfair to those employees. I find that the applicant could have raised his grievances using language that was not offensive, abusive or judgemental, but he chose not to do so. In conclusion I find that the nature of the applicant's claims and the language he used at times when making his complaints was inconsistent with the necessary and appropriate conduct and attitude required of an employee towards colleagues and his or her employer. Furthermore, I reject the applicant's complaint that the respondent did not give him a copy of the Code of Conduct and he was therefore unaware of the content of this code as he referred to Mr McCracken breaching the Code of Conduct in his email to Mr Jarvis on 12 February 2012.

25 I reject the applicant's complaint that the respondent did not tell him that the language he used in his emails was inappropriate. As I accept Mr Jarvis' evidence, who in my view gave his evidence honestly and to the best of his recollection, I find that during a discussion Mr Jarvis had with the applicant on 8 February 2012 he told the applicant that the emails he had sent him contained comments which were unacceptable and disrespectful. Furthermore, when the applicant was notified in writing on 23 February 2012 that the respondent wanted to have a meeting with him on 28 February 2012 he was told that it was to discuss his unacceptable and disrespectful communications. The applicant was therefore put on notice about the inappropriate manner in which he had communicated his grievances and that this issue was to be discussed at the meeting held on 28 February 2012.

26 I find that during the meeting held on 28 February 2012 the applicant conceded that he had sent the emails to Councillors and he did not resile from doing so, nor did he show any remorse for his behaviour. Given his criticism of the manner in which Mr Jarvis was conducting the investigation into his complaints, which in my view constituted insubordination, and having raised this with Councillors and when taking into account the derogatory, inappropriate, unnecessary and disrespectful comments the applicant made about colleagues I find that at this point it was clear to the respondent that the relationship between the applicant and the respondent had broken down such that the respondent had good reason to terminate the applicant.

27 I accept that the applicant was unaware prior to the meeting held on 28 February 2012 that his termination was to be discussed and given effect. However I find that the original purpose of the meeting, that is to discuss the inappropriate language and unacceptable comments contained in the applicant's emails to Mr Jarvis, was overtaken by the applicant inappropriately contacting Councillors about his grievances and making derogatory comments about Mr Jarvis. As the respondent only found out about this just prior to the meeting taking place it therefore did not have the opportunity to put the applicant on notice that his termination was to be discussed at this meeting. It was also the case that the applicant was offered a break during the meeting to consider his response to the respondent's intention to terminate him. In the circumstances I find that the timing of the meeting where the applicant was terminated was of the applicant's own making and he was not therefore disadvantaged by not being given notice of the respondent's intention to terminate him prior to this meeting. If I am wrong in reaching the conclusion that the applicant was terminated in a reasonable and fair manner, which I do not concede, I find that any denial of procedural fairness when the applicant was terminated did not invalidate the respondent's decision to terminate the applicant as he had committed misconduct serious enough to warrant termination.

The Investigation into the applicant's grievances

28 I reject the applicant's claim that he was terminated because he made complaints about colleagues and that the complaints he made in his emails were not properly investigated. I also reject the applicant's claim that the investigation was a 'Kangaroo court' and that the respondent never intended to properly deal with his grievances nor seriously review the issues he had raised.

29 I find that the respondent conducted the investigation in an appropriate manner. After receiving the applicant's first grievance on 4 February 2012 Mr Jarvis indicated to the applicant that he would be investigating this matter. Mr Jarvis and Ms Galambos, the respondent's Human Resources Coordinator, interviewed a number of employees about the applicant's grievances. The following employees were interviewed:

- Mr Gary Dewar – Building Facilities Supervisor
- Mr Paul Mildwaters – Parks Labourer
- Mr Max George – Parks Labourer
- Mr Mark Armstrong – Parks Supervisor
- Mr Anthony Loo – Indigenous Trainee
- Mr Alfred Niedelziek – Parks Labourer
- Mr Ken Cardy – Manager Asset Services
- Mr AJ Laurie – Parks Labourer
- Mr Subhash Kathiriya – Parks Labourer
- Mr Wayne Hartley – Reticulation Fitter
- Mr Robert Webb – Parks Labourer

Two employees were not interviewed but I accept that it was not possible at the time to do so as one employee was on leave and the wife of the other employee had recently passed away.

30 I find that the investigation conducted by Mr Jarvis and Ms Galambos into the applicant's grievances was thorough and properly dealt with matters and issues raised by the applicant. I find that after considering the information given by employees at these interviews the respondent decided that a number of measures and guidelines be put in place to improve the respondent's procedures. This included procedures relating to reporting faulty equipment, secondary employment, the use of council equipment during breaks and communications between employees. The investigation also found that the applicant made a number of unsubstantiated allegations and that a number of employees who had been named by the applicant in some of his grievances were unaware that he was raising these incidents. The investigation also concluded that some employees who were interviewed gave different versions of events from what the applicant had described in his emails. The investigation also found that some of the incidents involving the applicant had occurred as he had claimed. The report referred to the applicant's 'inappropriate and disrespectful comments' in his emails and that this was unacceptable, disrespectful, cynical, humiliating and degrading of colleagues. On 8 March 2012 Mr Jarvis wrote to the applicant detailing the recommendations arising out of the investigation into his grievances and those made by Mr McCracken and the applicant was also advised that

the recommendations would be 'actioned and implemented by the Town in order to resolve and conclude these issues'. The applicant claims that he was treated unfairly when he was not interviewed as part of the investigation however I find that the respondent had every intention of discussing the outcome of the investigation with the applicant once the investigation was completed but this was overtaken by the applicant's email to Councillors and his termination on 28 February 2012.

31 During the hearing the applicant gave evidence that when he and Mr Jarvis met in front of the administration office on 8 February 2012 Mr Jarvis said words to the effect to him 'who the [f***] did I think I was writing such letters to him' (t28). The applicant relies on this exchange in support of his claim that his grievances were never going to be properly investigated and the respondent was going to 'sweep it under the carpet' (t28). Mr Jarvis agreed that he had a discussion with the applicant on that date but he denies using these words. After carefully observing both witnesses whilst giving their evidence with respect to what was said at this meeting and other issues I prefer the evidence of Mr Jarvis that he did not speak to the applicant in the manner claimed by him. I accept the evidence of Mr Jarvis that he would not talk to an employee in the manner claimed by the applicant and in reaching this conclusion I take into account the reasoned tone of Mr Jarvis' emails to the applicant. I also note that the applicant does not resile from making a complaint if somebody makes comments that he believes are inappropriate, such as swearing at him, and he did not do this after this conversation with Mr Jarvis.

Additional matters

32 The applicant complained that he was disadvantaged when the respondent failed to use the proper processes and procedures to deal with his complaints. In my view the process adopted by the respondent in response to the applicant's complaints was of the applicant's own making as he chose to raise his complaints directly with Mr Jarvis who then had a duty to respond to and investigate the applicant's complaints.

33 In his submissions the applicant made serious accusations questioning the integrity of Mr Jarvis, Mr Cardy and Ms Galambos and the applicant did not provide any evidence or documentation in support of these claims both during and after the hearing. I find that it was inappropriate of the applicant to make these assertions and I find that as there was no evidence in support of his claims this reflected a vindictive and self-serving pattern of behaviour on the part of the applicant.

Mark Armstrong

34 Mr Armstrong gave evidence on behalf of the applicant. The issue of whether Mr Armstrong had been disadvantaged or subject to disciplinary action for doing so was raised during the hearing and the respondent, the applicant and Mr Armstrong made submissions on this issue after the hearing. The respondent strongly denied that Mr Armstrong had been disadvantaged or subject to disciplinary action for giving evidence on behalf of the applicant in these proceedings notwithstanding that a formal warning was given to Mr Armstrong on 4 April 2012 and the respondent claims that this warning was given to him prior to the applicant indicating he was calling Mr Armstrong as a witness. The respondent provided a summary of what took place at the performance management meeting held with Mr Armstrong on 4 April 2012 whereby the respondent detailed what it claimed to be his 'unacceptable and unprofessional communication' and in response Mr Armstrong provided a summary of what he maintained was discussed at this meeting. The applicant claims the respondent knew when he was terminated on 28 February 2012 that he would contest his termination and that Mr Armstrong would give evidence on his behalf. After reading the documentation provided by the parties and Mr Armstrong I am satisfied and I find that the respondent's disciplinary action against Mr Armstrong does not relate to him giving evidence in these proceedings. However, so that it is clear that Mr Armstrong has not or will not suffer any disadvantage for giving evidence on behalf of the applicant I will order that a copy of these reasons for decision and the correspondence generated by the respondent, the applicant and Mr Armstrong with respect to any disadvantage Mr Armstrong may have suffered by giving evidence on behalf of the applicant be placed on Mr Armstrong's personnel file.

35 An order will now issue dismissing this application.

2012 WAIRC 01112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID HARDS
	APPLICANT
	-v-
	TOWN OF BASSENDEAN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 19 DECEMBER 2012
FILE NO/S	U 50 OF 2012
CITATION NO.	2012 WAIRC 01112

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr S Roffey (as agent)

Order

HAVING HEARD Mr D Hards on his own behalf and Mr S Roffey as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders –

1. THAT a copy of the Reasons for Decision in this matter and the correspondence generated by the respondent, the applicant and Mr Mark Armstrong with respect to any disadvantage Mr Armstrong may have suffered by giving evidence on behalf of the applicant, be placed on Mr Armstrong's personnel file.

2. THAT this application otherwise be and is hereby dismissed.

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

2013 WAIRC 00005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD SHANE HAY
	APPLICANT
	-v-
	ROY HILL STATION PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JANUARY 2013
FILE NO/S	B 143 OF 2012
CITATION NO.	2013 WAIRC 00005

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS this matter was listed for hearing on 22 November 2012 for the applicant to show cause why his application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

AND WHEREAS the Commission wrote to the applicant requesting he advise whether or not he wished to proceed with his application;

AND WHEREAS the applicant failed to contact the Commission;

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

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

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

2012 WAIRC 01063

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01063
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 17 SEPTEMBER 2012
DELIVERED	**:**	FRIDAY, 30 NOVEMBER 2012
FILE NO.	**:**	U 88 OF 2012
BETWEEN	**:**	PETER JAKOB
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

Catchwords	:	Unfair dismissal – Termination of employment – Breach of discipline – Investigation by Standards and Integrity Directorate – Performance Management Process – Mentoring and support – Errors in Briefing Note - Denied procedural fairness – Reinstatement
Legislation	:	*Industrial Relations Act 1979* s 23A
		Public Sector Management Act 1994
Result	:	Application granted
Representation:		
Applicant	:	Mr M Cox of counsel
Respondent	:	Ms R Hartley of counsel

Reasons for Decision

1 The applicant was employed by the respondent as a teacher. His employment was terminated by letter dated 28 March 2012. He says that his dismissal was harsh, oppressive or unfair and he seeks orders that the findings made against him under the *Public Sector Management Act 1994* be set aside and that the penalty imposed against him be set aside.

2 The Commission has heard evidence from the applicant; from Eamon Francis Ryan, the Executive Director, Professional Standards and Conduct Division for the respondent; Liam Alan Bacon, Senior Investigator attached to the Standards and Integrity Directorate of the Department, who undertook the investigation into the allegations in respect of the applicant's conduct in August 2011, and Paul Vincent Larkin, the Principal of Waikiki Primary School during the applicant's time at the school.

