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FULL BENCH—Proceedings for Enforcement of Act—

2013 WAIRC 00310

APPLICATION UNDER S. 84A OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2013 WAIRC 00310
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	:	TUESDAY, 21 MAY 2013
DELIVERED	:	FRIDAY, 24 MAY 2013
FILE NO.	:	FBM 2 OF 2013
BETWEEN	:	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Appellant AND BENJAMIN JONES B.L. JONES & A.T. STEPHENS Respondent

Catchwords	:	Industrial law (WA) - application by Registrar under s 84A of the *Industrial Relations Act 1979* (WA) for enforcement of an order of the Commission - employer contravened or failed to comply with consent order to pay amounts specified in the order to an ex-employee - contravention proved
Legislation	:	*Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 32, s 84A, s 84A(1)(b), s 84A(5).
Result	:	Finding made
Representation:		
Applicant	:	Mr R J Andretich (of counsel) and Ms S L Mason
Respondent	:	No appearance
Solicitors:		
Applicant	:	State Solicitor's Office

Reasons for Decision

FULL BENCH:

The application

1 This is an application for the enforcement of an order of the Commission, brought pursuant to s 84A of the *Industrial Relations Act 1979* (WA) (the Act). The order was made in application U 225 of 2012: ***Courtney Mays v Benjamin Jones B L Jones & A T Stephens*** [2013] WAIRC 00084; (2013) 93 WAIG 180. Application U 225 of 2012 was made under s 29(1)(b)(i) of the Act on 19 October 2012. Ms Mays claimed that she had been unfairly dismissed by the respondent, whose name is Benjamin Jones trading as B L Jones & A T Stephens.

2 Application U 225 of 2012 was allocated to Chief Commissioner A R Beech and on 6 November 2012, the Chief Commissioner listed the matter for a conciliation conference pursuant to s 32 of the Act on 15 February 2013. The order was made by the Chief Commissioner at the conclusion of the conciliation conference convened on 15 February 2013. The order records that:

(a) at the conciliation conference agreement was reached in full and final settlement of all matters arising from the termination of Ms Mays' employment;

(b) it was agreed that Ms Mays would withdraw her application and that Mr Benjamin Jones would pay to Ms Mays the total sum of $5,000 in instalments; and

(c) the order was made by consent.

3 The order provides:

Mr Benjamin Jones, of 17 Neale Place, Cooloongup, Western Australia pay to Courtney Mays c/o MDC Legal -

(a) the sum of $3,000 net of tax on or before Friday, 15 March 2013.

(b) the sum of $2,000 net of tax on or before Friday, 12 April 2013.

4 In a letter to the Registrar dated 4 April 2013, Ms Mays' solicitors, MDC Legal, requested that the Registrar initiate enforcement proceedings. MDC Legal informed the Registrar that prior to the conciliation conference there had been an informal agreement made between the parties to settle Ms Mays' claim and that Benjamin Jones had not complied with either the original informal agreement or the terms of the order made by the Chief Commissioner.

5 On 19 April 2013, MDC Legal wrote to the Chief Commissioner requesting that the Chief Commissioner make a direction to the Registrar to initiate enforcement proceedings against Benjamin Jones.

6 On 23 April 2013, the Chief Commissioner made a direction pursuant to s 84A(1)(b) of the Act to the Registrar directing her to make an application in the prescribed manner to the Full Bench for the enforcement of the order.

7 Pursuant to the direction given by the Chief Commissioner, the Registrar made this application to the Full Bench on 3 May 2013. Contained within the application was a summons to the respondent to appear before the Full Bench of the Commission in court 3 on the 18th floor on Tuesday, 21 May 2013 at 2:15 o'clock in the afternoon. Attached to the application was a schedule setting out the facts that the Registrar relied upon to prove the breach of the order.

8 The Registrar filed a statutory declaration of service made by Sally Leeanne Mason on 8 May 2013 that the notice of application to enforce was served upon the respondent by ordinary post on 8 May 2013.

9 When this application came before the Full Bench for hearing on 21 May 2013, there was no appearance made by the respondent.

10 After hearing from Mr Andretich on behalf of the Registrar, and after reviewing all of the documents attached to the Registrar's application, the Full Bench informed the Registrar that:

(a) it was satisfied that Benjamin Jones had contravened or failed to comply with the order;

(b) it was of the opinion that prima facie an appropriate penalty for breach of the order should be a fine, but it was of the view that Benjamin Jones should be given 21 days from the date of the issue of these reasons for decision to pay the sums set out in the order; and if that was done it was of the view that a caution should be imposed; and

(c) if the total amount of $5,000 is not paid to Ms Mays within the time specified by the Full Bench, a fine would be imposed.

11 The Full Bench then sought a submission from the Registrar about the quantum of a fine that should be imposed. There was some discussion then about the maximum amount of the penalty being $500. The Registrar provided instructions to Mr Andretich that she was of the view that the maximum penalty should be imposed and no order for costs was sought. Subsequent to the hearing, it became clear to the members of the Full Bench that s 84A of the Act provides a maximum penalty of $2,000 in the case of an employer as s 84A(5) provides as follows:

On the hearing of an application under subsection (1) the Full Bench may —

(a) if the contravention or failure to comply is proved —

(i) accept any undertaking given; or

(ii) by order, issue a caution or impose such penalty as it considers just but not exceeding $2 000 in the case of an employer, organisation, or association and $500 in any other case; or

(iii) direct the Registrar or a deputy registrar to issue a summons under section 73(1);

or

(b) by order, dismiss the application,

and subject to subsection (6), in any case with or without costs, but in no case shall any costs be given against the Minister, the Registrar, a deputy registrar, or an industrial inspector.

12 On the expiration of 21 days of the date of these reasons, and upon being informed by the Registrar as to whether the sums set out in the order have been paid by the respondent, the Full Bench will make a decision as to the imposition of a penalty. As set out above, if members of the Full Bench receive information from the Registrar that the sums have been paid, it will issue a caution. If, however, it receives information that the sums have not been paid, it will impose a fine and at that time it will determine the quantum of a fine that it considers fit.

2013 WAIRC 00368

APPLICATION UNDER S. 84A OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00368
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 21 MAY 2013
DELIVERED	**:**	WEDNESDAY, 19 JUNE 2013
FILE NO.	**:**	FBM 2 OF 2013
BETWEEN	**:**	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND BENJAMIN JONES B.L. JONES & A.T. STEPHENS Respondent

Catchwords	**:**	Industrial law (WA) - application by Registrar under s 84A of the *Industrial Relations Act 1979* (WA) for enforcement of an order of the Commission - employer contravened or failed to comply with consent order to pay amounts specified in the order to an ex-employee - contravention proved - fine imposed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 84A
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr R J Andretich (of counsel) and Ms S L Mason
Respondent	**:**	No appearance
Solicitors:		
Applicant	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Mays v Benjamin Jones B L Jones & A T Stephens [2013] WAIRC 00084; (2013) 93 WAIG 180

The Registrar of the Western Australian Industrial Relations Commission v The State School Teacher's Union of WA (Inc) [2008] WAIRC 00270; (2008) 88 WAIG 333

Supplementary Reasons for Decision

FULL BENCH:

1 In our reasons for decision issued on 24 May 2013 ([2013] WAIRC 00310) we stated that we were satisfied that the respondent had contravened or failed to comply with an order made by Beech CC in ***Mays v Benjamin Jones B L Jones & A T Stephens*** [2013] WAIRC 00084; (2013) 93 WAIG 180. We also found that on the expiration of 21 days from the date of the reasons of this Full Bench if informed by the Registrar that the sums of $3,000 and $2,000 net of tax had not been paid by the respondent to his former employee, Ms Mays, as required by the order made by Beech CC, the Full Bench would impose a fine on the respondent and determine the quantum of a fine that it considers fit.

2 Whilst there has been no appearance on behalf of the respondent in these proceedings, we are satisfied that the respondent has been served with the reasons for decision given by this Full Bench on 24 May 2013.

3 The Full Bench was informed by the Registrar on 18 June 2013 that the sums have not been paid. The Full Bench is now called upon to impose an appropriate fine on the respondent.

4 The purpose of s 84A of the *Industrial Relations Act 1979* (WA) (the Act) is not just to enforce an order made by the Commission in the sense of trying to coerce or ensure compliance with particular orders of the Commission or sections of the Act. The focus of s 84A is also to reinforce the requirement for parties to comply with the Act and the orders of the Commission and to allow the Commission to publicly admonish and impose sanctions against transgressors. Consequently, the purpose of s 84A is similar to an application for contempt of court: ***The Registrar of the Western Australian Industrial Relations Commission v The State School Teacher's Union of WA (Inc) (SSTU)*** [2008] WAIRC 00270; (2008) 88 WAIG 333 [70] - [71] (Ritter AP), [168] (Smith SC).

5 The maximum fine that can be imposed on an employer for a breach of an order of the Commission is $2,000. This amount is low in an absolutist and comparative way. This maximum amount has stood unamended by any increase since s 84A was inserted in the Act in 1984: ***SSTU*** [90] - [91] (Ritter AP).

6 As no submission has been made that the respondent has on any previous occasion breached an order of this Commission or a provision of the Act, we are of the opinion the maximum fine should not be imposed. However, this factor appears to be the only mitigating factor, as the respondent has on at least two occasions agreed to pay the outstanding sums to Ms Mays, but has failed to do so. For this reason, we are of the opinion that an appropriate penalty is the imposition of a fine of $750.

7 We intend to issue an order that the contravention of the order made by Beech CC on 15 February 2013 ([2013] WAIRC 00084; (2013) 93 WAIG 180) is proved. Our order will also require that the respondent pay the fine within seven days of the date of the order and that the fine be paid to the Registrar.

2013 WAIRC 00377

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	BENJAMIN JONES
	B.L. JONES & A.T. STEPHENS
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 25 JUNE 2013
FILE NO.	FBM 2 OF 2013
CITATION NO.	2013 WAIRC 00377

Result	Contravention proved, fine imposed
Appearances	
Applicant	Mr R J Andretich (of counsel) and Ms S L Mason
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on Tuesday, 21 May 2013, and having heard Mr R J Andretich (of counsel) and Ms S L Mason on behalf of the applicant and there being no appearance on behalf of the respondent, and reasons for decision having been delivered on 24 May 2013 and supplementary reasons for decision having been delivered on 19 June 2013, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The contravention is proved.
2. The respondent is within seven (7) days of the date of this order to pay a penalty of $750 to the Registrar of the Western Australian Industrial Relations Commission.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2013 WAIRC 00767

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00767
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 8 AUGUST 2013
DELIVERED	**:**	TUESDAY, 27 AUGUST 2013
FILE NO.	**:**	FBM 1 OF 2013
BETWEEN	**:**	THE MASTER PAINTERS, DECORATORS AND SIGNWRITERS' ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) Applicant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	Industrial Law (WA) - application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - name of organisation - qualification of persons for membership
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 53, s 54, s 54(1)(b), s 55, s 55(2), s 55(4), s 55(4)(b)(ii), s 59, s 59(2), s 62(2), s 62(3)(b)(i), s 62(4); *Fair Work (Registered Organisations) Act 2009* (Cth).
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr M Thomas

Reasons for Decision

THE FULL BENCH:

Introduction

1 This application by The Master Painters, Decorators and Signwriters' Association of Western Australia (Union of Employers) (the applicant) was filed on 25 January 2013. The applicant, as a registered organisation, seeks the authorisation of the Full Bench, pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act), for the Registrar to alter the rules of the applicant:

(a) by altering the name of the organisation to Master Painters and Decorators Australia (Industry Association) in r 1; and

(b) to alter the qualifications of persons for membership in r 4 – Scope and Extent of the Painting and Decorating Industry and r 6 – Membership.

2 After hearing from the applicant on 8 August 2013, the Full Bench informed the applicant it would make an order to dismiss the application. These reasons set out the reason why the Full Bench made that decision.

(a) Change of Name

3 The reason why the applicant seeks a change in its name is outlined in a notice the applicant sent to members on 17 December 2012. In that notice, the applicant states that:

(a) The WA Association is no longer a member of Master Painters Australia which is a body registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) and therefore cannot trade as 'Master Painters Australia WA Association'.

(b) The applicant has registered a new business name of Master Painters and Decorators Australia and it is pertinent to change the official name of the association in line with the new trading name and to allow the association to possibly expand nationally in the future.

(c) The removal of 'Union of Employers' from the name of the applicant would allow the association to add to its current membership categories to include painter and apprentice members.

(b) Eligibility for membership – r 4 and r 6

4 The applicant seeks to vary r 4 which sets out the scope and extent of the painting and decorating industry. Rule 4 currently specifies a number of particular substances which can be used in the painting process. The proposed variations seek to broaden the definition of painting to include all facets of the industry, to broaden the scope of painting processes and to incorporate any future developments in processes that are adopted by the industry.

5 The changes sought to r 6 of the applicant's rules are various. The changes sought to r 6 were put to the members in two notices. The first notice was sent to the members on 17 December 2012. A second notice was sent because the Registrar raised a number of errors made in the first notice and in the comparison document showing the alterations sought. The second notice and another comparison document were sent to members on 1 March 2013.

(c) The variations sought by the applicant

6 Pursuant to s 55(2) and s 62(4) of the Act, the Registrar is required to publish in the Industrial Gazette any alterations sought to the rules of an organisation that relate to the qualification of persons for membership. The notice published by the Registrar in the Industrial Gazette on 26 June 2013 sets out the variations proposed by the applicant to r 1, r 4 and r 6 in this application as follows ((2013) 93 WAIG 553):

Proposed Rule 1

1 - NAME

The Association shall be known as '~~The~~ Master Painters~~,~~ **and** Decorators ~~and Signwriters Association of Western~~ Australia ~~(Union of Employers)~~**(Industry Association)**' hereinafter referred to as 'The Association'.

Proposed Rule 4

4 – SCOPE AND EXTENT OF THE PAINTING AND DECORATING INDUSTRY

Painting and Decorating work shall be deemed to be the ~~work and~~ processes **and application by any method recognised or adopted by the painting trade** as described in the following clauses but shall not be limited to or by these clauses.

Painting:

~~Means the application by any method recognised or adopted by the painting trade of paint, varnish or stain or any substance or preparation of a composition similar thereto or recognised by the said trade as a substitute therefor to the whole or any part of a building or other structure of a kind recognised by law as a fixture (but not being a floor, path or drive-way composed of concrete or other similar substance) and -~~

~~(a) includes such processes or treatments as are commonly known to the said trade as graining, kalsomining, marbling, distempering, gilding, colour washing, staining, varnishing and plastic reliefing;~~

~~(b) includes the hanging of wall paper and any substitute therefor;~~

~~(c) does not include painting which consists of the application of a protective coating to part of a building or structure (not being a dwelling house or like building or structure) which has first been treated by a process known as abrasive blasting or mechanical cleaning under a contract whereby the same contractor undertook both that process and the application of the protective coating.~~

Includes such processes as the applications of coatings or treatments as are commonly known to the painting trade.

Includes the hanging of wall coverings and any relevant products.

Proposed Rule 6

6 - MEMBERSHIP

6.1 Eligibility

Any person, firm, company or corporation who **is actively involved**~~, or which, is or is usually an employer within the meaning of the Industrial Relations Act 1979, or a sole trader working in, or in connection~~ with ~~all or~~ any facet of the Painting Industry ~~described in Rule 4 of these Rules~~, shall be eligible for membership.

6.2 Classes of Membership

There shall be classes of membership of the Association as follows:-

Voting Members

~~Ordinary Members~~ Master Painter Metropolitan Members

~~Country Members~~ Master Painter Regional Members

~~Industry Members~~

Life Members

~~Teaching Members~~

Retired Members

Teaching Members

Non-Voting Members

Associate Members

Apprentice Members

Affiliate Members

all of whom shall, unless the context otherwise requires, be included in any reference to 'member' wherever appearing in these Rules and Constitution.

