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NOTICES—General Matters—

2013 WAIRC 00386

SALARY CAP FOR LODGING CLAIMS OF UNFAIR DISMISSAL OR DENIAL OF CONTRACTUAL BENEFITS

Section 29AA(3) and (4) of the *Industrial Relations Act 1979* provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount. What is meant by an industrial instrument is defined in section 29AA(5) of the *Industrial Relations Act 1979* and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* (2006) 86 WAIG 2725. The prescribed amount of the salary is determined by Regulations 5 and 6 of the Industrial Relations (General) Regulations 1997. The amount is adjusted each July 1.

The figure that will apply 1 July 2013 has been calculated by the Registrar as being $145,800. The amount is a matter for the Commission to determine so that figure must be seen as a guide, until such time as the Commission may determine a different amount.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 00198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00198
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	WEDNESDAY, 20 FEBRUARY 2013
DELIVERED	**:**	MONDAY, 8 APRIL 2013
FILE NO.	**:**	U 158 OF 2012
BETWEEN	**:**	TIMOTHY DAVID ANSCOMBE
		Applicant
		AND
		THE TRUSTEE FOR THE BOZZY TRUST T/A BOZZY SHADE BLINDS
		Respondent

CatchWords	:	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Warning
Legislation	:	Industrial Relations Act 1979 (WA) s23A(6), s29(1)(b)(i)
Result	:	*Dismissal held unfair, compensation ordered*
Representation:		
Applicant	:	Mr T Anscombe
Respondent	:	Mr P Mendoza

Case(s) referred to in reasons:

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

Miles & Ors t/as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385

Reasons for Decision

1 Mr Anscombe was dismissed by Bozzy Shade Blinds on 28 June 2012. He claims that his dismissal was unfair. His claim to the Commission states as follows:

(1) The main reason given for my termination was the lack of sales performance from the team I managed. This is incorrect as the sales results have improved dramatically while I was in charge. I informed the owner and General Manager that they were wrong about the sales results during my termination meeting. You will note that there is no mention of the sales performance on my termination letter provided to me the day after my dismissal.

(2) Other items listed for dismissal were due to lack of direction from the owner during a period of changed management. On the termination letter there is a list of things claimed I did not complete, these items were agreed to prior to my role changing.

(3) I was not given a verbal or written warning at any stage of my employment.

2 Bozzy Shade Blinds submitted a notice of answer which merely disputed Mr Anscombe's claim. When this matter came on for hearing, it relied upon the matters in the letter of termination as the reasons why it dismissed Mr Anscombe.

The Hearing

3 Mr Anscombe represented himself in the hearing and gave evidence. He called Mr Shane Loseby, a former sales representative and Ms Zoe Martin, a current sales representative, of Bozzy Shade Blinds to give evidence.

4 Mr Mendoza, the General Manager of Bozzy Shade Blinds appeared for the respondent and gave evidence. With him was Mr David Bozuwa, the Managing Director of the respondent; Mr Bozuwa did not give evidence.

5 It is not necessary to repeat here all the evidence given during the hearing. What follows is an overview of the evidence.

Mr Anscombe's Evidence

6 Mr Anscombe's evidence is that he was employed as the Sales Manager for Bozzy Shade Blinds at the end of April 2011. He has had over 20 years of business management experience. When he commenced employment the business ran with no budgets in place. There were no reporting systems in place. The software used by the business was not able to run the reports he was looking for in the sales management role to cover average dollar conversion rates and the number of clients being seen and so on. So, he set targets for the sales staff and trained them to sell his way, which is to spend a longer time with each client, perhaps approximately one to one and a half hours. He introduced a system of follow-up files where clients' details are logged. There were no reports for paying commissions to sales representatives, so he established a commission report. Although his role was going to be based in the office and cover the central metropolitan area, when the sales representative for the northern suburbs left, he stepped into that role.

7 After three months' results, he put forward a proposal for the whole financial year of monthly budgets and a proposal for a referral programme he would run with patio companies. He approached Mr Bozuwa with a proposal for a new employment agreement. He signed an employment agreement in August 2011 and this was tendered into evidence. In July and August 2011 he wrote a report to Mr Bozuwa laying out some of the problems he was encountering. Mr Anscombe's evidence is that Mr Bozuwa was positive and thanked him, saying "Yeah, we need to improve". Another sales representative, Tanya, was employed just before Christmas 2011. There was then a period of time when Mr Bozuwa was away for personal reasons.

8 Mr Anscombe's evidence is that in March 2011 Mr Mendoza was employed as General Manager. He was not introduced to staff and Mr Anscombe had to introduce himself to Mr Mendoza. Mr Anscombe's evidence is that whilst Mr Mendoza is a very nice person, he did not have any sales experience. He had a meeting on 7 May with Mr Mendoza who wanted the monthly reporting changed. Mr Anscombe was concerned that it would be doubling-up the information in the follow-up files and may take the sales representatives away from selling. They agreed something might be done electronically and Mr Mendoza eventually came up with a spreadsheet for the purpose.

9 He was called in for a meeting on 10 May 2012 with Mr Mendoza and Mr Bozuwa. They talked about reporting. They talking about his coaching staff and Mr Mendoza and Mr Bozuwa wanted him to spend more time with Mr Loseby and Ms Martin. They talked about letterbox drops and other things for him to do. The last item discussed was Mr Bozuwa's decision not to replace the two office staff and he wanted Mr Anscombe and Mr Loseby to "cover the office" for 50% of their time.

10 Mr Anscombe tendered a calendar (exhibit 3) showing an example of his time blocked out for the morning in the office, and Mr Loseby blocked out for the afternoon. Mr Anscombe did not agree with this because it would mean them spending a lot of time driving north and south, but in the end, he organised it that way "to make it work as best we could".

11 Mr Anscombe tendered an email he received from Mr Mendoza after Mr Mendoza attended a sales meeting, and another about the new weekly reports he was required to do.

12 Mr Anscombe was on a week's leave from 31 May 2012. He refers in his evidence to an email dated 30 May 2012 from Mr Mendoza which he saw when he had returned from leave. Mr Anscombe states it made him "so frustrated" because it showed Mr Mendoza still did not have any idea of "how we actually were working" and the strain the sales staff were under trying to fit everybody in. Mr Anscombe stated that he "let it go" and produced a comparison report (exhibit 8) in the second week of June to show Mr Mendoza the reasons why as Sales Manager he had implemented things and to show the differences Mr Anscombe had made to the business. He suggested to Mr Mendoza that they sit down with Mr Bozuwa and "figure out exactly what we want on this report so we can just move on" and Mr Mendoza replied it was a good idea. Mr Mendoza proposed that he and Mr Anscombe meet the next Monday and go through and formalise a report. Unfortunately Mr Mendoza did not attend this meeting due to an issue arising elsewhere in the business and it did not occur.

13 Also upon his return from leave Mr Anscombe's evidence is that he had received an email from Mr Mendoza regarding the May commissions. He spoke to Mr Mendoza and explained the system of the sales representatives being paid their commissions. Then on 28 June 2012 he was asked to attend a meeting with Mr Mendoza and Mr Bozuwa where he was told he was being dismissed.

14 Mr Anscombe's evidence of this meeting is that the reason given to him by Mr Bozuwa for the dismissal was a lack of sales. Mr Anscombe's evidence is that he disputed this and pointed out that sales were up, and Mr Bozuwa had responded that his accountant had said sales were down. Mr Mendoza mentioned Mr Anscombe not having ordered uniform shirts and also mentioned a missing file.

15 Mr Anscombe asked for a letter terminating his employment. This was supplied to him the next day. Mr Anscombe's evidence is that it is significant that the letter does not refer to a lack of sales as a reason for dismissing him. Mr Anscombe gave evidence about the contents of the letter. This will be referred to later as necessary. Mr Anscombe completed his evidence by saying he had received no warning and was not given any opportunity to improve. Neither had he received any training and the meeting which was planned between him and Mr Mendoza had never happened.

16 Mr Anscombe was cross-examined on his evidence and this will be referred to later where necessary.

Mr Loseby's evidence

17 Mr Loseby's evidence is that he had started employment with Bozzy Shade Blinds in September 2010, some six months prior to Mr Anscombe starting as Sales Manager. When Mr Anscombe started, some of the changes he introduced were follow-up folders, which record a list of clients and notes about the meetings; spending a little bit more time with clients which gave a better chance of selling; and a few sales techniques. The aim was to see four to five clients a day maximum. In Mr Loseby's evidence, these changes definitely did improve the sales results and he continued with these procedures after Mr Anscombe had left Bozzy Shade Blinds. In the summer period they were dealing with approximately nine to ten quotes a day which was far more than the four or five which Mr Loseby believed should have been set. Working hours increased.

18 Mr Loseby's evidence is that after the meeting of 10 May 2012, instead of being out on the road selling all day, the day was basically split into two, with half of the day in the office and the other half out on the road selling, which cut the selling time in half and gave less time to spend with clients. Mr Anscombe had asked him to do a spreadsheet which had not previously been done and it was subsequently modified slightly.

19 In relation to Mr Anscombe training and mentoring him, Mr Loseby's evidence is that he had not required a lot of training because he had been employed for about six months before Mr Anscombe commenced. However Mr Anscombe would ring once or twice a day to ask how things were going and to give general advice. Mr Anscombe would work with Mr Loseby with certain clients to try to get them over the line to buy blinds. Mr Loseby thought that there was enough support needed in that case.

20 In relation to sales meetings, Mr Loseby stated they were held once a fortnight. When asked if he was given an agenda for the meeting, Mr Loseby said it was basically a list of sales figures, sales results, targets and conversion ratios. Mr Loseby confirmed that he had been asked to buy some new shirts and have logos put on them; however he explained to Mr Mendoza that there was not a lot of time available to do that because of spending half a day in the office doing receptionist duties and the other half out selling. He stayed with Bozzy Shade Blinds until November 2012 and he was never given new shirts.

21 In cross-examination, Mr Loseby confirmed that the agenda supplied for sales meetings included the spreadsheet that was developed by Mr Mendoza. He confirmed that testimonials were raised at some point in the meetings. In relation to training, Mr Loseby confirmed that Mr Anscombe did not spend a lot of time with him on the road; he was telephoning him once or twice a day to ask how Mr Loseby was going. This happened regularly. He was asked whether one of the reasons why sales representatives were to be in the office was that they were able to service clients that came into the showroom. He agreed, however he did not think that was the main reason for having sales representatives in the office. In Mr Loseby's view, the sales representatives' time would have been better spent on the road.

22 In relation to the purchase of shirts, Mr Loseby was never too sure what Mr Mendoza had expected him to wear, and during the week there was not a lot of time available to "do that sort of thing". It would have been possible to go to the uniform shop which is a five minute walk from Bozzy Shade Blinds but without knowing exactly what Mr Mendoza was after it would have been difficult to do. It was Mr Anscombe who had asked Mr Loseby to purchase uniforms.

Ms Martin's Evidence

23 Ms Zoe Martin was employed by Bozzy Shade Blinds in May 2011. In relation to being trained, she spent two days on the road with Mr Anscombe, and was also in the showroom for some of that time as well. During the time she was out selling by herself, Mr Anscombe called regularly and answered any queries she had. She is still using Mr Anscombe's way to sell and deal with clients, with a follow-up file.

24 She would come up to the head office every fortnight for the sales meeting. She does not recall receiving an agenda; however they were given sales results. She did not think that she had received enough support from Mr Anscombe as a Sales Manager; it should not have been solely up to her to have to telephone and ask when she came across situations.

25 She stated that when Mr Mendoza started he was introduced to the business at a sales meeting.

26 In cross-examination Ms Martin confirmed that apart from the first week of employment, where Mr Anscombe had spent some time with Ms Martin on the road, he did not do that again, nor come to the Mandurah showroom where Ms Martin worked. Meetings were not held every fortnight in the summer when they were busy, but otherwise they were held every fortnight. When she was asked about whether she received an agenda for the meetings she replied that the only things received were the conversion rate, the sales previously made and what was needed to be achieved.

Mr Mendoza's Evidence

27 Mr Mendoza's evidence is that the letter of termination outlines specifically why Mr Anscombe's employment was terminated. Mr Mendoza acknowledged that he himself was very inexperienced in terms of sales; however, he had been employed as General Manager to oversee the entire business. There were obviously parts of Bozzy Shade Blinds that he needed to understand. He spoke to different people in the organisation although his main point of contact was the Managing Director, Mr Bozuwa, because it was the Managing Director who wanted the results.

28 The letter of termination is signed by Mr Mendoza. He spoke about the reasons it lists for Mr Anscombe's dismissal. In summary, his evidence was as follows. The first reason is an inability or unwillingness by Mr Anscombe to follow directions and refers to 8, 15, 22 and 28 May, and 4, 11, 18 and 25 June 2012. These dates are dates of emails.

29 In relation to 8 May, Mr Mendoza had had a discussion with Mr Anscombe where he asked Mr Anscombe to provide him with a weekly report on sales or no-sales. This would have addressed a major concern of Mr Bozuwa: no-sales, or sales that did not go through. The email of 15 May 2012 thanked Mr Anscombe for an earlier report but in particular Mr Mendoza needed to know the number of quotes compared to the number of sales and clarification of certain things; just providing figures was not enough. Mr Mendoza's evidence is these issues had not been answered.

30 Mr Mendoza attended a sales meeting on 16 May and took minutes of the meeting, however, he saw minute-taking as the role of the particular manager concerned.

31 The second reason in the letter of termination was the requirement for Mr Anscombe to provide a weekly report with an explanation specifically of where no-sales eventuated, the number of revisits by sales representatives to clients following installation and the number of retirement villages visited. Mr Mendoza said the emails support the fact that they were not getting what was required in Mr Anscombe's reports.

32 The fourth reason (Mr Mendoza did not directly address the third reason which is monthly reports) is a failure on Mr Anscombe's part to have regular weekly/fortnightly team meetings and to provide Mr Mendoza with a copy of agenda items. Mr Mendoza had received only one agenda (exhibit D).

33 The fifth reason is there were no minutes of sales meetings, daily or weekly progress updates, tracking against targets and areas of focus by sales representatives on a weekly or monthly basis.

34 The sixth reason is coaching, mentoring, training and providing support to sales staff: coaching and mentoring in Mr Mendoza's view is not just about picking up a telephone and ringing a person; it is about spending time with them, developing techniques and looking at areas that can help them to get sales over the line and liaise better with people.

35 The seventh reason merely states "Liaison with Operations Manager". Mr Mendoza's evidence is that the relationship between the Operations Manager and Mr Anscombe was not exactly the best and they should liaise with each other to identify clients for the purpose of them providing testimonials.

36 The eighth reason is that there was a failure by Mr Anscombe to purchase and wear the correct uniform. Mr Mendoza's evidence is that he asked Mr Anscombe to go and purchase uniforms to provide a more professional look. Bozzy Shade Blinds would pay for the shirts. It took at least four to six weeks for this to happen.

37 Mr Mendoza's evidence is that there had been a meeting on 10th May 2012 between him, Mr Anscombe and Mr Bozuwa and a range of things was discussed. These are set out in ten dot points on page two of the termination letter. Mr Mendoza's evidence is that these dot points record what was asked of Mr Anscombe, yet they did not happen. The main one was sales representatives spending time in the showroom and although Mr Mendoza understood it took some time from them being out on the road, they also had to be in the showroom because they had paperwork to produce, they could help to cover the phones and attend to the people who come into the showroom. His evidence is that Mr Anscombe was reluctant to cover the showroom claiming that he did not see why he needed to come in each morning and then drive back to see clients.

38 Mr Anscombe was expected to go out with the sales representatives and mentor them. He was supposed to support Ms Martin and manager her through visiting at least once a month, but this did not happen.

39 Mr Mendoza's evidence is that these are directions given from management and whilst they were discussed, and management might not have agreed to what Mr Anscombe wanted, at the end of the day that was what management wanted to happen. Mr Mendoza's evidence is that there was then a discussion regarding terminating Mr Anscombe's employment and eventually an agreement that Mr Anscombe would leave Bozzy Shade Blinds. In Mr Mendoza's submission: "We didn't think that we did anything wrong. We had a contract that had expired and we provided adequate notice to Tim that what things weren't being met. We gave him the two weeks' notice and the option to stay or leave".

40 Mr Mendoza was cross-examined by Mr Anscombe and this will be referred to later as necessary.

Unfair Dismissal – Some Legal Principles

41 There was a written employment agreement between Mr Anscombe and Bozzy Shade Blinds (exhibit 1). It was signed on 4 August 2011 and states that the duration of the employment agreement is 12 months from signing. Relevantly, it contains a provision for termination of employment as follows:

> "This contract of employment can be terminated at anytime by either party on the condition that 2 weeks written notice is given".

Mr Anscombe's dismissal was in accordance with the employment agreement because Bozzy Shade Blinds gave him two weeks' written notice: the letter is dated 29 June 2012 and states –

> "Based on your length of service, your notice period is two weeks. Therefore your employment will end on Friday 13 July 2012".

42 Mr Anscombe's dismissal was a lawful dismissal in that he was dismissed in accordance with his employment agreement. Bozzy Shade Blinds had the legal right under the employment agreement to terminate Mr Anscombe's employment provided it gave two weeks' written notice, just as Mr Anscombe had the legal right to resign from Bozzy Shade Blinds provided he gave same amount of written notice. Mr Mendoza's evidence that the contract had expired is not correct, however that does not change the fact that Mr Anscombe's dismissal was a lawful dismissal.

43 Mr Anscombe's claim, however, is not that his dismissal was unlawful; it is that his dismissal was unfair. There have been many occasions when this Commission, and other tribunals and courts, have had to consider whether a dismissal is unfair and the Industrial Appeal Court in WA has stated that an unfair dismissal is one where the legal right of the employer to dismiss the employee is exercised so harshly or oppressively towards the employee that it amounts to an abuse of that right (said in *Miles & Ors t/as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch* (1985) 65 WAIG 385). The Commission is to decide whether a dismissal is unfair according to equity, good conscience and the substantial merits of the case. Another way of describing the task of the Commission is to consider whether or not there has been "a fair go all round". If there has not been a fair go all round, it is likely the dismissal will be found to have been unfair.

44 The onus is on Mr Anscombe to show that his dismissal was unfair; there is no onus on Bozzy Shade Blinds to show that it was fair.

Consideration of the Issues

45 Mr Anscombe's evidence of when he was employed, and the administrative systems he put in place, was not challenged and I accept it. I find he did do the things which he described.

46 The reasons why Mr Anscombe claims that his dismissal was unfair are set out at the beginning of these reasons and I turn to consider them now.

Mr Anscombe's First Reason

47 Mr Anscombe's first reason for claiming his dismissal was unfair is that the main reason given to him at the meeting on 28 June 2012 for his termination was lack of sales performance from the team he managed. I note, as Mr Anscombe has invited me to, that there is no mention of lack of sales performance in the termination letter of 29 June 2012. Mr Anscombe's evidence is that when he was called to the meeting with Mr Bozuwa and Mr Mendoza on 28 June 2012 (the day before the termination letter was given to him), Mr Bozuwa stated that the reason for the dismissal was lack of sales.

48 In my view, Mr Anscombe gave his evidence honestly and to the best of his recollection and his evidence on this point is quite credible; when Mr Mendoza was cross-examined by Mr Anscombe, Mr Anscombe asked Mr Mendoza whether the main reason given in the meeting for dismissing him was lack of sales. Mr Mendoza's answer was "I can't remember specifically if that was". I quite accept the answer as being the best of Mr Mendoza's recollection; however it does not deny the evidence of Mr Anscombe that it was said. On the balance of the evidence therefore, I find that when Mr Bozuwa and Mr Mendoza dismissed Mr Anscombe in the meeting on 28 May 2012 one of the reasons Mr Bozuwa gave was lack of sales performance.

49 However, lack of sales performance is not a valid reason to dismiss Mr Anscombe: the evidence that Mr Anscombe produced in the hearing is that sales had increased by 62% on the previous year. Mr Mendoza agrees that sales were up; the point he makes is that the sales still missed Mr Anscombe's annual target. The point was well made by Mr Anscombe however in the following exchange that lack of sales was not an issue which had been raised with him:

> "Mr Anscombe: So the sales were so unsatisfactory, when did you discuss with me about sales because not one of the emails you sent me mentioned sales?... Mr Mendoza: I think you could be right."

50 Mr Mendoza did say that he thought the issue of unsatisfactory sales was raised at Mr Anscombe's team meetings, so the issue "spoke for itself". However, when asked by Mr Anscombe why this had not been raised with him on the basis of an issue which needed to be "pick[ed] up", Mr Mendoza's reply is: "Well, I can't recall. I honestly don't know. No". When asked why, if the sales were so unsatisfactory, this issue was not mentioned in the termination letter, Mr Mendoza's reply was:

> "I don't know. That wasn't the whole basis behind it. I saw these as more important points".

51 I find it significant that there is no reference to lack of sales performance included in the termination letter when it was a reason for dismissing him stated to him in the meeting the day before. The absence of any reference to lack of sales performance in the termination letter, or even that although sales had increased Mr Anscombe missed his annual target, allows the conclusion that one of the reasons why Bozzy Shade Blinds decided in the lead-up to 28 June 2012 to dismiss Mr Anscombe was not valid. It could not be relied upon to justify the dismissal which by then had occurred so it was omitted from the termination letter.

52 I think Mr Anscombe's point, that although Bozzy Shade Blinds states that the reasons for dismissing Mr Anscombe are those set out in the termination letter when he was told he was being dismissed, lack of sales was said to him as a reason for dismissing him, is made out.

53 Ultimately Bozzy Shade Blinds does not rely on lack of sales performance for its decision to dismiss Mr Anscombe. It relies on the reasons in the termination letter. However, what was said to him on 28 June 2012 when he was dismissed is part of the dismissal which occurred. The letter given to him on the following day was another part of the dismissal. Therefore at the time of dismissing Mr Anscombe, Bozzy Shade Blinds did rely on lack of sales performance as a reason for dismissing him even though it later chose not to rely upon it. It has been shown to be not a valid reason to dismiss Mr Anscombe because sales had increased by 62% on the previous year, even if they were under the budget which had been set.

54 Mr Anscombe knew at the time that this reason for dismissing him "couldn't have been right". In my view, Bozzy Shade Blinds prepared poorly for the meeting to be held on 28 June 2012 to dismiss Mr Anscombe. What was said by Mr Bozuwa at the meeting regarding sales has been a significant part of why Mr Anscombe claims his dismissal was unfair. It illustrates the proposition that how a dismissal is done can often be more important than the fact that it is done.

55 Mr Anscombe's evidence is that at the meeting, Mr Mendoza also mentioned Mr Anscombe not having the correct shirts and there was a missing file. The former is one of the reasons listed in the termination letter and is dealt with later in these reasons for decision; the latter is a point about which Mr Anscombe himself says he is unsure and it was not referred to again during the hearing. Mr Anscombe did not specifically rely upon it as a reason why his dismissal was unfair and so there is no need to deal with it further here.

Mr Anscombe's Second Reason

56 Mr Anscombe's second reason for claiming his dismissal was unfair is in two parts:

(a) That the reasons listed in the letter of termination were due to lack of direction from the owner during a period of changed management; and

(b) On the termination letter there is a list of things claimed I did not complete, these items were agreed to prior to my role changing.