Agreed Facts

3 The parties provided an extensive statement of agreed facts. They demonstrate that the applicant had, until the time of the termination of his employment, been a primary school teacher for approximately 25 years in both the private and public school systems. He is 52 years of age. The last school at which he taught was Waikiki Primary School. He commenced in 2010, teaching a class of Year 6/7 students.

4 In 2010, following complaints and an investigation by the Standards and Integrity Directorate, the applicant was found to have committed a number of breaches of discipline by using an unreasonable degree of force against two students. In respect of the student C, he committed a minor breach for which he was reprimanded. In respect of the student J, he committed both a minor breach for which he was reprimanded and a serious breach for which he was fined two days' pay. There were two other allegations of breaches of discipline, however, one was not substantiated and the other was withdrawn.

5 Also in 2010, Mr Larkin informed the applicant that he considered that the applicant was not performing to a satisfactory standard. After some discussion, it was agreed that the applicant would receive assistance through an agreed Performance Management Process, not an Unsatisfactory Performance Program. Under the Performance Management Process, a supernumerary, full time teacher was provided as a mentor, to be in the classroom with the applicant during Term 3, 2010.

6 At short notice, at the commencement of Term 4, 2010, the applicant took leave without pay to look after his sick mother.

7 In Term 1, 2011, the applicant returned to Waikiki Primary School. There were no written complaints about him in Terms 1 and 2 of 2011.

8 Mr Larkin did not observe the applicant's classes during 2011, nor did the applicant have a mentor or anyone else in his class in 2011. He was not subject to any Unsatisfactory Performance Process or any Performance Management Process, other than that which applies to all teachers, in 2011.

9 The statement of agreed facts then deals in detail with allegations against the applicant regarding incidents said to have occurred in August 2011 in the following terms:

> 26. By letter dated 15 August 2011, Sharyn O'Neill, Director General informed the Applicant that two allegations of breaches of discipline had been made against him, namely that:
>
> (a) on 5 August 2011 during a sport class he forcibly removed (B's) hands from his pockets and pushed him off the basketball court; and
>
> (b) on 9 August 2011 he forced (J's) arm behind his back and held it there 'for some time.'
>
> 27. LIAM BACON, Senior Investigator of Standards and Integrity conducted an investigation into the allegations.
>
> 28. By letter dated 26 August 2011 to Standards and Integrity, Slater and Gordon responded denying the allegations on the Applicant's behalf.
>
> 29. By briefing note dated 15 February 2012 to Sharyn O'Neill (*the **First Briefing Note***), Liam Bacon, Senior Investigator - Standards and Integrity recommended that the Department terminate the Applicant's employment.
>
> 30. The First Briefing Note stated that the recommendation to terminate the Applicant's employment was based on a number of factors, including:
>
> (a) Two findings of minor breaches of discipline and one of serious breach in an investigation in 2010; and

(b) the 2011 Investigation had made a preliminary finding of breach of discipline against the Applicant.

31. The First Briefing Note also included the following information and conclusions:

(a) parent complaints against the Applicant had increased following his return to Waikiki Primary School in Term One of 2011;

(b) Paul Larkin had assumed a 'mentoring' role during 2010 and 2011 and had spent a 'significant amount of time' observing him in class in terms one and two of 2011;

(c) in Paul Larkin's view, the Applicant presented 'a significant risk to the safety and welfare of students in his care';

(d) in Liam Bacon's view, the Applicant would not benefit from counseling [sic] or performance management as he had followed a performance management process before;

(e) 'evidence and previous history' suggest that the Applicant often adopts '*an aggressive and confrontational demeanour when dealing with both staff and students'* and had demonstrated '*a clear, marked progression of physical violence towards students';*

(f) the Applicant had demonstrated aggressive behaviour in his dealings with other staff;

(g) the Applicant had been provided with a mentor in Terms 2 and 3 of 2010;

(h) there were grounds for termination given:

'... Mr Jakob's complaint history, the fact that this matter is not an isolated incident, and that significant performance management intervention has failed to prevent these further transgressions in Mr Jakob's behaviour.'

32. By letter from Sharyn O'Neill, Director General dated 20 February 2012 the Department informed the Applicant that:

(a) in relation to the allegation concerning (J), it had found that there was no breach of discipline;

(b) in relation to the allegation concerning (B), it had made a preliminary finding that the Applicant had committed a breach of discipline which would warrant dismissal if a final finding was made; and

(c) in proposing dismissal as an appropriate penalty, Ms O'Neill had taken into account the previous finding of breach of discipline on 8 November 2010.

33. The letter of 20 February 2012 from the Director General did not include any reference to the information contained in the first two complete paragraphs on the final page of the First Briefing Note.

34. The letter from Sharyn O'Neill enclosed a copy of the Standards and Integrity Directorate Investigation Report regarding the Applicant's matter.

35. By briefing note to Sharyn O'Neill dated 14 March 2012 (*the **Second Briefing Note***), Liam Bacon repeated his recommendation to terminate the Applicant's employment.

36. The Second Briefing Note contained a handwritten recommendation from Eamon Ryan that stated:

'Mr Jakob poses an unacceptable risk to children and has shown a propensity to the use of force.'

37. The Department terminated the Applicant's employment by letter from Sharyn O'Neill to the Applicant, dated 28 March 2012.

38. The Department's decision to terminate the Applicant's employment was based on the findings of the 2010 and 2011 Investigations and the factors outlined in the First and Second Briefing Notes.

The Applicant's Case

10 The applicant says that the process applied by the respondent did not comply with the requirements for procedural fairness. The respondent did not put to the applicant the reasons upon which the decision to terminate was based. This is because the First Briefing Note, prepared by the Senior Investigator, Mr Liam Bacon, dated 15 February 2012, which contained a number of highly prejudicial and incorrect assertions, was not provided to the applicant. He had no opportunity to respond to those comments. Whilst the applicant was provided with the Investigator's Report, he was not provided with the Briefing Note.

11 Secondly, the finding that the applicant had engaged in a breach of discipline on 5 August 2011 that precipitated termination was unsound. Thirdly, the respondent's reasons for dismissal were based on several mistaken findings of fact, those findings of fact were referred to as 'relevant and significant' by Mr Liam Bacon. Fourthly, the applicant says that there were not sufficient grounds to find that the applicant had engaged in the misconduct cumulatively or independently, such as to justify dismissal.

12 Alternatively, the applicant says that the dismissal was disproportionate to the conduct.

The Respondent's Position

13 The respondent's position is that following the 2010 disciplinary process the applicant had again breached discipline by using unreasonable force towards a student.

14 The particulars of the serious breach of discipline in 2010 are that on 28 April 2010 the applicant had taken hold of a student by the upper arms, lifted him off the ground and carried him across the classroom. This caused the student to cry and red welts were immediately visible on his arms.

15 In respect of the minor breaches of discipline, these occurred on 5 February 2010. The applicant had taken a particular student's artwork out of his hand, grabbed the student by the front of his T-shirt causing the student to stagger backwards, and at the same time had raised his voice saying 'go back to your seat'. He pushed another student in the upper chest with his hand causing the student to stagger forward and was shouting at the student in a raised voice to go to the Principal's office.

16 The letter of the Director General dated 8 November 2010 noted that the letter would be 'placed on a confidential Departmental file … and may be referred to in the event of future discipline matters arising against you. A repeat of the kind of behaviour that has resulted in the need for this reprimand and fine may well have more serious repercussions'. The letter also advised that '[t]o avoid any future allegations of misconduct I am directing you to avoid any unreasonable physical contact with students' (exhibit E).

17 Therefore, the respondent says the applicant was clearly on notice in relation to future acts of misconduct.

18 As to the information contained in the First Briefing Note to the Director General from Mr Bacon and Mr Ryan's handwritten note on the Second Briefing Note, the respondent characterises these as 'unfortunate inclusions of information' (t 149); some references which were 'not entirely accurate but not entirely inaccurate either' (t 149); and one which 'doesn't truly reflect the situation' (t 150). However the respondent says that there were parent concerns and complaints in 2011, that the applicant received additional assistance by way of mentoring under an extraordinary arrangement for a full-time, supernumerary, mentor teacher, engaged for Term 3 of 2010 to be situated in the classroom with the applicant. The respondent also says that Mr Larkin made genuine and concerted efforts in working with the applicant to provide him with every opportunity to improve in a number of areas with the focus on behaviour management strategies.

19 However, in 2011 a number of issues arose which were investigated and the applicant was found to have breached discipline on a further occasion, in contravention of his obligations and in spite of the warning about physical contact with students. Therefore, the respondent says that the decision to dismiss was not unreasonable in the circumstances.

CONSIDERATION AND CONCLUSIONS

The First Briefing Note Comments

20 Following completion of the Investigation Report, Mr Bacon prepared the First Briefing Note to the Director General, which he forwarded, through a number of other officers, along with the Investigation Report. In this First Briefing Note, Mr Bacon dealt with a number of issues relating to mentoring, training and counselling over 2010 and 2011. Reference in the Briefing Note to WPS means Waikiki Primary School. The briefing note states:

> There was sufficient concern regarding Mr Jakob's conduct in July 2010, that the Department provided additional funding to WPS to enable the appointment of a full time teacher to monitor Mr Jakob's performance in the classroom. A mentor/support person was therefore engaged during terms two and three, 2010. In term four, 2010, Mr Jakob took leave without pay and during the Christmas school holidays made failed attempts to transfer out of WPS. In 2011, Mr Jakob reluctantly returned to WPS, and resumed teaching duties without the support of a mentor/support person in his classroom. Mr Paul Larkin (Mr Larkin), Principal, WPS noted that within a short period of time of Mr Jakob returning to school, parent complaints regarding Mr Jakob's conduct increased.
>
> Mr Larkin assumed a mentoring role for Mr Jakob during 2010 and 2011. Mr Larkin implemented a comprehensive performance management plan for Mr Jakob, and during terms one and two, 2011, spent a significant amount of time observing Mr Jakob in his classroom. It appears, despite the effort put in by Mr Larkin that any sort of performance management intervention has been, and would continue to be unsuccessful. Mr Larkin maintains the view that Mr Jakob presents a significant risk to the safety and welfare of students in his care.
>
> Mr Jakob's conduct in this instance would never be considered appropriate. Evidence and previous history suggests that Mr Jakob often adopts an aggressive and confrontational demeanour when dealing with both staff and students. His conduct demonstrates a clear, marked progression of physical violence towards students. Mr Jakob has also ignored previous direction for him to be mindful of his conduct, and not to engage in inappropriate physical contact with students. It is for this reason that I believe, any form of counselling, improvement action or reprimand would have no effect on, or change Mr Jakob's approach to dealing with potential conflict issues (exhibit I, attachment C).

21 Mr Ryan made a handwritten comment at the top of the First Briefing Note, addressed to the Director General, in which he noted the results of the previous disciplinary process and said '[h]e has had support, mentoring and performance management but these efforts have not resulted in a change of behaviour. Although this is a relatively minor matter it cannot be viewed in isolation. I agree that dismissal is warranted.'

22 The statement of agreed facts and the evidence demonstrate that a number of these statements were incorrect or quite misleading. Firstly, it says that a mentor/support person had been engaged during terms 2 and 3 in 2010 when Agreed Fact 21 notes that this was for Term 3 2010 only. This is confirmed by the applicant's evidence (exhibit 1, [72]) and Mr Larkin's evidence that the mentor teacher, Mr Vanderven, commenced in that role on 29 July 2010 (exhibit G, [26]) and continued for the remainder of Term 3 2010 (exhibit G, [27]). There was no mentor teacher in Term 4 2010 (t 53).