6.3 ~~Ordinary~~**Master Painter Metropolitan** Members

~~Ordinary~~**Metropolitan** members of the Association shall comprise those individuals, sole traders, partnerships, companies or other legal entities carrying on a bona fide painting contracting business and the proprietor/principal/nominee of which shall hold a registration**/licensing** certificate where applicable issued by the appropriate statutory authority.

Such members may be admitted to the Association upon the endorsement of the Executive Committee.

6.4 ~~Country~~**Master Painter Regional** Members

~~Country~~**Regional** members of the Association shall comprise those individuals, sole traders, partnerships or other legal entities who or which meet the criteria for ~~ordinary~~**metropolitan** membership defined in Clause 6.3 but whose business is operated outside ~~the boundaries of the 26 Perth Metropolitan Regional Shires~~**a 100km radius of the State GPO**.

Such members may be admitted to the Association upon the endorsement by the Executive Committee.

~~6.5~~**6.8** ~~Industry~~**Associate** Members

~~Industry~~**Associate** members of the Association shall comprise those individuals, sole traders, partnerships, companies or other legal entities carrying on a bona fide business actively engaged in manufacture, distribution and/or servicing of the painting industry interpreted in its broadest sense, and on the endorsement of the Executive Committee, may be admitted to the Association as ~~Industry~~**Associate** Members.

~~Industry~~**Associate** members shall be ineligible to hold office, exercise voting rights or **use or** display emblems of the Association **without the prior consent of the Association. Only the primary company holding the Associate membership is permitted to use the logo with prior consent.**

~~6.6~~**6.5** Life Members

In recognition of faithful services rendered to the Association and/or the painting industry by ~~an ordinary~~ **a** member, a General Meeting may elect such a member as a Life Member of the Association.

Every nomination for the appointment of a Life Member shall be submitted to the Executive Committee in writing and accompanied by not less than three testimonials in support of such application.

Because Life Membership is the highest honour which the Association may bestow upon a member, the conferring of Life Membership ~~shall be restricted to not more than one nominee per annum and such nomination~~ must be submitted to the Annual General Meeting of members each year for approval by that meeting.

Life Membership shall entail all the privileges and rights of ~~ordinary~~**Master Painter** membership of the Association without payment of fees, subscriptions, dues or levies.

6.7 Teaching Members

Any person who is an approved instructor, teacher or lecturer ~~in the School of Painting of the W.A. Department of Technical & Further Education or any person holding a similar position at any private institution either secondary or tertiary in nature~~, **at a registered training organisation,** may apply to the Association for teacher membership. Every application for ~~teacher~~**teaching** membership shall include details of the qualifications held, and ~~the establishment or establishments at which tuition is currently being given~~**confirmation of place of employment**.

Upon endorsement by the Executive Committee such persons may be admitted to membership as Teaching Members.

~~Teaching members shall be ineligible to hold office or exercise voting rights.~~

~~6.8~~**6.6** Retired Members

For the purposes of this clause a Retired Member is a person, sole trader, nominee of a company or other legal entity who has sold or otherwise relinquished control or has ceased to exercise control of a painting contracting organisation previously enrolled with the Association as ~~an Ordinary~~**a Master Painter** member. An application for retired membership must be made in writing to the Executive Committee and subject to the acceptance of that Committee may be admitted to the Association as a Retired Member. **As financial members, Retired Members retain their voting rights.**

6.9 Apprentice Members

Any person who is undertaking a certified apprenticeship in painting and decorating with a registered training organisation, may apply to the Association for apprentice membership. Every application for apprentice membership shall include details of course enrolment and confirmation of the registered training organisation.

Upon endorsement by the Executive Committee such persons may be admitted to membership as apprentice members.

Apprentice Members shall be ineligible to hold office or exercise voting rights.

6.10 Affiliate Member

Any person who is affiliated with the painting industry as defined in Section 4, may apply to the Association for affiliate membership. Every application for affiliate membership shall include details of involvement with the painting industry.

Upon endorsement by the Executive Committee such persons may be admitted to membership as affiliate members.

Affiliate Members shall be ineligible to hold office or exercise voting rights.

6.~~9~~**11** Admission to Membership

Admission to membership of the Association shall be conditional upon compliance with the following:

~~(a)~~ ~~Members of the Association as at present constituted at the time of the meeting adopting these Rules creating the classes of membership shall be and subject to these rules shall continue to be members of the Association in the applicable category for such membership.~~

~~(b)~~**(a)** All new applicants for membership shall lodge with the ~~Director~~**Association**~~,~~ ~~a signed application on an approved~~ **the appropriate** form ~~together with a nomination fee (if applicable)~~ and subscription. ~~The Director shall submit every~~ **Every** application ~~received~~ **will be submitted** to the Executive Committee which shall review the suitability of the applicant and shall:

(i) Accept the application

(ii) Reject the application

~~(iii)~~ ~~Defer action in terms of (i) and (ii) pending further enquiries being made except that action in terms of (i) and (ii) shall not be delayed beyond the next schedule meeting of the Executive Committee.~~

~~(c)~~**(b)** An application by a firm, company or corporation shall nominate a representative to the Association who shall be a person acceptable to the Executive Committee. The person so nominated shall represent the firm, company or corporation if admitted to membership. The representative shall attend meetings and vote as for the firm, company or corporation he represents and the term Member shall also mean the representative of the Member. In the event of the representative ceasing to represent the firm or company a further representative ~~acceptable to the committee shall~~**must** be nominated by the firm, company or corporation.

6.~~10~~**12** Members Bound by the Rules and Constitution

Every applicant for membership shall, on acceptance as a member of the Association, be bound by the Rules and Constitution of the Association ~~in force from time to time and until he shall have formally resigned his membership in terms of rule 6.12 or his membership terminated in terms of rule 6.13~~.

6.~~11~~**13** Violation of the Rules and Penalties ~~Therefor~~

(a) The Executive Committee shall be empowered to recommend to General ~~Meeting~~**Membership**, supported by reasons in writing, the expulsion, suspension or fine of any member on proof to the satisfaction of the Committee that such member has been guilty of:

(i) Failing to observe, or the commission, of any breach of any of these Rules or of the Code of Conduct or refusal to carry out any **reasonable** order or direction of the Committee~~ or of any General Meeting in accordance with these Rules~~.

(ii) Divulging or making known or making use of correspondence, business, or information gained in a privileged position either as a member or officer of the Association to the advantage of the member or officer to the detriment of the Association or any members.

(b) The Procedure for dealing with charges against a member for violation of the Rules shall be as follows:-

(i) Any charge against any member shall be in writing signed by the person laying the charge, or by the Director acting on behalf of a member or members at his or their request.

(ii) Upon notification by the ~~Director~~**Chief Executive Officer** that a charge has been laid against a member, the Executive Committee shall cause a notice to be sent by ~~Certified~~**Registered** Mail to the member complained against at his address as shown in the Register of Members, ordering him to attend before the Executive Committee to answer the charge at a Meeting of the Executive Committee called for that purpose and shall also send a copy of such notice to the person laying the charge if other than the ~~Director~~**Chief Executive Officer** and such notice shall be sent not less than 7 clear days before the time appointed for the meeting.

(iii) The ~~Director~~**Chief Executive Officer** shall upon application by either party send a notice to any other member to appear and give evidence providing that such application is made 3 clear days before the date of the hearing of the charge. Should either of the two parties fail to attend, the Committee shall take evidence and decide the case as if all parties were present. The member charged shall remain in attendance while all evidence given against him is taken and shall be given full and complete opportunity to answer the same and to ask questions of all witnesses.

(iv) If after hearing the evidence the Committee shall be of the opinion that the charge is sustained, ~~it shall recommend such penalty as it thinks fit to the next General Meeting or to a Special General Meeting convened (inter alia) for the purpose of considering the Executive Committee recommendation~~ **the Chief Executive Officer shall cause a notice to be sent by Registered Mail to the member charged at the said address**.

~~(v) Upon the resolution of General Meeting to approve, amend or reject the recommendation of the Executive Committee in respect of penalty the Director shall thereupon cause notices of such resolution to be sent to the member charged at the said address by Certified Mail.~~

(c) Effect of Expulsion and Suspension or Fine

(i) Any expelled member shall forfeit all claim he may have upon the funds or property of the Association and shall remain liable for all subscriptions or other monies due by him to the date of his expulsion.

(ii) No member expelled, suspended or fined shall be entitled to take any action or proceeding whatsoever against the Association for or in respect of any such fine, suspension or expulsion.

(Rule 6.12 disallowed as of 22/1/96 Appl 1326 Order by the President)

~~6.12 Resignation of Membership~~

~~Any member shall be entitled to resign from membership of the Association upon giving at least three months written notice to the Director, or by payment of three months membership fees in lieu of notice, but such resignation shall not be effective until such member has paid all fees, fines, levies or other dues payable by him under these rules to the end of the period covered by such notice and obtains a clearance in writing which thereupon shall be issued by the Director. Upon his resignation taking effect a member shall cease to be bound by and to have any rights under these Rules and must forthwith remove all emblems or other indication of membership from vehicles, documentation, advertising or wherever elsewhere displayed~~.

6.~~13~~**14** Termination of Membership

(a) If a member ceases to be eligible as a member of the Association his membership shall be terminated.

(b) Where there is a reported alteration in the constitution of a member whether it be the formation or dissolution of a partnership or the formation or winding up of a company the ~~Director~~**Chief Executive Officer** shall make appropriate investigations and recommend:

(i) that existing membership or memberships should continue in changed nomenclature

(or)

(ii) that existing membership or memberships be terminated.

(c) If any member becomes bankrupt assigns his estate for the benefit of his creditors (or in the case of a partnership is dissolved or in the case of a company is wound up except for the purpose of reconstruction or amalgamation) such membership shall be terminated.

(d) If any member fails to pay all outstanding dues by the last day of the Association's Financial Year such membership shall be terminated without prejudice to any action initiated in terms of Rule ~~7.5~~**7.4**.

(e) Recommendations for termination of membership in terms of Rule ~~6.13~~**6.14** (a) - (d) shall be submitted by the ~~Director~~**Chief Executive Officer** to the Executive Committee for approval and the decision of Executive Committee shall be recorded in the Minutes of such Executive Committee Meeting.

6.~~14~~**15** Expulsion from Membership

Any member committing an offence against these Rules as herein provided may be expelled after such notice and upon such conditions as are set out in Rule 6.~~11~~**13**.

6.~~15~~**16** Register of Members

The ~~Director~~**Chief Executive Officer** ~~shall cause to be kept in one or more books~~ **will keep** a register of ~~the members of the~~ Association **members**~~with relevant particulars thereof including the name and address of the member and the name of the representative~~ **as outlined in Rule 10.2(d)(i)**.

Proposed Variations do not comply with the requirements of the Act

7 When the changes which are proposed to r 1, r 4 and r 6 are examined, it is clear that a number of alterations proposed by the applicant do not comply with the provisions of the Act.

8 It is apparent from the explanations given to the members and from the text of the variations sought, that the applicant seeks to not only change the name of its organisation, but also its eligibility rules to enable it to enrol not only employers but some categories of employees as affiliate members and apprentice members who would not be eligible to hold office or exercise voting rights. They also seek to create an undefined class of non-voting members. In our opinion, it is not appropriate to authorise the registration of these proposed variations as under the scheme of the Act, organisations can only be registered to enrol employers or employees, but not both.

9 In the variations proposed to the name of the applicant, it is proposed that all references to the association being an organisation of employers be deleted. Such a change is not authorised by the provisions of s 54 and s 59 of the Act. Under

s 59(2) of the Act, all organisations must clearly indicate in their name whether they are an organisation of employers or an organisation of employees. Nor are the proposed variations to r 6.1 authorised by s 54 of the Act. The proposed variations to r 6.1 propose:

(a) the deletion of the criteria of eligibility requiring that each class of members must be usually an employer or within the meaning of the Act; and

(b) the creation of the two new classes of apprentice members and affiliate members who would not be employers.

10 The Act does not contemplate that a registered employer organisation can enrol employees. Nor does it contemplate a registered employee organisation that is eligible to enrol employers. The scheme of creating and maintaining separate industrial organisations for employers and employees is made clear by the provisions of s 53, s 54 and s 59 of the Act. These provisions provide as follows:

53. Organisations of employees, which can be registered

(1) Subject to this Act, any unregistered organisation consisting of not less than 200 employees associated for the purpose of protecting or furthering the interests of employees may be registered by authority of the Full Bench.

(2) Subject to this Act, an unregistered organisation consisting of less than 200 employees may be registered by authority of the Full Bench if the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration.

54. Organisations of employers, which can be registered

(1) Subject to this Act, an unregistered organisation consisting of 2 or more employers who —

(a) have, in the aggregate throughout the 6 months immediately preceding the date of application for registration employed on an average, taken per month, not less than 200 employees; and

(b) are associated for the purpose of protecting or furthering the interests of those employers,

may be registered by authority of the Full Bench.

(2) Subject to this Act an unregistered organisation that does not comply with subsection (1)(a) may be registered by authority of the Full Bench if the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration.

59. Names of registered organisations, restrictions on

(1) The Full Bench shall not authorise the registration of an organisation under a name identical with that by which any other organisation has been registered or which by reason of its resemblance to the name of another organisation or body or for any other reason is, in the opinion of the Full Bench, likely to deceive or mislead any person.

(2) The registered name shall clearly indicate whether the organisation is an organisation of employers or an organisation of employees.

(3) This section does not prevent the Full Bench from authorising an organisation to which a certificate has been issued under section 71 to change its name so as to correspond with the name of its counterpart Federal body under that section.

11 Organisations of employers can only be registered under s 54(1)(b) of the Act if an organisation consists of two or more employers who are associated for the purpose of protecting or furthering the interests of those employers. This provision does not contemplate registration of an organisation of employers that protects interests of persons other than employers.

Adequate information not given to members of proposed variations to r 6

12 Pursuant to s 62(2) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to change the name of an organisation or to alter its rules of eligibility. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation under s 55 of the Act unless it is satisfied that:

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

13 The Registrar, by operation of s 62(4) and s 55(4)(b)(ii) of the Act, is prohibited from registering an alteration to any rule unless reasonable steps have been taken to adequately inform the members of the proposed alteration and the reasons therefor. When the two notices and the attached comparison documents are reviewed, it is clear that not only are there errors in the first comparison document which relate to the proposed variations to r 6, but the way in which the second notice and comparison document is drafted it does not address all of the errors that are contained in the first notice. Also, of importance is the fact that the comparison documents attached to both notices set out the proposed variations in a way that does not clearly reveal the proposed variations that the applicant now seeks in this application before the Full Bench. In the comparison documents given to the members, each current rule was typed in full in black and the proposed alterations were typed in blue in full in a separate paragraph and any explanation was given in a paragraph in red. The difficulty with this form is that the variations proposed by the applicant could not be said to be easily discernible and thus be characterised as adequate within the meaning of s 62(3)(b)(i) of the Act.

14 In addition, some variations set out in the comparison document attached to the first notice are now not being put forward as proposed variations. In the first notice, the applicant informed the members that the reason for changing r 6 was as follows:

6 MEMBERSHIP

The Association is proposing to include two new membership categories being Apprentice Members and Affiliate Members. These two categories allow the Association to represent a greater cross section of the industry and to reach out to those that are passionate and enthusiastic about the painting industry and that are either not qualified to become employers or do not wish to own their own business.

Other changes within this item include minor changes to membership category names and eligibility and procedural changes to reflect the current operational policies and processes of the Association.

15 In the second notice, each member was simply informed that:

As per the comparison document circulated on 17 December 2012 the below highlights the rule in question as it currently stands in blue, followed by the proposed rule in black. The reasons for the changes are highlighted in red with the clarification highlighted in purple.