– Part (a)

57 In relation to part (a) above, Mr Anscombe's evidence did not directly identify to whom he is referring by the word "owner". On the evidence, Mr Bozuwa is the "owner". There was a period of changed management when Mr Mendoza was employed. If the point Mr Anscombe is seeking to make is that Mr Bozuwa failed to give him direction when Mr Mendoza was employed, I reject it. Mr Anscombe's evidence that Mr Mendoza was not introduced to staff, and Mr Anscombe had to introduce himself, is not entirely supported by Ms Martin's evidence that Mr Mendoza was introduced to the business at a sales meeting.

58 Even if Mr Anscombe did have to introduce himself to Mr Mendoza, in other words that Mr Bozuwa did not introduce Mr Mendoza to him, that is hardly a reason why Mr Anscombe's dismissal some three months later was unfair; the earliest dated email tendered in evidence (8 May 2012, exhibit A) states clearly that it is at the request of Mr Bozuwa that Mr Mendoza is asking for more content in Mr Anscombe's weekly reports. There was no need for any separate "direction from the owner" during this period because as General Manager of Bozzy Shade Blinds, Mr Mendoza had the authority to make the requests, which he did, and Mr Anscombe as Sales Manager was obliged to obey the lawful and reasonable requests made to him by Mr Mendoza.

59 In any event, there is evidence of occasions when Mr Bozuwa was directly involved with Mr Anscombe, including the meeting on 10 May 2012 already referred to. In my view, Mr Anscombe has not shown that his dismissal was unfair because the reasons listed in the letter of termination were due to lack of direction from the owner during a period of changed management.

– Part (b)

60 In order to deal with part (b) of Mr Anscombe's second reason for claiming his dismissal was unfair, it is necessary to identify the "things" in the termination letter Mr Anscombe did not complete. First in the reasons listed in the termination letter is "[i]nability (or unwillingness) to follow directions" followed by eight dates and "[d]iscussions have been held with you about what is required". The eight dates refer to emails which were sent, however only three of those eight were tendered in evidence: 8, 15 and 22 May; the emails dated 28 May, 4, 11, 18 and 25 June were not tendered and their contents are not before the Commission.

61 Mr Mendoza's evidence of the first reason shows that at least some of the emails dealt with reasons which are listed later in the termination letter. For example, the email dated 8 May is around the discussion where Mr Mendoza asked Mr Anscombe to provide a weekly report on sales and no-sales, the number of re-visits, a breakdown of sales representative activity which is the second reason. Mr Anscombe says he did provide weekly reports, except for the period 4 to 11 June when he was on leave, and I find that he did.

62 The issue is that they did not contain the detail required, and I find Mr Anscombe did not provide the detail required. I find that Mr Mendoza is correct in his evidence that the reports did not contain the information that was required including information regarding retirement villages and that progress was to be displayed on a white board. In Mr Mendoza's view this illustrates the inability and unwillingness of Mr Anscombe to provide the information.

63 On the evidence however, each week something else was required. Mr Mendoza agreed that he would be wanting something different each week. In the email of 15 May Mr Mendoza says "it is fair to say that over the next 4-6 weeks we may be tweeking (sic) the report as we go until we get to the final version". The third reason is providing monthly reports similar to the weekly reports providing a more detailed overview of the month, and that the report for May 2012 was not received. Mr Anscombe's evidence is that his main focus was on sales and that monthly reports "fell by the wayside for a few months". He adds that Mr Bozuwa understood this and he would catch up with Mr Anscombe when he was in the office processing orders. He had been on holiday the one month he did not provide a monthly report.

64 The fourth reason is failure to hold regular weekly/fortnightly team meetings. Mr Anscombe says he did hold regular fortnightly team meetings unless he was away. Mr Mendoza disagrees. Both Mr Loseby and Ms Martin gave evidence that sales meetings were held fortnightly unless it was too busy in summer and I have no reason not to accept their evidence, and I do accept it. On balance I find that Mr Anscombe has shown that sales meetings were held fortnightly.

65 On the evidence of both Mr Loseby and Ms Martin there was also an agenda for these meetings provided by Mr Anscombe. The agendas were mainly sales results and conversion rates, but they were provided. I find that Mr Anscombe provided only one copy of an agenda to Mr Mendoza when he had been requested to provide a copy of each agenda.

66 The fifth reason is no minutes of sales meetings, daily/weekly progress updates, tracking against targets and areas of focus by sales representatives. Mr Anscombe concedes he did not do this.

67 The sixth reason is coaching, mentoring, training and providing support to sales staff and states "[i]t was agreed 15 May 2012 that [Mr Anscombe] would spend half day with Shane Loseby especially with regards to discounts". Mr Anscombe insists that he did coach and mentor sales staff by speaking with them on the telephone once a day, but did not spend half a day with Mr Loseby. He says that the rostering situation meant that he was not physically able to spend half a day with Mr Loseby but he made a point of sitting down with him in the office and spoke to him about discounting. Mr Loseby confirmed that Mr Anscombe had spoken to him about discounting and I accept that he did so.

68 In relation to coaching and mentoring by telephone, the evidence of Mr Anscombe that he believes he gave them all the coaching and training they required is countered by the evidence of Ms Martin that this was not enough support. I accept the evidence of Ms Martin on this point.

69 The seventh reason is stated as merely "Liaison with Operations Manager". Mr Anscombe states that he did not understand the point being made. In his evidence, Mr Mendoza stated the issue was Mr Anscombe not following up with the Operations Manager to identify clients who might be receptive to providing testimonials or to have a Bozzy Shade Blinds sign outside their home. Mr Anscombe questioned Mr Mendoza about this and established two occasions when this liaison had happened. This seventh reason appears to be an issue of either the extent to which this liaison occurred, or that it occurred but Mr Mendoza was unaware of it occurring.

70 The eighth reason is the failure to purchase and wear the correct uniform. On the evidence, Mr Anscombe had been asked on 10 May 2012 to purchase business shirts and this had taken some four to six weeks to be completed. Mr Anscombe may be criticised for taking that long, however, the evidence of Mr Loseby supports the evidence of Mr Anscombe that the change to the office routine did not leave a lot of time for the ordering of shirts. There is also the evidence from Mr Loseby that, at least in his case, shirts were not supplied after Mr Anscombe's employment had been terminated. It does not seem to be an example of an inability or unwillingness to do it when it was done, although not promptly. Also there is evidence that the change requiring both Mr Anscombe and Mr Loseby to be in the office for half a day had a few issues at the beginning, so it is not clear how much weight can be attached to the fact that it took four to six weeks for shirts to be ordered.

71 On the second page of the termination letter are a number of dot points of things said to have been agreed at a meeting on 10 May 2012 between Mr Anscombe, Mr Bozuwa and Mr Mendoza and which were expected to happen but the evidence of Mr Mendoza is that they did not happen. Most of these, if not all of them, are matters already dealt with on the first page of the termination letter. Mr Anscombe acknowledges these things were agreed but says he was then spending half a day working as a receptionist and dealing with customer queries; a lot of these things did get done, but "maybe sporadically".

72 The last of those points, on the evidence of Mr Mendoza, is that Mr Anscombe was reluctant to cover the showroom claiming he did not see why he needed to come in each morning and then drive back to the northern suburbs to see clients. Mr Anscombe says he was reluctant to cover the showroom for half a day but not for that reason: it was because the representative might be spending an hour driving which is time that could be spent with clients. Further, even if he had been reluctant, on the evidence, nevertheless did so, and organised it in a way to make it work as best as it could.

73 I conclude that part (b) of Mr Anscombe's second reason for claiming his dismissal was unfair is not made out. Of the things listed in the letter, only the falling-off of the monthly reports was said by Mr Anscombe to have been "understood" by Mr Bozuwa, and this evidence was not contradicted. All of the other things listed were matters which had been requested of him by Mr Mendoza and either not done, or only done in part.

Mr Anscombe's Third Reason

74 Mr Anscombe's third reason for claiming his dismissal was unfair is that he was not given a verbal or written warning regarding his performance at any stage of his employment. He states that no training was offered; the only day he was going to sit down and work on the reporting with Mr Mendoza did not occur because Mr Mendoza was not able to attend. He was not given the time nor an opportunity to improve his performance. Mr Mendoza's evidence is that he believed Bozzy Shade Blinds had provided adequate notice to Mr Anscombe what things were not being met.

75 On the evidence, the closest that Bozzy Shade Blinds came to warning Mr Anscombe about his performance on these issues is one month before his termination in an email on 30 May 2012 (exhibit 7).

76 This email lists a number of points and states at its conclusion:

> "As the Sales Manager I expect more from you and at this point I am just not seeing that. We need to sit down and discuss as this cannot continue".

77 This is not a warning. It does not say that Mr Anscombe's employment will be in jeopardy if there was not more from him. It says "this cannot continue" but it states it is at the stage where there needed to be a discussion between Mr Mendoza and Mr Anscombe to discuss Mr Mendoza's expectation of more from Mr Anscombe; therefore it was not at the stage where his dismissal was warranted.

78 On the evidence, the discussion was to occur at the meeting agreed between Mr Anscombe and Mr Mendoza to be on a particular Monday; the date was not stated in the evidence, however given Mr Anscombe returned from leave on Monday 11 June 2012, it can only have been in the third or fourth week of June, either Monday 18 or 25 June 2012. However, the meeting did not happen because Mr Mendoza did not attend and on 28 June 2012 Mr Anscombe was dismissed.

79 I find that Mr Anscombe's third reason for claiming his dismissal was unfair is made out: he was not given a verbal or written warning regarding his performance at any stage of his employment. Even if the email of 30 May 2012 should be taken to be a warning, there was not a reasonable opportunity between the scheduled Monday meeting and his dismissal for him to improve his performance.

80 Failure to warn an employee that their employment is in jeopardy unless they improve and give them a fair opportunity to improve, is an important consideration in whether there has been "a fair go all round". This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated unless they take appropriate remedial steps (*Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635).

81 The Small Business Fair Dismissal Code, which is applicable to dismissals occurring in Australia within the national industrial relations system, does not apply in this jurisdiction but it provides a guide to contemporary standards. Relevantly, the Code states:

> "The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there was no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations."

82 Mr Mendoza's submission, in response to a question from the Commission, was that he thought by providing the emails to Mr Anscombe, it was enough evidence; he did not think that by giving a warning there would be any change in performance. In his view, Mr Anscombe was happy with the way he was doing things and did not want to do things the way Mr Mendoza wanted them done.

83 There is some justification for Mr Mendoza's view: Mr Anscombe made the point more than once in his evidence that he did not think that Mr Mendoza understood how the sales team worked and even expressed a level of frustration about this. However the point is that Mr Mendoza had the authority as General Manager to make the requests which he made of Mr Anscombe, and Mr Anscombe was under a duty to obey them even if he did think that Mr Mendoza did not understand how the sales team worked.

84 I am far from convinced that Mr Anscombe would not eventually have done all that was required of him if he had been warned that his employment was in jeopardy. Although Bozzy Shade Blinds dismissed Mr Anscombe for an unwillingness to follow directions, the email which is exhibit 7 acknowledges that rostering Mr Loseby and Mr Anscombe in the office on alternate half days, which Mr Anscombe organised, had "started to work much better after a few issues at the beginning", with quotes being booked in at the time either of them was supposed to be in the office. Mr Anscombe did do as requested and did roster the sales representatives for half a day in the office.

85 He did order uniforms, even if it took four to six weeks to do so.

86 In relation to coaching and mentoring, I find that Mr Mendoza is correct in saying that more is involved than merely picking up a telephone, including supporting Ms Martin by visiting Mandurah at least once a month; that was the substance of Ms Martin's evidence on the point. On the evidence Mr Anscombe did not visit Mandurah once a month, however the evidence also is that being required to be in the office for half a day per week reduced the amount of time available for coaching and mentoring to occur, given that the time when Mr Anscombe was not in the office was meant to be filled with seeing clients. Mr Anscombe's evidence in this regard is supported by the evidence of Ms Martin that although more training was required, she recognised the constraints place upon Mr Anscombe's time.

87 Although Mr Anscombe did not spend half a day with Mr Loseby because of the rostering in the office, he made a point of speaking to him in the office and spoke to him about discounting as he had been requested to do.

88 Mr Anscombe did hold sales meetings fortnightly even if his agendas consisted mainly of sales results and conversions.

89 Mr Anscombe did not provide the detail in his weekly reports which had been repeatedly asked for, and he can be legitimately criticised for this; however Mr Mendoza agreed that he would be wanting something different each week and that it had been agreed that Mr Anscombe and he would meet to discuss reporting so that they weren't going "backwards and forwards" about what should be in the weekly reports. It was agreed that the lack of detail in the reports would be addressed in a meeting.

90 Further, the initiative to have this meeting to discuss the content of the reports was at Mr Anscombe's initiative, which is to his credit. On the evidence he prepared a comparison report in the second week of June and proposed a meeting with Mr Mendoza and Mr Bozuwa with Mr Mendoza responding with a suggestion that it be a meeting of just him and Mr Anscombe. This does not show an inability or unwillingness to comply; it shows a willingness to address the issue.

The Dismissal – Was it Unfair?

91 The dismissal of Mr Anscombe on 28 June 2012 is to be considered in the light of the foregoing findings. This includes the background that although Mr Anscombe's length of employment is not long, being just over one year, during that time he had made a positive contribution to the sales performance of the business: he had put in targets and trained the staff to sell his way, and introduced a system of follow-up files which worked so well that Mr Loseby and Ms Martin continued to use it even after he was dismissed. Although he had been employed as Sales Manager, he had stepped into the role of sales representative when it was needed.

92 Mr Anscombe has shown the following:

(a) One of the reasons stated to him for his dismissal, namely lack of sales performance, was incorrect because sales had increased on the previous year.

(b) The other reasons for his dismissal which, at his request were given to him in writing the next day, included an inability or unwillingness to follow directions when he had followed some, although not all, of those directions.

(c) Mr Mendoza's expectation of more from Mr Anscombe had been agreed to be discussed at a meeting to be held in the third or fourth week of June but through no fault of Mr Anscombe the meeting did not occur and it was not re-scheduled before he was dismissed in that fourth week.

(d) He had not been given a warning that his employment was in jeopardy if he did not follow all the directions given to him, and not given a reasonable opportunity to follow them.

93 Given the above, I find that Mr Anscombe has shown that he was not given a fair go all round when he was just called in to a meeting in the fourth week and dismissed, and he has shown that his dismissal was unfair.

Remedy

94 The primary remedy under the *Industrial Relations Act 1979* (WA) for a dismissal that is unfair is reinstatement or re-employment. Mr Anscombe does not seek to return to the respondent's employment. He has found alternative employment. For its part, there is no suggestion from Bozzy Shade Blinds that it would have Mr Anscombe back into its employment if his dismissal is found to be unfair. For those reasons, I find that reinstatement or re-employment would be impracticable.

95 If the Commission considers reinstatement or re-employment would be impracticable, the Commission may order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal. Mr Anscombe's evidence (exhibit 15), which was accepted by the respondent, was that he was out of work for ten weeks from 2 July until 8 September 2012. Based upon his average weekly earnings of $1,948.59, his loss for that ten weeks, less the two weeks' pay in lieu of notice he received, is $17,147.40. I find that the loss to Mr Anscombe caused by his dismissal is $17,147.40.

96 There is no evidence, nor submission, that Mr Anscombe has not taken appropriate steps to mitigate his loss. Finding an alternative means of income in ten weeks suggests that Mr Anscombe did take appropriate steps to find alternative employment after he had been dismissed. The Commission will order that the respondent forthwith pay that sum, less tax, to Mr Anscombe as compensation for the loss caused by the dismissal.

97 At the commencement of the hearing, it was agreed that the name of the respondent would be amended to read "The Trustee for the Bozzy Trust trading as Bozzy Shade Blinds". This change will be included in the order to issue.

98 A draft of the order, which is called a minute of the order, now issues. Both Mr Anscombe and the respondent are given seven days during which they may request the minute be altered if they consider it does not accurately reflect the decision which has been reached. This is not an opportunity to re-argue the merits of the case. If no request to alter the minute is received, the order will issue in the form of the minute after the seven days.

99 That concludes these reasons for decision.

2013 WAIRC 00230

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY DAVID ANSCOMBE
	APPLICANT
	-v-
	THE TRUSTEE FOR THE BOZZY TRUST TRADING AS BOZZY SHADE BLINDS
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 15 APRIL 2013
FILE NO/S	U 158 OF 2012
CITATION NO.	2013 WAIRC 00230

Result	Dismissal held unfair, compensation ordered
Representation	
Applicant	Mr T Anscombe
Respondent	Mr P Mendoza

Declaration and Order

HAVING HEARD Mr T Anscombe on his own behalf and Mr P Mendoza on behalf of the respondent, I the undersigned, having given reasons for decision and pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby –

1. DECLARE that the dismissal of Mr Timothy David Anscombe on 28 June 2012 is held unfair.
2. ORDER that the name of the respondent be amended to "The Trustee for the Bozzy Trust trading as Bozzy Shade Blinds".
2. ORDER that The Trustee for the Bozzy Trust trading as Bozzy Shade Blinds forthwith pay to Mr Timothy David Anscombe $17,147.40, less tax, being compensation for the loss caused by the dismissal.

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

2013 WAIRC 00416

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHELSEA BUTTERS
	APPLICANT
	-v-
	CARMEL HARFIELD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 10 JULY 2013
FILE NO/S	U 12 OF 2013
CITATION NO.	2013 WAIRC 00416

Result	Application discontinued
Representation	
Applicant	Miss C Butters
Respondent	Mrs C Harfield

Order

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

AND WHEREAS on 26 March 2013 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 8 July 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00418

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAUREN GIESIGE
	APPLICANT
	-v-
	CENTRE PROMOTIONS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 10 JULY 2013
FILE NO/S	U 87 OF 2013
CITATION NO.	2013 WAIRC 00418

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 8 July 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00417

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANE HANNAN
	APPLICANT
	-v-
	DAVE MCKENNA - THE MENZIES HOTEL WA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 10 JULY 2013
FILE NO/S	U 61 OF 2013
CITATION NO.	2013 WAIRC 00417

Result	Appliction discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 9 July 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00367

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00367
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	WEDNESDAY, 20 FEBRUARY 2013
WRITTEN SUBMISSIONS		WEDNESDAY, 20 MARCH 2013, FRIDAY 12 APRIL 2013
DELIVERED	**:**	WEDNESDAY, 19 JUNE 2013
FILE NO.	**:**	U 206 OF 2012
BETWEEN	**:**	WILLIAM PETER MADIGAN
		Applicant
		AND
		CITY OF ALBANY
		Respondent

Catchwords	**:**	Termination of employment - Harsh, oppressive or unfair dismissal - Whether Commission has jurisdiction - Trading activities of respondent considered - Commission not satisfied respondent is a trading corporation - Declaration issued
		Applicant's salary exceeds prescribed amount - Whether industrial instrument applies to applicant's employment - Award applies - Commission has jurisdiction - Declaration issued
		Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles applied - Commission satisfied applying principles that discretion should be exercised - Application accepted out of time - Order issued
Legislation	**:**	*Industrial Relations Act 1979* s 27(1)(c), s 29(2), s 29(3), s 29(1)(b)(i), s 29AA, s 29AA(3) and s 29AA(5)
		Fair Work Act 2009 s 12, s 13, s 14, s 14(1)(a) and s 26
		Australian Constitution s 51(xx) and s 109
		Local Government Act 1995 s 1.3(3), s 2.5, s 3.1, s 3.1(1) s 3.59 and s 6.15
Result	**:**	Declarations and Order issued
Representation:		
Counsel:		
Applicant	**:**	Mr B Hocking
Respondent	**:**	Ms M Saraceni
Solicitors:		
Applicant	**:**	Bradley Bayly Legal
Respondent	**:**	McKay Legal WA

Case(s) referred to in reasons:

Bone Densitometry Australia Pty Ltd v Sharmaine Deborah Lenny [2005] WAIRC Comm 2081

Byrne v Australian Airlines Ltd (1995) 185 CLR 411

Colin John Bourke v The Director of Catholic Education WA and The Principal at St Joseph's School [2005] WAIRC Comm 3334

Denise Brailey and Mendex Pty Ltd t/a Mair and Co Maylands (1993) 73 WAIG 26

Director General of the Department for Education v Prem Singh Malik (2003) 83 WAIG 3056

Malik v Paul Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683

McConkey v M & A'S of Denmark (2001) 81 WAIG 1561

Shire of Ravensthorpe v John Patrick Galea (2009) 89 WAIG 2283

Reasons for Decision

1 On 21 September 2012 William Peter Madigan (the applicant) lodged an application under the *Industrial Relations Act 1979* (the Act) claiming that he was unfairly dismissed on 29 February 2012 by the City of Albany (the respondent).

2 Three preliminary issues arise in relation to this application. The first issue is whether the respondent is a trading corporation for the purposes of s 51(xx) of the Australian Constitution and is thus a national system employer for the purposes of s 14 of the *Fair Work Act 2009* (FW Act). If so, the Commission cannot deal with this application. The respondent claims that the applicant's employment was not subject to an industrial instrument for the purposes of s 29AA of the Act and his salary exceeds the prescribed amount thus precluding him from making this claim for unfair dismissal. As this application was lodged 177 days outside of the required timeframe the Commission must also determine if this application should be accepted.

Background

3 The respondent employed the applicant for approximately 30 years. His last appointment, from 2 October 2009, was as the Executive Director of Corporate and Community Services, which is accountable to the Chief Executive Officer (CEO) (see Exhibit A1, annexure A). On 7 February 2011 the respondent employed a new CEO, Ms Faileen James, who the applicant claims immediately began harassing and bullying him and on 24 February 2011 the applicant went on stress related sick leave. Prior to this in mid February 2011 the applicant was approved to take long service leave between 18 April 2011 and 8 July 2011. The applicant submitted ongoing medical certificates for the period 28 February 2011 to 29 February 2012. On 15 March 2011 the respondent told the applicant about a planned restructure of his department and the abolition of his position. On 13 May 2011 Dr Andrew Knight advised the respondent that the applicant continued to be on work-related stress leave. When the applicant's doctor certified the applicant to take a further period of sick leave the CEO directed that the applicant be paid long service leave entitlements instead of being on sick leave even though he had accrued sick leave to cover this absence from work. On 25 November 2011 the respondent's solicitors wrote to the applicant raising a number of allegations about his performance and conduct, which the applicant denied. The respondent wrote to the applicant about a return to work programme on 16 December 2011 which was scheduled to commence on 19 December 2011. The applicant did not return to work under this programme and his representative wrote to the respondent on 19 December 2011 advising that the applicant was giving notice of his resignation. After receiving this resignation, effective 29 February 2012, the respondent advised the applicant that it would pay him in lieu of notice up to this date plus accrued entitlements. On 13 March 2012, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (the ASU), acting on behalf of the applicant, initiated a denied contractual benefits claim for long service entitlements the applicant claimed were due to him. When this dispute was resolved the applicant refused to sign a Deed of Settlement and Release with respect to all employment related matters as proposed by the respondent. The applicant's long service leave entitlements were paid to him in August 2012.

Is the respondent a trading corporation?

4 The respondent claims the Commission cannot deal with this application as it is a trading corporation and therefore subject to the FW Act. The applicant disputes that the respondent is a trading corporation and submits that the predominant and characteristic activity of the respondent is not trading.