23 Secondly, it stated that the applicant had taken leave without pay in Term 4 2010, had made failed attempts to transfer out of the school during the Christmas break and that the applicant had *reluctantly* returned to the school in 2011 (t 104) (emphasis added).

24 Mr Bacon said in cross-examination that his view of the applicant being reluctant to return was relevant enough to record it in the Briefing Note (t 104).

25 The evidence demonstrates that the applicant lived in Albany and travelled to Waikiki each week. His mother was ill and he took Term 4 2010 to care for her. (Statement of Agreed Facts [22]; (exhibit 1, [73]; t 59).

26 The applicant sought a transfer to Albany to enable him to be close to his mother (t 60). Mr Bacon acknowledged that the applicant had sought a transfer to another school to be closer to his sick mother, and requested a transfer on compassionate grounds (t 60). The applicant said in his evidence that he commutes to Perth each week to reach the primary school. This travelling was very painful for him because of a neck and back injury. His compassionate transfer request was granted but the Department could not guarantee him a position. He says it was therefore likely that he would end up doing relief work and he could not afford to do this as he had just taken one term's leave without pay and was about to have a child, and therefore, decided to remain at the school in 2011.

27 There is no evidence that the applicant was reluctant to return to the school. However, his reasons for seeking a transfer were not in any way associated with the disciplinary or performance management processes he had faced. I find that references to the applicant attempting to transfer out of the school and reluctantly returning were very misleading. They created a false impression, suggesting that the applicant was attempting to avoid the situation when a proper description of the circumstances demonstrates nothing of the sort. I find that this was designed to place the applicant in a negative light.

28 Thirdly, the First Briefing Note states that within a short time of the applicant's return in 2011, Mr Larkin noted that 'parent complaints regarding [the applicant's] conduct increased'. However, in his evidence, Mr Larkin said that he noted some improvement in Mr Jakob's performance in Semester 1 of 2011 and that as the semester progressed he received the occasional parent concern regarding the strictness of Mr Jakob's teaching methods, but he was able to direct them to Mr Jakob or address them himself. There were no written complaints made about the applicant during this time. He can recall only two written complaints made against Mr Jakob in 2011 and they were made in weeks 2 and 3 of Term 3 and were the complaints the subject of investigation by Standards and Integrity, which ultimately resulted in the applicant's termination of employment (exhibit G, [30] - [31]). In his Performance Management Notes 2011, under Semester 1, Mr Larkin noted that there had been 'no serious complaints from parents or students and it seemed that [the applicant] had "turned a new leaf". Throughout the semester I advised him informally on two or three occasions of how I thought he had been doing a much better job in 2011 (exhibit G, attachment 6, 4).

29 I find that the statement that within a short time of the applicant's return in 2011, Mr Larkin noted an increase in parent complaints was not only incorrect, it was the opposite of the truth.

30 In this context, too, Mr Ryan's comment at the top of the Briefing Note, where he said that there had been no change in the behaviour, is an oversimplification.

31 The First Briefing Note went on to say that Mr Larkin assumed a mentoring role in 2010 and 2011 and that Mr Larkin spent a significant amount of time observing the applicant in his classroom. The applicant denies that Mr Larkin took on a mentoring role, and says that Mr Larkin observed only three lessons in 2010 and none in 2011 (exhibit 1, [65]). There is no evidence which contradicts this.

32 I find that this statement exaggerates the amount of support provided to the applicant, which itself goes to support a view that he was continuing to behave inappropriately in spite of a high level of support. This is misleading and prejudicial to him.

33 The First Briefing Note says that the applicant's 'conduct demonstrates a clear, marked progression of physical violence towards students'. The evidence was of two minor breaches of discipline in February 2010 and one serious breach of discipline in April 2010. Following a performance management process, the applicant 'had turned a new leaf' and there were no serious complaints or any written complaints until the incident on 5 August 2011. This latter incident was described by Mr Bacon in his evidence as encompassing the applicant removing the boy B's, hand from his pocket and pushing him in the chest (t 88). B had said only one hand was removed from his pocket and that it did not hurt. The evidence of B being pushed by the applicant, if it is to be accepted, is of unnecessary physical contact which caused him to stumble but not fall.

34 Of significance, too, is that in cross-examination, Mr Bacon agreed that the incident, the subject of the investigation, was 'relatively minor' (t 109). Mr Ryan's note at the top of the First Briefing Note also recognises it in the same terms.

35 In the circumstances, I find that the language of a 'clear, marked progression of physical violence towards students' to be a significant overstatement. Further, the use of the word 'progression' implies both a succession of violent incidents, but also an escalation, neither of which is accurate.

36 The Briefing Note also says that '[e]vidence and previous history suggests that [the applicant] often adopts an aggressive and confrontational demeanour when dealing with both staff and students.' Mr Bacon acknowledged in his evidence that the issue of the applicant's behaviour towards staff members did not form any part of the allegations being investigated, and that this information had come from a teacher. It was never raised with the applicant.

37 The First Briefing Note also refers to advice sought from the Manager of Labour Relations Directorate as to the appropriate penalty. The advice was that dismissal would be an appropriate penalty. It goes on to say that the 'decision takes into account Mr Jacob's complaint history, the fact that this matter is not an isolated incident, and that significant performance management intervention has failed to prevent these further transgressions in Mr Jakob's behaviour'. The applicant points out that reference to transgressions, in the plural, is incorrect.

38 I am satisfied that the cumulative effect of all of these errors and exaggerations had the potential to influence the Director General's mind in considering the Investigation Report. They painted a very dim picture of the applicant and were very prejudicial.

39 Further, the applicant was not provided with a copy of a document which was, I find, designed to attempt to influence the Director General's decision. This failure denied him an opportunity to respond and was a serious denial of procedural fairness, contrary to the requirements of the Public Sector Standards in Human Resources Management.

40 In my view, these matters are sufficient to enable me to find that the dismissal was unfair.

The Finding of a Breach of Discipline

41 The applicant says that given the conflict in the evidence of the witnesses to the alleged breach of discipline, it is not safe to conclude that the applicant pushed B. Further, the applicant's explanation of the events leading up to and the circumstances of his touching B to remove his hands from his pocket or pockets, places the event in a context which does not make the contact unreasonable.

The Allegations

42 I have examined the Investigation Report with reference to the record of interviews as to whether the applicant forcibly removed B's hands from his pockets, before pushing B in the chest. The two issues of significance appear to be whether the applicant asked B if he wanted a demonstration of taking his hands out of his pockets, and the degree of force used.

43 Seven people were interviewed about the allegations. Ms Saunders saw none of the incident. The evidence is that B was asked or told between one and five times to take his hands out of his pockets. Only the applicant says he asked B if he wanted a demonstration of taking his hands out of his pockets. B and W deny it. No other witness was able to say that they remembered hearing it.

44 As to the degree of force used, B said that he was not hurt, K said that on a scale of one to ten it was at four to six, and W said that it was not hard, and it did not look like it hurt B.

45 As to the push, the evidence of B himself and of the two others who saw it varies from it being a push to the top right hand side of the shoulder (B's account), or to the chest. B said it hurt, W said the push was not that hard. B said that he stumbled, one witness said B tripped over and got back up, one said that B stumbled into the fence, and K said B took a couple of steps back.

46 There is no dispute that the applicant touched B to remove one or both of B's hands from his pockets. However, it is not possible to say definitively whether the applicant asked B if he wanted the demonstration of removing his hands from his pockets before he did so. Given that it is likely that B was told at least twice, and possibly more times, to take his hands out of his pockets, it is not unimaginable that the applicant asked him if he wanted a demonstration.

47 Given that this incident had the potential to become a criminal matter, then a higher standard of proof ought to have been required than on the balance of probabilities. In those circumstances I conclude that the finding that the applicant used unreasonable force in removing his hand's from his pockets is not sound.

48 As to the push, the evidence indicates that the applicant did push B. It was not of sufficient force for B to lose his footing. That is a matter requiring some response by his employer, but it is hardly sufficient to justify dismissal, either of itself or taken with the previous breaches of discipline.

49 I also express concern that Mr Bacon has conversations with Mr Larkin about which there is no record (t 103). It seems that Mr Larkin provided information and expressed opinions which influenced Mr Bacon but which have not been documented. In this circumstance, there was no opportunity for the applicant to respond to any of the things which were said of him. This means that the process was not transparent, contrary to the Public Sector Standards in Human Resource Management.

Conclusions

50 Given that the applicant has been denied procedural fairness; that the First Briefing Note contained errors and exaggerations which had serious potential to affect the Director General's decision; that at least part of the findings in respect of the allegation are not sound, and that the push was not of sufficient force to justify dismissal, I find that the dismissal was harsh and unfair. The remedy required is reinstatement in accordance with the section 23A of the *Industrial Relations Act 1979*. I intend to order reinstatement as it has not been suggested that this would be impracticable.

2012 WAIRC 01110

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER JAKOB
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 19 DECEMBER 2012
FILE NO/S	U 88 OF 2012
CITATION NO.	2012 WAIRC 01110
Result	Application granted

Order

HAVING heard Mr M Cox of counsel on behalf of the applicant and Ms R Hartley of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. DECLARES THAT the dismissal of the applicant was harsh and unfair.
2. ORDERS THAT the respondent reinstate the applicant in his employment as teacher on conditions at least as favourable as those that he was employed on at the time prior to his dismissal.
3. ORDERS THAT the respondent treat the applicant's employment as continuous.
4. ORDERS THAT the respondent pay to the applicant the remuneration lost because of the dismissal.

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

2012 WAIRC 01103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SCOTT LUCAS MOOREHEAD
	APPLICANT
	-v-
	WOOLIBAR CONTRACTING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 DECEMBER 2012
FILE NO/S	B 153 OF 2012
CITATION NO.	2012 WAIRC 01103
Result	Application dismissed

Order

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

WHEREAS on the 11th day of September 2012 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on the 25th day of September 2012 the applicant advised by telephone that the matter had settled;

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.

2013 WAIRC 00002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMILIE ROUGE
	APPLICANT
	-v-
	MRS NEOMI & TAL AMIT TRADING AS NATURAL WAVES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JANUARY 2013
FILE NO/S	B 184 OF 2012
CITATION NO.	2013 WAIRC 00002

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS on 27 September 2012 a conference between the parties was convened;

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

AND WHEREAS on the 13 December 2012 the Commission listed this matter for the applicant to show cause why her application should not now be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT the application be struck out for want of prosecution.

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

2013 WAIRC 00003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMILIE ROUGE
	APPLICANT
	-v-
	MRS NEOMI & TAL AMIT TRADING AS NATURAL WAVES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JANUARY 2013
FILE NO/S	U 184 OF 2012
CITATION NO.	2013 WAIRC 00003

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS on 27 September 2012 a conference between the parties was convened;

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

AND WHEREAS on the 13 December 2012 the Commission listed this matter for the applicant to show cause why his application should not now be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT the application be struck out for want of prosecution.