These changes are typographical in nature and do not significantly alter the constitution in terms of content from the previous notice.

16 In the comparison document attached to the second notice, proposed changes to r 6.1, r 6.2 and r 6.12 were set out. However, no mention was made that the changes which had been sought in the first notice were still to be pursued. In any event, such a statement would not be correct as there was a variation proposed in the first notice to r 6.11(b)(i), which is no longer being sought by the applicant. In the first notice it was proposed that the words 'or by the Director acting on behalf of a member or members at his or their request' would be deleted. Deletion of those words is now not sought in this application. However, members were not informed that such a variation would not be pursued. Also, the retention of the word 'Director' in that sub-rule is inconsistent with other changes which are not being dealt with by the Full Bench which propose a replacement of the term 'Director' with 'Chief Executive Officer' wherever it appears in the rules.

17 The other alteration which members were notified of in the comparison document attached to the first notice which is not being pursued is that in r 6.11(c) it was proposed that the words 'fine' or 'fined' be deleted. Again, no explanation was given to the members of that fact in the second notice or in the second comparison document.

18 For these reasons, we are not satisfied that the requirements of s 62(3)(b)(i) of the Act can be satisfied.

Other matters

19 We also make the observation that the proposed variations to r 4 (which seek to extend the scope of the painting and decorating industry) have been drafted in a way that could be said to be ambiguous.

20 The first paragraph of the proposed variations to r 4 creates a test of the processes that could be regarded within the industry which refers to the 'processes and application by any method recognised or adopted by the painting trade'. Under the heading 'Painting' it is stated that painting 'includes such processes as the application of coatings or treatments as are commonly known to the painting trade'. By the use of these phrases, to decide whether any particular process or application is painting, it will be necessary to first prove that the process or application is 'commonly known to the painting trade', and then to prove that it is also a process or application by any method recognised by the painting trade or adopted by the painting trade.

21 In our opinion, the use of different words to describe the same thing could allow an argument to be raised that the two phrases mean different things. In particular, 'recognised or adopted by the painting trade' could be said not to be the same as 'commonly known to the painting trade'. For this reason, it is our view that the applicant should consider redrafting this proposed variation to r 4.

2013 WAIRC 00764

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MASTER PAINTERS, DECORATORS AND SIGNWRITERS' ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 AUGUST 2013
FILE NO.	FBM 1 OF 2013
CITATION NO.	2013 WAIRC 00764

Result	Application dismissed
Appearances	
Applicant	Mr M Thomas

Order

This matter having come on for hearing before the Full Bench on Thursday, 8 August 2013, and having heard Mr M Thomas on behalf of the applicant, and reasons for decision having been delivered on Tuesday, 27 August 2013, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2013 WAIRC 00763

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FBA 6 OF 2013

PARTIES	MR MATTHEW KENNETH MILLER
	APPELLANT
	-and-
	WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC.
	RESPONDENT

- AND -

FBA 8 OF 2013

PARTIES	WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC.
	APPELLANT
	-and-
	MATTHEW MILLER
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 AUGUST 2013
FILE NOS	FBA 6 OF 2013, FBA 8 OF 2013
CITATION NO.	2013 WAIRC 00763

Result	Order for directions made
Appearances	
Appellants	FBA 6 of 2013 – Mr G McCorry, as agent
	FBA 8 of 2013 – Mr S Bibby, as agent
Respondents	FBA 6 of 2013 – Mr S Bibby, as agent
	FBA 8 of 2013 – Mr G McCorry, as agent

Order

HAVING heard Mr G McCorry, as agent (for the appellant in FBA 6 of 2013 and the respondent in FBA 8 of 2013) and Mr S Bibby, as agent (for the appellant in FBA 8 of 2013 and the respondent in FBA 6 of 2013), the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appellant in FBA 8 of 2013 file and serve his written submissions on the substantive issue of whether the dismissal was unfair by close of business on Friday, 20 September 2013;
2. The respondent in FBA 8 of 2013 file and serve its written submissions in reply on the substantive issue by close of business on Friday, 27 September 2013;
3. The appellant in FBA 6 of 2013 file and serve its written submissions on the issue of quantum by close of business on Friday, 4 October 2013;
4. The respondent in FBA 6 of 2013 file and serve his written submissions in reply (including submissions on the quantum issue raised in FBA 8 of 2013) by close of business Friday, 18 October 2013; and
5. The appeals be set down for hearing for a day on Monday, 28 October 2013 at 10:30 o'clock in the forenoon at 111 St Georges Terrace, Perth.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2013 WAIRC 00777

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN REEVE
	APPLICANT
	-and-
	THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 29 AUGUST 2013
FILE NO.	PRES 1 OF 2012
CITATION NO.	2013 WAIRC 00777

Result	Order issued
Appearances	
Applicant	Ms N Ireland
Respondent	Mr L McLaughlan

Order

WHEREAS the applicant and respondent have informed the Commission that the respondent requires further time to put in place procedures to change its rules to enable an application to be made under s 71 of the *Industrial Relations Act 1979*;

AND WHEREAS the parties agree that the interim committee should remain in place until at least 7 March 2014;

NOW THEREFORE the Acting President, pursuant to the powers conferred under the *Industrial Relations Act*, by consent, hereby orders that Order 2. of the order made on 8 June 2012 [2012] WAIRC 00343 be varied to state as follows:

2. Rule 23 - Elections to Office shall be waived until close of business on 7 March 2014.

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

COMMISSION IN COURT SESSION—AWARDS/AGREEMENTS AND ORDERS—Variation of—

2013 WAIRC 00795

CRISIS ASSISTANCE, SUPPORTED HOUSING INDUSTRY - WESTERN AUSTRALIAN INTERIM AWARD 2011

SOCIAL AND COMMUNITY SERVICES (WESTERN AUSTRALIA) INTERIM AWARD 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00795
CORAM	**:**	CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 7 MARCH 2013, WEDNESDAY, 28 AUGUST, 2013
DELIVERED	**:**	FRIDAY, 6 SEPTEMBER 2013
FILE NO.	**:**	APPL 77 OF 2012, APPL 78 OF 2012
BETWEEN	**:**	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES Applicant AND ABORIGINAL ALCOHOL AND DRUG SERVICE (AADS) (INC) & ORS AND MARRA WORRA WORRA ABORIGINAL CORPORATION & ORS Respondents

CatchWords	**:**	Award – Award variation – Alignment of rates of wages in State Awards with national modern award – SWC Principles 10 and 12 – Social and community services sector
Legislation	**:**	*Industrial Relations Act 1979 (WA)* s 6(b), s 40, *Workplace Relations Act 1996* (Cth)
Result	**:**	*Awards varied*

Representation:

Ms K Davis, Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Ms J Lorca, South West Refuge Inc (for APPL 77 of 2012)

Ms I Cattalini, Western Australian Council of Social Services Inc

Mr S Bibby (as agent), for Community Employers WA

Case(s) referred to in reasons:

Equal Remuneration case 1 February 2012 [2012] FWAFB 1000

Equal Remuneration case 22 June 2012 [2012] FWAFB 5184

2007 State Wage Case [2007] WAIRC 00157 at 127; (2007) 87 WAIG 1487 at 1501

2013 State Wage Case General Order [2013] WAIRC 00353; (2013) 93 WAIG 476 at 492

Reasons for Decision

1 This is our unanimous decision. These are two applications to amend the *Social and Community Services (Western Australia) Interim Award 2011* and the *Crisis Assistance Supported Housing Industry – Western Australia Interim Award 2011* in relation to wage rates. On 28 August 2013, after hearing the matters, the Commission in Court Session informed the parties that the awards would be varied in accordance with the agreement they had reached and that our written reasons for decision would issue subsequently. What follows are our reasons for decision.

2 The awards cover employees working for employers which are not national system employers in youth and children's services, community centres, women's services, family support services, community legal centres, home and community care services, drug and alcohol services, community housing services, specialist health services, tenancy services, mental health services and domestic violence refuges.

3 The creation of these two awards in 2011, as set out in the transcript of the delivery of the awards, followed the change to national-State industrial relations coverage in Western Australia in 2006 after the amendments to the *Workplace Relations Act, 1996* (Cth). When this change occurred, the majority of employers in the social and community services sectors in Western Australia were national system employers and retained their federal award coverage. However a minority of employers in Western Australia, estimated by the applicant to be approximately 15%, were not national system employers for the purposes of the changes to the *Workplace Relations Act, 1996*; those employers, and their employees, remained covered by those federal awards for a transitional period of five years which expired in 2011.

4 In 2011, the applicant, with the support of those employers, applied for these two awards to issue to cover the non-national system employers and their employees who would otherwise become award-free at the expiry of the transitional period. The purpose of the awards was stated to be to continue the existing terms of industrial relations regulation which had existed for quite some time in the federal system, but to utilise the provisions of the State legislation to prescribe that regulation by reason of the Commonwealth vacating the field. The making of the awards was supported by employers in the industry on the basis that the awards to issue in the WA industrial relations system contained exactly the same terms and conditions of employment as those in the transitional federal awards. The awards were made on that basis and are seen, in the words of the applicant, as "exact replicas" of those federal awards. This background is relevant to our consideration of these two applications.

5 The evidence before us shows that the employees of national system employers in the social and community services sectors in Western Australia, and indeed elsewhere in Australia, are covered now by the *Social, Community, Homecare Disability Services Industry Award 2010* (a national system modern award). The coverage of the two awards before us is stated by the applicant to be two streams covered by the national system modern award.

6 Following the decision of Fair Work Australia in the Equal Remuneration Case ([2012] FWAFB 1000; [2012] FWAFB 5184), employees covered by that modern award have been paid at significantly higher rates of wages. The applicant points to those higher rates of wages, and argues that equity, good conscience and the substantial merits of the case favours re-aligning the rates prescribed in the two awards before us in these matters with those rates.

7 None of the named parties to the two awards have objected to the applications. We accept the statement of Ms Davis from the bar table that at the time the applications were filed, the applicant sent a covering letter to the named parties to the awards inviting them to have discussions about the applications. We note too that on two occasions the Commission has enclosed a covering letter to the named parties to these awards with the Notice of Hearing explaining the nature of the applications and their right to object in the Commission proceedings. We are satisfied that lack of any objection to the applications does not arise from a lack of awareness on the part of the employers named in the awards.

8 The employers who appeared at the hearing agree with the applicant's submissions and the orders sought. The South West Refuge Incorporated is a named party to the *Crisis Assistance, Supported Housing Industry Award – Western Australia Interim Award 2011*; it submitted that it is unable to transfer to the modern award automatically as it is not a constitutional corporation, and it remains tied to the State award.

9 Community Employers WA, an organisation registered under the Act, also supported the variations sought. The organisation has a membership which includes both national system and non-national system employers and appeared in the Equal Remuneration Case. We consider the organisation has as members at least some employers who would be bound by the two awards before us and attach weight to the organisation agreeing with the applicant's submissions and the orders sought.

10 The Western Australian Council of Social Services Inc (WACOSS) supported the proposed variations. Ms Cattalini, appearing for WACOSS, stated WACOSS's commitment to the sustainability of services for vulnerable people in the community who are serviced by the employees covered by the two awards; their wages are critical to the workforce viability which is critical to the sustainability of those services. Secondly, WACOSS supports notions of equitable pay within the sector and of addressing the inequitable position that has arisen from the national modern award diverging from the WA State awards, and thirdly it will enable fair funding to flow into the sector - those services currently under the national modern award have received supplementary funding and those in the State system have not. Ms Cattalini referred to the difficulties faced by employers in the industry trying to determine whether or not they are a national system employer as being "significant".

11 UnionsWA filed a written submission in support of the applications. The Hon. Minister for Commerce and the Chamber of Commerce and Industry of WA were both given notice of the hearing, however neither appeared at the hearing.

12 The Commission's consideration of the two applications is as follows. The applications seek a wage increase above and beyond what usually arises from the operation of the State Wage General Order. We agree that the applications are to be considered under Principle 10 of the Commission's State Wage Principles, which states as follows:

> **"10. Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the award minimum conditions**
>
> 10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle. This may include but is not limited to matters such as equal remuneration for men and women for work of equal or comparable value.
>
> 10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.
>
> 10.3 All claims made under this Principle will be referred to the Chief Commissioner for him to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner."

13 Principle 10 is a principle of deliberately broad application. It is not easy to anticipate in advance the many different kinds of circumstances which may warrant consideration of a wage increase to an award beyond that prescribed in State Wage Case proceedings. The Commission in Court Session has deliberately chosen not to be prescriptive, in case so a circumstance which deserves consideration on merit is unable to be considered because it does not meet criteria set out in Principle 10. It is for this

reason that when the Commission in Court Session in the 2007 State Wage Case was asked to consider the issue of equal remuneration in significant detail, it declined to do so stating:

> "We do not think it advisable to set out the criteria by which such a claim is to be assessed given specific criteria might restrict or confine a particular claim in this jurisdiction, which may not be appropriate" [2007] WAIRC 00517 at 127; (2007) 87 WAIG 1487 at 1501).

14 In this case, the applicant does not bring these applications to the Commission in Court Session as an equal remuneration matter; rather, the applicant points to the Commission's award making powers in s 40 of the Act, and to the objects to the Act in s 6 and the general exercise of the Commission's jurisdiction in s 26, to support the applications.

15 We consider that fairness and equity, and the substantial merits of the case, support restoring the alignment in wages between social and community services employees in the WA industrial relations jurisdiction, and social and community services employees in Western Australia in the national system. They are undertaking identical work: the only difference between national system and non-national system employees in the social and community services sector in Western Australia is the business structure of their employer: those who are national system employers are so because they are trading corporations, and those who are not are either incorporated businesses which are not trading corporations or are unincorporated entities.

16 In the context of these two awards which were made by consent to maintain the same employment conditions across the social and community services sector in Western Australia irrespective of whether the employer is or is not a national system employer, we consider the applications should be granted. To conclude otherwise would be to leave social and community services employees in Western Australia, and their non-national system employers, faced with a growing disparity in wages compared to their colleagues in Western Australia performing identical work employed by national system employers.

17 We accept the evidence that social and community services employers have for some years campaigned for funding to increase wages to ensure the viability of the sector. Low wage rates and associated difficulties in attracting and retaining staff threaten the sector's capacity to deliver the services required. Amending the awards will facilitate Commonwealth Government supplementary funding for the wage increases prescribed by the amendments.

18 In this regard, correspondence received by the Commission from the Commonwealth Government confirms its commitment to equal remuneration for all social and community services workers throughout Australia, and advises that the Commonwealth Government is committed to fund its share of any wage increases resulting from the amendment of these awards in these applications (Exhibit ASU 2). The commitment from the Commonwealth Government is as follows:

> "We are pleased to advise that the Australian Government is committed to fund its share of any wage increases should the ASU's application before the Commission is successful, and extend supplementation to ensure that social and community sector workers in Western Australia receive the same support as their counterparts across Australia.
>
> As per the national supplementation process, the scope of the Government's commitment will be to those providers, funded either directly or indirectly, with employees in Western Australia who would have been covered by the federal Equal Remuneration Order had they been under the national workplace relations system."

19 We are satisfied from the applicant's submissions that the employees covered by the two awards subject to these applications are within the Commonwealth Government's commitment to ensure that social and community sector employees in Western Australia receive the same support as their counterparts across Australia.

20 Further, the applicant points to a $604 million increase to State funding for the not-for-profit community sector over four years announced in the 2011 WA State Budget, which included an initial increase to State-funded programs of 15% followed by a further increase of funding to meet strategic needs. The applicant draws the Commission's attention to the statement of the Hon. Premier of WA in the Legislative Assembly that the funding is so that organisations can continue to provide and improve quality services to those in need, and to improve the pay and conditions of the people they employ, although not simply for that reason (Hansard, Assembly, Tuesday 24 May 2011, p 3838).