5 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation, so far as it employs, or usually employs, an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines a constitutional corporation as a corporation to which s 51(xx) of the Australian Constitution applies and s 51(xx) of the Australian Constitution provides that corporations amongst others are 'trading or financial corporations formed within the limits of the Commonwealth'. Section 26 of the FW Act states that it applies to the exclusion of all State or Territory industrial laws that would otherwise apply to a national system employee or employer, including the Act. If the respondent is a trading corporation, by virtue of ss 12, 13 and 14 of the FW Act, the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 26 of the FW Act and s 109 of the Australian Constitution.

6 Only the respondent gave evidence about this matter. Mr Garry Adams has been the respondent's Executive Director Corporate Services since 11 June 2012. He confirmed that the respondent is a body corporate (s 2.5 of the *Local Government Act 1995* [the LG Act]). Mr Adams stated that the respondent takes a liberal approach to its general functions under s 3.1 of the LG Act. Its activities include receiving revenue and income from various sources including rates, service charges, fees and charges, borrowings, investments, dealings in property, grants, gifts and other authorised sources (see s 6.15 of the LG Act). The respondent relies on s 3.59 of the LG Act which provides that the respondent can undertake commercial activities. In the 2011/2012 financial year the respondent employed 234 full time equivalent staff and had a total revenue of $52,988,275. The respondent has significant infrastructure and services to support economic and social functioning and that of the wider Great Southern region and the respondent is a significant local government entity playing a major role in the Great Southern region. It is also a hub for other local governments within the region.

7 Mr Adams stated that the major sources of the respondent's revenue are from rates, statutory fees and charges and grants. The respondent also conducts a significant number of trading activities as part of its business. Some of these were originally undertaken due to a lack of services in the area and others are conducted with the intention of providing revenue to offset costs incurred in other parts of the respondent's business.

8 The respondent relies on income from the following activities, most of which did not generate a profit, which it claims are trading activities.

1. Airport

9 The respondent operates the Albany Regional Airport which has approximately 57,000 travellers per year. The airport operates as a distinct business unit. The respondent has six commercial leasing arrangements with various businesses operating within the terminal including the Runway Café, SkyWest, car rental/hire businesses and aircraft hangers. The respondent also hires out a conference room at the terminal. In the 2011/2012 financial year income from operating the

Albany Regional Airport was $2,236,737 and $463,000 of this income was from a capital grant from the Federal Government. The rest of the income came predominantly from fees charged for passenger services. Expenses totalled $1,469,427 including depreciation of $135,402. Wages of the respondent's employees who deal with airport issues are not included in this amount. All profits from operating the airport go into a reserve fund to be spent on airport services and facilities.

2. Land Development

10 In 2007 the respondent developed land known as the Ridge and the respondent claims this project was entered into with the sole intention of making a profit. In the 2011/2012 financial year sales of residential lots generated an income of $821,227. Significant cost variations and poor market conditions since the first stage of the development was completed will result in the respondent losing approximately $3 million when all developed residential lots in stage 1A are sold. Land is sold at market rates and expenses for this activity include agent's costs for selling the land. Expenses do not include the cost of setting up the land for sale which has already been acquitted. Any profits from this activity are put into another of the respondent's assets.

3. and 4. Albany Leisure and Aquatic Centre and Cafeteria

11 The respondent operates the Albany Leisure and Aquatic Centre (the ALAC) which is the Great Southern region's major indoor recreational facility. The ALAC has swimming pools, a water slide, swimming lessons, a health and fitness centre, fitness classes, basketball, netball and volleyball. The ALAC is operated on a user pays system but is subsidised by ratepayers as it is a community service obligation. The ALAC has always operated at a loss which is currently approximately $1 million per year. Rent is not paid by this facility as it is owned and operated by the respondent. Income from the ALAC and the cafeteria for the last financial year was $1,992,489 and expenses totalled $3,923,996. The ALAC's cafeteria currently trades at approximately break-even. Depreciation of $788,527 is also included.

5. Synthetic Surface

12 A synthetic hockey surface adjacent to the ALAC is hired out to the public at fees set by the respondent. Expenses do not include staff costs for hiring out this facility. Hiring income was $56,816 and expenses totalled $49,761 in the 2011/2012 financial year.

6. Emu Point Leased Boat Pens

13 The respondent owns and operates 59 pen berths at the Emu Point Boat Pens which are leased to the public. Hire charges are between $1,356 per annum and $3,052 per annum per pen depending on pen size. Income from boat pens for the 2011/2012 financial year was $124,007 and expenses totalled $36,001. The rates set for using these pens are set by council on the recommendation of the respondent's officers and these rates currently are less than the market rate for pens elsewhere in Albany. Income from the pens is put into a reserve fund.

7. Leased Assets (Commercial Leases)

14 The respondent leases 107 parcels of land and buildings for commercial purposes. Currently 46 of the commercial leases are at market rates and the remainder will be at market rates when they are renewed. Revenue from these leases was $528,987 for the 2011/2012 financial year. Expenses include the cost of staff in the respondent's property section, maintenance costs and lease expenses.

8. Landfill Operations

15 All local governments are required to provide landfill services and rate payers and private contractors use these facilities. The Hanrahan Road site is the main tip and is on land leased from the Agricultural Society. Rent the respondent pays for this site is offset against a lease the Agricultural Society has at Centennial Park and the respondent claims this arrangement is a commercial agreement. In the 2011/2012 financial year the respondent's landfill operations generated income of $1,671,079 with expenses totalling $1,341,887. $116,000 of this income is from the Bakers Hill tip and $1.3 million from the Hanrahan Road tip. This facility generated $152,000 in income from the sale of scrap metal. Fees are determined taking into account commercial operator costs, the importance of the provision of the service and the provision of this service as a community service obligation. Expenses cover tip maintenance and waste. Management costs for this activity were unspecified. Rate payers are issued with a number of free tip passes and income is from additional fee paying users.

9. Day Care Services

16 The respondent operates a fully licensed day care facility and the respondent claims this facility operates on a commercial basis as a small profit is made from this activity. Revenue from day care services was $806,987 for the 2011/2012 financial year. This activity is subsidised through Federal Government assistance and it is expected to operate at competitive rates to compete with private enterprise. Rent is not paid by this facility as the respondent owns the land it occupies. Day care fees are set taking into account costs and retaining charges at levels similar to private operators. Expenses for this activity are for staff and maintenance costs and capital expenditure on the day care centre is excluded from this amount.

10. The Forts

17 The Forts is a historical tourist asset owned and operated by the respondent and they are located on the respondent's land and it is a heritage facility. Income for this activity comprises $132,000 from entry fees and tours, a grant of $39,892 and income from a lease of the café and guided tours. Expenses include salaries of $178,000, maintenance of $26,000 and operating costs of $48,000. No rent is paid as it is on land owned by the respondent. It operates on a fee per entry basis and contains a small shop which sells merchandise. Revenue from the Forts was $229,232 in the 2011/2012 financial year. Approximately 40 volunteers assist with this activity.

11. Visitor Centre

18 The Albany Visitor Centre operates as an information centre for tourists and it provides a booking service for local tourism operators and sells merchandise. Revenue from the Visitor Centre in the 2011/2012 financial year was $380,603 which was mainly for providing booking services. Expenses for this activity were $649,990 which includes salaries plus operating costs. The building housing the Visitor Centre is owned by the respondent so no rent is paid.

12. Liquid Waste Joint Venture

19 In 2002 the respondent entered into a joint venture arrangement with the Water Corporation to build and operate a septage waste facility and the respondent borrowed $320,000 to fund its share. This facility was initially operated as a user pays commercial venture with the Water Corporation as manager and in 2011 the facility was subleased via a commercial tender to Great Southern Liquid Waste. Income for this activity is generated from a lease agreement from a monthly lease fee. From 2011 onwards the respondent suffered significant losses from this joint venture. Expenses include maintenance of the facility and management.

13. Vancouver Arts Centre

20 The respondent operates the Vancouver Arts Centre (the VAC) and uses this building to promote the development of the arts to residents. The VAC is a community facility which hosts paid and unpaid events. Income for this activity is from hiring of the facility at a rate set by the respondent taking into account the importance of providing the service as a community service obligation. Expenses include salaries, maintenance and operating costs and no rent is paid for this facility. In the 2011/2012 financial year the VAC had income of $125,637 and expenses totalled $368,379. The VAC has always operated at a loss.

14. Albany Parks and Reserves

21 The respondent manages reserves, parks, buildings and other facilities that are available for hire. Small amounts of revenue are generated through hire fees although the respondent did not specify this income.

22 Mr Adams stated that revenue from its trading activities represents approximately 17% of the respondent's revenue base.

23 The following table is based on Exhibit R3 and the evidence of Mr Adams.

Summary of Trading Activities for the Period 2011/12

		2011/2012 Total Actuals		Income as a % of Total Income for 2011/2012
		Income	**Expenditure**	
Normal Commercial Trading Activities		$	$	
1.	Airport (Services)	2,236,737	1,334,025	4.221
2.	Land Development	821,227	61,325	1.550
3.	Albany Leisure & Aquatic Centre	1,635,131	2,783,041	3.086
4.	Albany Leisure & Aquatic Centre Cafeteria	357,358	352,428	0.674
5.	Synthetic Surface	56,816	49,671	0.107
6.	Emu Point Leased Boat Pens	124,007	36,001	0.234
7.	Leased Assets (Commercial Leasing)	528,987	320,662	0.998
8.	Land Fill Operations	1,671,079	1,341,887	3.154
9.	Day Care Services	806,987	799,389	1.523
10.	Forts	229,232	332,925	0.433
11.	Visitor Centre	380,603	649,990	0.718
12.	Liquid Waste Joint Venture	9,552	39,929	0.018
13.	Vancouver Arts Centre	125,637	368,379	0.237
		8,983,353	**8,469,652**	
City of Albany Annual Report Operating		46,746,563	45,201,221	
City of Albany Annual Report Capital		6,241,711	12,739,094	
TOTAL INCOME AND EXPENDITURE		**52,988,274**	**57,940,315**	**16.95%**
		17%	14%	
Other Activities Provided				
Works and Services (Roads, Reserves Street Lighting etc)		5,497,982	16,612,805	
Corporate Services		31,693,719	19,452,890	
Governance		848,542	4,199,919	
Community Services		659,812	3,316,035	
Development Services		538,574	2,041,191	
Waste Minimisation		4,784,988	3,414,350	
Other		116,492	841,780	
		44,140,109	**49,878,970**	
TOTAL		**52,988,274**	**57,940,315**	

24 The applicant rejects the respondent's claim that income it receives from the activities it claims are trading activities constitutes trading. The applicant submits that if the Commission determines that these activities constitute trading activities, when considering the overall activities of the respondent, these activities do not form a substantial part of the respondent's activities to give the respondent the character of a trading corporation.

25 The applicant argues that operation of the VAC and the ALAC and the ALAC's cafeteria lacks the commercial character of a trading activity. These facilities fulfil a community service role and their operations are heavily subsidised. The Synthetic Surface is part of the ALAC, it is a community service role and no rent is paid. It is therefore subsidised by ratepayers. Salaries for taking bookings also do not form part of the expenses. As no information was forthcoming about the grant the respondent receives to operate the Day Care Centre the respondent has failed to demonstrate that this is a trading activity. Alternatively there is a degree of ratepayer subsidy and community service element to this activity. It also operates on a cost-recovery basis which suggests a want of commercial aspect. If the operation of the Albany airport is found to be trading it is peripheral to the respondent's activities and not characteristic of its activities as a corporation. The operation of the Forts is likely to continue at a loss and it appears that considerations other than commercial ones are involved in its continued operations. The applicant submits that its operation is therefore not trading.

26 The Visitors' Centre land and buildings are owned by the respondent so it pays no rent. This activity is also heavily subsidised by ratepayers. The applicant submits this is therefore not a commercial activity. A third party now operates the Liquid Waste Joint Venture facility and this activity is not profitable. None of the expenses for this activity appear to include salaries relating to the administration or management of this activity by the respondent. The applicant says that if the operation of the Emu Point Boat Pens is found to be a trading activity it is peripheral and not characteristic of the respondent's activities.

27 The provision of Land Fill Operations is a community service to ratepayers to provide a dump site for extra refuse. Regular removal services are either paid for or offset by rates and the extent of that offset is unable to be calculated because they are not included separately in the income for this activity. As a result of this and as rent is not an expense it appears that this activity is heavily subsidised. This activity is also like rubbish collection which is a traditional and essential service provided by local government. It is questionable if this activity makes a profit as it is not known whether salaries are included in expenses for this activity.

Consideration

28 I have no reason to doubt the veracity of the evidence given by Mr Adams. However I do not accept his characterisation that all of the activities the respondent relies on are trading activities. With this qualification, I accept Mr Adams' evidence.

29 There is no dispute between the parties and I find that in the financial year ending 30 June 2012 the respondent received the income specified in the respondent's summary of trading activities, as amended at the hearing by Mr Adams (Exhibit R3).

30 When determining if the respondent is a trading corporation I apply the authority of ***Shire of Ravensthorpe v John Patrick Galea*** (2009) 89 WAIG 2283 and the cases referred to therein. The issue to be determined when deciding if the respondent, which is a corporation, is a trading corporation, is in short, a review of the character of the activities carried out by the respondent at the relevant time within the context of the purpose of the organisation and whether the respondent engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation for the purposes of the FW Act.

31 Section 2.5 of the LG Act provides that each local government body in Western Australia is a body corporate and has the legal capacity of a natural person. I therefore find that the respondent is an incorporated body.

32 Section 1.3(3) of the LG Act creates a duty on the respondent to focus on the environment, social advancement and economic prosperity of community members residing within the Shire. Section 1.3(3) reads as follows:

> In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity.

33 There is also an obligation on the respondent under the LG Act to provide appropriate governance for its residents. Section 3.1(1) of the LG Act reads as follows:

> The general function of a local government is to provide for the good government of persons in its district.

34 I find that the respondent's main role is to provide a range of infrastructure and other services to the respondent's residents for their benefit. I find that most services provided to the local community and region by the respondent are funded from income derived from rates and service charges as well as from other sources, in the main grants (see Exhibit R2.1). I find that during the relevant period amongst other things the respondent was engaged in the collection of rates, governance, council administration, fire prevention, the provision of law, order, public safety and health services, public works, transport, child care services, community amenities, libraries, refuse collection and waste management, recreation and culture and tourism (see Exhibit R2.1).

35 After reviewing the evidence given about the activities the respondent claims constitute trading, the purpose and nature of these activities, income and expenses incurred with respect to these activities, where specified by the respondent, I find that a number of these activities are not trading activities.

36 I find that the income the respondent received from the ALAC, the Forts, the Albany Visitor Centre and the VAC in the 2011/2012 financial year does not constitute income from trading activities. I find that the income from these activities lacks the essential commercial character of trading. I find that these activities were in the main conducted by the respondent and subsidised by the respondent to provide services for the benefit of the local community and as a community service obligation one would expect of the activities of a local government entity given its charter under the LG Act. Furthermore, the income from these activities did not generate a profit after some but not all expenses were factored in. It is unclear if the Liquid Waste Joint Venture facility was ever structured to be profit making and as it operates at a significant loss and provides a community

service I find that this activity lacks the essential character of a commercial activity. It is unclear if the operation of the Day Care Services activity, which is provided as a community service, operates at a profit as no rent or capital costs have been factored into the expenses for this activity. On the information before me I therefore find that this activity lacks a commercial character and does not constitute trading. No income or expenditure details were provided by the respondent for Albany Parks and Reserves which includes reserves, parks, buildings and other facilities managed by the respondent and which are available for hire. I therefore cannot conclude that this activity constitutes trading.

37 I find that the following income is from trading activities. The respondent made a small profit from operating the Airport after expenses were taken into account and services were provided in return for income. Even though all of the costs associated with providing this activity were not included in expenses, including costs associated with the respondent's staff involved in this activity I find that this activity has a commercial character. However, I find that $463,000 in grant funding is to be deducted from the income for this activity as it was not derived from any commercial activity. I find that income from Land Development, the ALAC Cafeteria, Synthetic Surface, Emu Point Boat Pens and Commercial Leased Assets are commercial in character and constitute trading as fees were charged for users of these activities in return for a service being provided on a close to cost recovery or profit basis. I also find that the provision of Land Fill Operations has a commercial character as the services associated with this activity were provided in return for fees being charged and this service is conducted separate to the normal rubbish collection activity provided by the respondent out of rates. The income from the activities conducted by the respondent from trading activities therefore constitutes 10.06% of the respondent's total income.

38 When considering the income received from trading activities compared to the respondent's total income I find that the income received by the respondent from trading activities is insubstantial and insufficient to warrant the respondent being characterised as a trading corporation. I also find that the trading activities I have found which constitute trading are peripheral and incidental to the respondent's primary activities as a local government body and that overall the respondent does not exist for or conduct activities which are of a commercial character. I conclude therefore that the respondent was not a trading corporation during the relevant period for the purposes of this application.

39 I find that the respondent is not a financial corporation as there was no evidence that the respondent engaged in any financial activities.

40 For the reasons set out above I will declare that the respondent is not a trading corporation.

41 The applicant argued in the alternative that the respondent is prevented from claiming it is a national system employer as the applicant's contract of employment refers to Western Australian laws applying to a dispute about the applicant's contract of employment. Specifically, the applicant argues the respondent is bound by the terms of clause 11.6. – Governing Law and Jurisdiction of the applicant's contract of employment which states that:

> (a) This document is governed by and is to be construed in accordance with the laws in force in Western Australia.
>
> (b) Each party irrevocably and unconditionally submits to the nonexclusive jurisdiction of the courts of Western Australia and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

Nothing turns on this claim as I have found that the respondent is not a national system employer. However, for completeness it is appropriate to deal with this submission. In my opinion the applicant cannot rely on the proposition that the terms of clause 11.6 precludes the application of the FW Act. Statutory rights and obligations, such as the application of the FW Act to a particular case, have the legal effect that a statute itself determines and another subsidiary document cannot override these rights and obligations. This is confirmed in Sappideen, O'Grady, Riley and Warburton, *Macken's Law of Employment* (7th Ed, 2011) 261:

> It is clear that where a statute lays down requirements to be observed by parties to an employment contract, the statute will be decisive. The matter is authoritatively stated in *Director-General of Education v Suttling* where it was said: "If the relationship is contractual, the contract must be consistent with any statutory provision, which affects the relationship. No agent of the Crown has authority to engage a servant on terms at variance with the statute. To the extent that the statute governs the relationship, it is idle to inquire whether there is a contract which embodies its provisions. The statute itself controls the terms of service".

Does the Commission have jurisdiction to deal with this application when the applicant's salary exceeds the prescribed amount?

42 The respondent claims that as the applicant's salary was in excess of the prescribed amount and an industrial instrument did not apply to the applicant for the purposes of the Act the Commission cannot deal with this application pursuant to s 29AA(3) and (5) of the Act.

43 The respondent claims that no industrial instrument made by the Commission applies to the applicant nor by implication is one in place (see ***Byrne v Australian Airlines Ltd*** (1995) 185 CLR 411). The respondent submits that the applicant's contract of employment is to be read in conjunction with the FW Act, the Act and the *Local Government Officers (Western Australia) Award 1999* (the 1999 Award) which was a Federal award. The respondent maintains that this award was superseded by the *Local Government Industry Award 2010* made under the FW Act and applies to 'national system employers'. The current State award, the *Local Government Officers' (Western Australia) Interim Award 2011* (the 2011 Award) expressly excludes national system employers from its operation. Even if the respondent is not a constitutional corporation this award does not apply to the applicant given the seniority of his position.

44 The applicant claims that the terms of s 29AA(3) of the Act do not exclude this application because an industrial instrument applies to the applicant's employment within the meaning of s 29AA(3). The applicant's contract of employment provides that it is to be read in conjunction with the 1999 Award and on 27 March 2011 the 2011 Award came into effect, effectively replacing this award. The applicant also submits that the 2011 Award applied to the applicant's employment at the relevant

time as clause 13.6 of the 2011 Award provides for minimum wage determinations for senior officers including the Chief Executive Officer and Executive Officers, such as the applicant, not covered by the classifications contained in clause 13.5.

Consideration

45 The prescribed amount which applied at the relevant time between 1 July 2011 and 30 June 2012 was $134,100 and there was no dispute that the applicant's salary at the time he ceased employment with the respondent exceeded the prescribed amount.

46 Section 29AA(3) and (5) of the Act provide as follows:

> (3) The Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if —
>
> (a) an industrial instrument does not apply to the employment of the employee; and
>
> (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.
>
> (5) In this section —
>
> ***industrial instrument*** means —
>
> (a) an award; or
>
> (b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
>
> (c) an industrial agreement; or
>
> (d) an employer-employee agreement;
>
> ***prescribed amount*** means —
>
> (a) $90 000 per annum; or
>
> (b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.

47 The scope clause of the 2011 Award, an award of this Commission, provides as follows:

> Clause 3. – Area, Scope and Duration of this Award
>
> 3.1 This award shall apply throughout the State of Western Australia to all local government authorities and their agencies and their employees whether members of the Union/s or not.
>
> 3.2 This award shall not apply to employees employed by employers who are national system employers, as defined by the *Fair work Act 2009*.
>
> 3.3 This award shall come into operation on and from 27 March 2011 and shall remain in force for a period of twelve months.
>
> Clause 10. – Contract of Employment
>
> 10.3 Notice of Termination
>
> 10.3.1 Subject to the provisions of the Local Government Act 1995, as amended, and the Health Act 1911, as amended, the period of notice to be given by the Local Authority to an Officer other than a Casual Officer to terminate the contract of service shall be:
>
> (1) In the case of a Chief Executive Officer, or an Executive Officer who reports to the Chief Executive Officer; four weeks, or other notice as required by the contract of employment.
>
> (2) In order to terminate the employment of an employee the employer must give to the employee the period of notice specified in the table below:

Period of continuous service	Period of notice
1 year or less	1 week
Over 1 year and up to the completion of 3 years	2 weeks
Over 3 years and up to the completion of 5 years	3 weeks
Over 5 years of completed service	4 weeks

> (3) In addition to the notice in 10.3.1(2), employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, are entitled to an additional week's notice.
>
> (4) Payment in lieu of the prescribed notice in 10.3.1(1) and 10.3.1(2) must be made if the appropriate notice period is not required to be worked. Provided that employment may be terminated by the employee working part of the required period of notice and by the employer making payment for the remainder of the period of notice.
>
> (5) The required amount of payment in lieu of notice must equal or exceed the total of all amounts that, if the employee's employment had continued until the end of the required period of notice, the employer would have become liable to pay to the employee because of the employment continuing during that period. That total must be calculated on the basis of:
>
> (a) the employee's ordinary hours of work (even if not standard hours); and

(b) the amounts ordinarily payable to the employee in respect of those hours, including (for example) allowances, loading and penalties; and

(c) any other amounts payable under the employee's contract of employment.

(6) The period of notice in this clause does not apply:

(a) in the case of dismissal for serious misconduct;

(b) to apprentices;

(c) to employees engaged for a specific period of time or for a specific task or tasks;

(d) to trainees whose employment under a traineeship agreement or an approved traineeship is for a specified period or is, for any other reason, limited to the duration of the agreement; or

(e) to casual employees.

(7) Continuous service is defined in 10.7.

Clause 13. – Salaries – Minimum Annual

13.6 Negotiated salaries

13.6.1 A Senior Officer not covered by 13.5, (including the Chief Executive Officer and other Executive Officers not traditionally covered by the General salary scale), will be entitled to negotiate his/her salary at least once every two years.