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

2013 WAIRC 00004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAHLIL VELLANI
	APPLICANT
	-v-
	MRS NEOMI & TAL AMIT TRADING AS NATURAL WAVES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JANUARY 2013
FILE NO/S	B 185 OF 2012
CITATION NO.	2013 WAIRC 00004

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS on 27 September 2012 a conference between the parties was convened;

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

AND WHEREAS on the 13 December 2012 the Commission listed this matter for the applicant to show cause why his application should not now be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT the application be struck out for want of prosecution.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2013 WAIRC 00001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAHLIL VELLANI
	APPLICANT
	-v-
	MRS NEOMI & TAL AMIT TRADING AS NATURAL WAVES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JANUARY 2013
FILE NO/S	U 185 OF 2012
CITATION NO.	2013 WAIRC 00001

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS on 27 September 2012 a conference between the parties was convened;

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

AND WHEREAS on the 13 December 2012 the Commission listed this matter for the applicant to show cause why his application should not now be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT the application be struck out for want of prosecution.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Alice Colleen Anderson	Eastern Goldfields YMCA	U 31/2011	Chief Commissioner A R Beech	Discontinued
Marc Marinich	Chad Tilbrook	B 223/2012	Chief Commissioner A R Beech	Discontinued
Mr Peter Money	Shire of Cue	U 192/2012	Chief Commissioner A R Beech	Discontinued
Sean Nightingale	Conwood Concrete Fencing and Retaining Walls	U 176/2012	Chief Commissioner A R Beech	Discontinued
Sophie Swatton	Neve Rafferty and Cristina Kenneddy	U 94/2012	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2012 WAIRC 01070

DISPUTE RE EMPLOYER'S WORK PERFORMANCE 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 FRIDAY, 30 NOVEMBER 2012

FILE NO/S C 61 OF 2011

CITATION NO. 2012 WAIRC 01070

Result Application discontinued

Representation

Applicant Mr C Fogliani

Respondent Mr R Farrell

Order

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

THAT the application be and is hereby discontinued by leave.

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

CONFERENCES—Matters referred—

2012 WAIRC 01100

DISPUTE RE APPLICATION FOR LEAVE WITHOUT PAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE FRIDAY, 14 DECEMBER 2012

FILE NO/S CR 39 OF 2012

CITATION NO. 2012 WAIRC 01100

Result Application discontinued

Representation

Applicant Mr C Fogliani

Respondent Mr R Farrell

Order

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

THAT the application be and is hereby discontinued by leave.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 4/2012	21/03/2012 20/06/2012 29/06/2012	Dispute re work place environment	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Goldfield's Land and Sea Council	Beech CC	C 50/2012	21/09/2012	Dispute re Principal Legal Officer position	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2012 WAIRC 01105

DISPUTE RE FLEXIBLE WORKING ARRANGEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 18 DECEMBER 2012
FILE NO.	C 70 OF 2012
CITATION NO.	2012 WAIRC 01105

Result	Recommendation issued
Representation	
Applicant	Ms R Owen
Respondent	Mr M Shipman

Recommendation

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) on 14 December 2012 by the Director General, Department of Education (the applicant) seeking the Western Australian Industrial Relations Commission's (the Commission) assistance on issues relating to flexible working arrangements for persons employed under the *Public Service and Government Officers General Agreement 2011*.

AND WHEREAS on 17 December 2012 the Commission met with the parties both together and in divided conference with a view to resolving the issues in dispute.

AND WHEREAS the applicant and the respondent have reached an agreement now therefore I make the following recommendation with the consent of the parties:

1. The implementation date of 4 January 2013 previously advised by the Executive Director of Workforce in correspondence of 28 November 2012 is hereby voided;
2. It is the view of the applicant that an alternative date ought be set at 31 January 2013;
3. The reference to the acquittal of banked and credited flexitime hours in the same correspondence does not therefore need to be taken on and by 3 January 2013;
4. The parties are to continue to attempt to negotiate a resolution to the dispute;
5. The applicant is to provide evidence to the respondent as to the reasons for the proposed flexitime arrangements;
6. This recommendation is to be displayed in the workplace;
7. Liberty to apply is reserved to the parties in relation to this recommendation; and
8. A further conference will be listed in the Commission on 7 January 2012 at 10:00am.

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

2013 WAIRC 00011

DISPUTE RE FLEXIBLE WORKING ARRANGEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 7 JANUARY 2013
FILE NO.	C 70 OF 2012
CITATION NO.	2013 WAIRC 00011

Result	Recommendation issued
Representation	
Applicant	Ms R Owen
Respondent	Mr M Shipman

Recommendation

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) on 14 December 2012 by the Director General, Department of Education (the applicant) seeking the Western Australian Industrial Relations Commission's (the Commission) assistance on issues relating to flexible working arrangements for persons employed under the *Public Service and Government Officers General Agreement 2011*.

AND WHEREAS on 17 December 2012 the Commission met with the parties both together and in divided conference with a view to resolving the issues in dispute.

AND WHEREAS on 7 January 2013 the Commission met with the parties both together and in divided conference with a view to resolving the issues in dispute.

AND WHEREAS the applicant and the respondent have reached an agreement now therefore I make the following Recommendation with the consent of the parties:

1. The correspondence issued by the Executive Director of Workforce dated 28 November 2012 is hereby withdrawn;
2. The applicant is to undertake research into the application of operational and customer requirements for the next four months. The report will be submitted by the end of the financial year to the respondent. The Terms of Reference for the report are to be drawn up in consultation between the applicant and the respondent within 7 days of the issuance of this Recommendation;
3. The parties are to continue to attempt to negotiate a resolution to the dispute;
4. This Recommendation is to be displayed in the workplace;
5. Liberty to apply is reserved to the parties in relation to this Recommendation;
6. The Recommendation issued on 18 December 2012 is hereby withdrawn; and
7. The parties may seek assistance from the Commission should it be required.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2012 WAIRC 01113

DISPUTE RE CHANGES TO "TEACHER HOUSING SCHEME"

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES
	APPLICANT
	-v-
	DR T MCDONALD DIRECTOR AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 19 DECEMBER 2012
FILE NO/S	C 71 OF 2012
CITATION NO.	2012 WAIRC 01113

Result	Interim consent order issued
Representation	
Applicant	Ms E Palmer (as agent)
Respondent	Mr M Jensen (of counsel)

Interim Order

WHEREAS on 17 December 2012 The Independent Education Union of Western Australia, Union of Employees (the applicant) notified the Western Australian Industrial Relations Commission (the Commission) of an alleged industrial dispute between the applicant and Dr T McDonald Director and Others (the respondents) and requested an urgent conference be convened pursuant to s 44 of the *Industrial Relations Act 1979* (the Act);

AND WHEREAS on 18 December 2012 and 19 December 2012 conferences were convened;

AND WHEREAS on 19 December 2012 the parties agreed to an interim order issuing by consent;

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

(1) The implementation of the changes to the housing contribution for 1 January 2013 will go ahead;

(2) The implementation of all other changes in the Teacher Housing Scheme 2013 will be deferred, pending genuine consultation between the parties;

(3) The parties will meet in early February 2013;

(4) The Catholic Education Office, after consultation with the union, will issue a communication to all staff to clarify the implementation of changes to the housing contribution;

(5) Neither party concedes any factual or legal position in dispute; and

(6) Liberty is granted to either party to apply.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2012 WAIRC 01115

DISPUTE RE CHANGES TO "TEACHER HOUSING SCHEME"

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES
	APPLICANT
	-v-
	DR T MCDONALD DIRECTOR AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 19 DECEMBER 2012
FILE NO/S	C 71 OF 2012
CITATION NO.	2012 WAIRC 01115

Result	Order issued
Representation	
Applicant	Ms E Palmer (as agent)
Respondent	Mr M Jensen (of counsel)

Order

WHEREAS on 17 December 2012 The Independent Education Union of Western Australia, Union of Employees (the applicant) notified the Western Australian Industrial Relations Commission (the Commission) of an alleged industrial dispute between the applicant and Dr T McDonald Director and Others (the respondents) and requested an urgent conference be convened pursuant to s 44 of the *Industrial Relations Act 1979* (the Act);

AND WHEREAS on 18 December 2012 and 19 December 2012 conferences were convened;

AND WHEREAS on 19 December 2012 the parties agreed to an interim order issuing by consent;

AND WHEREAS it is the view of the Commission that relations between the applicant and the respondent have deteriorated and while the issuance of the interim order has been of assistance there remains the outstanding issue of provision of information to assist the resolution of the industrial dispute in 2013. Accordingly, it is the view of the Commission in order to prevent further deterioration in industrial relations;

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

1. The respondent is to provide in writing to the employees concerned and the applicant union such relevant information about the changes to the housing scheme including the nature of the changes proposed and the expected effects of the changes on the employees;
2. The respondent is to give prompt consideration to any matters raised by the employees or the applicant union in relation to the changes; and
3. Liberty is granted to either party to apply.

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

2012 WAIRC 01126

DISPUTE RE COMMUTED ALLOWANCE

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
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 21 DECEMBER 2012
FILE NO/S	PSAC 36 OF 2012
CITATION NO.	2012 WAIRC 01126

Result	Interim Order issued
Representation	
Applicant	Ms J O'Keefe
Respondent	Mr M Darcy

Interim Order

WHEREAS on 18 December 2012 The Civil Service Association of Western Australia Incorporated (the applicant) notified the Western Australian Industrial Relations Commission (the Commission) of an alleged industrial dispute between the applicant and Director General, The Department for Child Protection (the respondent) and requested an urgent conference be convened pursuant to s 44 of the *Industrial Relations Act 1979* (the Act);

AND WHEREAS on 21 December 2012 a conference was convened;

AND WHEREAS on 21 December 2012 the parties could not agree to a resolution to the dispute;

AND WHEREAS it is the view of the Commission that relations between the applicant and the respondent have deteriorated, it is the view of the Commission in order to prevent a further deterioration an interim order ought issue;

AND WHEREAS it is the view of the respondent that they are opposed to the issuance of such an order;

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

1. The respondent will stay its decision to cease payment of the commuted allowance on personal leave for residential officers (metropolitan, country and secure care); and
2. Liberty is granted to either party to apply.

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

2012 WAIRC 01104

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, 14 DECEMBER 2012
FILE NO.	U 75 OF 2011
CITATION NO.	2012 WAIRC 01104

Result Direction issued

Direction

WHEREAS this is an application by which the applicant claims that he was harshly, oppressively or unfairly dismissed from his employment by the respondent; and

WHEREAS on the 7th day of December 2012, the respondent requested further and better particulars; and

WHEREAS the applicant consents to providing further and better particulars as requested, and has agreed to provide them by Tuesday the 18th day of December 2012;

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

THAT the applicant file and serve further and better particulars as requested by the respondent on the 7th day of December 2012 by Tuesday the 18th day of December 2012.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Murdoch College Enterprise Agreement 2012 AG 50/2012	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees AND Murdoch College	(Not applicable)	Commissioner S M Mayman	Agreement registered
Shire of Harvey (Meat Inspectors) Union Collective Agreement 2012 AG 49/2012	14/12/2012	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Harvey	Commissioner J L Harrison	Agreement registered
WA Health - United Voice - Hospital Support Workers Industrial Agreement 2012 AG 51/2012	10/01/2013	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as: (I) the Hospitals formerly comprised in the Metropolitan Health Service Board, (i	United Voice, Western Australian Branch	Commissioner J L Harrison	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00006

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00006
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD
		ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN
		MR K TRENT - BOARD MEMBER
		MS D HOPKINSON - BOARD MEMBER
HEARD	**:**	FRIDAY, 23 NOVEMBER 2012
DELIVERED	**:**	MONDAY, 7 JANUARY 2013
FILE NO.	**:**	PSAB 10 OF 2012
BETWEEN	**:**	STEPHEN BRENT MEWETT
		Appellant
		AND
		DIRECTOR OF EDUCATION
		MS SHARYN O'NEILL
		Respondent

CatchWords	**:**	Public Service Appeal Board – Decision to stand down on full pay – Decision to terminate employment – Extension of time in which to file the appeal – Alleged abandonment of employment – Failure to return to work – Failure to attend a medical assessment –Scope of Appeal
Legislation	**:**	*Industrial Relations Act 1979*
		Public Sector Management Act 1994, s 78(1), s 78(1)(b)(iii), s 82, s 82(1)
Result	**:**	Appeal against decision to stand down – lack of jurisdiction
		Scope of appeal against decision to dismiss – to encompass events from early 2011
Representation:		
Appellant	**:**	Mr S Mewett on his own behalf
Respondent	**:**	Ms S Bhar and with her Mr J O'Brien

Reasons for Decision

ACTING SENIOR COMMISSIONER P E SCOTT:

1 The appellant was previously employed as a Residential Supervisor at the Western Australian College of Agriculture, Cunderdin. By Notice of appeal to Public Service Appeal Board, the appellant appeals against two decisions of the respondent, namely 'to stand me down on 4th March 2011 and the decision to terminate my employment for alleged abandonment of employment given on 2nd day of May 2012'. He has also filed an application for an extension of time in which to file the appeal against the first decision.