21 We regard the circumstances of these applications as limited. The decision in this matter does not provide a precedent for other awards to be amended beyond those increases permitted by the State Wage Principles where these circumstances do not apply.

22 The orders that issued in these applications on 29 August 2013 contain the same wording as far as possible as the wording used in the *Social, Community and Disability Services Industry Equal Remuneration Order 2012* (PR525485, 22 June 2012). This includes describing the additional payment to be made as an "Equal Remuneration Payment" although we have not varied the awards as a result of a consideration of the merits or otherwise of equal remuneration; we have used the same wording because we accept the applicant's submission that the Commonwealth Government intends to use the same funding model which was used to roll out the funding to national system employers following the Equal Remuneration Case. For that reason we consider that on this occasion using the same wording will assist in maintaining consistency between the application of Commonwealth funding to an employer bound by either of the awards with the application of that funding to an employer who is a national system employer.

23 Consistency of wording will also be of assistance to an employer who is unsure whether they are in the national or State industrial relations systems because there will be no significant difference between the national and State orders. Additionally it will assist in maintaining a consistency between the manner that the increased rates of salary resulting from the orders are applied to an employee covered by either of the awards and the increased wages paid to an employee of a national system employer resulting from the *Social, Community and Disability Services Industry Equal Remuneration Order 2012*.

24 We recognise that the capacity of an employer bound by either of the awards to pay the increased rates of salary resulting from the orders is dependent upon receiving the Commonwealth supplementary funding. In the event that this is not received, an employer will be able to apply to reduce or postpone the variation of the award to it in accordance with Principle 12 of the State Wage Principles.

25 We congratulate the parties on reaching an agreement. As Ms Davis, appearing for the applicant, properly noted, one of the principal objects of the Act in s 6(b) is to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes. That has occurred in this case: there has been lengthy conciliation before the Commission and it is a credit to the applicant and the employers with whom the applicant has spoken that agreement has been reached. In accordance with that agreement, the variations to the awards will take effect from the first pay period on or after 28 August 2013, the day the orders were signed and delivered.

2013 WAIRC 00775

CRISIS ASSISTANCE, SUPPORTED HOUSING INDUSTRY - WESTERN AUSTRALIAN INTERIM AWARD 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	ABORIGINAL ALCOHOL AND DRUG SERVICE (AADS) (INC) AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 AUGUST 2013
FILE NO/S	APPL 77 OF 2012
CITATION NO.	2013 WAIRC 00775

Result	Award varied
Representation	Ms K Davis, Western Australian Municipal, Administrative, Clerical and Services Union of Employees
	Ms J Lorca, South West Refuge Inc
	Ms I Cattalini, Western Australian Council of Social Services Inc
	Mr S Bibby (as agent), for Community Employers WA

Order

HAVING heard Ms K Davis on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Ms J Lorca on behalf of South West Refuge Inc, Ms I Cattalini on behalf of Western Australian Council of Social Services Inc, and Mr S Bibby (as agent), for Community Employers WA, and by consent, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders:

1 THAT the *Crisis Assistance, Supported Housing Industry – Western Australian Interim Award 2011* be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after the 29th day of August 2013.

2. The monetary obligations imposed on employers by this Order may be absorbed into over award payments. Nothing in this Order requires an employer to maintain any over award payment.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

SCHEDULE

1. Clause 2 – ARRANGEMENT: Delete this clause and insert the following in lieu thereof:

2 ARRANGEMENT

This Award is arranged as follows:

PART 1 – Application and operation of this award

2. Clause 13 – CLASSIFICATIONS AND SALARY RATES: Immediately following subclause 13.1(5) of this clause insert a new subclause as per the following:

(6) NOTE: An Equal Remuneration Order applies to the employees under this Award, see Schedule 1 for the required Equal Remuneration Payments.

3. Immediately following Clause 32 – LIBERTY TO APPLY, insert a new Schedule as per the following:

SCHEDULE 1 – EQUAL REMUNERATION PAYMENT

1. Transitional rates

1.1 The employer must pay minimum rates of salary in accordance with clause 13 of this Award.

1.2 The employer must apply any increase in minimum rates of salary in this Award to the amounts in clause 1.1 of this Schedule.

1.3 In addition to the minimum rates of salary referred to in clause 1.1 of this Schedule, the employer must pay an employee a Transitional Equal Remuneration Payment as follows:

(a) From the first full pay period on or after 29 August 2013 until the final pay period immediately before 1 December 2013, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine.

(b) Employers who are unable to make the payments required under 1.3(a) immediately must ensure that equal remuneration payments due from 29 August 2013 to 1 December 2013 are paid in full to employees by the first pay period in December 2013. Such payments may be made in lump sum or instalments. All equal remuneration payments due from the first pay period on or after 1 December 2013 must be paid in the pay period they fall due.

(c) From the first full pay period on or after 1 December 2013 until the final pay period immediately before 1 December 2014, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by two.

(d) From the first full pay period on or after 1 December 2014 until the final pay period immediately before 1 December 2015, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by three.

(e) From the first full pay period on or after 1 December 2015 until the final pay period immediately before 1 December 2016, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by four.

(f) From the first full pay period on or after 1 December 2016 until the final pay period immediately before 1 December 2017, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by five.

(g) From the first full pay period on or after 1 December 2017 until the final pay period immediately before 1 December 2018, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by six.

(h) From the first full pay period on or after 1 December 2018 until the final pay period immediately before 1 December 2019, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by seven.

(i) From the first full pay period on or after 1 December 2019 until the final pay period immediately before 1 December 2020, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by eight.

1.4 The payments in clauses 1.1 and 1.3 of this Schedule shall be regarded as part of the ordinary rate of pay for all purposes.

1.5 Clauses 1.1 to 1.3 of this Schedule cease to apply to an employer immediately before the beginning of the first full pay period on or after 1 December 2020.

2. Final Rates

2.1 The payments in clause 2.2 of this Schedule shall be referred to as the "Final Rate".

2.2 From the first full pay period on or after 1 December 2020, the employer must pay an employee:

(a) the minimum rate of salary in accordance with clause 13 of this Award, and

(b) a Final Equal Remuneration Payment equal to the following percentage of the applicable minimum rate of salary in the Award:

Classification in the Awards	**Final Equal Remuneration Payment Percentage**
Level 2	23%
Level 3	26%
Level 4	32%
Level 5	37%
Level 6	40%
Level 7	42%
Level 8	45%
Level 9	47%

2.3 The Final Rate in clause 2.2 of this Schedule is equal to the following percentage of the applicable minimum rate of salary in this Award:

Classification in the Awards	**Final Rate Percentage**
Level 2	123%
Level 3	126%
Level 4	132%
Level 5	137%
Level 6	140%
Level 7	142%
Level 8	145%
Level 9	147%

2.4 The payments in clause 2.2 of this Schedule shall be regarded as part of the ordinary rate of pay for all purposes.

2013 WAIRC 00776

SOCIAL AND COMMUNITY SERVICES (WESTERN AUSTRALIA) INTERIM AWARD 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	MARRA WORRA WORRA ABORIGINAL CORPORATION AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 AUGUST 2013
FILE NO/S	APPL 78 OF 2012
CITATION NO.	2013 WAIRC 00776

Result	Award varied
Representation	Ms K Davis, Western Australian Municipal, Administrative, Clerical and Services Union of Employees
	Ms I Cattalini, Western Australian Council of Social Services Inc
	Mr S Bibby (as agent), for Community Employers WA

Order

HAVING heard Ms K Davis on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Ms I Cattalini on behalf of Western Australian Council of Social Services Inc, and Mr S Bibby (as agent), for Community Employers WA, and by consent, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders:

1. THAT the *Social and Community Services (Western Australia) Interim Award 2011* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 29th day of August 2013.

2. The monetary obligations imposed on employers by this Order may be absorbed into over award payments. Nothing in this Order requires an employer to maintain any over award payment.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert the following in lieu thereof:

2. - ARRANGEMENT

2. Clause 14 – Classifications and Salary: Immediately following subclause 14.1.3 of this clause insert a new subclause as per the following:

14.1.4 NOTE: An Equal Remuneration Order applies to the employees under this Award, see Schedule 1 for the required Equal Remuneration Payments.

3. Immediately following Clause 33 – Named Respondents to this Award, insert a new Schedule as per the following:

SCHEDULE 1 – EQUAL REMUNERATION PAYMENT

1. Transitional rates

1.1 The employer must pay minimum rates of salary in accordance with clause 14 of this Award.

1.2 The employer must apply any increase in minimum rates of salary in this Award, to the amounts in clause 1.1 of this Schedule.

1.3 In addition to the minimum rates of salary referred to in clause 1.1 of this Schedule, the employer must pay an employee a Transitional Equal Remuneration Payment as follows:

(a) From the first full pay period on or after 29 August 2013 until the final pay period immediately before 1 December 2013, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine.

(b) Employers who are unable to make the payments required under 1.3(a) immediately must ensure that equal remuneration payments due from 29 August 2013 to 1 December 2013 are paid in full to employees by the first pay period in December 2013. Such payments may be made in lump sum or instalments. All equal remuneration payments due from the first pay period on or after 1 December 2013 must be paid in the pay period they fall due.

(c) From the first full pay period on or after 1 December 2013 until the final pay period immediately before 1 December 2014, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by two.

(d) From the first full pay period on or after 1 December 2014 until the final pay period immediately before 1 December 2015, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by three.

(e) From the first full pay period on or after 1 December 2015 until the final pay period immediately before 1 December 2016, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by four.

(f) From the first full pay period on or after 1 December 2016 until the final pay period immediately before 1 December 2017, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by five.

(g) From the first full pay period on or after 1 December 2017 until the final pay period immediately before 1 December 2018, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by six.

(h) From the first full pay period on or after 1 December 2018 until the final pay period immediately before 1 December 2019, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by seven.

(i) From the first full pay period on or after 1 December 2019 until the final pay period immediately before 1 December 2020, a payment equal to the difference between the Final Rate in clause 2.2 of this Schedule and the minimum rates of salary in clause 1.1 of this Schedule, as increased from time to time, for the relevant classification in the Award, divided by nine then multiplied by eight.

1.4 The payments in clauses 1.1 and 1.3 of this Schedule shall be regarded as part of the ordinary rate of pay for all purposes.

1.5 Clauses 1.1 to 1.3 of this Schedule cease to apply to an employer immediately before the beginning of the first full pay period on or after 1 December 2020.

2. Final Rates

2.1 The payments in clause 2.2 of this Schedule shall be referred to as the "Final Rate".

2.2 From the first full pay period on or after 1 December 2020, the employer must pay an employee:

(a) the minimum rate of salary in accordance with clause 14 of this Award, and

(b) a Final Equal Remuneration Payment equal to the following percentage of the applicable minimum rate of salary in the Award:

Classification in the Awards	**Final Equal Remuneration Payment Percentage**
Level 2	23%
Level 3	26%
Level 4	32%
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Level 6	40%
Level 7	42%
Level 8	45%
Level 9	47%

2.3 The Final Rate in clause 2.2 of this Schedule is equal to the following percentage of the applicable minimum rate of salary in this Award:

Classification in the Awards	**Final Rate Percentage**
Level 2	123%
Level 3	126%
Level 4	132%
Level 5	137%
Level 6	140%
Level 7	142%
Level 8	145%
Level 9	147%

2.4 The payments in clause 2.2 of this Schedule shall be regarded as part of the ordinary rate of pay for all purposes.

INDUSTRIAL MAGISTRATE—Claims before—

2013 WAIRC 00773

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2013 WAIRC 00773

CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI

HEARD : WEDNESDAY, 24 JULY 2013

DELIVERED : WEDNESDAY, 28 AUGUST 2013

FILE NO. : M 79 OF 2012

BETWEEN : LOLA NUZZO

CLAIMANT

AND

A.C.N. 008 668 602 PTY LTD (FORMERLY FONTERRA BRANDS AUSTRALIA (P&B) PTY LTD)

RESPONDENT

Catchwords	**:**	Application to dismiss claim; Enforcement of Clause 22 – Introduction of Change and Redundancy of the *Fonterra Brands Australia (P&B) Pty Ltd Balcatta Operations Union Collective Agreement 2008-2011*; Whether the decision of the Full Bench of Fair Work Australia in *Fonterra Brands Australia (P&B) Pty Ltd v Transport Workers' Union of Australia and another* [2010 FWAFB 9986] in relation to the meaning of "ordinary base weekly rate of wage" is binding on the Claimant; Whether Claimant is estopped from litigating the issue; Whether issue of estoppel is established; Whether the decision said to create estoppel is a final judicial decision; Whether the parties to the decision or their privies were the same person as the parties to the proceedings in which estoppel is raised; Finality of proceedings; Abuse of process.
Legislation	**:**	*Workplace Relations Act 1996* *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*
Instrument	**:**	Fonterra Brands Australia (P&B) Pty Ltd Balcatta Operations Union Collective Agreement 2008-2011
Result	**:**	Application is granted - Claim is dismissed
Claimant	**:**	Mr R. Hooker, of Counsel, appeared for the Applicant
Respondent	**:**	Mr N. Gibian, of Counsel, appeared for the Respondent
Case(s) referred to in Decision:		*Transport Workers' Union of Australia and another v. Fonterra Brands Australia (P&B) Pty Ltd* [2010] FWA 4538 *Fonterra Brands Australia (P&B) Pty Ltd v. Transport Workers' Union of Australia and another* [2010] FWAFB 9986 *Marek Kuligowski v. Metrobus* (2004) 220 CLR 363 *Miller v. University of New South Wales* (2003) 200 ALR 565 *Construction, Forestry, Mining and Energy Union v. Wagstaff Piling Pty Ltd and Others* (2012) 203 FCR 371 *Administration of Papua and New Guinea v. Daera Guba* (1973) 130 CLR 353 *Ramsay v. Pigram* (1968) 118 CLR 271 *Young and Others v. Public Service Board* [1982] 2 NSWLR 456 *Eljazzar v. BHP Iron Ore Pty Ltd* (1996) 65 IR 40 *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 *Effen Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510 *SOS Nursing & Home Care Service Pty Ltd v. Smith* [2013] FCA 295 *Walton v. Gardiner* (1993) 177 CLR 378 *Reichel v. Magrath* (1889) 14 App Cas 665

REASONS FOR DECISION

The Claim

1 Lola Nuzzo alleges that her former employer, Fonterra Brands Australia (P&B) Pty Ltd (Fonterra) owes her money under the *Fonterra Brands Australia (P&B) Pty Ltd Balcatta Operations Union Collective Agreement 2008–2011* (the Agreement).

2 Ms Nuzzo was made redundant from her employment with Fonterra in 2009. Consequently, she was entitled to severance pay in accordance with Clause 22 - Introduction of Change and Redundancy (Clause 22), of the Agreement. Clause 22(d) of the Agreement required that she be paid four weeks' pay in lieu of notice and four weeks' pay per year of completed service, to a maximum of 104 weeks. A week's pay is defined in the Agreement as meaning –

> "… the ordinary base weekly rate of wage for the employee concerned."

3 At the time of the termination of her employment, Ms Nuzzo was paid an annualised salary. However, her severance pay was calculated by reference to the base hourly rate for her classification under the Agreement, and multiplied by 38. Ms Nuzzo contends that the way in which her severance pay was calculated was incorrect, and that it should have been calculated by using her annualised salary. She alleges, therefore, that she has been underpaid.

4 On 11 September 2012, Ms Nuzzo lodged a claim in this Court alleging that Fonterra had breached the Agreement. Ms Nuzzo seeks an order that Fonterra pay her the difference between the severance pay to which she is entitled under the Agreement, and the amount that she has already been paid in purported satisfaction of Clause 22 of the Agreement. She also seeks ancillary orders.