13.6.2 The salary negotiated will not be less than it would be if covered by the General minimum salary scale at the time of negotiations, nor will it be less than the following minima:

	Chief Executive Officer	Executive Officer
A	$60,252	(paid as per general minimum salary scale)
B	$62,240	(paid as per general minimum salary scale)
C	$67,839	$67,839
D	$73,440	$73,440

(1) The following examples, being the guide for determining the relevant grade for Local Governments:

A Shire of Cue

B Shire of Collie/Town of Bassendean/Shire of Manjimup

C Cities of Belmont/Bunbury

D Cities of Rockingham/Bayswater/Gosnells and Larger

13.6.3 The negotiated salary will take into account the range of responsibilities inherent in the position including the size of the organisation as measured by revenue, number of employees, population, or any other relevant factors.

13.6.4 The requirement to attend Council meetings, or work in excess of the standard number of ordinary hours each week, where such Officer is excluded from the provisions of Clause 22. - Overtime of this award may be a consideration.

13.6.5 The annual leave loading specified in clause 24.1.3 may be incorporated into the salary package.

13.6.6 The additional weeks leave specified in clause 24.1.4(1) for Chief Executive Officers, Town or Shire Engineer or Environmental Health Officers may be incorporated into the salary package.

13.6.7 Any requirement to deputise for higher positions and the extent this occurs may also be a consideration.

13.6.8 At the request of the employee, his/her Union or association may participate in salary negotiations.

48 I find that the applicant is not precluded from lodging this application even though his salary exceeds the prescribed amount. I find that the 2011 Award is an industrial instrument as defined in s 29AA(5) of the Act and it applied to the applicant and the respondent. When the applicant resigned he held the position of Executive Director Corporate and Community Services. His terms and conditions of employment at the time were regulated by a written contract of employment, dated 2 October 2009, which states that it is to be read in conjunction with the 1999 Award, which I find was superseded by the 2011 Award. The scope clause of this award - clause 3 - provides that this award applies to Western Australian local government authorities which are not national system employers as well as their employees. As the respondent is not a national system employer I find that this award therefore applies to the respondent and the applicant as its employee. Additionally, I find that other terms of the 2011 Award expressly apply to the applicant. Clause 13.6 sets out the parameters for senior employees such as those in the applicant's position to negotiate his or her salary, subject to prescribed minima. The terms of clause 10.3.1(1) in relation to Notice of Termination also apply to the applicant as he was an Executive Officer who reported to the CEO.

49 I will declare that the applicant is not precluded by the terms of s 29AA from making this application.

Should time be extended to accept this application?

50 The applicant claims that after he tendered his resignation on 19 December 2011, effective 29 February 2012, he was very stressed and he used his available time and energy towards reinstating his long service leave entitlements. This occurred after Ms James left the respondent in August 2012 and once she left he felt motivated to pursue his unfair dismissal claim. When the applicant tendered his resignation he asked his representative about the timeframe for suing the respondent for a breach of his contract and he was told he had three to six years to do so. When the applicant saw his representative on 11 September 2012 after his long service leave issues were finalised his representative then told him that his only option for redress was to lodge an unfair dismissal claim in the Commission and at this point in time he was outside of the required timeframe to do so. It was only then that the applicant found out there was a timeframe for lodging an unfair dismissal claim in the Commission and that a common law action for breach of contract would not be successful. He then instructed his representative to lodge this application. The applicant also gave evidence that when he liaised with the ASU to obtain advice about his long service leave entitlements he did not discuss any other employment matters such as remedies relating to the cessation of his employment. The applicant maintained that he suffered stress throughout 2012 and this continues. He saw his doctor in February 2012, June 2012 and January 2013 and he will see him again in March 2013.

51 The applicant submits that even if the length of delay is considerable this is no bar to granting an extension of time. The length of delay in lodging this application was 177 days however other factors, particularly merit, weigh heavily in the consideration of unfairness in this case (***Colin John Bourke v The Director of Catholic Education WA and The Principal at St Joseph's School*** [2005] WAIRC Comm 3334). The delay in lodging this application arose because the applicant was diagnosed by a Consultant Psychiatrist as suffering from a work related adjustment disorder and whilst the then CEO continued to work with the respondent the applicant was unlikely to be able to return to work. When on sick leave the applicant liaised with the CEO about having his long service leave entitlements reinstated and this caused him further stress. After the CEO left the respondent and when the applicant's long service leave claim was settled the applicant instructed his lawyers on 11 September 2012 to contest his termination and this application was filed on 21 September 2012. The applicant had been advised of the common law limitation period for an action related to a breach of contract on 19 December 2011 when he tendered his resignation but it was not until 18 September 2012 that the applicant was advised that a common law action for damages would be unlikely to succeed and he was told that his best recourse was to lodge this application notwithstanding the delay.

52 The applicant says the merits of his application are strong and he claims he was constructively dismissed (see ***Bone Densitometry Australia Pty Ltd v Sharmaine Deborah Lenny*** [2005] WAIRC Comm 2081). The applicant had given long and good service to the respondent in senior positions until he came into conflict with the new CEO. The CEO was combative and contrary and she engaged in a course of conduct and correspondence which increasingly vilified and bullied the applicant, destroying any relationship of trust and confidence between the respondent and the applicant. The applicant submits there is little or no prejudice suffered by the respondent if this application is accepted. Any evidence to be given by the former CEO, a possible hostile witness, may not assist the respondent's case as the respondent claims that the issues in dispute between the parties had nothing to do with her. The applicant disputes that he had a 'termination plan' and this is not supported by any medical or other evidence.

53 The respondent argues that the applicant has not provided an acceptable reason for the delay in lodging this application. Neither the medical evidence nor evidence given by the applicant supports the assertion that he was stressed and could not deal with his long service leave entitlements and a claim for unfair dismissal at the same time. The applicant was taking no medication relating to his stress and the symptoms of stress relied on by the applicant are not of such magnitude that together with assistance from his union adviser and/or his legal adviser he would be incapable of lodging an unfair dismissal claim within the required timeframe.

54 The applicant's actions were deliberate at all times and it is open for the Commission to infer that his lengthy absence from work was planned so as to exhaust his accrued sick leave before resuming work. The termination plan devised by the applicant is so obvious that to grant an extension of time in the circumstances of this case would amount to facilitating an abuse of process by the applicant. The failure of the applicant's worker's compensation claim in December 2011 and the respondent's demand that he return to work on a graduated return to work plan meant that his choices for moving forward were limited. As he had no intention of returning to work, the applicant resigned alleging a constructive dismissal. Furthermore, the applicant ceased employment of his own volition after receiving legal advice over a lengthy period. The applicant did not actively contest the cessation of his employment and the respondent has been prejudiced by the delay as crucial witnesses are no longer employed by the respondent. The most crucial witness is now involved in litigation against the respondent such that she would be a hostile witness if called to give evidence.

Consideration

55 Section 29(2) of the Act requires that unfair dismissal applications be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 21 September 2012 and the applicant ceased employment with the respondent on 29 February 2012 it is 177 days out of the required timeframe for lodging a claim of this nature which is a lengthy period.

56 Section 29(3) of the Act reads as follows:

> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

57 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** (2004) 84 WAIG 683 as follows:

> '1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion [26].'

58 When considering the issue of fairness, Heenan J further observed in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** at the following:

> I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims [74].

59 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

60 The following letter dated 16 December 2011, from the respondent's CEO to the applicant, was left at the applicant's house on that date (formal parts omitted):

> ***Employment Matters***
>
> I refer to the 'without prejudice' letter dated 25 November 2011 from the City's solicitors ("Letter of Concern"), which addressed some serious matters of real concern regarding your performance and conduct in the following matters:
>
> 1. Albany Leisure and Aquatic Centre ("ALAC")
> 2. ICT Functions
> 3. Town Hall
> 4. Records Management
> 5. Land Asset Management
> 6. Sexual Harassment
> 7. Payroll
> 8. Cull Road
> 9. HR practices
> 10. Royal Perth Show Guest Town
> 11. Albany Entertainment Centre
>
> I understand from the City's solicitors that your solicitor responded to that letter by denying all of the allegations and concerns listed and referring to your past performance reviews. Unfortunately the letter from your solicitors did not respond at all to the proposal that there be a without prejudice meeting to address these matters.
>
> Please note that the letter was only sent on a "without prejudice" basis because it contained a proposal that there be a meeting to discuss a resolution, which is a variation to the contractual process for addressing these matters. Please note that the City relies on that letter as forming notice to you of performance failures and issues, which is further explained below, and waives any privilege over that letter.
>
> Your solicitor's letter contained your refusal to attend such a meeting on medical advice. The letter goes on to state that the Chief Executive Officer is the cause of your being on "stress leave". This assertion is contradicted by Dr Terrace's opinion.
>
> I refer to your attendance before Dr Terrace and his medical reports to the City's workers' compensation insurers, particularly his report dated 11 August 2011. Those reports indicate that your symptoms were mild, your level of function was good, you had by then made a partial recovery and that your condition did not incapacitate you for employment, including retraining.

Dr Terrace was also of the view that you would continue to improve, but the prognosis may worsen if you became entrenched in the Workers Compensation process. I note the advice of the City's insurer that you are no longer intend (sic) continuing with your workers compensation claim.

I further note that the allegations you have made about my treatment of you (of which I am only aware because they are mentioned in the medical reports in relation to your workers compensation claim, and not from any other source including yourself) could only relate to the period of 2 weeks in which you worked with me. That period ended in February 2011, many months ago. I do not consider that anything that occurred in those 2 weeks, very early in my appointment as CEO, could be the cause of what has now amounted to over 9 months' absence on "stress leave".

With the greatest of respect, it is my duty to Council and the ratepayers of the City to raise these matters with you and insist that they be addressed. Having taken legal advice, on behalf of the City I do not accept in view of the above matters, that you have been over the past several months at least medically unfit to return to work. I have no good reason or evidence to believe that you are medically unfit to return to work. I make that assessment in the context of the seniority, responsibility and longevity of your roles within the City, and the reality that you have never suffered from any form of work related stress in the past. It is inconceivable that 2 weeks of limited interaction with me has caused a person of your seniority, experience and responsibility level to require so many months' absence from work.

I additionally note that the City's solicitors have requested in their letter to your solicitors dated 7 December 2011 that you swear a statutory declaration pursuant to section 25.6a of the Local Government Officers (Western Australia) Award 1999 ("Award") in relation to your inability to work because of your illness. I insist that be provided to me promptly, and in any event by no later 4pm 20 December 2011.

I further note that the medical certificates provided by you do not specify the nature of your illness or its possible duration. The letter dated 13 May 2011 was the first indication given to your employer that your absence was due to work related stress. This is a direct breach of clause 25.5(b) of the Award which requires you give notice before taking personal leave of the nature of your illness and how long you expect to be away from work.

Putting all of these matters together, and noting especially your solicitors' assertion on your behalf in their letter dated 2 December 2011 that you are medically advised not to meet me, and their refusal on your behalf to respond with any particularity to the serious matters raised in the Letter of Concern, I consider I have little option but to invoke clause 8.2(d) of your Contract.

The matters raised in the Letter of Concern indicate that you have failed, over a sustained period, to substantially measure up to the Performance Criteria in the manner set out in that letter. I refer specifically to Performance Criteria in your contract regarding ethics, accountability, leadership, problem solving, adaptability, business knowledge, commitment to quality, delegation and task management, and commitment to training.

As a result the City requires you to undertake the following course of action ("Return to Work Plan") in order to address and correct these failures, as well as address your re-entry to the work place in view of your sustained absence and stress.

Return to Work Plan

Date of commencement - Monday 19 December 2011 at 8.30 am

Purpose - To provide an opportunity for you and the City of Albany to address and correct performance issues over a period of three months from the Date of Commencement, by carrying out tasks which balance your diagnosis in August 2011 of mild adjustment disorder with improving prognosis, with your current position description, and to participate in relevant retraining.

Objective - Your full and active return to the duties of Executive Director Corporate Services as soon as possible having addressed and corrected the performance issues.

Tasks - You will carry out the role of supporting the Manager of Recreational Services, including the Albany Leisure and Aquatic Centre, reporting to the Acting Executive Director Community Services, Ms Linda Hill. This will also involve finalising the situational analysis and business plan for the Leisure Centre. The new Manager will direct and support you in this task giving guidance when needed. It is envisaged that this will occupy approximately 20 hours per week.

To develop a strategic and business plan for the City of Albany's ICT function including finalising a tender for possible outsourcing of that function. The strategic plan will include the development of the ICT asset management plan. You will report to the Acting Executive Director, Corporate Service, for this task.

In relation to the Town Hall, you will carry out the role of supporting the Manager of Cultural and Community Development to prepare a report addressing asset and strategic operational planning for that Town Hall, in order to relieve the current financial impact on the City of Albany's budget. You will report to the Acting Executive Director Community Services, Ms Linda Hill, for that function.

You will be required to provide a detailed report addressing appropriate strategic economic development opportunities on strategic land disposal and release. The City of Albany must be satisfied that your proposal is reasonable for implementation. You will report to the Acting Executive Director, Corporate Service, for this task.

Training - You are to enrol in a course of counselling as soon as practicable specifically addressing appropriate workplace behaviour toward women at a registered counselling services provider, as recommended by the Human Rights and Equal Opportunity Commission or other similar government body. The City

> of Albany will monitor your attendance at these sessions and your progress. Appropriate course selection and times will be provided to you shortly.
>
> You are to enrol in a suitable training program in relation to HR and team leadership/management practices in order for you to obtain higher skills in this field. This training will assist you in the development of your knowledge and abilities which will correct the issues mentioned in clauses 9 and 10 of the Letter of Concern. Suitable courses operate in Albany at the TAFE, UWA extension and other organisations and a selection will be provided to you.
>
> Would you please report to the Acting Executive Director, Corporate Service at 8.30am on Monday 19 December, at the City's North Road Offices. From 9.00am to 12.30 on Monday 19 December 2011 you will then commence the program of work support at the Leisure Centre.
>
> If you have any concerns or queries about the clause 8.2(d) procedure or the above plan, please contact Pam Wignall, Acting Executive Director, Corporate Service as soon as possible. If you have any concerns regarding the above, please put those in writing to me for consideration, and to suggest alternatives. I undertake to consider any considered, reasoned and genuine response and alternative proposal. However, the Return to Work plan must be adhered to in the meantime.
>
> (Exhibit A1, annexure E)

61 I find that there was an acceptable reason for the lengthy delay of 177 days in lodging this application. The applicant's employment ceased as at 29 February 2012 and this application was lodged on 21 September 2012. The applicant tendered copies of medical certificates certifying him unfit for work up to the cessation of employment and I accept the applicant's evidence that he was unwell after that date and he continues to receive ongoing medical care. I accept the applicant's evidence that after he ceased employment with the respondent he was preoccupied with restoring his long service leave entitlements which the CEO required him to use even though the respondent was aware that the applicant had sick leave available to him and medical certificates confirming his illness. The applicant's focus was therefore on ensuring that his long service leave entitlements were restored to him which continued until August 2012. In the circumstances I accept the applicant's claim that during this period he was unwell and incapable of pursuing a claim alleging unfair dismissal at the same time as dealing with this issue. I find that once the dispute about the applicant's long service leave entitlements was settled he felt able to contest what he maintained was his forced resignation and this application was then lodged. I also accept the applicant's evidence that he did not receive any advice from the ASU about lodging an unfair dismissal application after he ceased employment with the respondent.

62 I find that representative error contributed to this application being lodged a lengthy period after the required timeframe. The applicant received incorrect advice in December 2011 from his legal representative that he could lodge a common law claim to obtain damages for his dismissal and he had some years to do so. In September 2012 his representative then advised him that his only remedy was to lodge an application in the Commission. Upon receiving this advice this application was then lodged in a timely manner (see ***Director General of the Department for Education v Prem Singh Malik*** (2003) 83 WAIG 3056).

63 When considering the issue of merit as a factor to extend time to file this application I find that there may be sufficient evidence to establish that the applicant has an arguable case that he was constructively dismissed. I note that just prior to the applicant tendering his resignation the respondent wrote to the applicant on Friday 16 December 2011 and this letter referred to a range of issues with respect to the applicant's performance and conduct. The applicant denied his performance or conduct was wanting yet it appears the respondent had already concluded that this was the case. Furthermore, this letter was given to the applicant whilst he was on sick leave on Friday 16 December 2011 and the CEO required the applicant to report for work on the morning of 19 December 2011 in a subordinate role which could be regarded as oppressive. This letter also refers to the applicant being required to demonstrate his inability to work due to illness by 20 December 2011 after he was required to return to work on 19 December 2011 which appears to contradict the respondent's insistence that the applicant report for work on the morning of 19 December 2011.

64 I find that the prejudice suffered by the applicant would be greater than that suffered by the respondent if this application is not accepted. The applicant would not have the opportunity to prosecute his claim, which I have found may have merit. No disadvantage was highlighted by the respondent in meeting this application because of the delay in lodging it apart from Ms James possibly being a hostile witness which in my view is not an insurmountable issue. I also take into account that the respondent asked the applicant to sign a deed of settlement when finalising his long service leave entitlements many months after he ceased employment with the respondent which settled all employment matters and not just the long service leave issue however the applicant refused to sign this deed. The respondent was therefore aware that other employment related claims may be lodged by the applicant including a claim alleging unfair termination. I also find that there was no compelling evidence in support of the respondent's claim that the applicant had a 'termination plan' to exhaust his sick leave entitlements.

65 When taking into account the above findings and the relevant factors to consider with respect to an application of this nature and the issue of fairness to both parties, I find that it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is granted.

66 The respondent is seeking orders under s 27(1)(c) of the Act for its costs (other than legal costs) and expenses, including travelling expenses and including the expenses of witnesses (***McConkey v M & A'S of Denmark*** (2001) 81 WAIG 1561; ***Denise Brailey and Mendex Pty Ltd t/a Mair and Co Maylands*** (1993) 73 WAIG 26). In my view this application is premature, particularly in light of my conclusion that the Commission has jurisdiction to deal with this application and that time should be extended to lodge this application.

2013 WAIRC 00369

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM PETER MADIGAN
	APPLICANT
	-v-
	CITY OF ALBANY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 JUNE 2013
FILE NO/S	U 206 OF 2012
CITATION NO.	2013 WAIRC 00369

Result	Declarations and order issued
Representation	
Applicant	Mr B Hocking (of counsel)
Respondent	Ms M Saraceni (of counsel)

Order

HAVING HEARD Mr B Hocking of counsel on behalf of the applicant and Ms M Saraceni of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. DECLARES THAT the respondent is not a trading corporation.
2. DECLARES THAT the applicant is not precluded by the terms of s 29AA of the Act from making this application.
3. ORDERS THAT application U 206 of 2012 be and is hereby accepted out of time.

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

2013 WAIRC 00130

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00130
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 1 FEBRUARY 2013
DELIVERED	**:**	THURSDAY, 7 MARCH 2013
FILE NO.	**:**	B 204 OF 2012
BETWEEN	**:**	PETER EVAN JOHN MORRIS
		Applicant
		AND
		LIFT EQUIPT PTY LTD (ACN 125 331 848)
		Respondent

Catchwords	**:**	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of balance of probationary period, overtime, tool costs, prescription safety glasses and airport parking costs - Applicant not due benefits claimed - Application dismissed - Liberty granted to respondent to apply for costs
Legislation	**:**	*Industrial Relations Act 1979* s 7 and s 29(1)(b)(ii)
Result	**:**	Dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr Brian Johnston and Ms M Johnston

Case(s) referred to in reasons:

Belo Fisheries v Froggett (1983) 63 WAIG 2394

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

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 Peter Evan John Morris (the applicant) maintains he is owed the following benefits which he claims are due to him under his contract of employment with Lift Equipt Pty Ltd (the respondent):

(1) $39,688 being the balance of his six month contract of employment - $1,804 ($44 x 41 hours [38 hours + 2 hours overtime at time and a half]) x 22 weeks;

(2) $3,747 in overtime payments;

(3) $765 reimbursement of the cost of tools;

(4) $363.91 reimbursement for purchasing prescription safety glasses; and

(5) $386 reimbursement of car parking costs at Perth Airport when he flew to Karratha to work with the respondent.

2 The respondent claims that the applicant is not owed the benefits he is seeking.

3 The applicant was employed by the respondent between 4 July 2012 and 12 August 2012. The applicant worked as a heavy duty mechanic servicing forklifts which the respondent hires out to businesses in and around the Karratha area. The applicant flew from Perth to Karratha to undertake his duties and he worked three weeks on and one week off. The applicant's terms and conditions of employment are contained in a written contract signed by the applicant and Mr Brett Johnston, the respondent's director, prior to the applicant commencing employment with the respondent (the Contract) (Exhibit R1.1). When he was terminated the applicant was paid two weeks' pay in lieu of notice.

Applicant

4 The applicant claims that under the Contract he was guaranteed employment for the full term of his six month probationary period. He is therefore entitled to be paid the wages due to him for the remainder of this period after he was terminated (see Clause 5 of Exhibit R1.1). The applicant claims he is entitled to overtime rates for the hours he worked in excess of 40 hours each week as other employees undertaking the same work are paid time and a half for hours worked over 40 hours per week. The applicant relies on the provisions of the *Metal Trades (General) Award 1966* (the Award) as the basis for this claim. The applicant maintains that he should be reimbursed airport car parking costs when he travelled to Karratha and left his car at Perth Airport. The applicant claims he is entitled to be reimbursed for the purchase of an impact gun and sockets which he needed to undertake his duties as the respondent refused to supply him with these tools. The applicant claims he was only expected to supply basic tools and an impact gun was a special tool. The applicant gave evidence that the respondent did not supply him with safety glasses so he bought prescription safety glasses to use when working with the respondent. He asked to be supplied with safety glasses soon after he started work but the respondent did not do so. The applicant confirmed he can wear non-prescription safety glasses which fit over his prescription glasses. The applicant did not know that a spare pair of safety glasses was kept in the vehicle provided to him by the respondent.

Respondent

5 Mr Brett Johnston stated that the provision of tools was the applicant's responsibility and impact guns and sockets are standard tools expected to be supplied by heavy duty fitters who work on forklifts. A tool allowance was included in the applicant's rate of pay in return for him providing these tools. Mr Johnston confirmed that the applicant asked him to buy an impact gun and sockets but he told him the respondent was not responsible for providing these tools.

6 The applicant was given a hard hat and a pair of safety glasses at his induction on the first day of his employment and a spare pair of safety glasses was kept in the vehicle used by the applicant. Safety glasses were also available on site. The applicant did not ask the respondent to supply him with prescription safety glasses and if the applicant told the respondent he required prescription safety glasses the respondent would have supplied him with safety glasses to wear over his prescription glasses.

7 The respondent claims that the Contract does not include a provision for the payment of overtime rates. The applicant's hourly rate of $44 was a flat rate and was inclusive of overtime. The applicant's payslips also do not refer to the applicant being paid overtime. A payment of $50 per hour to the applicant in one week was a mistake.

8 The Contract was not time limited but was subject to the successful completion of a six month probationary period subject to satisfactory performance and the applicant was not guaranteed six months' employment.

9 Apart from agreeing to pay the applicant's air fares and providing accommodation the respondent did not agree to reimburse the applicant any expenses or pay any other costs such as airport parking.

Conclusions

10 In determining whether or not a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which he is entitled under his contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under this contract having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307).