2 At a scheduling hearing on 13 August 2012 the appellant argued that the decision to terminate his employment encompassed a lengthy series of events and conduct by the respondent. He also said that those events, including the stand-down in March 2011, should form part of the matters to be heard by the Public Service Appeal Board (the Board).

3 The respondent says that it is the appellant's failure to attend for work as directed, which constitutes the reason for the employment ending, and therefore, the hearing in respect of the appeal against the decision to dismiss ought to be limited to the circumstances of the failure to attend for work as directed.

4 Also at that hearing there was discussion about the other aspect of the appeal, being the decision to stand the appellant down. The question was whether that matter is actually a matter forming part of the dismissal, and if not, that it is filed out of time by a significant period.

5 The Board convened on Friday 23 November 2012 for the purposes of dealing with the scope of the appeal and whether it is to encompass all of the circumstances referred to by the appellant, including the stand-down, should that constitute part of the circumstances of the dismissal, and the question of the remedy sought by the appellant. At the commencement of the hearing on that day, the appellant advised the Board that he seeks reinstatement rather than compensation.

STAND DOWN

6 As to the appeal against the respondent's decision to stand him down on 4 March 2011, it is clear that this was on full pay. The question arises as to the Board's jurisdiction to hear such an appeal.

7 During the course of his submissions, the appellant made reference to various sections of the *Public Sector Management Act 1994* (the *PSM Act*) and the *Industrial Relations Act 1979* (the *IR Act*), in particular, to section 78(1) of the *PSM Act* which provides as follows:

> **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 —
>
> (a) is, or was, a Government officer within the meaning of section 80C of the *Industrial Relations Act 1979*; and
>
> (b) is aggrieved by —
>
> (i) a decision made in respect of the Government officer under section 79(3)(b) or (c) or (4); or
>
> (ii) a finding made in respect of the Government officer in the exercise of a power under section 87(3)(a)(ii); or
>
> (iii) a decision made under section 82 to suspend the Government officer on partial pay or without pay; or
>
> (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.

Consideration and conclusions

8 The appellant has referred to and intermingled the powers under a number of sections of the *PSM Act* and the *IR Act*. However, the only provision for an appeal against a decision to stand down or suspend is that set out in s 78(1)(b)(iii) of the *PSM Act*. Section 78 provides for a right of appeal against a decision made under s 82 of the *PSM Act* to suspend on partial pay or without pay. Although s 82(1) of the *PSM Act* allows a decision to suspend on full pay, partial pay or without pay, there is no appeal right in respect of a decision to suspend on full pay. Further, s 82 of the *PSM Act* relates only to decisions to suspend an employee pending a decision on a breach of discipline or a criminal charge. It is only a decision to suspend on partial pay or without pay against which a government officer may appeal.

9 Given that the appellant was stood down or suspended on full pay, there is no capacity for the Board to hear such an appeal. In those circumstances there is no purpose in the Board deciding whether to extend time in which to file that appeal against the decision made on 4 March 2011.

SCOPE OF APPEAL

10 The respondent says that the appeal should be limited to those circumstances which arose after 22 August 2011 when Mr Bernard Beatty, the Principal of the Western Australian College of Agriculture, Cunderdin, wrote to the appellant advising him as follows (formal parts omitted):

> I write in reference to your employment with the Department of Education as a Residential Supervisor at the Western Australian College of Agriculture - Cunderdin. I have been informed by the Employee Support Bureau that your Workers Compensation claim has been assessed and it is my understanding that you are now fit to return to work. If this is not the case then a medical certificate needs to be supplied to me as soon as possible
>
> I am also advising you that Standards and Integrity Directorate reviewed the allegations and directed that they be managed at the local level through a L2 Grievance Process and Performance Management. Therefore you are requested to return to work for the shift starting at 3.00 pm Monday 29 August 2011 or provide the school with medical certificates to cover your absence.
>
> I would like to advise you that confidential support services are available to employees of the Department and their immediate family through an Employee Assistance Program. Should you wish to avail yourself of these services, please contact PRIMEXL Employee Assistance Services on [tel no.].
>
> (Respondent's Outline of Submissions, attachment 3)

11 Mr Beatty then wrote to the appellant advising him to attend an appointment on 6 October 2011 with a Dr Pearce for his capacity to return to work and carry out his full duties to be assessed. The appellant did not attend that appointment. He says that he telephoned and advised that he would not be able to attend that appointment due to family circumstances. The appointment was rescheduled to 15 December 2011. The appellant attended that appointment and then wrote to the respondent complaining about Dr Pearce's conduct, that it was not a proper assessment and that confidentiality was breached. He was subsequently directed to attend a further appointment with Dr Pearce on 17 January 2012, which he did not attend.

12 The respondent says his failure to attend the 17 January 2012 appointment was without good cause.

13 Mr Beatty subsequently advised the appellant by letter dated 2 May 2012 that there had been difficulties in contacting the appellant despite continued efforts of the administration of the College and of the Department; that he had failed to comply

with the direction to return to work given on 22 August 2011 and he had failed to attend an appointment with the Department's occupational physician on 6 October 2011.

14 The respondent also said that as a consequence of an appointment with Dr Pearce on 15 December 2011 the appellant was requested to provide the Department with evidence of his treatment and prognosis from his doctor, however, he failed to produce any evidence of his medical status. He also failed to attend an appointment with Dr Pearce on 17 January 2012, said to be without good cause. The respondent took into consideration the appellant's letters dated 10 February 2012 and 2 March 2012 and concluded that the employment relationship with the Department must now be terminated on the basis of abandonment of employment, and did so.

15 However, the appellant says that the question of abandonment of employment cannot be seen in isolation of the events which commenced in early 2011.

Consideration and conclusions

16 The parties have submitted a substantial number of documents and correspondence between themselves and other parties. Those documents indicate that in early 2011, a number of issues arose between the appellant and Mr Beatty. It seems that they include Mr Beatty raising an issue of substandard performance in respect of the appellant, and of the appellant and Mr Beatty each making complaints to the respondent about the other's behaviour in early March 2011. Mr Beatty then wrote to the appellant asking him not to attend work but advising him that he would continue to be paid.

17 The appellant wrote to a number of people associated with the respondent including the Minister for Education, asserting that he had not in fact been paid his proper entitlements. The correspondence regarding this issue went on for some months. In the meantime, the issue of the appellant's and Mr Beatty's complaints against each other went to the Department's Standards and Integrity Directorate.

18 It was then Mr Beatty, the person against whom the appellant had complained and his supervisor, who wrote to the appellant advising that the Standards and Integrity Directorate had decided that rather than the allegations against him, the appellant, being the subject of investigation, they were to be dealt with through a local complaints management resolution process. In this letter Mr Beatty advised the appellant to contact Mr Beatty when he was fit to return to work and cleared by Workers' Compensation, to discuss the complaints management resolution process and his return to work.

19 The appellant seems aggrieved by a number of aspects of this. Firstly, following the complaints by the appellant against Mr Beatty, and Mr Beatty against him, the appellant was stood down but Mr Beatty was not. Secondly, the appellant was directed to return to work when the issues between them were not resolved. Thirdly, it was the person against whom he had made a complaint and who had complained against him, who directed him to return to work. Importantly, this was the person with whom he was to discuss the complaints management resolution process.

20 The next issue seems to be that the appellant submitted a workers' compensation claim and claimed he was unwell. He and the respondent then began a series of correspondence about whether or not the medical certificates he supplied provided sufficient information.

21 The appellant was subsequently directed to attend a medical assessment by the respondent, by a Dr Pearce on 6 October 2011. He did not attend and says he telephoned and advised that he would not be able to do so due to family circumstances. The appointment was rescheduled to 15 December 2011. There was correspondence between the parties about arrangements for the appellant to be transported to the appointment by another employee of the Department. The appellant complains that when he arrived at the appointment this employee also came in; that Dr Pearce's conduct was inappropriate in that he did not undertake a proper assessment and he breached confidentiality by providing the other employee with information about the appellant. The appellant also complains about the other employee's conduct on the return trip. The appellant wrote a letter of complaint about this. In spite of his complaints about Dr Pearce, the appellant was directed to attend a further appointment with Dr Pearce on 17 January 2012. The appellant did not attend.

22 Also, in August 2011, the appellant through his solicitor, asserted that he had been denied natural justice in the manner in which the Standards and Integrity Directorate had dealt with him. It was Mr Beatty who replied, indicating that the appellant was now on unauthorised absence, his workers' compensation claim having been rejected, and he needed to produce medical certificates or he would be treated as having abandoned his employment.

23 As can be seen from the above recitation, by December 2011, the appellant and the respondent were in dispute over a significant number of issues.

24 Following the appellant's failure to attend the 17 January 2012 appointment with Dr Pearce, the respondent wrote to him on 2 February 2012 that:

> In light of this information, the difficulty with establishing communications with you and the length of your absence, I am of the view that the employment relationship with the Department must now be concluded,

and that due to his continuous absence and his failure to attend the appointment with Dr Pearce, he had repudiated his contract of employment. He was to provide written evidence by 17 February 2012 to explain why the Department should not accept the repudiation, or a recommendation would be made to the Director General to terminate his employment.

25 The appellant responded, denying the truth of some of the statements in the letter and explaining his absences from the appointments with Dr Pearce, reiterating his complaints against Dr Pearce, and about Mr Beatty's conduct. There was further correspondence between the parties about these matters, which did not resolve them.

26 The appellant also says that those issues also include whether the respondent's Standards and Integrity Unit should have dealt with him and given him the directions, whereas Mr Beatty gave him those directions and did so unlawfully. Therefore, he says, any decision after the decision to stand him down was unlawful. He says his complaints about the treatment afforded to him throughout the process from 2 March 2011 until the respondent decided to terminate his employment were not resolved at

that time and it was unreasonable to require him to return to work. Furthermore, he says that decisions made in those processes were unlawful.