5 Ms Nuzzo makes her claim pursuant to section 539 of the *Fair Work Act 2009* (Cth) (FW Act). That provision enables an employee to bring proceedings alleging a contravention of a civil remedy provision, which includes a claim for payment arising under an industrial instrument. Section 545(3) of the FW Act permits an "*eligible state or territory court*" to make orders with respect to an underpayment. An "*eligible state or territory court*" includes this Court, being a Court constituted by an Industrial Magistrate.

6 On 10 April 2013, Fonterra made an application seeking the dismissal of Ms Nuzzo's claim. In effect, Fonterra seeks summary judgment. It says that Ms Nuzzo's claim should be dismissed without a hearing on the merits because an issue estoppel arises from the decision of Fair Work Australia (FWA) in *Fonterra Brands Australia (P&B) Pty Ltd v. Transport Workers' Union of Australia and another* [2010] FWAFB 9986; (2010) 202 IR 24. The decision in that matter arose from a dispute notified to FWA by the Transport Workers' Union of Australia (TWU) and another, under Clause 21 – Disputes Settlement Procedure (Clause 21) of the Agreement.

7 Relevantly, Clause 21.2 of the Agreement provides –

> "21.2 Any dispute or matter ("Matter") raised by Fonterra arising from this Agreement, an employee or a group of employees shall be settled in accordance with the following procedure:
>
> (a) The Matter shall first be discussed between the appropriate supervisor, the employee concerned or the group of employees concerned (and where requested by an employee or employees, the Union workplace representative or other representative).
>
> (b) If the Matter remains unresolved a more senior manager of Fonterra, the employee concerned or the group of employees concerned (and where requested by an employee or employees, the Union workplace representative or other representative) shall attempt to resolve the Matter.
>
> (c) If the Matter remains unresolved any party to the dispute (and where requested by an employee or employees, the Union workplace representative or other representative) may refer it for conciliation and/or arbitration by the Australian Industrial Relations Commission ("Commission").
>
> (d) If arbitration is necessary the Commission shall have the power to do all such things as are necessary for the just resolution or determination of the Matter. This includes exercising of procedural powers in relation to hearings, witnesses, evidence and submissions which are necessary to make the arbitration effective.
>
> (e) The parties to the dispute will abide by the decision of the Commission, subject to any party to the dispute exercising a right of appeal against the decision to a Full Bench of the Commission."

8 The subject of the dispute as notified by the TWU in its application to FWA was "*the proper construction of Clause 22, and the employees' redundancy entitlement*".

9 Following an unsuccessful conciliation conference, Commissioner Williams conducted a hearing on 30 March 2010 for the purpose of arbitrating the dispute between Fonterra on the one part and the TWU and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) on the other. Both Fonterra and the TWU were represented by counsel. On 23 June 2010, Commissioner Williams handed down his decision in favour of the TWU and the CEPU, concluding that the word "*ordinary*" should be given the meaning of "*regular, normal, customary or usual*" and that the term "*base … rate*" means the annualised salary of an employee.

10 On 14 July 2010, Fonterra appealed the decision of Commissioner Williams to the Full Bench of FWA. Again, Fonterra and the TWU were represented by counsel at the hearing which was conducted on 12 October 2010. On 24 December 2010, the Full Bench of FWA handed down its decision, with the result being that the appeal was upheld and the decision of Commissioner Williams was quashed. The Full Bench held that the term "*ordinary base weekly rate of wage*" in Clause 22 of the Agreement was that as attributed to it by Fonterra (see *Fonterra Brands Australia (P&B) Pty Ltd v Transport Workers' Union of Australia and another* [2010] FWAFB 9986).

11 Fonterra says that as a result, this claim is issue estopped and ought to be dismissed at the threshold without Fonterra and the Court being put to the time and expense of a further trial. It argues that the *ratio decidendi* of the decision of the Full Bench of FWA on 24 December 2010 was that the term "*ordinary base weekly rate of wage*" does not mean the annualised salary of employees on an annualised salary. That is precisely the same question that this Court is being asked to determine, and accordingly, is issue estopped. Alternatively, it submits that the Court should decline to hear the claim in the proper and fair exercise of its discretion.

12 Ms Nuzzo contends that no issue estoppel could or does arise from the decision of FWA and even if it did, it would not prevent a claim being pursued. She says that it is the duty of this Court to determine all claims brought within its jurisdiction.

Issue Estoppel

13 In *Marek Kuligowski v. Metrobus* (2004) 220 CLR 363, the High Court of Australia reiterated that the following are requirements which need to be established for an issue estoppel to take effect:

1. the same question has been decided;
2. the judicial decision which is said to create estoppel is final; and
3. the parties to the judicial decision, or their privies, were the same persons as the parties to proceedings in which the estoppel is raised, or their privies.

14 Fonterra contends each of those necessary elements is established. Ms Nuzzo on the other hand, says that although FWA decided the same question, its expression of opinion as to the question of law, being the proper construction of the industrial instrument, cannot operate as a binding declaration of right or give rise to an issue estoppel, because FWA is not a Court. Ms Nuzzo says further, that an issue estoppel can only arise between the parties to the original litigation, or their privies. Given that she was not a party to the proceedings before FWA, she cannot now be bound by FWA's decision.

Was There a Final Judicial Decision?

15 In submissions made on behalf of Ms Nuzzo, it was argued that the expression of opinion on an issue of legal rights by an Industrial Commission cannot establish *res judicata* or issue estoppel (per Gray J at [7] and at [8] in *Miller v. University of New South Wales* (2003) 200 ALR 565 (*Miller*)). It is further submitted that findings about matters of legal rights made by a

tribunal without the power to make a binding judicial determination cannot give rise to an issue estoppel (see *Miller* per Ryan and Gyles JJ).

16 Ms Nuzzo further relies on the recent decision of the Full Court of the Federal Court of Australia in *Construction, Forestry, Mining and Energy Union v. Wagstaff Piling Pty Ltd and Others* (2012) 203 FCR 371 (*Wagstaff*) to support her contention that even an arbitrated dispute resolution procedure could not validly purport to confer judicial power. Any opinion expressed in a private arbitration as to the proper interpretation of an enterprise agreement, has no legal effect of any kind and therefore is not conclusive or binding on any Court.

17 In my view, both *Miller* and *Wagstaff* are distinguishable from the circumstances of this case. In *Miller*, the Australian Industrial Relations Commission was called upon to exercise its discretion with respect to whether a dismissal was harsh, unjust or unreasonable. It, coming to its conclusion concerning the dismissal, expressed a view about aspects of the parties' rights. Those observations, as part of the process of arriving at the ultimate decision, could not have had a binding effect and did not give rise to issue estoppel. In *Wagstaff*, the opinion was expressed in arriving at a recommendation to resolve the dispute. That could not have had any legal effect or have bound the parties.

18 In the matter between Fonterra and the TWU and the CEPU, FWA was not called upon to express an opinion, but rather, to make a determination as to the meaning of "*ordinary base weekly rate*". The parties sought a final determination about the meaning of those words and agreed, subject to a right of appeal which was later exercised, to be bound by the determination. Fonterra and the TWU and, for that matter the CEPU, submitted themselves to FWA for the purpose of achieving a final determination.

19 In *Administration of Papua and New Guinea v. Daera Guba* (1973) 130 CLR 353 (*Daera Guba*), Gibbs J said, at 453:

> "The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between the parties, even if it is not called a court and its jurisdiction is derived from statute or from the submission of the parties, and it only has a temporary authority to decide a matter ad hoc."
>
> (my emphasis)

20 That was precisely the position of FWA in determining the dispute between Fonterra, the TWU and the CEPU. It is not the case that FWA acted without power. To the contrary, the parties gave it power by submitting themselves to finally determine the issue between them.

Privity

21 Moving to Ms Nuzzo's second argument, I observe to be correct her contention that an issue estoppel arises only between the parties to the original litigation, or their privies (see *Ramsay v. Pigram* (1968) 118 CLR 271 at 276 (*Pigram*)).

22 Fonterra says that the TWU was acting for and on behalf of its members in pursuing the FWA proceedings. Ms Nuzzo was, at all material times, a member of the TWU. It is argued that it was in effect the privy of those members who would have derived a benefit of an increased entitlement under Clause 22 of the Agreement, if the decision of Commissioner Williams had not been overturned on appeal.

23 The basic requirement of a privy of interest is that a privy must claim under or through the person of whom he is said to be a privy (see Barwick CJ at 299 in *Pigram*). A person is not a privy because he has participated so actively in the first litigation that he has assumed a de facto role of an actual party (see *Effen Foods Pty Ltd v. Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510).

24 In *Young and Others v. Public Service Board* [1982] 2 NSWLR 456 (*Young*), Lee J held that members of an individual union or association have no legal privity of interest with the union so as to estop them in relation to proceedings in the New South Wales Industrial Commission. The relevant factors leading to his Honour's conclusion in *Young* were:

(a) the individual members could not appear as parties in the relevant proceedings in the Commission, and

(b) they had no control of the proceedings in the Commission; and

(c) they did not claim through or under their association. They asserted their rights merely as employees.

25 In *Young*, Lee J explained at 466:

> "But the fundamental matter which prevents the findings of Dey J from binding the plaintiffs in their action here against their employer is that they do not in these proceedings claim through or under the association. The reverse is the case – they assert rights merely as employees of the defendant and without regard to the association or membership of it. They require a decision as to whether the Board does have power to fix hours of work except by regulation and whether the Board has in fact fixed such hours. In my view they are not estopped by the findings of Dey J on these matters, because there is no privity of interest between them and the association. They are, of course, as stated earlier, estopped by s 87 from denying the terms of the *Crown Employees (Overtime) Award* and the binding effect thereof.
>
> It follows from the fact that no issue estoppel arises in respect of the relief sought in pars (1) and (2) of the summons that the plaintiffs can seek relief in this Court."

26 The same approach was taken in *Eljazzar v. BHP Iron Ore Pty Ltd* (1996) 65 IR 40. That matter concerned the applicant who, with another, had been dismissed from their employment as a result of a fight. Both were members of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers. The union had an industrial agreement with the respondent to refer any unresolved disagreements between the union and the respondent to the Western Australian Industrial Relations Commission (WAIRC). Given that the union had failed to have the respondent change its mind with respect to the dismissals, it referred the matter to the WAIRC. Commissioner Beech (as he then was) of the WAIRC concluded that the decision to dismiss Mr Eljazzar was not unfair. Mr Eljazzar was dissatisfied with the manner in which the union had represented him. He asserted that there was a clear conflict of interest and that his case and that of the other employee involved in the fight should not have been heard together and, in any event, the union should not have acted for both of them.

27 In determining the position of Mr Eljazzar *vis a vis* the union, Madgwick J said at 43:

> "The union had legitimate interests of its own to consider, which may or may not entirely have coincided with those of Mr Eljazzar. In the first place it had also the interests of Mr Reid to consider. It had its own obligation to refer its dispute with the respondent to the Commission. It would have its own strategic and tactical industrial interests to consider. It would have the interests of its members employed by the respondent other than the applicant and Mr Reid to consider. It would have, in deciding whether or not to appeal, its own doubtless relatively scarce resources to consider.
>
> Thus, although the applicant was one of the intended beneficiaries of the union's application to the Commission and, in a practical sense, a necessary participant in the proceedings there, on the face of it, he really had a relatively limited capacity to control the way his case was put and the extent to which it was advanced. In particular, he had limited ability to ensure that only his own interests were taken into account in putting his case."

28 In this matter, Ms Nuzzo believes that she was underpaid by Fonterra under the Agreement. She claims this as an employee entitled to the benefit of the Agreement, and not under or through the TWU. It is submitted that she is not, and could not be, estopped as a result of the decision of FWA which arose from a dispute notification filed by the TWU. She argues that no issue of estoppel does or could arise from the decision of FWA so as to bind her or any person with respect to the legal question of the proper interpretation of Clause 22(d) of the Agreement. Further, the FWA decision cannot bind any Court in the determination of subsequent proceedings.

29 Each case will turn on its own facts. The particular facts in this matter will dictate whether privity existed between Ms Nuzzo and the TWU, and whether she is now estopped in proceeding with her claim. Any consideration of Ms Nuzzo's position *vis a vis* the TWU, must commence with the contemplation of Clause 21.2(c) of the Agreement. It provides:

> "21.2(c) If the Matter remains unresolved any party to the dispute (and where requested by an employee or employees, the Union workplace representative or other representative) may refer it for conciliation and/or arbitration by the Australian Industrial Relations Commission ("Commission")."

30 The opening words of Clause 21.2 of the Agreement make it clear that the dispute resolution process applies to a dispute between Fonterra, an employee, or a group of employees. Sub-clause 21.2(c) provides that where the Matter (dispute) remains unresolved, any party to the dispute, being Fonterra, an employee or a group of employees (and where requested by an employee or employees) the union workplace representative or other representative may refer it for conciliation. The invocation of the conciliation and/or arbitration process by the union representing employees, including Ms Nuzzo, could not have taken place on the union's own initiative without having regard to its members. Its power to act in the process could only have arisen through a request made by an employee or employees. Unlike the situation in *Young*, individual members of the union affected by Fonterra's decision, had, pursuant to Clause 21.2(c) of the Agreement, the right and ability to refer the matter to conciliation and/or arbitration. They could have, if they had chosen to either individually or collectively, irrespective of the TWU or the CEPU, referred the dispute to conciliation and/or arbitration and thereby become personally involved in the matter before FWA. Ms Nuzzo had the legal ability to commence proceedings in her own right or to be joined in the FWA proceedings, but did not to participate. She allowed the TWU to act for her. She did not assert her own rights but, rather, claimed through or under the TWU. Her position is distinguishable from the situation in *Young*.

31 Indeed, her situation is not dissimilar to that described by Gibbs J in *Daera Guba* in which he said:

> "77. Finally, the applicants denied there was an identity of parties before the Board and the Commission. The native claimants before the Board included the Tubumaga Idibana and the Tubumaga Laurina, but it was for the former branch of the iduhu that claimed Era Taora. The application to the Commission was made by Daera Guba on behalf of the descendants of Guba Daera but it emerged at the hearing that Daera Guba was representing both branches of the Tubumaga iduhu. It was submitted that the relevant party before the Board was the Tubumaga Idibana – a communal group – whereas before the Commission the applicants were a number of individuals, represented by Daera Guba, and if the individuals were members of the group, they were nevertheless proceeding in a different capacity, and that a decision given against them by the Board in one capacity would not estop them in the other. Of course, neither tribunal had any strict rules of pleading, and before the Commission there was some disconformity between the application, which described the persons represented by Daera Guba as the descendants of Guba Daera and the statement made by Daera Guba that he was representing the whole clan, but there is not the least doubt, when the evidence is regarded, that this case before the Commission was advanced on the basis that he was representing the whole of the Tubumaga people – both branches of the iduhu. However, it was then submitted that the decision of the Board could not estop the Tubumaga Laurina, since that branch of the iduhu had made no claim before the Board to Era Taora. In fact, both branches of the iduhu were represented before the Board, and by the same counsel. In my opinion, if there was not an estoppel per rem judicatam between the Tubumaga Laurina and the Administration, the former were estopped by their conduct from relitigating the issue of ownership of the subject land. The Tubumaga Laurina being a party, and knowing that the Board was required to decide who was the owner of land in question, stood by, and allowed the Tubumaga Idibana, the other branch of the iduhu, alone to assert its claim against the Administration. In those circumstances, justice and common sense would require the Tubumaga Laurina to be bound by the result."

32 Ms Nuzzo stood by and allowed the TWU to assert her claim. She is now bound by the decision made by FWA. If that were not so, the result would be that she would only be bound by the decision if it suited her purpose. If not, she could re-litigate the very same issue. That is impermissible. Ms Nuzzo is clearly estopped in continuing with her claim, given that she was the TWU's privy throughout the FWA proceedings. The required elements to satisfy issue estoppel exist.