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

12 I find that the applicant's terms and conditions of employment with the respondent are those contained in the Contract.

Relevant sections of the Contract

13 The relevant terms of the Contract are Clauses 3, 4 5, 7 and 8 and Items 7, 8 and 10 in the schedule attached to the Contract.

3. Work hours

3.1 The Employee's ordinary hours of work are as stated in item 7 of the Schedule per week averaged over a 12 month period. In addition, the Employee may be required or requested to work such additional hours are (sic) reasonably necessary to complete the Employee's duties.

3.2 The Employee is to follow the fly-in, fly-out roster ("FIFO roster") for applicable work hours. Standard full time working hours will be 38 hours per week plus 2 reasonable additional hours making an average of 40 hours per week.

3.3 All employees must be available to work 24 hours a day in accordance with their FIFO roster.

3.4 An employee other than shiftworkers, may be required to work up to 12 ordinary hours per day between the hours of 6.00am and 6.00pm, Monday to Sunday.

3.5 The FIFO roster runs on a 4 weeks cycle with 3 continuous working weeks followed by 1 week off-work ["FIFO roster cycle"]

4. Remuneration

4.1 The Employee will be paid a base wage at the rate(s) as set out in Item 8 of the Schedule ("Base Wage").

4.2 An employee's Base Wage is calculated on an hourly rate which compensates for all wages payable under the Award including but not limited to the payment in advance of the Employee's annual leave, public holidays and any other benefits (where applicable) payable under the NES or the Award.

4.3 A copy of the calculation of the Base Wage itemising the calculation for annual leave payment and public holidays entitlements is available to the Employee on request.

4.4 Pay week commences from Thursday to Wednesday of the following week and the employee's pay will be deposited via electronic transfer into the employee's nominated account no later than the close of business each Friday. The employer will not be accountable for any delay incurred by individual banks or their employees.

4.5 In addition to the Base Wage above, the employee may be entitled to such allowances as set out in item 9 of the Schedule.

4.6 The Employer shall review the employee's salary annually and shall adjust same in accordance with the employer's policy of annual review based on performance, productivity and such other matters as the employer shall in its absolute discretion consider relevant.

5. Duration

5.1 The Employee's employment will be subject to the probationary period as stated in item 10 of the Schedule during which time either party may terminate the employment by giving four (4) weeks' written notice to the other party or in lieu of such notice, a penalty of two (2) weeks' wages given by the terminating party to the other.

5.2 At any time during the probationary period, the Employee may be assessed as to his or her suitability for the position and on what basis the Employee's employment may continue beyond the probationary period. The Employee will undergo site and safety induction programmes as well as any training and assessments required by the Employer to assess the Employee's attitude, performance and commitment to working in a team environment.

5.3 The Employee's employment shall continue until determined by notice in accordance with the provisions of this agreement.

7. Expenses

7.1 The Employee shall be entitled to reimbursement of such expenses as are reasonably and necessarily incurred by him [with the consent of the employer] in performing his duties under this agreement.

7.2 The expenses as stated in item 11 of the Schedule are payable to the Employee.

7.3 Economy class air fares will be paid to employees following the FIFO roster to fly to and from to (sic) their capital city.

8. Uniforms and Protective Equipments

8.1 The Employer will provide to the Employee five (5) sets of uniforms on commencement of employment. Uniform does not include work boots.

8.2 Uniforms supplied by the Employer must be:

(a) worn by the Employee at all times during working hours; and

(b) kept in a clean and tidy condition by the Employee.

8.3 Each uniform is calculated to achieve a minimum of 6 months of service. Replacement uniforms will only be supplied on request on an "old exchange for new basis" every 6 months. Any new uniform requested by the Employee before the expiry of the 6 months period will be provided at the cost of the Employee and the Employer may at the absolute discretion of the Employer deduct the costs of such new uniform from the remuneration of the Employee which discretion will be exercised where the Employee fails to complete the initial 12 months of employment. For the avoidance of doubt, where any uniforms are damaged due to work related issues, the Employer will replace them on a "show and exchange" basis.

8.4 The Employer will further supply to the Employee personal protective equipments (sic) which must be correctly worn by the Employee when carrying out the duties allocated. The Employee must maintain such equipments (sic) properly and any negligent use or damage to the equipments (sic) will entitle the Employer to deduct the replacement cost from the remuneration of the Employee.

Item 7: **Work Hours**

38 hours per week plus 2 reasonable additional hours making an average of 40 hours per week.

Work hours between _____ to _____

No overtime payment.

[insert any other requirement]

Item 8: **Remuneration**

Base Wage = $____44_____per hour

An employee's Base Wage is calculated on an hourly rate which compensates for all wages payable under the Award including but not limited to the payment in advance of the Employee's annual leave, public holidays and any other benefits (where applicable) payable under the NES or the Award.

Item 10: **Probation Period**

Six (6) months

(Extract Exhibit R1.1)

1. Payment for the balance of the applicant's six month period of probation

14 I find that on a plain reading of the relevant terms of the Contract the applicant was not to be employed by the respondent for a minimum period of six months. When the terms of Clause 5 are read in conjunction with Item 10 of the schedule attached to the Contract this does not guarantee that the applicant would be employed for the full period of the probationary period of six months. Clause 5 - Duration provides that the applicant's employment was subject to a probationary period during which time either party may terminate the employment by giving four weeks' written notice to the other party or the payment of two weeks' wages in lieu of notice. Item 10 of the schedule attached to the Contract refers to the probationary period being six months. Clause 5.2 states that at any time during the probationary period the employee may be assessed as to his or her suitability for the position and Clause 5.3 states that the employee's employment shall continue until determined by notice in accordance with the provisions of the Contract. I find that soon after the applicant commenced employment the respondent became concerned about a number of issues related to his performance and the way in which he conducted himself with respect to health and safety issues. I find that it was on this basis that the respondent terminated the applicant with two weeks' pay in lieu of notice in accordance with Clause 5.1 of the Contract. As the Contract allowed the respondent to terminate the applicant within the probationary period of six months I find that the applicant is not due to be paid any wages for the remaining 22 weeks of the six month period of probation that he did not work for the respondent.

2. Overtime payments

15 I find that the Contract does not contain any provision entitling the applicant to be paid overtime rates for hours worked in excess of 38 or 40 hours per week. I also find that the Contract does not include the overtime provisions contained in the Award, which is the basis of the applicant's claim for overtime payments. The applicant's payslips confirm that on some occasions he worked more than 38 hours per week. I find that the applicant was properly paid the additional hours he worked over 38 hours each week at the ordinary rate of $44 per hour as this was in accord with the terms of the Contract. Clause 3 – Work Hours and Item 7 in the schedule attached to the Contract states that the applicant was to work ordinary hours of 38 hours per week plus two additional hours averaged over a 12 month period. Clause 4 – Remuneration and Item 8 of the Contract, which is also headed remuneration, state that the applicant was to be paid an ordinary rate of pay of $44 per hour in compensation for all wages payable under the Award, including but not limited to annual leave and other entitlements. Item 7 – Work Hours of the schedule also refers to the applicant not being entitled to any overtime payments. Given the terms of the Contract I find that the applicant is not entitled to the overtime payments he is claiming. On one occasion the applicant was paid $50 per hour but I accept this was an error. Furthermore, it was not an overtime payment based on a rate of pay of time and a half of $44 per hour.

3. Reimbursement of the cost of an impact gun and sockets

16 I find that the applicant is not due the amount he his claiming as reimbursement for the purchase of an impact gun and sockets. There is no provision in the Contract that the respondent would reimburse the applicant for any tools purchased by him and the applicant conceded that there was no verbal agreement between the applicant and the respondent that if the applicant purchased these tools the respondent would reimburse him. Clause 7 – Expenses of the Contract, refers to the employee being reimbursed for the cost of reasonable and necessary expenses however this reimbursement only occurs with the respondent's consent. There was no evidence that the respondent agreed to reimburse the cost of any tools purchased by the applicant. Furthermore, there was no evidence before the Commission that the impact gun and sockets were purchased and used by the applicant during his employment with the respondent.

4. Reimbursement for the cost of prescription safety glasses

17 I find that there was no term of the applicant's contract of employment with the respondent that the applicant would be reimbursed for the cost of prescription safety glasses. There was no evidence that the applicant and the respondent had any agreement that the prescription safety glasses ordered by the applicant would be paid for by the respondent if the applicant purchased these glasses, nor is there any provision in the Contract that the respondent would reimburse the applicant for the cost of purchasing prescription safety glasses. Clause 8.4 of the Contract states that the respondent has an obligation to supply protective equipment to the applicant. I have no reason to doubt the evidence given by Mr Brett Johnston that safety glasses were supplied to the applicant at his induction on the first day of his employment with the respondent and a pair was also available for the applicant's use in the respondent's vehicle. I accept the respondent's contention that if the applicant had required safety glasses to be worn over prescription glasses then these safety glasses would have been provided to the applicant and there was no evidence that this matter was raised by the applicant with the respondent. It is also the case that the receipt relied upon by the applicant for the purchase of the prescription safety glasses does not state that the glasses the applicant is claiming reimbursement for were purchased during the applicant's employment with the respondent and I find that the applicant's evidence about the claim that he purchased the glasses during his employment with the respondent was unconvincing.

5. Reimbursement of Perth Airport parking costs

18 I reject the applicant's claim for reimbursement of parking costs at Perth Airport when he travelled to Karratha to undertake his duties with the respondent. The Contract does not provide for the reimbursement of these costs and there was no evidence that the applicant and the respondent had a verbal agreement that the respondent would pay these costs.

19 As I have found that the applicant is not due any of the benefits he claims he is owed under his contract of employment and when taking into account s 26(1)(a) of the Act considerations and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits, this application will be dismissed.

20 The respondent foreshadowed that it would be seeking an order for costs. Liberty to apply is granted to the respondent to make an application for costs, which is to be received in the Commission within fourteen days of the date of these reasons for decision.

2013 WAIRC 00137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER EVAN JOHN MORRIS
	APPLICANT
	-v-
	LIFT EQUIPT PTY LTD (ACN 125 331 848)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 11 MARCH 2013
FILE NO/S	B 204 OF 2012
CITATION NO.	2013 WAIRC 00137

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

Order

HAVING HEARD the applicant on his own behalf and Mr Brian Johnston and Ms M Johnston on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders –

1. THAT liberty to apply is granted to the respondent to make an application for costs by no later than 21 March 2013.

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

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

2013 WAIRC 00357

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00357
CORAM	**:**	COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS	**:**	TUESDAY, 16 APRIL 2013, TUESDAY, 30 APRIL 2013, TUESDAY, 14 MAY 2013
DELIVERED	**:**	FRIDAY, 14 JUNE 2013
FILE NO.	**:**	B 204 OF 2012
BETWEEN	**:**	PETER EVAN JOHN MORRIS
		Applicant
		AND
		LIFT EQUIPT PTY LTD (ACN 125 331 848)
		Respondent

Catchwords	**:**	Contractual benefits claim - Application for costs - Applicant's claim for benefits dismissed - Liberty granted to respondent to apply for costs - Costs awarded in part - Details of wages to be provided to Commission
Legislation	**:**	*Industrial Relations Act 1979* s 26, s 27(1)(c), s 29(1)(b)(ii)
Result	**:**	Reasons for decision issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	Ms M Johnston

Case(s) referred to in reasons:

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

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 75 WAIG 9

Reasons for Decision

1 On 11 March 2013 an order issued dismissing the applicant's claim for benefits he maintained were denied to him under his contract of employment with the respondent. As the respondent foreshadowed it wanted to claim costs at the end of the hearing the respondent was given liberty to make this application.

2 The respondent argues that the applicant's claim lacked any merit. The applicant's contract did not provide for the wages and overtime he claimed were due to him and the applicant did not seek reimbursement for any of the benefits he claimed were due to him until after he was terminated. The respondent maintains that numerous hours of its employees' time have been wasted dealing with the applicant's application, his Full Bench appeal and the hearing resulting in monetary losses to the respondent.

3 The applicant argues that no costs should be awarded against him as it is unfair for the respondent to be reimbursed the costs of preparing and defending this application. Additionally, the wages being claimed by the respondent to deal with this application are based on incorrect amounts. Claiming costs related to the Full Bench application are inappropriate as this was a different matter.

4 The respondent is claiming reimbursement of the following costs:

Ms Melanie Johnston – one week's wages $1,884.62;

Mr Brett Johnston – one week's wages $3,469.20;

Mr Brian Johnston – one week's wages $3,469.20;

Mr Stefan Putyra - $47.50 per hour sitting in court - three hours in total; and

Incidental costs amounting to $250.

5 The respondent included details of the activities undertaken by the respondent to deal with the applicant's claim for denied contractual benefits and the time spent by Ms Johnston, Mr Brian Johnston and Mr Brett Johnston to do so between 22 October 2012 and the date of the hearing on 1 February 2013. Time spent by the respondent's employees to deal with application FBA 7/2012 between 7 January 2013 and 22 January 2013, which related to an application by the applicant to have this application heard in Perth and was dismissed, was also included in the respondent's claim for reimbursement of wage costs. No breakdown was provided as to how the hours being claimed were calculated and no receipts were provided for the incidental costs being claimed nor were details of this expenditure provided.

6 Mr Brett Johnston gave evidence on behalf of the respondent at the hearing to deal with the applicant's claim for denied contractual benefits and the respondent's case was conducted by Mr Brian Johnston and Ms Johnston. Mr Putyra was listed to be a witness for the respondent and attended the hearing but the respondent did not call him to give evidence.

Consideration

7 Section 27(1)(c) of the *Industrial Relations Act 1979* (the Act) gives the Commission the power to order any party to a matter to pay to any other party its costs and expenses, including witness expenses, but no costs are allowed for the services of any legal practitioner or agent.

8 The test to be applied in awarding costs under s 27(1)(c) of the Act is set out in ***Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands*** (1992) 73 WAIG 26 where the Full Bench held that '[t]he general policy in industrial jurisdictions is that costs ought not to be awarded, except in extreme cases' (27). It is also the case that costs may be awarded against a party where an application has no merit and is 'manifestly groundless' or 'so manifestly faulty that it does not admit of argument' (see ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 75 WAIG 9, 11).

9 I am satisfied that the circumstances of this matter are such as to warrant an order for costs. I find that the applicant's claims for wages and overtime owing to him were groundless, lacked merit and had no prospect of success. Furthermore, the items for which the applicant was seeking reimbursement were not agreed to be paid by the respondent, nor was payment for these items contemplated in the applicant's contract of employment with the respondent. These claims therefore had no prospect of success. After taking into account s 26 considerations, and my conclusions that the applicant's claims were baseless and had no prospect of success, I will order that the applicant pay the respondent some of the costs being sought. In my opinion it is appropriate that costs incurred by the respondent for the hours Ms Johnston, Mr Brian Johnston and Mr Brett Johnston spent in the Commission during the hearing should be reimbursed by the applicant. In my view the payment of these costs is fair and reasonable as they were all required to attend the hearing to give evidence and/or were involved in conducting the respondent's defence of the application. The hearing commenced at 11.30 am and concluded at approximately 2.00 pm. I will therefore base the costs to be awarded to the respondent on the hourly rate of pay for each employee on the pay slips of each employee on or about the date of the hearing for a period of two and a half hours. To this end, within seven days the respondent is to provide to the Commission by way of statutory declaration copies of pay slips of the wages paid to Ms Johnston, Mr Brian Johnston and Mr Brett Johnston at the relevant time, which also confirm their hourly rate of pay, so that the amount due to the respondent can be calculated.

10 The respondent claimed reimbursement of time employees spent sending emails, preparing responses and general preparation to meet the applicant's claims however no details were provided as to who carried out these activities and the time spent on each activity. I therefore reject these claims. It is also inappropriate in my view that the respondent be reimbursed the cost associated with defending the Full Bench application as that was a separate matter to the applicant's application for denied contractual benefits and was a matter that should have been raised with the Full Bench. Mr Putyra did not give evidence so the claim for the reimbursement of the cost of his attendance at the hearing is also rejected. As no details or receipts were provided with respect to the incidental costs being claimed by the respondent these claims are also rejected.

2013 WAIRC 00389

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER EVAN JOHN MORRIS
	APPLICANT
	-v-
	LIFT EQUIPT PTY LTD (ACN 125 331 848)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 2 JULY 2013
FILE NO/S	B 204 OF 2012
CITATION NO.	2013 WAIRC 00389

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms M Johnston

Order

WHEREAS on 14 June 2013 Reasons for Decision issued in this matter awarding costs to the respondent; and

WHEREAS the respondent was to provide additional information to the Commission so that the amount due to the respondent could be calculated; and

WHEREAS on 19 June 2013 the respondent provided information in relation to wages paid to Mr Brett Johnston and Ms Melanie Johnston by way of Statutory Declaration; and

FURTHER on 25 June 2013 the respondent provided information about the remuneration paid to Mr Brian Johnston by way of Statutory Declaration; and

WHEREAS I accept that the information provided by the respondent is true and correct and calculate the costs owing to the respondent as follows in accord with my reasons for decision:

1. Brett Johnston - hourly rate $86.73

   2.5 hours x $86.73 = $216.825 (rounding $216.80);

2. Melanie Johnston - hourly rate $47.1154

   2.5 hours $47.1154 = $117.7885 (rounding $117.80); and

3. Brian Johnston - weekly remuneration $3,469.20 ÷ 40 hours = $86.73 per hour

   2.5 hours x $86.73 = $216.825 (rounding $216.80); and

WHEREAS on 25 June 2013 the Commission issued a Minute of Proposed Order and on 26 June 2013 the applicant requested a Speaking to the Minutes; and

WHEREAS on 2 July 2013 the Commission conducted a Speaking to the Minutes; and

WHEREAS having considered the parties' submissions the Commission was of the view that no issue had been raised about the Minute of Proposed Order not reflecting the decision and the parties were advised that the order would issue in the terms of the Minute;

NOW HAVING HEARD the applicant on his own behalf and Ms M Johnston on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT Peter Evan John Morris pay to Lift Equipt Pty Ltd the sum of $551.40 by way of costs within 14 days of the date of this order.

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

2013 WAIRC 00372

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER LESLIE OLDAKOWSKI
	APPLICANT
	-v-
	FUJITSU AUSTRALIA LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 25 JUNE 2013
FILE NO/S	B 35 OF 2013
CITATION NO.	2013 WAIRC 00372

Result	Application dismissed
Representation	
Applicant	Mr K Trainer
Respondent	Ms J Hymus

Order

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

WHEREAS on the 8th day of May 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to engage in further negotiations in an endeavour to reach a resolution; and

WHEREAS the application was set down for hearing on the 13th day of June 2013; and

WHEREAS by email dated the 12th day of June 2013 the applicant advised that the parties had reached an agreement in principle; and

WHEREAS on the 18th day of June 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2013 WAIRC 00300

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00300
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 17 MAY 2013
DELIVERED	**:**	WEDNESDAY, 22 MAY 2013
FILE NO.	**:**	U 60 OF 2013
BETWEEN	**:**	BRIAN LESLIE RUSSELL
		Applicant
		AND
		KD (KERRY) & A (ANNE) EDWARDS T/A COMO NEWS
		Respondent

Catchwords	**:**	Industrial law (WA) - Alleged harsh, oppressive and unfair dismissal – Application referred outside of 28 day time limit – Whether application attracted jurisdiction of Commission – Reason for delay – Principles applied – Commission satisfied that discretion should not be exercised – Application dismissed.
Legislation	**:**	Industrial Relations Act 1979 s 29(2), s 29(3)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr W Milward of counsel

Case(s) referred to in reasons:

Malik v Director General Department of Education (2004) 84 WAIG 683;

Attorney-General v the Western Australian Prison Officers Union (1995) 75 WAIG 3166

Reasons for Decision

1 Mr Russell was employed by Como News in February 2008 as a part time delivery driver. Como News is a news agency located in Como. Mr Russell alleges he was "constructively dismissed" by Como News in about November 2012, as a result of Como News' failure to provide a safe workplace. Mr Russell contended that he suffered lung damage as a consequence of being exposed to diesel fumes from the truck he drove. Mr Russell further contended that despite a complaint to WorkSafe Western Australia, Como News did not remedy the situation, forcing him to leave that employment.

2 Despite the date of the alleged dismissal in November 2012, the present application was not filed until 24 April 2013, many months outside of the time limit prescribed under s 29(2) of the Act. Mr Russell said that the Commission should accept his claim out of time under s 29(3). In effect, Mr Russell contended that the reason he delayed commencing these proceedings was

that he was awaiting a report from WorkSafe in relation to the investigation of his complaint regarding fumes in the workplace. Furthermore, Mr Russell contended that he did not resign from this employment, but because of his lung condition, he needed time off. Mr Russell now accepts that the prospect of a working relationship with the employer being restored is untenable.

3 On the other hand, Como News, as is the case with many matters of this kind, has a very different view of the events. It says that it took no steps to force Mr Russell to leave this employment, nor did it terminate his employment. Como News contended that Mr Russell has been absent from the workplace for over five months. Mr Russell has never informed his employer of his intentions. Como News therefore says on this basis, the only reasonable conclusion to be drawn is that Mr Russell abandoned his employment. He was not dismissed, so does not attract the jurisdiction of the Commission.

4 As to the allegation of an unsafe workplace, Como News denies this. It contended that WorkSafe did respond to Mr Russell's complaint. It investigated the complaint and found no basis for the employer to alter its work practices in relation to the matter about which Mr Russell complained.

5 Therefore, Como News contended that the Commission should decline to exercise its discretion to accept Mr Russell's claim out of time under s 29(3) of the Act.

Relevant principles

6 The relevant principles in cases of this kind are well settled. The Commission has power under s 29(3) of the Act to accept an unfair dismissal claim out of time. This involves the exercise of discretion by the Commission. The manner of the exercise of that discretion was considered by the Industrial Appeal Court in *Malik v Director General Department of Education* (2004) 84 WAIG 683. In *Malik*, EM Heenan J at pars 73-74 said as follows:

> In a case like the present, where the applicant belatedly wishes to institute a claim for relief under s 29, there will be no unfairness in rejecting a late application if the application could not succeed. Hence, unfairness must involve, as a minimum at least, the Commission being satisfied that some prospect of success would be denied to the applicant if he could not pursue his late claim. If there is some prospect of success to be lost by denying an extension of time, it would then become necessary to evaluate the position having regard to the length of the delay, its effects upon the respondent and the public interest in the due expedition and finalisation within an acceptable period of legal and industrial processes. Fairness, in this sphere, has a legislative starting point in the choice by Parliament that 28 days is a sufficient period in the public interest for the commencement of such a claim. The longer the delay the more difficult it will be to show unfairness, but even in instances of long delay there may be particular circumstances which reveal that it would be unfair not to accept a late referral. But this point in balancing conflicting interests was never reached in the present case because of the finding by the Full Bench that the application at first instance did not have merit (see his Honour President Sharkey at [91] and Commissioner Kenner at [115]).
>
> The principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. In that case his Honour was considering the jurisdiction under s 170EA of the *Industrial Relations Act 1988* (Cth), as it then was, to grant an extension of time. His Honour said, after examining previous applicable authority:
>
> > "I agree, with respect, that those principles are appropriate to be applied in the circumstances of this matter.
> >
> > Briefly stated the principles are:
> >
> > 1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
> >
> > 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
> >
> > 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
> >
> > 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
> >
> > 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
> >
> > 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."
>
> I agree, with respect, with that formulation of the principles and their application in the present case. See also ***Clark v Ringwood Private Hospital*** (1997) 74 IR 413 (AIRC). However, counsel for the applicant/appellant citing the decision in ***Kornicki v Telstra - Network Technology Group*** [Print P3168, 22 July 1997] submits that the language of s 29(3) suggests that considerations of fairness towards an applicant are central to the exercise of the discretion and that, at least in the federal sphere, such a test was intended to convey an approach to the exercise of the Commission's discretion more generous to applicants than that which previously prevailed. I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

7 Given the question of jurisdiction has been raised by Como News, Mr Russell needs to demonstrate that there is at least an arguable case, that the Commission has the jurisdiction to entertain his claim. In my view, if a claim has no prospect of success because it is beyond the jurisdiction of the Commission, it could never be unfair to not accept it out of time.