27 By letter dated 2 May 2012, the Acting Executive Director, Workforce, Mr Geoff Gilbert, wrote to the appellant. He noted his continuous absence from 25 March 2011, the direction to return to work, the appointments made with Dr Pearce and his failure to attend the appointment on 17 January 2012 without good cause. Mr Gilbert advised that, taking account of the applicant's correspondence '[i]t is the position of the Department that by your continuous absence from work, failure to provide medical evidence supporting your absence; and failure to attend your latest appointment with Dr Pearce you have abandoned your contract of employment'.

28 I am of the view that all of these matters, from the complaints by the appellant and Mr Beatty against each other in March 2011, until the decision to terminate, make up important aspects of whether it was reasonable for the respondent to require the appellant to return to work in the particular circumstances and whether it was then subsequently appropriate to terminate his employment. To limit the scope of the appeal to only the direction to return to work and subsequent refusals to comply with the direction, is to hear only a part of the matter. The appellant's complaints about the way in which matters were handled by the respondent from March 2011 provide explanations for his own conduct and his failure or refusal to return to work. Therefore, the scope of the appeal needs to encompass the conduct of both parties and whether it was reasonable in all of the circumstances in relation to those issues commencing in early 2011.

29 The hearing of the appeal will now be listed.

MR K TRENT:

30 I agree and have nothing to add.

MS D HOPKINSON:

31 I agree and have nothing to add.

2012 WAIRC 00284

APPEAL AGAINST DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL SMITH
	APPELLANT
	-v-
	DIRECTOR GENERAL - DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	WEDNESDAY, 9 MAY 2012
FILE NO.	PSAB 5 OF 2012
CITATION NO.	2012 WAIRC 00284

Result	Direction issued
Representation	
Applicant	Mr W Claydon
Respondent	Mr D Anderson of counsel

Direction

HAVING heard Mr W Claydon on behalf of the appellant and Mr D Anderson 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 for two days on dates to be fixed.

(2) THAT the appellant file and serve upon the respondent any witness statements upon which he intends to rely no later than 21 days prior to the date of hearing.

(3) THAT the respondent file and serve upon the appellant any witness statements upon which it intends to rely no later than 14 days prior to the date of hearing.

(4) THAT the parties file and serve upon one another written outlines of submissions three 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 01093

APPEAL AGAINST DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01093
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MS B CONWAY - BOARD MEMBER MR M COE - BOARD MEMBER
HEARD	**:**	FRIDAY, 3 AUGUST 2012, TUESDAY, 8 MAY 2012, THURSDAY, 2 AUGUST 2012; WRITTEN SUBMISSIONS 7 & 9 NOVEMBER 2012
DELIVERED	**:**	TUESDAY, 11 DECEMBER 2012
FILE NO.	**:**	PSAB 5 OF 2012
BETWEEN	**:**	PAUL SMITH Appellant AND DIRECTOR GENERAL - DEPARTMENT OF TRANSPORT Respondent

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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	**:**	Industrial Relations Act 1979 ss 80I(1)(d); Public Sector Management Act 1994 ss 78(1)(b)(iv), 80A, 82A(3)(b)(i)
Result	**:**	Appeal dismissed
	Representation:	
Counsel:		
Appellant	**:**	Ms K Hagan and with her Mr M Shipman (not of counsel)
Respondent	**:**	Mr D Anderson and with him Ms R Hartley
Solicitors:		
Appellant	**:**	Civil Service Association of Western Australia Inc
Respondent	**:**	State Solicitors' Office

Case(s) referred to in reasons:

Khalil Ihdayhid v Director General, Department of Mines and Petroleum (2012 WAIRC 00949)

Case(s) also cited:

Reasons for Decision

1 This is the unanimous decision of the Appeal Board.

2 Mr Smith is a motor driver licence assessor employed by the Department of Transport at its Welshpool Driver and Vehicle Services Centre. Mr Smith has been an employee of the Department since June 2008. The events giving rise to these proceedings took place in the period August to September 2011 at the Welshpool premises. It was contended by the Department that Mr Smith, in concert with others, engaged in a series of acts of misconduct in the form of inappropriate remarks to a co-employee, Mr Vaisi. These inappropriate remarks were alleged to have had racial and sexual overtones. Mr Vaisi complained. An investigation took place under the terms of the Public Sector Management Act 1994 and the complaints were established. The Department, by letter of 23 February 2012, proposed to impose a penalty of a formal

reprimand and a fine equal to three days' remuneration, in accordance with s 82A(3)(b)(i) of the PSM Act. An opportunity was given to Mr Smith to make a submission on that proposed course of action but this appeal was instituted prior to any action being taken.

3 A number of issues are raised by Mr Smith for consideration by the Appeal Board. They are:

(a) That the Department's decision to commence disciplinary proceedings was unlawful because the Department did not follow its own policies and procedures and that Mr Smith's conduct could not reasonably be regarded as racial or sexual harassment for the purposes of the equal opportunity legislation in this State;

(b) That, for a variety of reasons, the investigation conducted on behalf of the Department was flawed and procedurally unfair; and

(c) In any event, the penalty imposed by the Department was disproportionate to the conduct found to have been engaged in by Mr Smith.

4 Since the hearing of this appeal, the Appeal Board in *Khalil Ihdayhid v Director General, Department of Mines and Petroleum* (2012 WAIRC 00949), in a decision dated 26 October 2012, determined that a "provisional decision" to take disciplinary action, subject to the receipt of further submissions from the affected employee, was not a "decision to take disciplinary action" for the purposes of s 78(1)(b)(iv) of the PSM Act and s 80I(1)(d) of the Industrial Relations Act 1979. In that matter, the employer had, after the conclusion of an investigation finding misconduct allegations to have been established, advised the employee that it was proposing to take certain disciplinary action and provided a time limit within which the employee could respond on that proposed course. The appeal was instituted before that response was received from the employee. The employer challenged the competency of the appeal, on the ground that it was prematurely filed, as the employer had yet to make an appealable decision.

5 In upholding the employer's challenge, the Appeal Board said at pars 18 – 19 as follows:

> [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.

6 No issue was raised by counsel for the Department as to the competency of this appeal. The issue has only come to the attention of the Appeal Board since the decision in *Ihdayhid* was handed down. On a review of the notice of appeal and the annexures attached to it, annexure E is a letter from Mr Waldock, the Department's Director General, of 23 February 2012. This letter refers to the previous correspondence regarding the findings of a breach of discipline by Mr Smith. The letter goes on to say:

> In accordance with Commissioner's Instruction Discipline - General section 1.7 and section 82A(3)(b)(i) of the *Public Sector Management Act 1994* (the Act) I have determined that the **proposed action** I intend to take is to formally reprimand you and to impose a fine equal to three days' remuneration.
>
> Improvement action will also be taken, as per section 3 of the Act. The improvement action will be in the form of training in the prevention of bullying, harassment and discrimination in the workplace.
>
> Prior to imposing the above action against you, I am providing you with an opportunity to make a written representation to me on the **proposed course of action**. If you wish to do this, I require your advice by Friday, 16 March 2012. In the event that no submission is received by this date, I will take the action described above and notify you accordingly.
>
> (My emphasis)

7 It was common ground in the proceedings that after Mr Smith received the letter of 23 February 2012 but before the due date for his response, that being 16 March 2012, the present appeal was commenced on 7 March 2012. The notice of appeal refers to Mr Smith as having "instituted an appeal against the decision of the respondent to take disciplinary action on adverse findings made by an external investigator that the Appellant had committed a preach of discipline – the decision was pursuant to s.82A(3)(b) Public Sector Management Act 1994, and was given on or about the 23rd day of February 2012". It was also common ground that as at the institution of the appeal, the Department had not taken the proposed course as outlined in its letter of 23 February 2012.

8 Accordingly, this matter having come to the attention of the Appeal Board, and it being trite to observe that a court or tribunal must be satisfied that it has jurisdiction and power to determine the proceedings before it, it is necessary to determine this issue. To assist in that process, the parties were invited to make submissions on the effect of the decision in *Ihdayhid*. They have done so. In summary, the submissions are as follows.

9 The appellant contended that the present appeal is distinguishable from that before the Appeal Board in *Ihdayhid*. The appellant submitted that in this matter, there had been a final determination by the Department as evidenced by penalties imposed on Mr Merrigan, in similar circumstances to the appellant, dealt with in the evidence before the Appeal Board.

10 Furthermore, the appellant submitted that unlike in *Ihdayhid*, the appellant in this appeal also contends that he was denied natural justice and that the Department failed to comply with its own policies and procedures, and therefore acted ultra vires in disciplining the appellant. In this regard, the appellant referred to s 78(5) of the PSM Act. On the basis of these submissions, the appellant maintained that the appeal is competent and the Appeal Board has jurisdiction to determine it.

11 For the Department, it was submitted that the Decision of the Appeal Board in *Ihdayhid* was on all fours with the present matter and this appeal should also be dismissed for want of jurisdiction. It was contended that in the Department's response filed on 4 May 2012, at par 21, reference is made to the letter from the Department to the appellant dated 23 February 2012. In that letter, the Department referred to the proposed action that it intended to take against the appellant, but before imposing such action, provided the appellant with an opportunity to make a written submission on the proposed course. The Department noted that prior to making such a submission, the appellant commenced the appeal on 9 March 2012. Further, the Department submitted that it has not made a final decision as to the appropriate disciplinary action to be implemented, which has not been imposed.

12 Having regard to the terms of s 78(1)(b)(iv) of the PSM Act, the Department submitted that no decision to take disciplinary action under s 82A(3)(b) of the PSM Act had been made by 7 March 2012, on the commencement of the appeal.

13 On that basis, the Department submitted that there is no jurisdictional foundation for the appeal and accordingly, it has no prospects of success and should be dismissed.

Consideration

14 Regrettably in our view, given the late stage of these proceedings, the conclusion which must be reached in relation to the competency of this appeal is the same conclusion that was reached by the Appeal Board in *Ihdayhid*. It is clear from the letter of the Department of 23 February 2012, that Mr Waldock, after considering further submissions made on behalf of Mr Smith, was informing Mr Smith of the *proposed action* that he intended to take, by way of the imposition of a formal reprimand and a fine. It is also clear from Mr Waldock's letter that he was acting in accordance with the Public Sector Commissioner's Instruction Discipline – General par 1.7. Pars 1.7 and 1.8 of the Instruction provide as follows:

> 1.7 If the employing authority finds that a breach of discipline did occur, the employing authority is to notify the employee in writing of that finding within 14 days and of any **proposed action** that may be taken. The employee is to be given a reasonable opportunity to respond to the **notification of proposed action** and that response is to be **genuinely considered** by the employing authority.
>
> 1.8. Upon the **taking of any action** resulting from a finding that a breach of discipline occurred, the employee is to be notified in writing as soon as is practicable, but in any event within 14 days.
>
> (My emphasis)

15 It is reasonably clear that par 1.7 of the Instruction imposes an obligation on an employer, when a finding of a breach of discipline has been made, to notify the affected employee of any *proposed action that may be taken.* The employee is then given an opportunity to respond and the employer is required to genuinely consider that response. The next step, as is made clear by par 1.8, is that the employer, having taken into account and genuinely considered any such response from the affected employee, is to take any relevant action and then, *upon the taking of any action,* the employee is to be notified. It is clear from the Statement of Intent of the Instruction, that the Instruction contains the minimum procedural requirements that public sector employers are required to follow, in dealing with suspected breaches of discipline or disciplinary matters, and the taking of disciplinary action, under the PSM Act.