Summary Dismissal for Other Reasons

33 The Industrial Magistrates (General Jurisdiction) Regulations 2005 empower this Court to control and manage cases before it and to ensure that those cases are dealt with efficiently, economically and expeditiously. There is also a requirement that the

Court ensures that its judicial and administrative resources are used as effectively as possible. The Court has wide powers to achieve those ends.

34 Fonterra argues that Ms Nuzzo should not be permitted to take her claim to trial essentially re-agitating an issue already decided a long time ago. Her action is said to amount to an abuse of process. Ms Nuzzo says that her claim can only be summarily dismissed if Fonterra can establish that her claim is so clearly untenable that it cannot possibly succeed, unless the decision of FWA gave rise to a declaration of right binding upon both the Court and Ms Nuzzo. It is put that there is no basis to suggest that Ms Nuzzo's claim is so clearly untenable that it cannot possibly succeed. To support her contention, counsel for Ms Nuzzo cites the judgment of Ryan and Gyles JJ in *Miller*, in which they said at [81]:

> "In our view, near enough to an estoppel is not good enough to establish abuse of process between the same parties without some other element being present. There is the danger that persistent or unattractive litigants with awkward cases might be refused access to courts if there is a broad and imprecise discretion to stay actions which are somewhat like a previous proceeding."

35 In my view, discretionary considerations remain. Public policy demands that there should be an end to litigation. Justice demands that the same party shall not be harassed twice for the same cause (see *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853).

36 Indeed, Fonterra's situation in this matter is similar to that of the applicant in *SOS Nursing & Home Care Service Pty Ltd v. Smith* [2013] FCA 295, in which his Honour Buchanan J referred at [50] to the decision of *Walton v Gardiner* **(**1993) 177 CLR 378 (*Walton*). In *Walton*, Mason CJ, Deane and Dawson JJ (at 393), referring to *Reichel v Magrath* (1889) 14 App Cas 665, said:

> "… proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a new case which has already been disposed of by earlier proceedings."

37 His Honour Buchanan J said at [51]:

> "That principle appears to me to apply in the present case. The point of construction which the applicant wishes to ventilate in the present case was fully argued to finality …"

38 It would be wrong to allow Ms Nuzzo to re-agitate precisely the same issue which was litigated on her behalf in respect of which a final decision has been made. In any event, I rely on *Daera Guba* in concluding that in the circumstances, justice and common sense would require Ms Nuzzo to be bound by the result of the FWA proceedings.

39 If it were not for the conclusion I reached earlier that issue estoppel applies, I would have dismissed the claim as an abuse of process in any event.

G. Cicchini

Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 00781

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00781
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	THURSDAY, 11 APRIL 2013
DELIVERED	**:**	FRIDAY, 30 AUGUST 2013
FILE NO.	**:**	B 118 OF 2012
BETWEEN	**:**	DAVID ERNEST ELEY
		Applicant
		AND
		POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA
		Respondent

CatchWords	**:**	Industrial law (WA) - Termination of employment - Entitlements under contract of employment - Jurisdiction considered - Principles applied - Whether contractual relationship had been entered into - application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii), s 29AA(3), s 29AA(3)(a), s 29AA(4)(a), s 29AA(A)(b)
		Marketing of Potatoes Act 1976 (WA), s 18(1), s 18(4)
		Public Sector Management Act (WA) s 64(1)(b)
Result	**:**	Order issued

Representation:

Applicant	:	Mr Eley (in person)
Respondent	:	Mr Lethbridge (of counsel)

Case(s) referred to in reasons:

Amalgamated Collieries of WA Ltd v True (1938) 59 CLR 417

Appleton v Director General, Department of Education (2012) WAIRC 00381; (2012) 92 WAIG 910

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266

Genovesi v Affluence Pty Ltd t/as Swan Districts Real Estate (2005) WAIRC 00828; (2005) 85 WAIG 1314

Millar v JB and BL Nominees Pty Ltd t/as Southern Cross Traders (2005) WAIRC 02857; (2005) 85 WAIG 3797

Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd (2006) WAIRC 05220; (2006) 86 WAIG 2725

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) (1987) 67 WAIG 325

Trigwell v Brereton t/as Aircraft Cleaner Extraordinaire (2012) WAIRC 331; (2012) 92 WAIG 624

Waring v WorkCover WA (2010) WAIRC 00914; (2010) 90 WAIG 1664

Case(s) also cited:

Byrne v Australian Airlines Ltd [1995] HCA 24

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) (1981) 147 CLR 297

Griffith v Marston and Cook Pty Ltd PR 918518

Harward v Griffin Coal Mining Company Pty Ltd (2004) WAIRC 11512; (2004) 84 WAIG 1412

Hocking v Western Australian Bank (1909) 9 CLR 738

Remedios v Oceaneering Australia Pty Ltd (2005) WAIRC 01929; (2005) 85 WAIG 3161

Shields v WMC Resources Ltd (2004) WAIRC 10787; (2004) 84 WAIG 3378

Reasons for Decision

1 The substantive claim in this matter is brought by Mr David Ernest Ely (the applicant) against the Potato Marketing Corporation of Western Australia (the respondent) in which the applicant claims on 14 May 2012 he is owed payment for the balance of his three year term of employment as chief executive officer (the CEO). At the time this matter was considered the unfair dismissal claim had been heard and dismissed by Kenner C. The application was filed in the Registry on 28 May 2012 pursuant to the *Industrial Relations Act 1979* (WA) (the Act). The particulars of claim prescribe at [17] of the application that the applicant's gross wages and salary were $152,337 per annum. At the time of submitting his application no further particulars on the applicant's wages were provided.

2 Kenner C in his decision (2013) WAIRC 00096; (2012) 93 WAIG 213 issued on 22 February 2013 said at [44] and [45]:

> Furthermore, by its notice of answer and counter–proposal, the Corporation contends that whilst Mr Eley purported to act as the Chief Executive Officer of the respondent between 7 and 11 May 2012, as at 14 May 2012, on Mr Eley's, summary dismissal, the terms of his contract with the Corporation were still in dispute. The Corporation contends that Mr Eley's appointment as Chief Executive Officer was conditional upon the approval of the Minister under s 18(4) of the MP Act, which approval was never given. The Corporation therefore denies there was any contractual relationship entered into between it and Mr Eley, capable of enforcement under s 29(1)(b)(ii) of the Act.
>
> There is no evidence before the Commission as to these matters. To enable the issue of whether there was an enforceable contract of employment in place between the Corporation and Mr Eley, and if so, Mr Eley's relevant salary for the purposes of s 29AA(5)(b) of the Act to be determined, the Commission will re-list Mr Eley's contractual benefits claim for further hearing and determination.

3 The file was re-allocated. On 11 April 2013 a directions hearing was scheduled between the parties out of which an order issued requiring the applicant to file and serve an affidavit evidencing the employment contract upon which Mr Eley relied and the composition of the applicant's salary as it appeared in his particulars of claim on 28 May 2012. In addition the applicant was to file and serve written submissions relating to whether or not the *Government Officers Salaries, Allowances and Conditions Award 1989* (the GOSAC award) applied and the relevant agreement applying to the employment of the applicant for the purposes of s 29AA(4)(a) of the Act. The respondent was to file and serve written submissions relating to the same matters in reply. Relevant to the preliminary issue is whether or not the applicant's claim can be considered by the Commission given the terms of s 29AA(3) and (4) of the Act, which prescribe that an applicant raising this aspect of the Commission's jurisdiction must not earn a salary in excess of $134,100 per annum on the basis that the employee is not covered by an industrial instrument for the purposes of that section. The relevant rate applying at the time was $134,100, the salary cap as published in the Western Australian Industrial Gazette, (2011) WAIRC 00468; (2011) 91 WAIG 995. The amount is adjusted each year on 1 July.

4 Prior to considering that question is the jurisdictional question raised by the respondent in their Notice of Answer and Counter Proposal (Form 5), that being the applicant's appointment as the CEO had never been approved by the minister under s 18(4) of

the *Marketing of Potatoes Act 1946* (WA) (MP Act). The respondent contends there was never any contractual relationship entered into capable of enforcement under s 29(1)(b)(ii) of the Act.

Applicant's Written Submissions

5 The applicant submits in relation to s 29AA(5) the relevant amount to be considered by the Commission is $134,100 as set at 1 July 2011 and reset as at 1 July, each year. The application was filed on 28 May 2012. The *Industrial Relations (General) Regulations 1997* (WA) (the General Regulations) prescribe how to determine reg 5(2)(c) the salary of an employee who has been employed for a period of less than 12 months. The formula specified is:

$$\frac{\text{remuneration received} \times 365}{\text{days employed.}}$$

6 The applicant submits he was employed for eight days, from 7 – 14 May 2012 inclusive, therefore falling into the category of less than 365 days of consecutive employment. Relevant also is the sworn affidavit submitted by the applicant as filed on 2 May 2013 and a matter conceded by the respondent, that being that no remuneration was ever received. Applying the relevant figures relating to the applicant's salary together with the prescribed formula the result is less than the prescribed salary amount of $134,100 that applied at that time. That is, given the applicant's salary received was nil. The applicant refers to the case of ***Genovesi v Affluence Pty Ltd t/as Swan Districts Real Estate*** (2005) WAIRC 00828; (2005) 85 WAIG 1314 where it was stated by the then Smith C [62]:

> It is my opinion the meaning of the reg 5(2)(c) is clear and unambiguous. For the purposes of ascertaining whether the salary of an employee who has been employed for less than 12 months exceeds the prescribed amount, the Commission is only required to take into account the remuneration received by the employee, that is, remuneration actually received and not the salary the employee or the employer claims the employee was entitled to receive. In my view the Applicant's counsel correctly contends in written submissions:
>
> > "Whilst this result may seem unusual, on closer analysis, reg 5 is structured in a way that is clearly intended to differentiate between employees who have been employed for less than 12 months and those who have been employed continuously for 12 months or more. Compare reg 5(2)(a) (which provides for the prescribed amount to be the greater of the salary entitled to be received and the salary actually received) with reg 5(2)(c) (which is based on remuneration received)."

In ***Genovesi*** the applicant had received no remuneration and the actual claim was dismissed for other non-related jurisdictional issues.

7 The applicant submits that the ***Genovesi*** decision was considered again in the matter of ***Millar v JB and BL Nominees Pty Ltd t/as Southern Cross Traders*** (2005) WAIRC 02857; (2005) 85 WAIG 3797 where the proportion of ***Genovesi*** was upheld for the purposes of reg 5(2)(c) of the General Regulations to the Act. The applicant in his submissions attached an unsigned employment contract dated 7 May 2012 or (the contract) as an annexure DEE-2B to his affidavit (sworn 2 May 2013). The applicant does not agree that the said contract specifies all of the terms as agreed between himself and the respondent however it is submitted that most matters are contained within the employment contract as to what was agreed. The applicant specifically submitted that:

> [12] … the Applicant's position was covered by the *Government Officers Salaries, Allowances and Conditions Award 1989* ("GOSAC") including subsequent amendments referred to as General Agreements, with the latest General Agreement (GA–5) which took effect from 15 April 2011. The General Agreement of 15 April 2011 is more fully known as the *Public Service and Government Offices General Agreement 2011*("General Agreement 2011").
>
> …
>
> [14] Despite the finding by Commissioner S J Kenner that the Respondent is a constitutional corporation as defined in s.12 of the *Fair Work Act 2009* (Cth) and the Commissioner's finding that the Respondent cannot be covered by or subject to the terms of an award or industrial agreement of the Commission, it is the Applicant's contention that an award or industrial agreement can nonetheless still "apply" to the employment of the Applicant employee, as that term is used in s 29AA(4)(a):
>
> [15] The Employment Contract specifies in the second paragraph that its purpose was to "formally acknowledge the GOSAC award and to include additional or overriding conditions specific to this position. At all times of the conditions contained herein shall override the related conditions of GOSAC".

8 The applicant submitted that the employment contract subsumed the GOSAC award and the *Public Service and Government Officers General Agreement 2011* into the employment relationship with the exception of variations by additional or overriding terms. In the decision of the Full Bench in ***Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd*** (2006) WAIRC 05220; (2006) 86 WAIG 2725 the phrase 'apply to the employment of the employee' as it appears in s 29AA(3) of the Act was considered. The applicant submitted the reasons as reflected in ***Quinn*** apply equally to the same phrase used in s 29AA(4) of the Act as the phrase as used in a similar context and for a similar purpose in both sections.

9 The applicant submitted that in the current application the GOSAC award and the General Agreement have an impact on the terms and conditions of the applicant in setting out the majority of the employment relationship. The industrial instruments cannot be enforced in a manner that binds the respondent in the Industrial Magistrate's Court it does not mean that the same instruments cannot apply to the employment of an employee and can therefore be enforced by the Commission by way of an application made pursuant to s 29(1)(b)(ii). The applicant submitted these were the circumstances of the particular application. There is no requirement under s 29AA(3)(a) or s 29AA(4)(a) that the relevant industrial instrument is unable to be enforced but merely that the instruments apply to the employment of the applicant. The applicant submitted that the Commission should

find that neither of the conditions set out in s 29AA(4)(a) or s 29AA(4)(b) are encountered and therefore there is no jurisdictional bar to the Commission hearing the application.

Respondent's Submissions

10 To the extent that the terms of the applicant's contract of employment were decided, the employment contract provided for a salary of $152,337 per annum (as per [8] of the affidavit of David Ernest Eley sworn 2 May 2013). The applicant worked eight days prior to his dismissal and for that period received no wages.

11 The respondent submits what remains at issue is whether or not the salary figure of $152,337 is exceeded. It is the applicant's view that the application of reg 5(2)(c) produces a salary of nil and it is this figure which is to be compared with the prescribed amount for the purposes of s 29AA(4)(b). This is opposed by the respondent.

12 It is the view of the respondent:

(a) reg 5(1) provides for the "prescribed amount" such that reg 5(2) need not be considered; or

(b) reg 5(2)(c) is ultra vires and cannot be applied; or

(c) reg 5(2) cannot be applied in the way contended for by the applicant.

([8] of the respondent's submissions)

Supplementary Submissions

13 The Commission on 6 June 2013 wrote to the parties providing them with the opportunity to provide further submissions in accordance with the provisions of s 26(3) of the Act, in light of Kenner C's comments at [44].

Applicant's Supplementary Submissions

14 The applicant submitted that;

> There is no evidence before the Commission in relation to 'the question of the consent of the Minister to the appointment of the Applicant as Chief Executive Officer of the Respondent.
>
> (applicant's supplementary submissions)

15 Although the respondent suggests there was no consent given there is no evidence to confirm such a suggestion. For example, was the minister asked and did he refuse. Whether it was customary for the minister to provide his approval or alternatively if a person acted in a position of the CEO pending the conclusion of the approval process. The applicant raised the issue of the refusal and whether it occurred after or before the applicant's employment was terminated. In terms of the statutory construction of the MP Act s 18(4) states:

> Of the Officers appointed under this section one shall, subject to the approval of the Minister, be appointed as chief executive officer of the Corporation who –
>
> (a) shall, subject to the control of the members of the Corporation, administer the day to day operations of the Corporation; and
>
> (b) may be a person who is a member of the Corporation

Section 18(1) of the MP Act states:

> The Corporation may appoint such inspectors and other officers and employees, subject to any relevant instrument, as it requires to assist it –
>
> (a) in the administration of this Act;
>
> (b) if the collection, handling, examination, grading, treatment, storage, distribution and sale of potatoes and other services incidental or auxiliary to any of the foregoing matters.

16 In the view of the applicant approval by the minister can be retrospective. To assert that the applicant was not appointed because the minister had not given his approval is contrary to the provisions of s 18(1) and s 18(4) of the MP Act.

17 The applicant submits that it would be in accordance with the provisions of s 26 for the Commission to find that the applicant was appointed by the respondent as acting CEO.