8 As to the concept of "constructive dismissal", this refers to the common law position where, because of a repudiation of the contract by the employer, an employee regards themselves as released from the contract and may terminate it. In such cases, the employee is "constructively dismissed" (see *Macken's Law of Employment* Seventh Edition at par 9.30). The issue to be resolved for the purposes of the Commission's unfair dismissal jurisdiction is "who really terminated the employment"?: *Attorney-General v the Western Australian Prison Officers Union* (1995) 75 WAIG 3166.

Consideration

9 At various points Mr Russell's testimony on the issue of termination of employment was less than clear. Initially, despite the allegation in his claim that he was constructively dismissed, Mr Russell testified that he had neither resigned nor had Como News dismissed him. He seemed to be under the impression that he had some agreement with the employer from about September 2012, at least until he returned from a holiday overseas in late October or early November, that he was given a "break" from his employment because of his concerns about his health. Mr Russell testified the main reason he delayed commencing these proceedings, was because he was awaiting a report from WorkSafe, following its investigation of a complaint that he made regarding fumes from the delivery truck. It was common ground that Mr Russell did not work at Como News after 10 September 2012. There were unrelated issues regarding a wages claim Mr Russell made, about which there were some discussions in late September 2012.

10 According to Mr Edwards, the co-proprietor of Como News, Mr Russell informed him on 10 September 2012 that he had the flu and could not work. He did not work the following days either. On Friday 14 September, Mr Edwards testified that he telephoned Mr Russell to clarify his intentions. Mr Edwards said that Mr Russell informed him that "he wouldn't be back, that he had a few things to sort out". Mr Edwards testified that he took that as a clear statement that Mr Russell did not want to work for Como News anymore and would not be returning to work. Mr Edwards said that a couple of months prior to this, Mr Russell had complained about fumes from the delivery truck. Mr Edwards also said that on one occasion, Mr Russell told him that he couldn't work with the gas fumes from the truck and his health was the most important thing.

11 On about 4 October 2012 Mr Edwards said he telephoned Mr Russell to try and finalise the wages claim that Mr Russell had made. According to Mr Edwards, Mr Russell did not wish to resolve that issue, as he was pursuing the matters with WorkSafe in relation to the fumes from the delivery van and was also about to go overseas on holiday and would speak to Mr Edwards further when he returned. Mr Edwards said there was no further contact at all from Mr Russell. Also, in the meantime, Como News had received no medical certificates or a workers' compensation claim from Mr Russell.

12 In about mid-November, an Inspector from WorkSafe inspected the premises of Como News. Additionally, Mr Russell testified that WorkSafe considered air sampling data provided by Mr Russell. Whilst direct evidence of the WorkSafe investigation was not before the Commission, Mr Edwards informed the Commission that the investigation concluded that there was no substance to Mr Russell's complaint.

13 The next Mr Edwards heard from Mr Russell, was on 26 April 2013. On that date, the notice of application in these proceedings, and also proceedings lodged in the Industrial Magistrate's Court for recovery of unpaid wages, were served on Mr Edwards.

14 In my view, on the evidence, the only reasonable conclusion open, having regard to all of the circumstances, is that Mr Russell was not dismissed by Como News rather, he abandoned his employment. I accept Mr Edwards's evidence, which was not contradicted, that on about 14 September 2012, Mr Russell informed Mr Edwards that he would not be returning to the workplace as "he had a few things to sort out". Combined with the fact that Mr Russell never returned to work, and never expressed any indication of his intention to do so, it was entirely reasonable for Como News to conclude that Mr Russell did not wish to remain employed by it and had terminated his employment by leaving without notice. It simply cannot be the case, that an employee can be absent from the workplace for about seven months, without any expressed intention to return, and then claim to have been dismissed many months earlier.

15 Moreover, to the extent that it is necessary to comment upon it, it is also clear on the evidence that Mr Russell took no steps, even if he considered that he was "constructively dismissed", to contest the dismissal. Simply waiting for an indeterminate period, for the outcome of a WorkSafe investigation, is not a sufficient reason for such a lengthy delay in commencing these proceedings. Whilst Mr Russell said he was not familiar with Western Australian employment law, he certainly found sufficient information through his own resources, to prosecute his WorkSafe complaint, to take matters to the Ombudsman, and ultimately, to commence proceedings in the Industrial Magistrate's Court.

16 Taking all of the evidence into account, I am far from persuaded that Mr Russell has established he was dismissed to attract the jurisdiction of the Commission. In any event, even if he had been dismissed, I am not persuaded that Mr Russell has demonstrated sufficiently cogent reasons why the discretion to accept an unfair dismissal application out of time under s 29(3) of the Act, should be exercised in his favour on this occasion.

17 Accordingly, the extension of time is refused and the application is dismissed.

2013 WAIRC 00301

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN LESLIE RUSSELL
	APPLICANT
	-v-
	KD (KERRY) & A (ANNE) EDWARDS T/A COMO NEWS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 22 MAY 2013
FILE NO/S	U 60 OF 2013
CITATION NO.	2013 WAIRC 00301

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr W Milward of counsel

Order

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

THAT the application be and is hereby dismissed.

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

2013 WAIRC 00399

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMONE WARD
	APPLICANT
	-v-
	303 GROUP PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 JULY 2013
FILE NO/S	B 149 OF 2012
CITATION NO.	2013 WAIRC 00399

Result	Application dismissed
Representation	
Applicant	Mr P Mullally of counsel
Respondent	Mr M Gresham of counsel

Order

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

WHEREAS on the 16th day of August 2012 the Commission convened a hearing for mention; and

WHEREAS the hearing was adjourned to allow the applicant to investigate the status of other matters between the parties; and

WHEREAS on the 7th day of June 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Cara Anne Picken	Friar Tucks Restaurant Inn	U 169/2012	Chief Commissioner A R Beech	Discontinued
Craig Larsen	Weir Minerals Australia Ltd	U 34/2013	Chief Commissioner A R Beech	Agreement reached
Lynette Hayes	Du Clene Pty Ltd	U 38/2013	Chief Commissioner A R Beech	Discontinued
Rebecca Hobson	Onslow Primary School P&C Assn	U 218/2009	Commissioner S M Mayman	Discontinued

CONFERENCES—Matters arising out of—

2013 WAIRC 00371

DISPUTE RE EMPLOYMENT UNDER SUBCLASS 457 VISAS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE FRIDAY, 21 JUNE 2013

FILE NO/S C 69 OF 2012

CITATION NO. 2013 WAIRC 00371

Result Application discontinued

Representation

Applicant Mr K Singh

Respondent Mr S Lawton

Order

WHEREAS HAVING heard Mr K Singh on behalf of the applicant and Mr S Lawton on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2013 WAIRC 00358

DISPUTE RE RETURN TO WORK OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COMMISSIONER O'CALLAGHAN, WESTERN AUSTRALIAN POLICE SERVICE, POLICE HEADQUARTERS

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE FRIDAY, 14 JUNE 2013

FILE NO PSAC 15 OF 2013

CITATION NO. 2013 WAIRC 00358

Result	Application discontinued
Representation	
Applicant	Mr M Shipman
Respondent	Mr T Clark

Order

WHEREAS HAVING heard Mr M Shipman on behalf of the applicant and Mr T Clark on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2013 WAIRC 00177

DISPUTE RE ELECTRICAL CONTROL OFFICERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 27 MARCH 2013
FILE NO.	PSAC 37 OF 2012
CITATION NO.	2013 WAIRC 00177

Result	Recommendation issued
Representation	
Applicant	Mr R Farrell
Respondent	Ms K Davis

Recommendation

WHEREAS on 20 December 2012 the Authority made application under s 44 of the Industrial Relations Act 1979 for a compulsory conference in relation to a dispute between it and the Union on behalf of employees employed as Electrical Control Officers, concerning their terms and conditions of employment.

AND WHEREAS on 15 January 2013 the Commission convened a compulsory conference. At the conference the Commission was informed that the parties were in dispute in relation to rostering arrangements for the Electrical Control Officers and related issues. Those related issues concerned the establishment of a qualified relief pool for the purposes of providing relief to existing Electrical Control Officers during periods of training, leave and unanticipated circumstances. Further issues relate to the requirement of the officers to undertake training of prospective members of the relief pool by way of "on the job" training and the appropriate classification of the Electrical Control Officers. The officers are presently classified as Level 4 officers in accordance with the Public Transport Authority Salaried Officers Agreement 2011.

AND WHEREAS the Commission was informed that the issues in dispute had been the subject of on-going negotiations between the parties in the latter part of 2012 without resolution.

AND WHEREAS, as a consequence of the conference convened on 15 January 2013, the parties further conferred in relation to the issues in dispute and exchanged relevant information. Additionally, as a part of providing relief to the Electrical Control Officers, the Authority has now appointed a person to a position of Relief Electrical Control Officer, whilst continuing to seek to establish an effective relief pool of qualified, experienced and skilled Electrical Control Officers, which is a course supported by the Union and the employees.

AND WHEREAS the Authority requested the relisting of the compulsory conference to further progress the matters in dispute, with such conference being held on 26 March 2013.

AND WHEREAS at the conference the Commission was informed that the issues in relation to the appointment of a relief Electrical Control Officer and progress towards the establishment of a relief pool had largely been resolved, however, the issue of

the classification of the Electrical Control Officers remained in dispute. Having heard from the parties as to this issue, the Commission informed the parties that it would make a recommendation, applying only to the circumstances of the present dispute with the current employees, in an endeavour to assist in the resolution of this matter.

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 44 the Industrial Relations Act, 1979 hereby recommends –

THAT the employees of the Authority presently employed as Level 4 Electrical Control Officers under the Public Transport Authority Salary Officers Agreement 2011 receive a personal reclassification to Level 5.

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

2013 WAIRC 00370

DISPUTE RE ELECTRICAL CONTROL OFFICERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY
	APPLICANT
	-v-
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	FRIDAY, 21 JUNE 2013
FILE NO	PSAC 37 OF 2012
CITATION NO.	2013 WAIRC 00370

Result	Application discontinued
Representation	
Applicant	Mr R Farrell
Respondent	Ms K Davis

Order

WHEREAS HAVING heard Mr R Farrell on behalf of the applicant and Ms K Davis on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2013 WAIRC 00361

DISPUTE RE SAFE STAFFING LEVELS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 JUNE 2013
FILE NO/S	C 30 OF 2012
CITATION NO.	2013 WAIRC 00361

Result	Application discontinued
Representation	
Applicant	Mr J Walker
Respondent	Ms K Jack

Order

WHEREAS the applicant filed a notice of discontinuance, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

2013 WAIRC 00384

DISPUTE RE REDEPLOYMENT OF STAFF

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 1 JULY 2013
FILE NO/S	C 200 OF 2013
CITATION NO.	2013 WAIRC 00384

Result	Application discontinued
Representation	
Applicant	Ms R Marton
Respondent	Ms N Sagar

Order

HAVING heard Ms R Marton on behalf of the applicant and Ms N Sagar on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2013 WAIRC 00359

DISPUTE RE OVERPAYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 JUNE 2013
FILE NO/S	C 201 OF 2013
CITATION NO.	2013 WAIRC 00359

Result	Application discontinued
Representation	
Applicant	Ms R Marton
Respondent	Mr D Hughes

Order

WHEREAS the applicant filed a notice of discontinuance, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

CONFERENCES—Matters referred—

2013 WAIRC 00344

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00344
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 6 MARCH 2013
DELIVERED	**:**	MONDAY, 10 JUNE 2013
FILE NO.	**:**	CR 65 OF 2012
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

Catchwords	**:**	Industrial law (WA) - Termination of Employment of Union member – Whether incident sufficient to warrant termination of employment – Consideration of prior conduct and performance – Principles applied – Application dismissed
Legislation	**:**	Industrial Relations Act 1979 ss26(1)(a) and (c), 44(9)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr C Fogliani
Respondent	**:**	Mr D Anderson of counsel

Case(s) referred to in reasons:

Miles v The Federated Miscellaneous Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (1985) 65 WAIG 385;

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

Reasons for Decision

1 Mr Claydon is a member of the Union and was employed by the Public Transport Authority as a Transit Officer in about mid-2007. As a consequence of a series of incidents, Mr Claydon's employment was terminated by the Authority on 9 November 2012 by the payment of four weeks' salary in lieu of notice. The Union, on behalf of Mr Claydon, now challenges his dismissal and seeks his reinstatement.

2 The Authority contended that Mr Claydon's dismissal arose from a long history of difficulties with Mr Claydon's punctuality and his inability to work without supervision. Events that occurred on 22 July 2012, when it is alleged that Mr Claydon was not ready to commence work "fully rigged up" at his appointed start time, were the "straw that broke the camel's back" for the Authority. This is challenged by the Union. It contended that the events of 22 July 2012, viewed in context, were relatively minor and were not sufficient to warrant Mr Claydon's dismissal.

3 In determining this matter, the Commission will consider the events of 22 July 2012 and Mr Claydon's prior conduct and performance.

22 July 2012 incident

4 On 22 July 2012 Mr Claydon was rostered on shift to commence work at 3pm at the Stirling Train Station. As a result of a customer complaint about an unrelated matter, the Authority had cause to review the CCTV footage for the station. In the course of doing so, Mr Claydon was observed entering the station office at approximately 3pm, and the Authority contended he was not ready for the commencement of his rostered shift at his designated start time. It was common ground that to be ready for a rostered shift at the designated start time, means being "rigged up" and ready to start work. For a Transit Officer, being "rigged up" means being fully dressed in uniform and wearing the accoutrement belt, but excluding the OC spray canister. The requirement to be rigged up in this fashion is to enable Transit Officers to attend to any issue as a part of their responsibilities, including assisting a member of the public who may need security assistance.

5 Also on this occasion, Mr Claydon was observed remaining in the station office for approximately 98 minutes, without the approval of the Shift Supervisor. It was also common ground in relation to this matter that the Authority's Transit Officer Operations Manual, requires Transit Officers to seek the permission of their supervisor to remain in the office beyond 15 minutes at the start of a shift. This is because Transit Officers are required to maintain a high degree of visibility for members of the public, on train platforms and in car parks. Transit Officers are also required to greet trains on their arrival at stations. A safety presence is required for patrons during these times.

6 These requirements were referred to in the testimony of Mr Svirac, the Authority's Transit Manager Security, Transperth Train Operations. In particular, Mr Svirac testified that punctuality is important because a Transit Officer not only needs to be able to respond to issues with members of the public, but to assist other Transit Officers. For safety reasons, Transit Officers are required to work in pairs. If, for example, Transit Officers are required on a particular train, one of the Transit Officers being late for duty may result in the train service being without security for its whole journey.

7 Because Mr Claydon remained in the office for approximately 98 minutes without approval, Mr Svirac said that the Stirling Station platform did not have the presence of two Transit Officers as required.

8 Mr Claydon did not dispute the fact that he arrived for work just before his appointed start of shift and was not fully rigged up as he was required to be. He was aware of the requirement. This was not the first occasion he had been either late for work, or arrived right on his appointed shift commencement time. There had been a long prior history of problems with Mr Claydon's punctuality, which to his credit, Mr Claydon acknowledged in his testimony. I will deal with the prior history later in these reasons.

9 Mr Claydon testified that he had been at his nephew's birthday party on the day in question and lost track of time. He said he arrived at work at 2:59pm in part uniform. Inside the office, Mr Claydon put on his uniform shirt and vest. He testified that he took approximately 45 to 60 seconds to do this. Mr Claydon accepted, however, that he did not have his radio and OC spray on at the time. In response to a question from the Commission, Mr Claydon agreed that he often "cut it fine" and "shaved it close to the bone" in terms of his punctuality. He was involved a number of activities outside of work: 33T

10 In terms of the allegation that he spent some 98 minutes in the station office, contrary to the manual, Mr Claydon said that he was quite tired from a broken sleep the night prior. He was also required to review an incident report he had completed from the previous night shift. While the incident report had been lodged with the Supervisor, Mr Claydon said that he was checking it to make sure all the details were correct. A copy of the incident report form was exhibit A1. The narrative of the incident is one paragraph or so in length. Most of the remaining pages in the document are crossed out as not applicable. Mr Svirac testified that such a report, from his experience, should take no longer than five to 10 minutes to review.

11 Mr Claydon testified that his Transit Officer partner was on the platform at the time that he was in the office. Furthermore, he contended that on Sundays, the only obligation on Transit Officers is to greet "football specials" and all train services after 7pm. Mr Svirac's testimony was to the effect that all Transit Officers know, or should know, that they are required to greet train services on the platform. He emphasised the importance of Transit Officers being visible to the public and being present, with their Transit Officer partner, to attend to any issue that may arise or to provide necessary safety support.

12 Whilst the Union argued that Mr Claydon was present at work by 3pm, I do not consider that it was acceptable for a Transit Officer to arrive at work literally seconds prior to the appointed start of shift. In my view, as a matter of common sense, there is an obligation on a Transit Officer to arrive at the workplace in good time to get rigged up and to be prepared to commence duty at the appointed start of shift time. On his own admission to the Authority in the course of the investigation, Mr Claydon did not comply with this obligation.

13 Moreover, I do not accept in the circumstances, it was reasonable to spend over one and a half hours in the station office reviewing exhibit A1, which can only be regarded as a relatively brief document. The fact of Mr Claydon not obtaining the approval of his Shift Supervisor, contrary to the manual is one thing. Equally important, however, was his absence from the platform, and thus, not being able to provide appropriate safety support for his Transit Officer partner on the day in question. Such an absence from the platform and the surrounds of the station was contrary to the obligations imposed on a Transit Officer under the manual, to ensure patron safety by being present for the arrival of trains, following passengers to car parks and otherwise having visibility for patrons. Safety for both patrons, and other Transit Officers, is of paramount importance.

14 These two incidents, taken in isolation, would not be sufficient to warrant termination of employment. However, as noted at the outset of these reasons, Mr Claydon has had a lengthy history of problems with punctuality whilst employed by the Authority. I turn to consider this issue now.

Prior conduct and performance

15 It was common ground that Mr Claydon had punctuality problems and on occasion failed to attend to station duties as far back as June 2008. A detailed chronology of these matters was contained in exhibit R1, a series of internal memorandums regarding disciplinary action taken by the Authority concerning Mr Claydon's conduct. In summary, Mr Claydon was late for duty on eight occasions in 2008 and two occasions in 2009 and 2010. He had numerous punctuality problems in 2011. He failed to attend to station duties on several occasions in 2008, 2009 and 2010. In 2011, Mr Claydon was further disciplined for failing to attend to station duties.

16 As a result of these breaches of discipline, Mr Claydon was informed that his employment was at risk. He was also put on two Performance Improvement Plans, one from 21 February 2011 and the second from 24 June 2011, in an endeavour to remedy these difficulties. Also, to assist with punctuality, Mr Claydon was relocated to the Perth Line Roster from 29 January 2012 to 6 May 2012, so that he would be more closely supervised. However, even while placed on the second Performance Improvement Plan, numerous instances of Mr Claydon being late for shift starts were recorded. On many occasions, despite Mr Claydon's repeated assurances to modify his punctuality and to arrive at work at least 15 minutes prior to the start of shift in order to be ready to start work in good time, Mr Claydon still transgressed.

17 The respondent's attempts to get Mr Claydon to modify his conduct were dealt with in some detail in the testimony of Mr Svirac. It is sufficient to observe that Mr Svirac gave Mr Claydon many opportunities to mend his ways, including several "second chances" prior to escalating the issue formally to the Authority's Labour Relations Division to review Mr Claydon's ongoing employment. Mr Svirac testified that Mr Claydon was a likeable employee, and he was endeavouring to get him to change his ways, to avoid the need to terminate his employment.

18 On all of the occasions when these issues were raised with him, Mr Claydon acknowledged his problem with punctuality and not attending to station duties, and undertook to do better in the future. Mr Claydon also acknowledged, to his credit, that as a consequence of his ongoing failure to comply with the obligations on him as a Transit Officer, his employment was being placed at risk.

19 It is against this background that the events of 22 July 2012, took place. It is also against this background, that the Commission must consider Mr Claydon's claim.

Conclusions

20 Whether the dismissal of an employee is harsh, oppressive or unfair, involves an assessment by the Commission as to whether the employer's lawful right to terminate the contract of employment has been abused: *Miles v The Federated Miscellaneous Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. It is also established that it is not for the Commission to assume the role of the manager in considering whether a dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty under ss 26(1)(a) and (c) of the Act.

21 Moreover, contemporary standards of industrial fairness require that before an employee is dismissed, they be given fair warning that their employment is at risk. If their performance or conduct does not improve as required by the employer, an employee should be informed that termination of employment may be an outcome. Such a warning should be more than a mere general exhortation to improve and should place the employee in no doubt that their employment is at risk, unless they take appropriate remedial action: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635.

22 I am not to any extent persuaded in this case, that the Authority's dismissal of Mr Claydon was harsh, oppressive or unfair. The Authority must be able to rely on employees in important positions, such as that of Transit Officer, being reliable and punctual. Also, the Authority must be able to have confidence that Transit Officers will perform their duties properly in an unsupervised environment. Equally important, is the obligation on the Authority to ensure, as far as practicable, that the safety of patrons and fellow Transit Officers is not compromised by the failure of a Transit Officer to perform their duties to the required standard.

23 In the present case, Mr Claydon has had numerous chances to remedy his shortcomings. On each occasion he acknowledged the problem, undertook to do better, but fell short of the required standards once again. In the final analysis, the only person responsible for Mr Claydon's dismissal was, in my view, Mr Claydon himself. It is hardly surprising that the end result of Mr Claydon's employment history was a decision by the Authority that it could no longer give him further chances. To do so, would send the message to the Authority's workforce generally, that it is acceptable to repeatedly fail to comply with the basic obligations of an employee to be punctual in attending for work and to perform duties as required. It is not acceptable.

24 Taking into account all of the circumstances of the case the Authority has been more than fair to Mr Claydon. Accordingly, the application is dismissed.

2013 WAIRC 00345

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 JUNE 2013
FILE NO/S	CR 65 OF 2012
CITATION NO.	2013 WAIRC 00345

Result	Application dismissed
Representation	
Applicant	Mr C Fogliani
Respondent	Mr D Anderson of counsel

Order

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

THAT the application be and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Commissioner Ian Johnson Department of Corrective Services	Scott A/SC	PSAC 9/2013	22/04/2013	Dispute re study leave	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 00400

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMA JAYNE CORLEY
	APPLICANT
	-v-
	GAYLENE BICHENO - PEARD REAL ESTATE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 JULY 2013
FILE NO/S	B 42 OF 2013
CITATION NO.	2013 WAIRC 00400

Result	Name of respondent amended

Order

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

WHEREAS at a conference convened on the 18th day of June 2013 the applicant sought to amend the name of the respondent to "Peard and Associates Pty Ltd t/as Peard Real Estate Hillarys"; and

WHEREAS the respondent agreed to the name of the respondent being amended;

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

THAT the name of the respondent in the application be amended to "Peard and Associates Pty Ltd t/as Peard Real Estate Hillarys".