16 From his letter of 23 February 2012, it is clear that Mr Waldock was acting in accordance with par 1.7 of the Instruction, in notifying Mr Smith of the Department's proposed course of action. When read as a whole, and particularly with the terms of pars 1.7 and 1.8 of the Instruction, the Department had not, for the purposes of s 78(1)(b)(iv) of the PSM Act and s 80I(1)(d) of the Act, made a "decision to take disciplinary action" as at 23 February 2012. The Department was required to "genuinely consider" any response from Mr Smith. If such a response had been forthcoming, this may have entailed a different outcome to that provisionally indicated in the Department's letter. There can be no final and conclusive determination until that consideration has taken place. Accordingly, the filing of the notice of appeal on 7 March 2012, before that decision was taken, was premature and the appeal must be held to be jurisdictionally incompetent.

17 It is a matter of considerable regret that this issue has arisen at such a late state in the proceedings, indeed after the hearing has concluded and before the Appeal Board has delivered its decision. However, given that a court or tribunal cannot proceed to determine a matter in the absence of jurisdiction, and the absence of jurisdiction cannot be waived by the parties by consent, the Appeal Board has no option but to hold that the appeal as instituted is beyond the Appeal Board's jurisdiction. If a fresh appeal is commenced, it would seem to be open for the parties to agree to adopt their submissions, the transcript and documentary evidence in these appeal proceedings, as supplemented by any further material, in any fresh appeal. However, that is a matter that we leave to the parties to consider.

18 Accordingly, what the decisions in *Ihdayhid* and in this appeal clearly illustrate is that particularly when regard is had to the Instruction, employing authorities in the public sector are required to seek the views of an affected employee before the taking of any final decision in relation to disciplinary action. It is only once that final decision is made, as to the taking of specified action, that an appeal from that decision is competent.

19 Accordingly, for the foregoing reasons, the appeal is dismissed.

2012 WAIRC 01092

APPEAL AGAINST DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL SMITH
	APPELLANT
	-v-
	DIRECTOR GENERAL - DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	TUESDAY, 11 DECEMBER 2012
FILE NO	PSAB 5 OF 2012
CITATION NO.	2012 WAIRC 01092

Result	Appeal dismissed
Representation	
Appellant	Ms K Hagan and with her Mr M Shipman
Respondent	Mr D Anderson and with him Ms R Hartley

Order

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

THAT the appeal be and is hereby dismissed.

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

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 68/2012	Request for mediation re breach of contract	Beech CC	N/A	Withdrawn

NOTICES—Union Matters—

2013 WAIRC 00030

NOTICE

FBM No. 7 of 2012

NOTICE is given of an application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch to the Full Bench of the Western Australian Industrial Relations Commission for alterations to its Rule 1 - Name and Rule 2 - Constitution.

It is proposed to alter the name of the Union (Rule 1 - Name) to reflect a name that is nationally recognised and to provide harmonisation and consistency across the country.

It is further proposed to alter the Union's Constitution (Rule 2 - Constitution) by replacing the word "tradesman" with the word "tradespeople", which is gender neutral.

The proposed alterations are detailed below:

Existing Rule 1

1 - NAME

1.1 The name of the Union shall be the COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH.

Proposed Rule 1

1 - NAME

1.1 The name of the Union shall be the **Electrical Trades Union WA.** ~~COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH.~~

Existing Rule 2

2 - CONSTITUTION

2.1 Membership of the Union shall be comprised:

2.1.1 Persons who are employed, or usually employed within the area of the State of Western Australia, known as the South West Lands Division, engaged in the following callings or vocations:

Engineers, fitters, coppersmiths, turners, water meter fitters, patternmakers, tool and gauge makers, scale makers and adjusters, safe-makers, pipe fitters, brass finishers (engineering and general), blacksmiths, shipsmiths, toolsmiths, gunsmiths, angle iron smiths, oliversmiths, blacksmiths' strikers, steam and other hammer drivers, spring makers, millwrights, steam and drop hammer forgers, furnacemen (forge, electric and other furnacemen), oxy-acetylene and electric welders and cutter, locksmiths, iron and steel rollers, electrical engineers, electrical fitters, electrical wiremen, electrical linesmen, electrical installers, electrical mechanics, automotive electricians, refrigeration and air conditioning fitters, armature winders, electrical workers generally, battery fitters, mechanical and scientific instrument makers, mechanical draughtsmen, typewriter mechanics, tool and material storepersons and persons employed in the servicing, repairing maintaining, structurally altering and/or assembling of business machines, motor mechanics, motor cycle mechanics, aircraft mechanics, cycle (other than motor) mechanics (including filers, assemblers and wheel builders, cycle enamellers, sprayers, liners and writers), machine joiners, die-sinkers, press toolmakers and stampers, wirenetting and link mesh workers, wire drawers, including persons (not being workers eligible for membership of either the Amalgamated Metal Workers' and Shipwrights' Union of Western Australia by virtue of paragraphs (ii) or (iii) of sub-rule (a) of Rule 2 of the Rules of that Union or the Plumbers and Gas Fitters Employees Union of Australia, West Australian Branch, Industrial Union of Workers, engaged in or in connection with the treatment and/or fabrication of copper, brass, aluminium and other non-ferrous metals for the purpose of the production of wire, tubes, rods, bars, sheets, strip sections, angles and other fabricated products) tubular steel and iron gate and fence makers, galvanisers, riggers and splicers belt repairers and oilers, rivet heaters, machine makers, milling machinists, planers, slotters, borers, shapers, machine drillers, all workers engaged in the making of wrought iron and malleable iron pipes, dressers, electroplaters and polishers, grinders and tappers, bolt, nut and screwing machinists, lifters and assemblers and assistants, and all other machine operators and examiners of work prepared by the foregoing classifications and vocations employed in the engineering, locomotive, ship building, rolling stock, aircraft, agricultural implement making and kindred trades, munition and iron trades, or in any other industry whatsoever engaged on the manufacturing of engineering products or in the maintenance of plants but not including tool and material storepersons employed otherwise than in the Education Department and in the gate fence and frame manufacturing industry.

2.1.2 Persons who are employed or usually employed in the State of Western Australia, except that portion comprised in the South West Lands Division, engaged in the following vocations:

Engineers, coppersmiths, fitters, turners, die-sinkers, pattern-makers, brass finishers (engineering and general) blacksmiths, shipsmiths, toolsmiths, gunsmiths, angle iron smiths, spring makers, millwrights, oxy-acetylene and electric welders, cycle and motor mechanics, mechanical draughtsmen, milling machinists, planers, slotters, shapers, borers, machine drillers, iron and steel rollers, grinders, and other machinemen, mechanics, lifters and assemblers, machine makers, mechanical and scientific instrument makers, steam and drop hammer forgers, electroplaters, metal polishers, typewriter mechanics, tool and material storepersons and persons employed in the servicing, repairing, maintaining, structurally altering and/or assembling of business machines, and pipe fitters employed in the engineering, locomotive, shipbuilding, rolling stock, aircraft, agricultural implement making and kindred trades, or in any other industry whatsoever, engaged on the manufacturing of engineering products or in the maintenance of plant but not including tool and material storepersons employed otherwise than in the Education Department and in the gate, fence and frame manufacturing industry.

2.1.3 Persons engaged in the following trades or branches of the Coal Mining Industry:

Engineers, coppersmiths, fitters, turners, pattern-makers, brass finishers, (engineering and general) blacksmiths, angle iron smiths, toolsmiths, steam and drop hammer forgers, blacksmiths' strikers, steam and other hammer drivers, electrical engineers, electrical workers, mechanical draughtsmen, millwrights,

milling machinists, planers, slotters, borers, shapers, machine drillers, and other machine men and assistants to the above Trades or Callings, engaged in the Coal Mining Industry.

2.1.4 Persons engaged by B.P. (Fremantle) Limited as bunkering operators, and bunkering attendants.

Provided that such persons referred to in this sub-rule 2.1.4 are those who by custom and practice would have industrial coverage under the terms of the Oil Bunkering B.P. (Fremantle) Limited Worker's Agreement No. 9 of 1979 as amended.

2.1.5 Persons employed or usually employed in the manufacture and/or distribution of natural and/or fuel gas in the callings of gas fitters, gas meter and/or appliance testers, gas meter repairers, gas holder attendants, gas plant operators, gas mainlayers and assistants in the area and operations under the State Energy Commission Act, the Perth Gas Act and the Fremantle Gas and Coke Company Act.

2.1.6 Persons employed or usually employed by the State Energy Commission of Western Australia in any calling or vocation mentioned in paragraph 2.1.1 of this Rule.

2.2 Persons employed or usually employed as Moulders and/or Coremakers, or apprentices or juniors (who when so employed) are engaged in any class of moulding and/or coremaking for the production of castings from molten metal of any kind, or making moulds (from) other materials in any industry, or branch of industry together with any foundry workers being moulders and/or coremakers, assistants, furnacemen and assistants, tool and material storepersons, fettlers and grinders who are solely employed or are usually solely employed in a moulders shop or section and any cast bank and cast spun pipe makers moulders and/or coremakers and their assistants, die casters and smelters of scrap metals and their assistants. Provided always that no person referred to in this sub-rule 2.2 shall be eligible for membership by reason of anything contained in this sub-rule 2.2 merely because he is employed or usually employed in work of such kind as would had he been employed in such work on the first day of July 1961, have then qualified him for membership of any one of the following named Industrial Unions -

Australian Railway Union of Workers, West Australian Branch.

Federated Miscellaneous Workers' Union of Australia, West Australian Branch, Union of Workers.

The United Furniture Trades Industrial Union of Workers, W.A.

The Union may admit to membership any person who is eligible in accordance with the aforesaid provisions of this Rule and who exercises his calling or vocation or who resides within the State of Western Australia, but excluding that portion of the State comprised within the area bounded by a line drawn from the intersection of the 20th parallel of latitude and 125th meridian of longitude to the intersection of the 20th parallel of latitude and the 129th meridian of longitude then South along the 129th meridian of longitude to the intersection of that meridian of longitude with the 24th parallel of latitude; thence West along the 24th parallel of latitude to the intersection of that parallel of latitude with the 125th meridian of longitude; thence North along the 125th meridian of longitude to the intersection of that meridian of longitude with the 20th parallel of latitude but not including Tool and Material Storepersons employed otherwise than in the Education Department and in the gate, fence and frame manufacturing industry.

2.3 The Union shall also consist of an unlimited number of workers engaged or usually engaged:

2.3.1 As electrical fitters, armature winders, electrical installers, automotive electrical fitters, battery fitters, cable jointers, electrical welders, linesmen refrigeration fitters or electrical labourers;

2.3.2 As electricians employed in running and maintaining electrical plants and installations;

2.3.3 As electricians employed as dynamo, motor or switchboard attendants;

2.3.4 On radio, television or electronic work as servicemen, repairers, wiremen, installers, set testers, coil winders, technicians, operators, assemblers, cabinet fitters and/or radio workers, television workers and electronic workers generally;

2.3.5 All electrical workers (other than engine drivers) associated with the generation and/or distribution of electricity and maintenance and repair of any electrical motor;

2.3.6 Without in any way limiting any of the foregoing shall also include all workers whose callings are peculiar to the electrical industry;

2.3.7 PROVIDED THAT no person who is eligible to be a member of the State Electricity Commission Salaried Officers' Union of Workers under its constitution as registered and subsisting on the first day of November 1956 shall be eligible to be admitted a member of this Union by reason of anything contained in sub-rules 2.3.1 to 2.3.6 both inclusive hereof;

2.3.8 PROVIDED FURTHER that no person (other than a tradesman) who is eligible to be a member of the West Australian Amalgamated Society of Railway Employees Union of Workers under its constitution as registered shall be eligible to be admitted a member of this Union by reason of anything contained in sub-rules 2.3.1 to 2.3.6 both inclusive hereof.