18 The respondent was aware of the need for ministerial approval and even so entered into a contract of employment with the applicant and prior to obtaining the necessary ministerial approval allowed the applicant to commence working for the respondent. Prior to obtaining the necessary approval the respondent seemingly seeks to excuse itself from its contractual obligations and seeks to 'rely upon its deliberate failure to obtain the requisite approval'. The applicant relies on an implied term of common law as set out by the majority in ***BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*** (1977) 180 CLR 266.

Respondent's Supplementary Submissions

19 The respondent submitted that the application filed initially by the applicant on 28 May 2012 should be dismissed for want of jurisdiction because:

(a) the contract of employment is invalid by reason of the absence of ministerial approval for the applicant to be appointed CEO; and

(b) the applicant accordingly has no standing to refer the s 29(1)(b)(ii) application to the Commission and the Commission has no jurisdiction to hear and determine it. The applicant's occupation as identified on the application was 'Chief Executive Officer'. In the main he managed the operations of the organisation (Question 12) and he commenced work on 7 May 2012 and was terminated on 14 May 2012 (Question 14). His

> employment was permanent, full-time and fixed term. The applicant indicated on his application that the number of hours he worked per week was '37.5' and that 'his gross wages/salary (including any salary package benefits value) was '$152,337 per year' (Question 17).

20 The respondent indicates that a basic tenet of the applicant's application is that the alleged contract was for a fixed term of three years, as claimed by the applicant 'Payment for the balance of my three year contractual term' (Question 20). The respondent is a statutory corporation and as such the question of whether the assumed contract exists must be considered within the statutory framework that permits the respondent to employ persons, in particular the CEO. The respondent's authority to allow for the provision to employ the CEO is expressly provided for in s 18 of the MP Act as earlier referred to.

21 The respondent submits that the employing authority is required to seek the approval of the minister to employ the CEO. In the case of Mr Eley there was no formal appointment nor was there a contract of employment as detailed in the application ever finally agreed between the parties. The respondent submitted:

> Even if the respondent did purport to formally appoint the applicant as CEO and a contract in the terms alleged by the applicant was agreed, there was a procedural irregularity in the exercise of the power to appoint because a condition upon the exercise of that power was not satisfied. The Minister has never approved the appointment of the applicant as the CEO of the respondent.
>
> ([12] respondent's supplementary submissions)

22 The respondent referred to the decision in the matter of ***Waring v WorkCover WA*** (2010) WAIRC 00914; (2010) 90 WAIG 1664 that was considered by the Public Service Appeal board. The particular case involved the consideration of whether the power to appoint arbitrators as fixed term officers under s 64(1)(b) of the *Public Sector Management Act 1994* (WA) had been validly exercised. It transpired the board found that the appointments were not validly made. Although it did not expressly say so, the board appeared to agree with WorkCover. At [47] the Board stated:

> In this case, the power to appoint is set out in a statute to include a requirement to meet a test set out in an award, that is s 64 of the *PSM Act* requires that the test for fixed term appointments set out in the Award be complied with. The employer is required to exercise their employing authority to appoint officers in accordance with that test. In this case it has been demonstrated that the purported exercise of statutory power, to appoint, has been made contrary to the statutory requirements and therefore the decision to appoint was invalid from the date it was made (See *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253). While the Award requirement is binding on the employer by virtue of s 64 of the PSM Act, the Award does not at this point apply to the employee because no valid contract yet exists (emphasis added).

The Board then went on to quote Latham CJ in ***Amalgamated Collieries of WA Ltd v True*** (1938) 59 CLR 417.

23 The creation of the relation of employer and employee depends upon an agreement between them and not upon any award. The existence of obligations under an award in relation to a particular employer and employee always depends on the existence of a contract between them. The respondent submits the Commission has the power to make a finding that the alleged contract was invalid and that it is appropriate to exercise such power in this case.

24 The law relating to denial of contractual benefits is summarised by Harrison C in the decision of ***Trigwell v Brereton t/as Aircraft Cleaner Extraordinaire*** (2012) WAIRC 331; (2012) 92 WAIG 624. The claimed benefit must be a contractual benefit to which there must be an entitlement under the applicant's contract of service. The obligation is on the Commission considering the matter to act according to equity, good conscience and the substantial merits of the case.

25 The respondent submits that the Commission should follow the logic of the board in the ***Waring*** judgment in relation to the exercise of legal power upon the presence of the legitimacy of the contract of employment and make a finding that if the contract was ever agreed between the parties which the respondent says it was not it must now be treated as unsound by reason of the absence of ministerial approval as is required by s 18(4) of the MP Act. In the event the alleged contract does not exist due to being invalid then, the respondent submits, the applicant has no standing to refer the claim to the Commission as the Commission's jurisdiction under s 23 of the Act fails to be enlivened. The respondent referred to s 29(1)(b)(ii) of the Act in that an industrial matter can be referred to the Commission in matters where a claim by an employee in circumstances where he had not been allowed by their employer a benefit, which was not a benefit under an award or order. The respondent referred to the decision by the Court of Appeal in ***HotCopper Australia Ltd v Saab*** (2002) WASCA 190 at [18]:

> The section is a source of power in a very limited sense only in that its purpose is to furnish the Commission with the authority in certain cases to entertain a reference to it by an individual employee rather than by a registered organisation. It does so by expressly conferring standing on an employee himself or herself to refer to the Commission a claim of the kind described in the subsection.

26 Any claim for contractual benefits before the Commission must have one primary factor in existence and that is a contract of employment. In this case the respondent submits even if the alleged contract was agreed it is invalid and therefore the applicant has no standing to refer the claim in the application to the Commission. In the decision of Scott ASC in ***Appleton v Director General, Department of Education*** (2012) WAIRC 00381; (2012) 92 WAIG 910 in circumstances where there is no standing for an applicant to file the application and the Commission is without jurisdiction to hear and determine the matter the application should be dismissed for want of jurisdiction. Accordingly the respondent seeks the Commission declare the alleged contract invalid and the application be dismissed for want of jurisdiction.

Conclusion

27 The substantive task of the Commission is to assess whether the applicant's salary pursuant to his agreed contract of employment exceeds the prescribed amount in s 29AA of the Act. On the face of it that appears to be the case as $152,337 the class one salary (that was purportedly agreed between the applicant and the respondent) exceeds the prescribed amount applying at the time the application was filed, (the cap that applied as at 1 July 2011) being $134,100. However, before

considering that matter the Commission needs to address the preliminary issue raised by the respondent in its Notice of Answer and Counter Proposal.

Preliminary Issue

28 It is quite clear that if the jurisdiction of the Commission is challenged, that challenge must be determined before the merits of the application are determined as per the decision in ***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1987) 67 WAIG 325.

29 On the day the applicant was terminated (14 May 2012) the respondent raised the jurisdictional issue submitting the terms of the applicant's contract remained in dispute. Also raised was the appointment of a CEO to the respondent's organisation as conditional upon the approval by the minister, which had never been granted. The specific provision requiring ministerial approval is to be found at s 18(4) of the MP Act.

30 Conversely, the applicant considers there is no evidence before the Commission which would support the question that the minister consented to the appointment or alternatively did not consent to the appointment of the applicant as the CEO of the respondent.

31 The applicant commenced work with the respondent on 7 May 2012 and on 14 May 2012 the respondent terminated the applicant with immediate effect.

32 The Commission finds the terms of the applicant's employment contract had yet to be finalised/agreed upon by 14 May 2012, the day the applicant was terminated.

33 Considering the structure of the MP Act (in particular s 18(4) and 18(1)) together with the supplementary submissions of the applicant and the respondent and having regard for equity good conscience and the substantial merits of the case in accordance with the provisions of s 26 of the Act, it is the view of the Commission that the appointment of the applicant as CEO required the approval of the minister in accordance within s 18 (4) of the MP Act.

34 The Commission finds:

the applicant’s appointment was never submitted to the minister for approval; and

the applicant’s appointment as CEO under the terms of the MP Act is required to receive ministerial approval.

35 The Commission therefore considers the applicant was never appointed as CEO of the respondent. Accordingly, the Commission will issue an order dismissing the application.

2013 WAIRC 00780

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID ERNEST ELEY
	APPLICANT
	-v-
	POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 30 AUGUST 2013
FILE NO/S	B 118 OF 2012
CITATION NO.	2013 WAIRC 00780

Result	Application dismissed
Representation	
Applicant	Mr D Eley (in person)
Respondent	Mr T Lethbridge (of counsel)

Order

HAVING heard Mr D Eley (the applicant) and Mr T Lethbridge on behalf of the respondent and having received written submissions, the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be, and is hereby, dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00779

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00779
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 22 MAY 2013, THURSDAY, 23 MAY 2013, FRIDAY, 24 MAY 2013
DELIVERED	**:**	THURSDAY, 29 AUGUST 2013
FILE NO.	**:**	U 29 OF 2013
BETWEEN	**:**	MR PATRICK GURETTI Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Industrial Law - Harsh oppressive unfair dismissal - Substandard performance issues - Procedural fairness considered - Principles applied - Applicant unfairly dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29 1(b)(i), *Public Sector Management Act 1994* (WA) s 79(3), s 79(5)
Result	**:**	Reasons for decision issued
Representation:		
Applicant	**:**	Mr S Millman (of counsel)
Respondent	**:**	Mr J O'Brien

Case(s) referred to in reasons:

Amalgamated Metal Workers' and Shipwrights Union of Western Australia v Robe River Iron Associates (1989) 69 WAIG 985

Bi-Lo and R v Ltd; Blizzard; ex parte Downs [1993] 1 Qd R 151

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

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

Department of Education and Training v Weygers (2009) WAIRC 00041; (2009) 89 WAIG 267

Fastidia Pty Ltd v Goodwin (2000) 102 IR 131

Garbett v Midland Brick Company Pty Ltd (2003) WASCA 36; (2003) 83 WAIG 893

Johnston v Acting Director General of Department of Education (2002) WAIRC 06155; (2002) 83 WAIG 1553

Jones v Dunkel (1959) 101 CLR 298

Kioa v West (1985) 159 CLR 550

Miles t/as Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Minister for Health v Drake-Brockman (2012) WAIRC 00150; (2012) 92 WAIG 203

Minister for Immigration & Multicultural Affairs, ex parte Lam (2003) 214 CLR 1

Minister for Police v Western Australian Police Union of Workers (2000) WAIRC 01174; (2000) 81 WAIG 356

Public Employment Industrial Relations Authority v Public Service Association of New South Wales (re-Scorzelli) (1993) 49 IR 169

Sanzana v Director General, Disability Services Commission (2011) WAIRC 00088; (2011) 91 WAIG 2106

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Case(s) also cited:

Bromley v Offenders' Review Board (1990) 51 ACrimR 249

Health Services Union of Western Australia (Union of Workers) v Director General of Health (2008) WAIRC 00215; (2008) 88 WAIG 543

McGovern v Ku-ring-gai Council [2008] NSWCA 209

Mijatovic v Legal Practitioners Complaint Committee [2008] WASCA 115

VAAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 117

Reasons for Decision

1 This application was made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (the Act) on 22 February 2013. Mr Patrick Guretti (the applicant) considers the penalty of dismissal was harsh, unjust and unreasonable. Mr Guretti seeks reinstatement in his employment as a science teacher with the Director General, Department of Education (the respondent) of some eight years standing. Mr Guretti was first employed by the respondent in January 2005 and dismissed on 31 January 2013.

2 The respondent denies that the applicant was unfairly terminated. The respondent considers the applicant to have been terminated for substandard performance, following a process that commenced on 11 June 2012. Further the respondent, pursuant to s 79(3) of the *Public Sector Management Act 1994* (WA) (the PSMA), suggests a range of penalties were considered before determining termination to be appropriate. The respondent seeks an order that the application be dismissed.

3 A statement of agreed facts was tendered by the applicant and the respondent at the hearing and is as follows:

1. The Applicant was employed by the Respondent as a science teacher at Kalgoorlie Boulder Community High School ("KBCHS") from 31 January 2005 to 31 January 2013.
2. The Applicant was permanently appointed as a teacher at KBCHS on 11 August 2006.
3. The Applicant's period of employment at KBCHS was not continuous. The Applicant made an application in October 2007 for compassionate transfer back to Perth for family reasons. This application was granted and the Applicant held various fixed term placements in the Perth Metro area.
4. The Applicant returned to KBCHS in January 2011.
5. On 11 June 2012 Ms Kylie Cattaway, Deputy Principal KBCHS wrote to the Applicant and notified the Applicant that his performance was alleged to be substandard.
6. The Respondent placed the Applicant on a substandard performance process on 11 June 2012.
7. KBCHS referred the allegations of substandard performance of the Applicant to the Respondent on 6 July 2012.
8. The Respondent developed a performance management plan (PMP) and the Applicant was required to focus on two areas for improvement:
    a. Curriculum; and
    b. Learning Environment.
9. The PMP was signed by the Applicant in September 2011.
10. The PMP stated that the Curriculum Leader and the Associate Principal will conduct classroom observations on alternate weeks.
11. The Respondent did not contact or invite the Applicant to participate in an interview as part of the alleged substandard process.
12. Via letter dated 13 August 2012, the Respondent notified the Applicant that an investigator was appointed to undertake an investigation into the Applicant's alleged substandard performance process.
13. During the alleged substandard performance process, in term 3 of 2012, the Applicant took a period of sick leave for a knee operation.

Applicant's Evidence

4 Mr Max Douglas McFarlane gave evidence as a science teacher of some 37 years standing currently employed at Shenton College. The witness was appointed as head of department to middle school at Kalgoorlie in 2005 and 2006 when Mr Guretti was first appointed as a science teacher by the respondent. During this time the witness supervised Mr Guretti as his line manager and observed he had issues with student control, similar to the issues the witness had had when he had first started teaching. The witness gave evidence he did not recall Mr Guretti being tardy, and in fact Mr Guretti had a good rapport with the students, and had an effectiveness of delivery. The witness described the Kalgoorlie students as being much more difficult than those students in the metropolitan area. The witness described the students as a law unto themselves.

5 The witness gave evidence that he was a little surprised Mr Guretti was being made permanent in 2006 as he felt he needed more mentoring. The witness understood the applicant and himself were similar in that they were both quiet and reserved and at times struggled with 'outgoing attitudes as far as teachers are needed to have' (ts 22). The witness confirmed that Mr Guretti was on the right track.

6 In cross-examination the witness was asked whether he recalled the applicant and his teaching to which he replied in the affirmative. The witness also indicated that as a head of department you do not normally enter a first year teacher's classroom however in Kalgoorlie the situation was different as classroom management was vital, much more so than for example at Shenton College. The witness indicated that classroom management at Kalgoorlie Boulder Community High School (KBCHS) was very difficult compared to most other schools.

> … because of the nature of the school and the difficulty with the students and the fact that we were very isolated, we were encouraged to make observations and assist teachers wherever necessary.
>
> (ts 28)

7 Mr Stephen Bradley Holyoake gave evidence, having been line manager for the applicant during 2009 at Rossmoyne College. He is currently head of department for physical sciences. The witness gave evidence he first commenced teaching in 1981 and at the time he met the applicant was acting head of department at Rossmoyne College. The applicant at the time was

employed as a science teacher on a short-term contract. The witness had not experienced any difficulties with respect to the applicant in classroom management at Rossmoyne. He did recall giving the applicant advice on class content at one stage, advice he recalls the applicant having taken up. The witness provided a reference for the applicant (exhibit Guretti 1) acknowledging the document had been requested by the applicant. As part of the reference the witness confirmed of the applicant:

> He demonstrated a capacity to develop a rapport with the students he taught and he endeavoured to cater to their different learning styles.
>
> (exhibit Guretti 1)

8 The witness confirmed that Mr Guretti had no difficulty with classroom management. There were a few aspects of teaching where he responded in the way that he had been asked by the witness to do so.