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

2013 WAIRC 00408

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREVILLE BLAKE GRIFFIN
	APPLICANT
	-v-
	ROBERT ROBSON
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 8 JULY 2013
FILE NO/S	B 162 OF 2008
CITATION NO.	2013 WAIRC 00408

Result	Application for adjournment allowed
Representation	
Applicant	Mr G Griffin
Respondent	Mr R Robson

Order

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

WHEREAS the application is set down for hearing on 16 July 2013; and

WHEREAS on 1 July 2013 the respondent requested an adjournment of the hearing as one of the respondent's main witnesses, Ms Sarah Steenson, was to travel overseas on 4 July 2013 to be with her father who is seriously ill; and

WHEREAS on 3 July 2013 the applicant advised the Commission that he wishes to have his application dealt with expeditiously; and

WHEREAS the respondent provided documentation confirming Ms Steenson's overseas travel on 4 July 2013; and

WHEREAS the Commission is of the view that an adjournment of the hearing set down for 16 July 2013 should be granted; and

WHEREAS the Commission has concluded that the injustice to the respondent is greater than the injustice to the applicant if an adjournment is not granted (see *Myers v Myers* [1969] WAR 19). The Commission accepts that Ms Steenson is one of the respondent's main witnesses and she is unavailable to attend the hearing due to her father being unwell; and

FURTHER apart from a delay in the proceedings taking place the applicant has not highlighted any disadvantage he will suffer if an adjournment is granted;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s 27(1), hereby orders:

THAT the hearing scheduled for 16 July 2013 is adjourned to a date to be fixed.

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

2013 WAIRC 00419

DISPUTE RE INFORMATION CONTAINED IN EMPLOYMENT RECORDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR-GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 11 JULY 2013
FILE NO.	CR 66 OF 2012
CITATION NO.	2013 WAIRC 00419

Result	Directions issued
Representation	
Applicant	Mr S Millman and Mr D Stojanoski of counsel
Respondent	Mr R Bathurst of counsel

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS at a hearing convened on the 10th day of July 2013 the parties agreed that directions should issue in respect of programming matters associated with the hearing of the jurisdictional issue, and have agreed to the terms of those directions; and

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

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

1. THAT the issue of jurisdiction will be set down for one day of hearing in September 2013.
2. THAT the parties file a Statement of Agreed Facts by Friday the 26th day of July 2013.
3. THAT the respondent file and serve any witness statements upon which it intends to rely with respect to the issue of jurisdiction by Friday the 16th day of August 2013.
4. THAT the applicant file and serve any witness statements upon which it intends to rely with respect to the issue of jurisdiction by Tuesday the 30th day of August 2013.
5. THAT the respondent file and serve an Outline of Submissions by Friday the 6th day of September 2013.
6. THAT the applicant file and serve an Outline of Submissions by Friday the 13th day of September 2013.

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

2013 WAIRC 00374

DISPUTE RE VOLUNTARY REDUNDANCY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	MINISTER FOR HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 25 JUNE 2013
FILE NO	PSAC 18 OF 2013
CITATION NO.	2013 WAIRC 00374

Result	Interim order issued
Representation	
Applicant	Ms C Drew and Mr C Panizza
Respondent	Ms J Love and Mr C Gleeson

Interim Order

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979* by which the applicant claims that its members, Mr Bruce McKeaig and Mr Benjamin Dent (the employees), employed by the respondent as Medical Imaging Technologists (MITs) at Busselton Hospital are being subjected to unfairness. This is said to be due to a lack of clarity as to the future of their positions as the respondent prepares to enter into a contract with Global Diagnostic Australia (GDA) to provide medical imaging services; and

WHEREAS the Public Service Arbitrator (the Arbitrator) convened conferences on Friday the 31st day of May 2013 and Tuesday the 25th day of June 2013; and

WHEREAS at the conference on the 25th day of June 2013 the Arbitrator was advised that the respondent and GDA may commence to operate under the contract as from the 1st day of July 2013, however, the contract has not yet been signed by both parties. The employees have not been advised of the options available to them, or whether their positions will be declared redundant, yet they have received offers of employment from GDA, to commence work on the 1st day of July 2013, to which offers they must respond urgently; and

WHEREAS the respondent will be unable to advise the employees of their options and enable the employees to decide prior to their being required to accept or reject employment offered by GDA, particularly as some decisions regarding the employees and their positions are within the power of the Public Sector Commissioner; and

WHEREAS the applicant seeks interim orders which would enable the employees to take leave without pay and to take up employment with GDA, pending the determination of the respondent's position in respect of their employment arrangements; and

WHEREAS the respondent opposes the orders sought and says that the employees have offers of employment and it is for them to elect whether to take them; and

WHEREAS the Arbitrator is of the opinion that it is necessary to issue interim orders to prevent deterioration of industrial relations in respect of the issues between the parties, in particular between the employees and the respondent as to the employees' working arrangements, and to protect the positions of the employees pending the respondent determining its position in respect of the employees, and to enable further conciliation or arbitration to resolve the disputes between the parties as to the appropriate treatment of the employees should their positions be abolished; and

WHEREAS the Arbitrator is of the opinion that the issuing of the interim orders would encourage the parties to divulge attitudes and information which would assist in the resolution of the matter, in particular that the respondent convey to their employees, as soon as possible, its intentions regarding their future arrangements; and

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

1. THAT the respondent grant to Mr Benjamin Dent and Mr Bruce McKeaig:

   (a) leave without pay for eight weeks commencing on and from the date GDA commences delivery of medical imaging technology services to Busselton Hospital; and

   (b) authorisation to undertake external employment with GDA, during the period of leave without pay.

2. THAT the Union has leave to apply to extend the period of leave without pay should the matter not be resolved.

3. THAT either party have leave to apply to amend or rescind these orders upon giving 24 hours' notice to the other party and to the Arbitrator.

4. THAT the parties report back to the Arbitrator in a conference to be convened in four weeks, for the purpose of further conciliation.

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

2013 WAIRC 00406

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 JULY 2013
FILE NO.	PSAC 20 OF 2013
CITATION NO.	2013 WAIRC 00406

Result	Directions issued
Representation	
Applicant	Mr R Hooker of counsel
Respondent	Mr M Warner

Direction

WHEREAS the applicant filed an application seeking that the Public Service Arbitrator (the Arbitrator) enquire into and deal with a dispute between the parties as to the circumstances of the stand-down of Dr J Savundra and the respondent's conduct in relation to that matter; and

WHEREAS on Thursday, 4 July 2013 the Arbitrator convened a conference pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) for the purpose of conciliating between the parties; and

WHEREAS having heard from the parties the Arbitrator formed the opinion that issuing directions requiring the respondent to formally answer the claim and to divulge information and attitudes would assist in the resolution of the matter;

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

1. THAT the respondent provide to the applicant and to the Commission the following information in writing:
    a. the source of power relied on by the respondent to conduct the preliminary inquiry into Dr Savundra's conduct;
    b. Dr Daly's role in the process;
    c. a detailed description of the conduct said to have prompted the preliminary inquiry;
    d. details of the process undertaken by the respondent in coming to the conclusions set out in Professor Stokes' letter of 6 June 2013;
    e. respond to the applicant's assertions that Dr Savundra was:
        i. entitled to natural justice; and
        ii. denied natural justice;

        in both:
        i. the suspension; and
        ii. the making of adverse findings against him.
    f. whether it accepts the Arbitrator's jurisdiction to deal with the matter pursuant to s 80E of the Act or the dispute settlement procedure contained in clause 55 of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011*.
2. THAT such information is to be provided by Friday the 19th day of July 2013.
3. THAT the parties report back to the Arbitrator at a time to be fixed in approximately 21 days.

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

2013 WAIRC 00398

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	K.S. THALAKADA
	APPLICANT
	-v-
	SCOTT VICTOR AIROLDI
	KIMBERLEY LANDSCAPING AND KERBING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 5 JULY 2013
FILE NO/S	U 43 OF 2013
CITATION NO.	2013 WAIRC 00398

Result	Change of respondent's name
Representation	
Applicant	Mr K S Thalakada
Respondent	Mr S V Airoldi

Order

WHEREAS this application was lodged in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for hearing on 26 June 2013;

AND WHEREAS at the hearing it became clear that the respondent had been incorrectly named;

AND WHEREAS the Commission formed the view that is was appropriate to amend the respondent's name;

AND WHEREAS the parties agreed to amend the respondent's name;

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

THAT the name Scott Victor Airoldi, Kimberley Landscaping and Kerbing be deleted and Scott Victor Airoldi, West Kimberley Landscaping and Kerbing inserted in lieu thereof.

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

2013 WAIRC 00414

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONALD MILIADO
	APPLICANT
	-v-
	CHAIRMAN MALCOLM SKINNER
	YUNGNGORA ASSOCIATION INC, NOONKANBAH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 10 JULY 2013
FILE NO/S	U 68 OF 2013
CITATION NO.	2013 WAIRC 00414

Result	Change of respondent's name
Representation	
Applicant	Mr P Cozens (of counsel)
Respondent	Ms J Edinger (of counsel)

Order

WHEREAS this application was lodged in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for conference on 18 June 2013;

AND WHEREAS at the conference it became clear that the respondent had been incorrectly named;

AND WHEREAS the Commission formed the view that is was appropriate to amend the respondent's name;

AND WHEREAS the parties agreed to amend the respondent's name;

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

THAT the name Malcolm Skinner – Chairman Yungngora Association Inc be deleted and Yungngora Association Inc inserted in lieu thereof.

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

2013 WAIRC 00415

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAYLENE MILIADO
	APPLICANT
	-v-
	MALCOLM SKINNER - CHAIRMAN
	YUNGNGORA ASSOCIATION INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 10 JULY 2013
FILE NO/S	U 69 OF 2013
CITATION NO.	2013 WAIRC 00415

Result	Change of applicant's name
Representation	
Applicant	Mr P Cozens (of counsel)
Respondent	Ms J Edinger (of counsel)

Order

WHEREAS this application was lodged in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for conference on 18 June 2013;

AND WHEREAS at the conference it became clear that the respondent had been incorrectly named;

AND WHEREAS the Commission formed the view that is was appropriate to amend the respondent's name;

AND WHEREAS the parties agreed to amend the respondent's name;

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

THAT the name Malcolm Skinner – Chairman Yungngora Association Inc be deleted and Yungngora Association Inc inserted in lieu thereof.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Metropolitan Cemeteries Board (Western Australia) Cemetery Employees Enterprise Agreement 2013 AG 9/2013	28/06/2013	The Western Australian Municipal, Road Boards, parks and Racecourse Employees' Union of Workers, Perth AND The Metropolitan Cemeteries Board	(Not applicable)	Commissioner J L Harrison	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00379

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT MADE ON 8 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00379
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER J L HARRISON- CHAIRPERSON MR B DODDS - BOARD MEMBER MR M TAYLOR - BOARD MEMBER
HEARD	**:**	THURSDAY, 23 MAY 2013
DELIVERED	**:**	WEDNESDAY, 26 JUNE 2013
FILE NO.	**:**	PSAB 6 OF 2013
BETWEEN	**:**	ALEV ERATAN Appellant AND MAIN ROADS Respondent

Catchwords	**:**	Industrial Law (WA) – Public Service Appeal Board – Appeal against decision to terminate employment – Preliminary issue – Whether Public Service Appeal Board has jurisdiction – Appellant not employed by respondent - Not a government officer – Appeal dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 7, s 80C(1), s 80I and s 80I(1)(e) *Main Roads Act 1930*
Result	**:**	Dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Ms M Kovacevic and Mr B Kirwan

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board (the Board).

2 On 19 February 2013 Alev Eratan (the appellant) lodged an appeal to the Board under s 80I of the *Industrial Relations Act 1979* (the Act) claiming that she was unfairly dismissed by Main Roads, which should read the Commissioner of Main Roads, (the respondent), on 8 February 2013. The respondent claims that the Board cannot deal with this application as the appellant was not an employee of the respondent. A preliminary hearing was therefore held to deal with this issue.

3 Section 80I(1)(e) of the Act provides that the Board can hear and determine an appeal by an employee who is a government officer.

4 Section 80C(1) of the Act defines an employer and government officer as follows:

> ***employer*** —
>
> (a) in relation to a government officer who is a public service officer, means the employing authority of that public service officer; and
>
> (b) in relation to any other government officer, means the public authority by whom or by which that government officer is employed;
>
> ***government officer*** means —
>
> (a) every public service officer; and
>
> (aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*; and
>
> (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*; and
>
> (b) every other person employed on the salaried staff of a public authority; and
>
> (c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984* [1],
>
> but does not include —
>
> (d) any teacher; or

(e) any railway officer as defined in section 80M; or

(f) any member of the academic staff of a post-secondary education institution;"

5 The Board finds that the respondent is a public authority as defined in s 7 of the Act as it is established under the *Main Roads Act 1930*. The definition of a public authority in s 7 of the Act is as follows:

> the Governor in Executive Council, any Minister of the Crown in right of the State, the President of the Legislative Council or the Speaker of the Legislative Assembly or the President of the Legislative Council and the Speaker of the Legislative Assembly, acting jointly, as the case requires, under the *Parliamentary and Electorate Staff (Employment) Act 1992*, the Governor or his or her delegate under the *Governor's Establishment Act 1992*, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law but does not include a local government or regional local government.

6 There was no dispute and the Board finds that the appellant commenced working at Main Roads on 17 September 2012 on a temporary assignment and on 8 February 2013 Main Roads advised her and Gel Group Pty Ltd (Gel Group) that her services were no longer required due to unsatisfactory performance.

7 Ms Samantha Cotgrave, Managing Director of Gel Group, gave evidence that the appellant was employed by Gel Group as a contractor. Gel Group placed the appellant on a temporary assignment at Main Roads, which was one of its clients, under a contract for service between the respondent and Gel Group. Under the terms of this contract Gel Group provided its employees to undertake temporary placements at Main Roads and in return Main Roads paid Gel Group an hourly fee for the services of its employees (see Exhibit A1, document 1). In accord with this, the appellant kept a timesheet of the hours she worked at Main Roads, which was authorised by Main Roads and then forwarded to Gel Group which then paid the appellant for the hours she worked (see Exhibit A1, document 5).

8 The Board finds that the appellant was employed by Gel Group and was not an employee of Main Roads during the period she worked at Main Roads. The Board finds that the appellant's terms and conditions of employment, which applied to her during the period she worked at Main Roads, were contained in an 'Independent Contractor Agreement' she entered into with Gel Group on 10 September 2012 (see Exhibit A1, document 4). The appellant's Independent Contractor Agreement confirms that the appellant was to be paid a 'fee' by Gel Group for providing services to a client during an assignment. Gel Group deducted income tax from the wages or fees it paid to the appellant, her superannuation was paid by Gel Group and Gel Group had workers' compensation insurance covering the appellant. The Board finds that these indicia point to an employment relationship between the appellant and Gel Group, not Main Roads.

9 The appellant's Independent Contractor Agreement states that if the appellant was unsuitable for a position with a client, the client may 'terminate the attendance of [the appellant] at an assignment at their absolute discretion'. This occurred when Main Roads indicated to the appellant on 8 February 2013 that her services were no longer required due to her unsatisfactory performance.

10 As the appellant was not an employee of the respondent, she was not a government officer. The Board therefore does not have jurisdiction to deal with this application.

11 An order will issue dismissing the application.

2013 WAIRC 00378

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT MADE ON 8 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALEV ERATAN
	APPELLANT
	-v-
	MAIN ROADS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRPERSON
	MR B DODDS - BOARD MEMBER
	MR M TAYLOR - BOARD MEMBER
DATE	WEDNESDAY, 26 JUNE 2013
FILE NO	PSAB 6 OF 2013
CITATION NO.	2013 WAIRC 00378

Result	Dismissed
Representation	
Appellant	In person
Respondent	Ms M Kovacevic and Mr B Kirwan

Order

HAVING HEARD the appellant on her own behalf and Ms M Kovacevic and Mr B Kirwan on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be and is hereby dismissed.

(Sgd.) J L HARRISON,
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 24/2013	Request for mediation re return to work programme	Beech CC	N/A	Discontinued
APPL 11/2013	Request for mediation re employee dispute	Beech CC	11/04/2013	Discontinued

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2013 WAIRC 00360

REFERRAL OF DISPUTE RE TERMINATION OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	LAKESHORE NOMINEES PTY LTD
	APPLICANT
	-v-
	SITA AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 JUNE 2013
FILE NO/S	RFT 7 OF 2012
CITATION NO.	2013 WAIRC 00360

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr K Cowl

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.

2013 WAIRC 00278

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2013 WAIRC 00278
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 15 APRIL 2013, TUESDAY, 16 APRIL 2013 FRIDAY, 10 MAY 2013
DELIVERED	**:**	MONDAY, 13 MAY 2013
FILE NO.	**:**	RFT 13 OF 2012, RFT 3 OF 2013
BETWEEN	**:**	SHACAM TRANSPORT PTY LTD; DAMIEN COLE PTY LTD Applicant AND DAMIEN COLE PTY LTD; SHACAM TRANSPORT PTY LTD Respondent

CatchWords	**:**	Owner-driver contract - Breach of contract - Breach of condition of contract - Termination of contract - No written contract - Verbal agreement - Commercial agreements of indefinite duration - Reasonable notice of termination - Implication of term - Removal of signwriting - Re-open hearing to adduce fresh evidence
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007* s 47 *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 S*chedule 1
Result	**:**	RFT 13 of 2012 – Referral granted in part RFT 3 of 2013 – Applicant to notify Tribunal
Representation:		
RFT 13 of 2012		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	**:**	Mr J Uphill as agent
RFT 3 of 2013		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	**:**	Mr J Uphill as agent

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings,

taken from the transcript as edited by the Tribunal)

1 Shacam Transport Pty Ltd (Shacam) claims damages of $41,700 for pay in lieu of reasonable notice due to Damien Cole Pty Limited trading as Damien Cole Group (DCG) terminating the contract between them, and an amount of $2,420 said to have been wrongly deducted from the final payment to Shacam. DCG says Shacam breached the contract between them in a manner which entitled DCG to terminate the contract without notice. DCG seeks damages for the costs incurred as a result of Shacam's breach.

2 The two referrals were heard concurrently. The issue of any damages arising from DCG's referral will be dealt with subsequent to any findings of breach.

3 On 15 and 16 April 2013, the Tribunal has heard evidence from Edward Gregory Richardson and Carol Anne Richardson, husband and wife, who at the time of the matters the subject of these referrals, were directors of Shacam; Damien John Cole who described himself as the owner of DCG and John Vassiliou Phatouros and Nolita Renee Phatouros, joint Transport Managers for DCG in early 2012.

4 On 3 May 2013, DCG applied to have the hearing re-opened to adduce fresh evidence. A hearing was convened on 10 May 2013, and evidence was called from Bradley Orme Willis, an owner-driver working for DGC. The result of that application was that the fresh evidence was heard.

Background

5 DCG undertakes a business of carrying offal and waste products from three abattoirs in the south west of the state namely Balingup, Cowaramup and Dardanup, and from retail outlets around Perth under a contract with Craig Mostyn Group. This was done by four trucks on a rotating arrangement. DCG also collected offal from a plant in Gingin and another in Linley Valley, both close to Perth. According to Mr Cole, the nature of the product carried by the business means that it must be transported within a very short time. Mr Cole says this requires extreme flexibility from DCG as changes to the requirements can occur on the basis of a telephone call. DCG operates with 21 contractors, all owner-drivers.

6 In 2010, DCG was in the process of taking over a contract from another transport company which I understand to be Fertal Holdings Pty Ltd.

7 Mr Richardson gave evidence that he previously had a number of transport industry contracts, some as an owner-driver with his own vehicle, and at other times he worked as a sheet metal worker. In late 2010, he was advised by a friend who was working for DCG as a sub-contract truck driver, that Mr Damien Cole was pursuing the Fertal Holdings Pty Ltd run and would need several trucks and drivers. Mr Richardson contacted DCG indicating his interest and was soon after contacted by Mr Cole. Shacam purchased directly from Fertal Holdings Pty Ltd a 2007 Volvo truck, however the negotiations for this were undertaken through Mr Cole, as were arrangements for Mr Richardson, through Shacam, to undertake the work for DCG. For a number of weeks until the truck which Shacam was purchasing was delivered, Mr Richardson was employed by Mr Cole in the workshop. Once the truck was available and transferred to Shacam, Mr Richardson commenced doing sub-contract driving work and his first three trips were undertaken with a person from Fertal Holdings Pty Ltd, who showed him the requirements of the job.

The Contract

8 It is agreed that there was no written contract between Shacam and DCG; it was a verbal agreement. The terms were that Shacam would purchase the truck and make the truck and Mr Richardson available to do a daily run to collect offal. Initially, this was simply from three abattoirs in the south west mentioned earlier. It was agreed that the contract would involve between 55 and 65 hours per week depending upon conditions and circumstances. Shacam was to be paid $7,400 per week. This arrangement progressed without significant incident for the remainder of 2011. Shacam worked exclusively for DCG.

9 Mr Phatouros gave evidence of the culture of DCG, that trust was a strong element, that he trusted that in that organisation the right thing would be done regarding payments. A number of witnesses gave evidence that DCG always paid in full and weekly, which was unusual in the industry.

Parking Arrangements

10 Shacam's truck was usually parked at DCG's yard in South Guildford. At the commencement of each day, Mr Richardson would drive to the yard, leave his car there and take the truck to Talloman in Hazelmere to collect a trailer and travel to the abattoir. At the abattoir, the empty trailer would be dropped off and a full trailer picked up and brought back to Hazelmere, where it would be left. Mr Richardson would then drive the truck back to the DCG yard in South Guildford where he would leave the truck, collect his car and go home.

11 From time to time, Mr Richardson would take the truck home for cleaning and maintenance work. Mr Phatouros says he saw the improvement in the truck each time Mr Richardson took it out to be worked on.

Signwriting

12 The trailers owned by DCG and the trucks owned by the owner-drivers are sign written in the following manner. The body colour of both the truck and trailer is white. The signwriting is by way of plastic or vinyl stickers which are stuck onto the paint work of the truck and trailer. The DCG logo is set onto the air deflector on top of the cab of the truck, on the panel behind the door of the truck and at the top right hand corner of the trailer. The name 'Damien Cole Group' is set across the front of the cabin between the windscreen and the radiator grille. The logo and words are in green with a narrow red border. The trailer and truck contain an integrated pattern of leaves in the same green as the trim to the trailer and the DCG logo.

13 The pattern of the leaves goes from the rear of the trailer, tapering down from the top rear corner diagonally across the side of the trailer, from six rows at the top, down to one row at the bottom front corner. The pattern of leaves continues across the lower part of the cab of the truck, finishing with two rows of leaves along the bottom of the front of the cab. The trailer has a green border across the top, bottom and back edge. The colours and styling of the signwriting in this way, integrates the truck and trailer. The trailer also contains the Craig Mostyn Group logo (exhibit R2).