2.4 The Union shall also consist of those persons who were, immediately prior to the registration of this Union, duly elected officers of the Australasian Society of Engineers, Moulders and Foundry Workers, Industrial Union of Workers Western Australian Branch or appointed officers and admitted as members of the Electrical Trades Union of Workers of Australia (Western Australian Branch, Perth).

2.5 Elected officers and employees of the Union shall be eligible for membership thereof except such persons who are eligible for membership of the Federated Clerks' Union of Australia Industrial Union of Workers, W.A. Branch as at the date of registration of the Union and whose major and substantial duties are clerical.

Proposed Rule 2

2 - CONSTITUTION

2.1 Membership of the Union shall be comprised:

2.1.1 Persons who are employed, or usually employed within the area of the State of Western Australia, known as the South West Lands Division, engaged in the following callings or vocations:

Engineers, fitters, coppersmiths, turners, water meter fitters, patternmakers, tool and gauge makers, scale makers and adjusters, safe-makers, pipe fitters, brass finishers (engineering and general), blacksmiths, shipsmiths, toolsmiths, gunsmiths, angle iron smiths, oliversmiths, blacksmiths' strikers, steam and other hammer drivers, spring makers, millwrights, steam and drop hammer forgers, furnacemen (forge, electric and other furnacemen), oxy-acetylene and electric welders and cutter, locksmiths, iron and steel rollers, electrical engineers, electrical fitters, electrical wiremen, electrical linesmen, electrical installers, electrical mechanics, automotive electricians, refrigeration and air conditioning fitters, armature winders, electrical workers generally, battery fitters, mechanical and scientific instrument makers, mechanical draughtsmen, typewriter mechanics, tool and material storepersons and persons employed in the servicing, repairing maintaining, structurally altering and/or assembling of business machines, motor mechanics, motor cycle mechanics, aircraft mechanics, cycle (other than motor) mechanics (including filers, assemblers and wheel builders, cycle enamellers, sprayers, liners and writers), machine joiners, die-sinkers, press toolmakers and stampers, wirenetting and link mesh workers, wire drawers, including persons (not being workers eligible for membership of either the Amalgamated Metal Workers' and Shipwrights' Union of Western Australia by virtue of paragraphs (ii) or (iii) of sub-rule (a) of Rule 2 of the Rules of that Union or the Plumbers and Gas Fitters Employees Union of Australia, West Australian Branch, Industrial Union of Workers, engaged in or in connection with the treatment and/or fabrication of copper, brass, aluminium and other non-ferrous metals for the purpose of the production of wire, tubes, rods, bars, sheets, strip sections, angles and other fabricated products) tubular steel and iron gate and fence makers, galvanisers, riggers and splicers belt repairers and oilers, rivet heaters, machine makers, milling machinists, planers, slotters, borers, shapers, machine drillers, all workers engaged in the making of wrought iron and malleable iron pipes, dressers, electroplaters and polishers, grinders and tappers, bolt, nut and screwing machinists, lifters and assemblers and assistants, and all other machine operators and examiners of work prepared by the foregoing classifications and vocations employed in the engineering, locomotive, ship building, rolling stock, aircraft, agricultural implement making and kindred trades, munition and iron trades, or in any other industry whatsoever engaged on the manufacturing of engineering products or in the maintenance of plants but not including tool and material storepersons employed otherwise than in the Education Department and in the gate fence and frame manufacturing industry.

2.1.2 Persons who are employed or usually employed in the State of Western Australia, except that portion comprised in the South West Lands Division, engaged in the following vocations:

Engineers, coppersmiths, fitters, turners, die-sinkers, pattern-makers, brass finishers (engineering and general) blacksmiths, shipsmiths, toolsmiths, gunsmiths, angle iron smiths, spring makers, millwrights, oxy-acetylene and electric welders, cycle and motor mechanics, mechanical draughtsmen, milling machinists, planers, slotters, shapers, borers, machine drillers, iron and steel rollers, grinders, and other machinemen, mechanics, lifters and assemblers, machine makers, mechanical and scientific instrument makers, steam and drop hammer forgers, electroplaters, metal polishers, typewriter mechanics, tool and material storepersons and persons employed in the servicing, repairing, maintaining, structurally altering and/or assembling of business machines, and pipe fitters employed in the engineering, locomotive, shipbuilding, rolling stock, aircraft, agricultural implement making and kindred trades, or in any other industry whatsoever, engaged on the manufacturing of engineering products or in the maintenance of plant but not including tool and material storepersons employed otherwise than in the Education Department and in the gate, fence and frame manufacturing industry.

2.1.3 Persons engaged in the following trades or branches of the Coal Mining Industry:

Engineers, coppersmiths, fitters, turners, pattern-makers, brass finishers, (engineering and general) blacksmiths, angle iron smiths, toolsmiths, steam and drop hammer forgers, blacksmiths' strikers, steam and other hammer drivers, electrical engineers, electrical workers, mechanical draughtsmen, millwrights, milling machinists, planers, slotters, borers, shapers, machine drillers, and other machine men and assistants to the above Trades or Callings, engaged in the Coal Mining Industry.

2.1.4 Persons engaged by B.P. (Fremantle) Limited as bunkering operators, and bunkering attendants.

Provided that such persons referred to in this sub-rule 2.1.4 are those who by custom and practice would have industrial coverage under the terms of the Oil Bunkering B.P. (Fremantle) Limited Worker's Agreement No. 9 of 1979 as amended.

2.1.5 Persons employed or usually employed in the manufacture and/or distribution of natural and/or fuel gas in the callings of gas fitters, gas meter and/or appliance testers, gas meter repairers, gas holder attendants, gas plant operators, gas mainlayers and assistants in the area and operations under the State Energy Commission Act, the Perth Gas Act and the Fremantle Gas and Coke Company Act.

2.1.6 Persons employed or usually employed by the State Energy Commission of Western Australia in any calling or vocation mentioned in paragraph 2.1.1 of this Rule.

2.2 Persons employed or usually employed as Moulders and/or Coremakers, or apprentices or juniors (who when so employed) are engaged in any class of moulding and/or coremaking for the production of castings from molten metal of any kind, or making moulds (from) other materials in any industry, or branch of industry together with any foundry workers being moulders and/or coremakers, assistants, furnacemen and assistants, tool and material storepersons, fettlers and grinders who are solely employed or are usually solely employed in a moulders shop or section and any cast bank and cast spun pipe makers moulders and/or coremakers and their assistants, die casters and smelters of scrap metals and their assistants. Provided always that no person referred to in this sub-rule 2.2 shall be eligible for membership by reason of anything contained in this sub-rule 2.2 merely because he is employed or usually employed in work of such kind as would had he been employed in such work on the first day of July 1961, have then qualified him for membership of any one of the following named Industrial Unions -

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The United Furniture Trades Industrial Union of Workers, W.A.

The Union may admit to membership any person who is eligible in accordance with the aforesaid provisions of this Rule and who exercises his calling or vocation or who resides within the State of Western Australia, but excluding that portion of the State comprised within the area bounded by a line drawn from the intersection of the 20th parallel of latitude and 125th meridian of longitude to the intersection of the 20th parallel of latitude and the 129th meridian of longitude then South along the 129th meridian of longitude to the intersection of that meridian of longitude with the 24th parallel of latitude; thence West along the 24th parallel of latitude to the intersection of that parallel of latitude with the 125th meridian of longitude; thence North along the 125th meridian of longitude to the intersection of that meridian of longitude with the 20th parallel of latitude but not including Tool and Material Storepersons employed otherwise than in the Education Department and in the gate, fence and frame manufacturing industry.

2.3 The Union shall also consist of an unlimited number of workers engaged or usually engaged:

2.3.1 As electrical fitters, armature winders, electrical installers, automotive electrical fitters, battery fitters, cable jointers, electrical welders, linesmen refrigeration fitters or electrical labourers;

2.3.2 As electricians employed in running and maintaining electrical plants and installations;

2.3.3 As electricians employed as dynamo, motor or switchboard attendants;

2.3.4 On radio, television or electronic work as servicemen, repairers, wiremen, installers, set testers, coil winders, technicians, operators, assemblers, cabinet fitters and/or radio workers, television workers and electronic workers generally;

2.3.5 All electrical workers (other than engine drivers) associated with the generation and/or distribution of electricity and maintenance and repair of any electrical motor;

2.3.6 Without in any way limiting any of the foregoing shall also include all workers whose callings are peculiar to the electrical industry;

2.3.7 PROVIDED THAT no person who is eligible to be a member of the State Electricity Commission Salaried Officers' Union of Workers under its constitution as registered and subsisting on the first day of November 1956 shall be eligible to be admitted a member of this Union by reason of anything contained in sub-rules 2.3.1 to 2.3.6 both inclusive hereof;

2.3.8 PROVIDED FURTHER that no person (other than a trades**person**~~man~~) who is eligible to be a member of the West Australian Amalgamated Society of Railway Employees Union of Workers under its constitution as registered shall be eligible to be admitted a member of this Union by reason of anything contained in sub-rules 2.3.1 to 2.3.6 both inclusive hereof.

2.4 The Union shall also consist of those persons who were, immediately prior to the registration of this Union, duly elected officers of the Australasian Society of Engineers, Moulders and Foundry Workers, Industrial Union of Workers Western Australian Branch or appointed officers and admitted as members of the Electrical Trades Union of Workers of Australia (Western Australian Branch, Perth).

2.5 Elected officers and employees of the Union shall be eligible for membership thereof except such persons who are eligible for membership of the Federated Clerks' Union of Australia Industrial Union of Workers, W.A. Branch as at the date of registration of the Union and whose major and substantial duties are clerical.

The matter has been listed before the Full Bench at 10:30am on Thursday, the 28th day of February 2013, in Court No. 3 (Level 18). A copy of the Rules of the organisation and the proposed rule alterations may be inspected at Level 16, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S. BASTIAN
REGISTRAR

21 January 2013

CUMULATIVE CONTENTS HEADINGS

* Denotes New Heading

CUMULATIVE CONTENTS

Vol. 93 Part 1 Sub Part 1 (January)

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF THE INDUSTRIAL APPEAL COURT, INDUSTRIAL RELATIONS COMMISSION AND INDUSTRIAL MAGISTRATES COURT CONTAINED IN VOL. 93 PART 1, SUB PART 1.

Digest Headings

* Denotes New Heading

Industrial Appeal Court
Full Bench
Commission In Court Session
President
Industrial Magistrate
Public Service Appeal Board
Public Service Arbitrator
Commissioner
Board of Reference
Police Appeal

Page

Editor's Note: The Registrar wishes to advise that as from January 2004, the format of the "Cumulative Digest" published at the back of the Western Australian Industrial Gazette has changed to incorporate "Catchword Phrases", please refer to the Notice at (83WAIG3937).

All documents within the above headings are in chronological order.

By Authority: SUSAN BASTIAN, Registrar, Western Australian Industrial Relations Commission