14 DCG arranged and paid for Shacam's truck to be sign written in the same manner as the other trucks hauling its trailers. This was done after Shacam put the truck to work for DCG.

The Gingin Run

15 Until late 2011, DCG had undertaken a pick up from an abattoir in Gingin by one owner-driver only, Mr Brad Willis. Mr Cole and Mr Phatouros gave evidence that the amount of work available for the job was making it unprofitable for both Mr Willis and DCG. DCG was paying Mr Willis $580 per round trip, to assist Mr Willis to cover his costs and keep going. However, it

was not sustainable. DCG wanted to integrate the Gingin run into the remainder of the roster and redeploy Mr Willis. This would require the agreement of the other drivers to take on the Gingin route in addition to the south west roster, in a three week roster of two trips in week one, two trips in week two and one trip in week three. It therefore required the agreement of all of the drivers to ensure that this was workable and the load spread evenly.

16 Mr Richardson gave evidence that, on the day or days each week when he had a single trip to Cowaramup from which he would return by 2.00 pm, it required him to then collect a trailer and take it to Gingin and return. He says that he was prepared to undertake that additional work 'to fill in' until the rate for the run was discussed, on a trial basis to see how it went and also subject to negotiating a suitable rate of pay.

17 Mr Phatouros says he approached Mr Richardson in early 2012 and explained the arrangement to him, including that he needed all trucks to be involved and this would enable Mr Willis to make more money. Mr Richardson asked what the rate would be and Mr Phatouros told him that they needed to work that out. At that point they did not discuss the rate that was being paid to Mr Willis. Mr Phatouros says that Mr Richardson's response to the proposition of Shacam participating in the new arrangement was 'we'll be in it' and that they would discuss the rate after he started doing the work. On that basis the new arrangement was put in place. Later, Mr Richardson again asked about the rate and he was advised at some stage that the rate Mr Willis was receiving was $580, but that would not necessarily be the rate for the future.

18 Mr Phatouros denies that it was a trial, but says that the arrangement was agreed and was in place, and it was merely a matter of working out the rate.

19 Shacam's truck had new hydraulics fitted to enable it to do the Gingin run, although there was no discussion of the cost of doing that.

20 In the meantime, Mr Phatouros and Mr Cole determined that the appropriate rate for the Gingin run would be $400. By this time Mr Richardson had done three runs to Gingin.

21 On Friday 16 March 2012, Ms Richardson received the payslip for the period which covered two of the three Gingin trips already undertaken by Shacam. She noted that the rate was $400. Ms Richardson telephoned Mr Richardson and advised him that the rate was $400. Mr Richardson telephoned Mr Phatouros and told him that he was not prepared to do the Gingin job until the rate was increased as there was not enough in it for him. On that basis, Mr Phatouros spent the weekend organising another driver to undertake the Gingin run.

22 While Mr Richardson says that he was prepared to do the Gingin run scheduled for Monday 27 March 2012, to enable arrangements to be made and possible further discussions with Mr Cole, and that he believed he had done the run once or twice after 16 March 2012, the other evidence is to the contrary. Mr Phatouros made the necessary arrangements for the Gingin run to be done without Mr Richardson immediately after Mr Richardson indicated on Friday 16 March 2012 that he would no longer do it. The evidence indicates, and I find that Mr Richardson did three trips to Gingin, all before 16 March 2012, and none afterwards.

23 Mr Phatouros arranged for Mr Richardson and Mr Cole to meet, which they did on 19 March 2012. During that meeting, Mr Richardson affirmed his previous advice that he was not interested in doing the Gingin run at the rate of $400. Mr Cole undertook to consider reviewing the rate, however, he stressed to Mr Richardson the need for him to be part of the team and work in the arrangement including Gingin.

24 The following day, on Tuesday 20 March 2012, Mr Cole sent Mr and Ms Richardson an email in the following terms (formal parts omitted):

> Greg thanks for coming in last night, I will reiterate my thoughts.
>
> 1) The position here is that we need 4 trucks to manage GinGin, not 3.
>
> When we re-arranged the logistics, which was driven by my lack of confidence in the viability or sustainability of Willis's job, we planned around giving more work to each of 4 trucks (one of which is yours).
>
> That logistics need still exists. Our 4 prime movers need to do GinGin.
>
> I have revisited the rate and it seems more than fair, and we will not be reviewing it any time soon.
>
> The position we have is that we need your (or our 4th) truck to be part of this new arrangement.
>
> I understand your concerns about an extra 7 hours work affecting your lifestyle, but at present I have no option but to require your truck to do its share of our total long distance operation. I would also respect your decision not to work it the extra hours. However if not I would have to engage another Contractor in your place, in our complete long distance system. Please get back to me on this.
>
> 2) We also need a key left near your truck, for obvious reasons as explained.
>
> 3) Please look into your insurance as promised for maximum flexibility.
>
> 4) We need your dockets to assist our Admin by 8:00am Mondays. Late dockets hold us up no end.
>
> 5) Get back to us on GinGin.
>
> (Exhibit A2)

25 Mr Richardson replied that evening as follows (formal parts omitted):

> In response to your email, I advise the following.
>
> 1. The verbal contract between Shacam Transport and Damien Cole Group in December 2010 was for the South/West runs in your long distance operation. Additional runs were never discussed.

2. The Gin Gin run extends the hours and that is both, unacceptable and unwanted. I am currently working in excess of 60 hours per week.
3. The rate offered for the Gin Gin run does not cover the costs of an owner driver for wages/ super /fuel/ maintenance.
4. Further to the meeting 19th March 2012 - I have liaised with my Insurance company. They advise that prior to driving, any intended driver is to complete a Driver's Declaration for approval by the insurance company. If this is not complied to, and information is not disclosed, it could prejudice the outcome of any claims.
5. In keeping with the Heavy Haulage Accreditation for my truck and the Occupational Health and Safety Act – Prior to driving the truck, any driver must provide a current medical certificate, copy of driver's licence and complete/or have proof of completion of the Driver Fatigue Management Online Assessment. Non compliance can result in fines of $5000 for the driver, $25000 for Owner/Driver and in excess of $60000 for companies.
6. Taking the above reasons into consideration, I stand by my decision not to undertake in the additional Gin Gin run.
7. You state in your email that if my decision is to not participate in the Gin Gin run, that you will engage another contractor to take my place in the complete long distance system. I believe this action contradicts your Company Philosophy, Values and Business Model that you gave me a copy of on commencement of my contract.

(Exhibit A3)

26 The evidence of Mr Phatouros and Ms Phatouros is that Mr Richardson was not as readily available on the telephone as other drivers. He would not answer the phone nor would he quickly return calls when required.

27 Mr Cole says he became concerned that communications between Mr Richardson and DCG personnel were breaking down so he wanted to have a discussion with Mr and Ms Richardson to sort things out. He was concerned that if Shacam did not participate in the roster including the Gingin run, it would create real difficulties for the operation of the roster and, I believe, potentially harm the co-operative arrangements amongst drivers. At Mr Cole's instigation, a meeting was arranged for late on Tuesday 27 March 2012.

28 On Monday 26 March 2012 at 10.46 am, Mr Cole wrote the following email to Mr and Ms Richardson (formal parts omitted):

> I believe the communication between us has been either lost, not working or been unclear from the start.
>
> The reason for the meeting tomorrow is to communicate better. If I have failed to communicate the values of this organisation to you, then I re-iterate them to you, and my expectations of our people and our contractors.
>
> Put simply, this is how we work, how we want to work and how we will work.
>
> I do understand that there could be some dissonance between our value systems and yours here. If we have that dissonance it does not make one of us right or wrong. It simply means we should not be working together because of value dissonance. I understand that not everyone can work here under this organisations conditions, and values.
>
> Before the meeting your good self and Greg need to decide whether you want to work with us as a team, with trust and with total cooperation. To me it looks simple, our organisation has an expectation, you need to decide whether you wish to meet it. If you choose not to work with us because of our values etc, then we can meet and discuss an orderly finalisation of your time with us.
>
> We will always uphold our "fairness to all concerned" tradition in any circumstances.
>
> What we won't be doing at the meeting is discussing the (6) items one by one. That is a committee based approach, and cannot work in a trust based organisation, which works for the better good.
>
> We will see you on Tuesday.

(Exhibit A4)

29 Between 16 and 27 March 2012, Mr Richardson removed from the truck all of the DCG signwriting. He says he did this to enable him to do some minor repairs to the panel work and to cut and polish the paint work. He says he intended to have the signwriting reinstated at his own cost, estimated at around $1,000, after the work was done. He did not get a chance to do the work and reinstate the signwriting before DCG terminated the contract on Tuesday 27 March 2012. He did not consult anyone from DCG about the removal before or after he had done it.

30 Mr Phatouros said that on Monday 26 March 2012, he noticed that the signwriting on Shacam's vehicle had been removed. He also received two telephone calls, one from another contractor and one from Talloman, where offal was being dropped off, about the truck having no signwriting.

31 Mr Phatouros also says that on the Monday morning when he drove into the yard, he noticed that neither Shacam's truck nor Mr Richardson's car was there. Whilst he noted that there would be occasions when this occurred, he said that it was unusual, and taken together with the signwriting having been removed from the truck, he wondered what was going on. He discussed the matter with Mr Cole and Mr Cole instructed that he ask Mr Richardson why he had removed the signwriting.

32 On Tuesday 27 March 2012, Mr Phatouros told Mr Richardson that Mr Cole had asked him to speak to Mr Richardson and ask why he had removed the signs. Mr Richardson responded that he had a meeting with Mr Cole that day and he would tell Mr Cole himself. According to Mr Phatouros, Mr Richardson said 'I am not talking to you, I am talking to Damien'.

33 Mr Phatouros says that there is no reason to remove stickers from the roof unless one is spray painting the whole cab and there was no need at all to remove the signwriting. It would generally not be removed for about five years. Whilst he accepted that

different drivers take different levels of care of their vehicles and some are detailed to a higher standard than others, Mr Richardson's approach in removing the writing at this point was going to a 'real extreme'.

34 Mr Cole says that in the meeting on 16 March 2012 and in his subsequent email, he made it clear to Mr Richardson that it was necessary for him to participate in the Gingin run or he would need to replace Shacam in the entire roster. He says it was not appropriate to have drivers 'cherry-picking' jobs. On Friday 24 March 2012, Mr Phatouros had told him that some of the signwriting had been removed from Shacam's truck and on the following Monday 27 March 2012, it had all been removed. Mr Phatouros also told him that the truck and the car were not in the yard on Monday, and that he had heard whispers that Mr Richardson had found other work and was possibly leaving.

35 Mr Cole says that the removal of the signwriting was significant. It had never happened before, that taking the brand off the truck was an indication of finalisation of the contract. He says he expected Mr Richardson to leave soon after.

36 He also viewed Mr Richardson's refusal to answer Mr Phatouros' question, asked on his behalf, about the reason for the removal of the signwriting as indicative of a lack of co-operation with the transport manager, and another sign of the relationship breaking down.

Final Meeting

37 There is conflict between the evidence of Mr Cole and Ms Phatouros as to his instructions to her prior to the meeting on Tuesday 27 March 2012. Having considered that evidence, I prefer the evidence of Ms Phatouros. In those circumstances, I find that Mr Cole had formed the view during Monday 26 March 2012, that the relationship with Mr and Ms Richardson had broken down due to the refusal to participate in the Gingin run, the removal of the signwriting, the failure to answer Mr Phatouros' question about that and the coincidence of the absence of both the truck and the car from the yard. I find that up until around the middle of the day, Mr Cole had been hopeful of a resolution, but that in considering these things, he decided to bring the contract to an end. He was ill that afternoon and went home. After discussing a number of scenarios with Ms Phatouros during the day, he asked Ms Phatouros to meet Mr and Ms Richardson and inform them of the decision to terminate the contract and retrieve the keys and the dockets from Mr Richardson.

38 Ms Phatouros met Mr and Ms Richardson that afternoon. Ms Richardson asked why Mr Cole was not coming and Ms Phatouros explained that he was ill. She said that because the signs had been removed and Mr Richardson refused to speak to the manager, that this would be his last day. Ms Richardson asked if they were Mr Cole's exact words and she confirmed that they were. Ms Phatouros then asked Mr Richardson for the keys and for the dockets. He refused to hand over the keys, saying that 'if Damien wants the keys he can contact me'. Ms Richardson said to Mr Richardson to hand over the keys. He said no, and left.

Conclusions – RFT 13 of 2012

39 In cases of commercial agreements of indefinite duration, it is appropriate to imply a term requiring reasonable notice of termination, (*Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438). This is 'to enable the parties to bring to an end in an orderly way a relationship which, ex hypothesi, has existed for a reasonable period so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship' (448).

40 The question in this matter is whether Shacam breached the contract with DCG such as to enable DCG to bring the contract to an end without notice, or whether reasonable notice was due.

41 I find that while Shacam was a separate corporate entity to that of DCG and operated under a contract, part of that relationship was in fact the integration of Shacam into DCG's operation as were other owner-drivers. There was a significant level of goodwill, trust and co-operation required and existing between them. Shacam was involved in a roster for the south west run and it appears from the evidence of Mr Cole, Mr Phatouros and Ms Phatouros, which I accept, that there was a need for regular communications and flexibility.

42 There was a level of co-operation amongst them all exemplified by the decision of DCG to subsidise the Gingin run to enable Mr Willis to remain and to cover his overheads. However, he was not earning a good income, it was not profitable for DCG and Mr Cole wanted to remedy this. All drivers agreed to work the new arrangement to integrate the Gingin run and Mr Willis into the work. There was a level of trust and regard amongst them all which I believe was reflected in the way in which Mr Richardson agreed to take on the Gingin run.

43 I have no hesitation in accepting the evidence of Mr Phatouros and Mr Willis where it conflicts with that of Mr Richardson. I found Mr Phatouros and Mr Willis to be very reliable and straight forward in their evidence, whereas for reasons set out below, I found Mr Richardson's evidence regarding both the terms of his agreement to do the Gingin run and the reason for and circumstances of the removal of the signwriting implausible.

44 I find that Mr Richardson agreed to do the Gingin run, not on a conditional basis, but on a permanent basis. I find that, as noted in the evidence of Mr Phatouros, he trusted that an appropriate rate would be paid in due course. Further, the arrangement between all of the drivers and DCG was such that, as Mr Cole indicated, there should not have been 'cherry-picking of jobs amongst them' but a co-operative arrangement. As a consequence of the agreement to do the Gingin run, new hydraulics were installed on Shacam's truck.

45 In those circumstances, I find that Shacam agreed to take on the Gingin run, not as part of a trial, not to see how things went, but on the basis that it was part of that new arrangement and that the rate would be worked out. When Mr Richardson was advised that the rate was less than expected, Shacam withdrew from that agreement.

46 In the circumstances, I find that Shacam's refusal to continue in that arrangement constituted a breach of a condition of the contract as it existed at the time (*Poussard v Spiers and Pond* (1876) 1 QBD 410). In the context of the arrangement and the relationships, DCG was entitled to elect to accept the breach and bring the contract to an end, (*Shevill v Builders Licensing*

Board (1982) 149 CLR 620 and *Hill v Canberra Centre Holdings Ltd* (1995) 122 FLR 434) and to indicate that if Shacam was not prepared to participate in the whole roster then DCG would need to consider replacing Shacam in the entire roster. DCG was not prepared to accept part performance of the contract.

47 There were ongoing discussions between them from 16 March 2012 to resolve the issue.

Was the removal of the signwriting a breach of a condition of the contract?

48 The signwriting was placed on Shacam's truck by DCG at its expense after the truck went to work for DCG. The question arises as to whether it was a term of the contract that the signwriting not be removed without agreement.

49 Given that the signwriting, if not the timing of its application, was agreed to by Shacam and was applied at DCG's expense, and identified Shacam's vehicle as part of the fleet undertaking DCG's work, I conclude that a term to require that the signwriting not be removed was reasonable and equitable. It was fair to both parties and would not impose an unnecessary burden or detriment on either of them. The term was necessary to make the contract effective and workable in the context of the parties presumed intentions, that is, that the truck was labelled or branded as part of the DCG fleet, for which it worked exclusively.

50 It was so obvious that it would go without saying that the parties would readily have agreed on such a proposed term if it had been suggested to them during the course of their negotiations.

51 It is capable of clear expression to state that the signwriting would not be removed without the agreement of DCG.

52 The term would not contradict any other term within the contract.

53 These conditions meet the requirements for implying a term into a contract (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337). Therefore, I find that it was a condition of the contract that, once the signwriting was put onto its truck by DCG, Shacam not remove that signwriting without the agreement of DCG. It was essential that the truck be branded as part of DCG's fleet.

54 In coming to this conclusion, I note that the DCG truck, which did regular trips to the port, was not branded for good commercial reasons. I also note that Shacam's truck commenced work for DCG prior to having the signwriting applied, but this was to enable some work to be done on the truck before the signwriting was applied. However, once it was applied, at DCG's expense, it was branded as part of the DCG operation. Any removal of the signwriting would have required discussion as to purpose, timing and reapplication arrangements.

55 Even if it was not a term of the contract, the decision to remove the signwriting was significant. Mr Richardson says in his evidence that he did not think it would be such an issue 'removing a few stickers' (ts 37). An examination of exhibit R2, which was a vehicle similar, if not identical, to that of Shacam's vehicle, indicates that the number of stickers on the truck was close to 50. Its significance was that it integrated the vehicle with the trailer, indicating the integration within DCG of Shacam's vehicle, branding it with the trailer, as DCG's fleet. The significance of the removal is exemplified by two comments being made to Mr Phatouros when the vehicle undertook its run on Monday 26 March 2012 with the stickers removed. The removal was not merely of a few stickers to be later reinstated, but was a clear indication that Shacam was separating itself from DCG, of an intention to no longer be bound by the contract during a period when the parties were negotiating about the future of the relationship, given Shacam's refusal to perform part of the contract.

56 I accept Mr Phatouros' evidence that signwriting is not usually replaced for about five years. The signwriting on this truck had been there for less than one year.

57 I find Mr Richardson's evidence as to the reason for removing the signage to be improbable. Given the timing of the removal of the signwriting, coming as it did after he had refused to further undertake the work on the Gingin run, it seems to be quite a logical extension to, and expression of, the deterioration in the relationship between the parties. Shacam was either preparing to end the relationship with DCG or it was protesting at not being offered a higher rate for the Gingin work and it was a means of attempting to negotiate a higher rate. It was not merely an innocent act undertaken for the purpose of maintaining and upgrading the appearance of the truck. It is not plausible that Mr Richardson would have taken the sign writing off without first discussing it with anyone from DCG and then indicate, for the first time during the hearing, that it was his intention to replace it at his own cost at a later time once some repairs were done.

58 Having considered the evidence of Mr Willis, I note that he was caught in the middle of a friendship with Mr Richardson of many years' standing, and of his loyalty to DCG where he had a contract to work for 10 years. His conflict over the situation was such that he offered to try to settle Mr Richardson's claim against DCG out of his own pocket. I find that it was likely that he was not encouraged to do so by Mr Cole but he thought that it would be in his interests to do so. He had a contract of long standing which he would have been loath to lose because of his friendship with Mr Richardson.

59 I have a great deal of sympathy for Mr Willis and accept his evidence as truthful.

60 The significance of that evidence was that when he and Mr Richardson discussed the possible end of Shacam's contract after the refusal to continue with the Gingin run, Mr Richardson said words to the effect that he would have to remove the leaves, meaning the signwriting, from the truck to enable him to look for other work.

61 That is what Mr Richardson did in the time between receiving the letter or email from Mr Cole about the need to do the Gingin run or that DCG would need to replace Shacam in the entire system.

62 In that context, it is too much of a coincidence to conclude that the signwriting was removed to do some minor repairs and to replace the signwriting soon after.

63 As the removal of the signwriting constituted a serious breach of a condition of the contract, it also entitled DCG to bring the contract to an end. I add that it was not merely the removal of the signwriting which was an issue for the ongoing contract, but it was a sign of Mr Richardson's withdrawal from the co-operation necessary for the operation of the contract.

64 When Mr Phatouros asked Mr Richardson why the stickers had been removed, Mr Richardson declined to respond, saying that he was meeting Mr Cole and would explain to him. Whilst on its face this might appear to be a perfectly sensible response, it occurred when the parties were in the process of negotiating, and Mr Cole had expressed the view that communications between the two needed to be improved. Mr Richardson's response to DCG's transport manager indicates a refusal to explain that to DCG in circumstances which confirms that he was either separating Shacam from DCG or would be utilising the issue of the signwriting as a negotiating tactic in his discussions with Mr Cole that day.

65 It was also indicative of a breakdown in communications between the parties or a refusal to speak to the person in the position of transport manager, to whom Mr Cole had left much of the management of the business following his semi-retirement some time earlier.

66 In the circumstances, I find that Shacam breached the contract with DCG by refusing to perform part of the contract. Secondly, in removing the signwriting from the truck, Shacam confirmed an intention to no longer be bound by the contract, entitling DCG to bring the contract to an end without notice. Whilst Mr Cole's email to Mr and Ms Richardson indicated that if Shacam was not prepared to participate in the Gingin run then he would need to replace Shacam in the entire operation, he also indicated that they would need to discuss an orderly end to the arrangement. An orderly end would have involved sufficient time for both parties to make alternative arrangements, including Shacam continuing to participate in the roster. Mr Richardson's refusal to do the Gingin run and the removal of the signwriting meant that this was not practicable and the relationship had broken down beyond the point where there could have been a co-operative working arrangement to enable them to part ways amicably and to bring the arrangement to an orderly conclusion. In removing the signwriting, Mr Richardson jumped the gun and prevented the contract coming to an orderly conclusion.

67 Therefore, I conclude that Shacam's claim for pay in lieu of notice ought to be dismissed.

Unauthorised Deduction

68 As to Shacam's claim regarding the amount of $2,420 being deducted from the final payment, this amount was for the cost of the hydraulics and their installation onto Shacam's truck. There was no discussion regarding the cost being charged to Shacam.

69 The *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*, Schedule 1 (the Code of Conduct 2010) at clause 10(1), prohibits the deduction of any amount of money payable by the hirer to the owner-driver except in certain circumstances. Clause 2 provides that the deduction is authorised if certain conditions apply including that the hirer has given written notice to the owner-driver, not less than 14 days before the deduction is made, setting out certain information.

70 In this case, the deduction was made and the notification was provided at the termination of the contract. The notice required by clause 2 was not given, in a breach of the Code of Conduct.

71 In those circumstances, and in accordance with section 47 of the *Owner-Drivers (Contracts and Disputes) Act 2007*, I intend to order that DCG pay to Shacam the amount of $2,420 within seven days.

RFT 3 of 2013

72 DCG has sought damages in respect of Shacam's breach of the contract. DCG says that it wishes to consider the matter further upon the findings of breach before pursuing this matter. DCG is to advise the Tribunal within seven days of its intentions in that regard.

2013 WAIRC 00294

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	SHACAM TRANSPORT PTY LTD
	APPLICANT
	-v-
	DAMIEN COLE PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 MAY 2013
FILE NO/S	RFT 13 OF 2012
CITATION NO.	2013 WAIRC 00294

Result	Referral granted in part
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr J Uphill

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr J Uphill on behalf of the respondent, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007* hereby orders:

1. THAT Damien Cole Pty Ltd pay to Shacam Pty Ltd the amount of $2,420 no later than seven days from the date of this order.

2. THAT the referral otherwise be and is hereby dismissed.

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