9 Mr Patrick Michael Guretti gave evidence. The witness commenced studying for a degree in 1997 and concluded his qualifications in 2004. Application was made to the respondent as a prospective employer, in particular to the scholarship program that was advertised at the university. The witness gave evidence that his application was successful. The witness gave evidence that the scholarship was worth $20,000 and the conditions attached to the scholarship were that Mr Guretti needed to undertake a country position for a period of three years upon completion of the teaching qualification in either maths or physical science. The scholarship commenced at the start of the 2005 academic year in Kalgoorlie at the Eastern Goldfields Senior High School, the school's name was subsequently changed to KBCHS.

10 The witness continued at KBCHS, obtaining permanency in 2007 (exhibit Guretti 3). Shortly afterwards the applicant gave evidence he made application for a compassionate transfer back to Perth. The application was successful and between 2008 and 2010 the applicant was employed in a series of metropolitan schools. While the witness was working in Perth he applied to transfer his substantive position from Kalgoorlie back to Perth, his motivation stemming from the medical issues his mother in particular was suffering from and the difficulty with the students in Kalgoorlie. In response to Mr

11 Guretti's request he received a document from the respondent advising that the application had been refused. Mr Guretti's relinquishment of his position as a science teacher at school was reversed and he returned to Kalgoorlie at the start of 2011.

12 Mr Guretti recalled receiving feedback from the head of english regarding the class he took for relief. The feedback came in the form of an email:

> Pat,
>
> I took your year nine science class for relief period for today. Nice group. Thanks for taking the kids literacy levels into account in differentiating tasks for them. It's great to see a science teacher doing this, especially for relief - for a relief lesson.
>
> Cheers
>
> (exhibit Guretti 14)

13 Mr Guretti confirmed he was placed on a performance management action plan (PMAP) dated 30 September 2011. The PMAP identified two areas for improvement in 'curriculum' and 'learning environment'.

14 Mr Guretti gave evidence that he undertook professional development with respect to classroom management and instructional strategies in 2006, a course CMIS level I, over the period of a year. The witness gave evidence that Ms Brown (the person managing the course) gave feedback into the way he managed his teaching. The next stage of professional development was tactical teaching, an extension of strategies in which to implement the curriculum, an area he was keen to learn.

15 Mr Guretti gave evidence in relation to his PMAP that there were a number of points he met in terms of his success indicators. For example every five weeks the witness was required to design and issue a formal assessment. Profiles had to be completed for each class and that was also undertaken. Mr Guretti gave evidence that he considered himself effective in the use of case management strategies (CMS) and low-key responses and he received positive indicators from both Ms de Grace and Ms Cattaway.

16 The witness confirmed he had met his indicators. Mr Guretti received positive feedback in the form of classroom observations that were documented and carried out by the curriculum leader Ms de Grace and the associate principal Ms Cattaway, positive comments such as:

> Teacher predicts, intervenes and responds appropriately to student behaviour.
>
> Effective use of CMS low key responses.
>
> Teacher spends increasingly less time gaining student's attention.
>
> Teacher continually moving round the room observing and offering help.
>
> Teacher demonstrates continuous knowledge and student movements and actions in the class
>
> (ie: with-it-ness)
>
> Student behaviour is managed such that disruptions to other classes is minimised.
>
> Effectively following up on student behaviour to maximise teacher's authority in the classroom.
>
> Select, use and modify a reward system to elicit positive student behaviour
>
> (exhibit Guretti 15)

17 According to the witness an issue that was commented on by both Ms de Grace and Ms Cattaway was the witness' ability to maintain calm. By June 2012 all the issues that had been raised had either been met or had been well developed. The witness

gave evidence that he was particularly interested in the tactical teaching professional development course however it was not available until 2012. He commenced the course in term three of 2012 but unfortunately sustained a knee injury which required him to be off work for the remainder of the term. In terms of observations the witness recalled there was a total of four in all in 2012.

18 When asked what feedback the witness received from his colleagues his response was that it varied depending on the particular teacher. Feedback from the curriculum leader Ms de Grace was negative, feedback from Ms Hansen varied between negative and positive and feedback from Anita and Miranda was positive. The only written feedback the witness received was from Ms de Grace which tended to be all negative. From Ms Cattaway the feedback varied between positive and negative.

19 During the period Mr Guretti was off work with his knee injury he gave evidence that Ms Hansen contacted him and asked whether he would undertake the marking of formal assessments. The witness agreed and subsequently marked five classes, some 100 exams.

20 Mr Guretti gave evidence (exhibit Education 6) in respect of positive observations made by Ms Cattaway in the witness' classroom. A series of positive observations were made including:

> I was pleased to see you positioned yourself well to observe the class at work whilst also being able to observe and assess the students performing the bunsen burner test. I observed that you give positive and encouraging comments if the student made an error with the bunsen. Clinton was so proud of himself after passing the test. His smile said it all.
>
> (exhibit Education 6)

21 The witness gave evidence that such comments indicated an improvement in his performance consequent upon his PMAP. The witness regarded the improvements overall as a positive reflection on himself and his teaching ability.

22 Mr Guretti then gave evidence that he was the subject of a substandard performance investigation by the respondent commencing 11 June 2012. Mr Guretti considered that the investigation was flawed in that the investigator did not appear to consider the witness' written response in that she did not comment on it. Furthermore, he was not interviewed by the investigator. People such as Mr Ronnie Naidoo and Ms Ruth Kane were not contacted. Nothing prior to 2011 and 2012 was taken into consideration in the investigation. For example, none of Mr Guretti's employment history whilst in Perth was taken into consideration. None of the people Mr Guretti worked with in Perth were interviewed by the investigator.

23 On 11 June 2012 the witness confirmed he received correspondence from Ms Cattaway (exhibit Education 13) advising he was not performing to a satisfactory standard at KBCHS. The witness confirmed that the document outlined areas he had been focusing on even though Mr Guretti understood that he had improved on his performance management. The written correspondence invited the witness to respond within 10 days and Mr Guretti submitted on 2 July 2012 a lengthy response (exhibit Guretti 17).

24 The witness advised when Ms Cattaway responded (exhibit Education 14) there was no mention of any of the issues that had been raised by Mr Guretti (exhibit Guretti 17). Mr Guretti was unsure as to whether his response had been considered at all. At the conclusion of Mr Guretti's correspondence the witness requested the following of the respondent:

> I request that my response be carefully considered and I propose that I'm provided with an opportunity to engage in the performance management process that is reasonably resourced and adequately supported.
>
> (extract from exhibit Guretti 17)

25 Mr Guretti gave evidence that he returned to work following his knee injury in term four of 2012. Mr Guretti was asked whether he was ever advised his performance was unsatisfactory between 2005 and 2007. The witness answered in the negative. This was a period the witness confirmed was his first eighteen months of teaching working with difficult students from a tough socio-economic background. The witness confirmed it was also the period in which he was granted his permanency which was a relatively short period compared to most other teachers.

26 In 2011 Mr Guretti confirmed that when he arrived at KBCHS he was allocated Ms de Grace as a line manager. She was the head of the department of science and maths. Ms Hansen was not a line manager. Mr Guretti gave evidence that he had concerns with Ms de Grace because she was a difficult person to deal with and conversations were not easy. He described her as:

> … gruff and closed; not very forthcoming with positive comments; to such an extent that it – it became an ordeal to have a conversation with Ms de Grace.
>
> (ts 185)

27 Mr Guretti gave evidence he did request a change in line management. At that stage Mr Guretti requested Ms Hansen however a decision was made that was not possible. Mr Guretti indicated that the request was declined on the basis that performance management must be undertaken by someone in a level III position. Mr Guretti indicated he then proposed Mr John Foeken would be able to provide a fair and balanced assessment of where he was at, however, unfortunately that did not occur.

28 Mr Guretti gave evidence about his time at Governor Stirling, where he was employed for 12 months on fixed term contract. Mr Guretti's line manager at the school was the head of department. There were no performance related concerns nor was the witness placed on any performance improvement processes. At the end of the fixed term contract the witness gave evidence he applied to have his compassionate transfer extended. It was agreed and at the start of 2009 another fixed term contract with the respondent was obtained.

29 Mr Guretti moved to Rossmoyne and there were no performance related concerns raised with the witness. At no stage was he ever placed on a PMAP and in addition the witness found Rossmoyne to be a very good environment to work in.

30 At Kalamunda Senior High School the witness was on two fixed term contracts. Mr Guretti taught science specifically to lower school chemistry and TEE chemistry. During the classes the witness was required to teach in Perth the whole spectrum

from year eight through to year 12. There were no performance concerns raised, no one ever wrote to the witness saying they were concerned about his performance and no one ever placed Mr Guretti on a PMAP.

31 Mr Guretti gave evidence he was employed at Mirrabooka High School in a number of roles including as a science teacher, as a physical education teacher and also as an ITAS teacher dealing with numeracy and literacy. Mr Guretti was not advised his performance was substandard nor was he placed on a PMAP. The witness was there throughout the entire year and was required to develop lesson plans in accordance with the curriculum, to develop assessments, and to mark the assessments. The witness indicated that the school had students from a diverse range of ethnic backgrounds and Mr Guretti was given the position of the lower school soccer coach. Mr Guretti gave evidence he was commended on the role given the school performed well in that the soccer team reached the finals of the competition.

32 Mr Guretti gave evidence that he was terminated in February 2013. Since that day as the respondent is the main employer in this state and as the witness does not have an E number that has made it very difficult to go to the employer to seek further work. An E number is the identification number that is received by teachers that places the teacher on the respondent's system. Mr Guretti confirmed with the Commission that he is seeking reinstatement or re-employment from the proceedings.

33 In cross-examination the respondent tabled exhibit Education two (139 – 146) dated 23 March 2011. The front page was titled performance management and the remaining pages were titled self reflection plan.

34 Mr Guretti confirmed in cross-examination (exhibit Guretti 15) that at that time Ms de Grace was his line manager that 'curriculum' was one of the areas that had been identified as problematic. Mr Guretti was then asked whether under the column 'Success Indicators' he was able to understand what the words 'Deadlines for common assessment tasks not met' meant. In response Mr Guretti said:

> … , I'm not entirely sure what that's referring to, whether that's directed toward me or the students, I'm not sure.
>
> (ts 155)

35 Mr Guretti was asked whether behaviour management was another area that needed to improve. In response the witness indicated it was something he was willing to work on. Mr Guretti agreed there were concerns raised about his performance based on an assessment over a six month period from March to September 2011.

36 In the context of exhibit Education 12 Mr Guretti was asked whether he recalled meeting with Ms Cattaway on 29 March 2012 to which he responded – 'Vaguely' (ts 171). He was then asked whether he recalled receiving a copy of the employee performance policy (exhibit Education 11) to which he responded in the affirmative. The relevant document is dated 21 July 2010 a document received by Mr Guretti. It did not have the flow chart that appears on the current document.

37 Mr Guretti was then taken to exhibit Education 13, formal advice from Ms Cattaway dated 11 June 2012 that alleged Mr Guretti was not performing to a satisfactory standard as a teacher, level II. Mr Guretti agreed that the private and confidential correspondence invited him to respond to the allegations made in the letter. The correspondence detailed the process whereby if Mr Guretti's process was determined inappropriate then the matter would be referred to the director general in accordance with the respondent's policy. The witness agreed that was his understanding of the policy.

38 Mr Guretti gave evidence that he responded in some detail to a response from Ms Cattaway. Subsequently exhibit Education 15 advises Mr Guretti in accordance with s 79(5) of the PSMA that Ms Sherina Bhar was to be appointed as an investigator by the director general of the respondent. Mr Guretti agrees that this correspondence was received and noted that the investigator may conduct an interview with Mr Guretti.

39 Mr Guretti confirmed in evidence that he received exhibit Education 17 from the director general advising that she intended to terminate his employment as a teacher with the respondent effective as of 22 February 2013. Mr Guretti advised he did not respond to the director general's initial correspondence based on legal advice.

40 In re-examination the witness was taken to a performance evaluation held on 2 May 2012. Mr Guretti confirmed that he was concerned about what occurred in the particular lesson critique in that it was the last of the observations of 2012 before Ms Cattaway's letter of 11 June 2012. It was written without consultation with himself and was quite critical of Mr Guretti. Mr Guretti gave evidence he was therefore worried as to the comments contained in exhibit Education 9. This was the final observation prior to the matter being referred to the respondent for a substandard performance investigation. The witness also confirmed that the idea for this lesson was proposed by Ms Hansen. It was a lesson in matter, solids, liquids and gases. The idea was to demonstrate to the students and require them to write down their prediction as to what they thought might happen, to write down their observations and determine whether they could explain what had occurred. Mr Guretti confirmed he had no opportunity to explain to Ms de Grace or Ms Cattaway prior to the lesson what the teaching objective was that day.

41 Mr Guretti gave evidence that he was surprised to receive a response so quickly after writing his letter in response to the letter received from Ms Cattaway. Mr Guretti's letter was sent on 2 July 2012 and the response was received from Ms Cattaway on 6 July 2012 some four days later suggesting:

> Having considered your response, the – the reasons you presented failed to persuade me that I should not progress this matter.
>
> (ts 201)

42 Mr Guretti said he was disappointed in receiving the correspondence. It did not appear that his own response had been considered. Mr Guretti indicated he was not interviewed by the investigator nor were his union representatives.

43 Mr Ronnie Naidoo gave evidence on the behalf of the applicant. Mr Naidoo has been employed at the KBCHS for the last seven years including at the campus behaviour centre. It is also known as the Goldfields Transition Centre, an off-site facility for children with behaviour issues. The witness explained Kalgoorlie was a town with a transient population. Many children come to the school for a year to two years and then move on. Many of the children at the school have behavioural issues. In

the last year and a half the witness had been at the school he had been involved in a special scheme for aboriginal children with specialist literacy and numeracy needs. During his time at the school he had observed Mr Guretti's classes, on occasion with people in management, and on a number of other occasions with students that were in Mr Guretti's science classes.

44 The witness sat in with Ms de Grace on one occasion and Ms Cattaway on another occasion. It would have been in 2011. He was not aware that he was on a PMAP he simply thought it was part of his yearly management process.

45 Mr Guretti felt uncomfortable as too many were people sitting in his class and he asked the union representative at the school to sit in on his class which the witness complied with. On another occasion the witness heard Ms Hansen criticise Mr Guretti at staff drinks. The witness heard Ms Hansen express her displeasure at the concept of Mr Guretti returning to KBCHS on several occasions in 2011. The witness confirmed he would have observed Mr Guretti in his classroom on 20 to 30 occasions.

46 Mr Naidoo confirmed that he had been a teacher for 31 years in South Africa, New Zealand and Australia. As part of that experience the witness had had experience as head of a department.

47 Ms Ruth Kane gave evidence for the applicant. She is currently employed at KBCHS as head of department and has been there since 2006. The witness met Mr Guretti when he came to KBCHS in 2006 and although she and Mr Guretti work in separate departments they are fellow union colleagues. On one occasion she gave evidence she had sat in on one of Mr Guretti's classes at his request towards the end of 2011. The witness gave evidence that Mr Guretti did all that he was supposed to do including a seating plan, introducing a body of the lesson and a conclusion. The witness indicated that the children listened well and generally were well behaved.

48 Ms Kane gave evidence that Mr Guretti was off work in term three of 2012 and she picked up his relief lessons. The witness indicated the lesson plan and the content of the lesson were left in the office by Mr Guretti. The witness described his year eight class as:

> … it was a solid lesson. There was a seating plan, the kids knew what they were doing, I understood the lesson, I understood the content that he needed delivered, there was no problem.
>
> (ts 119)

49 In cross-examination Ms Kane gave evidence that most students were well-behaved. In general, it was the five percent of students who were most difficult to handle at KBCHS.

Respondent

50 The respondent submitted that Mr Guretti's performance was substandard based on an assessment undertaken as part of the performance management process outlined in s 79 of the PSMA and the public sector standards. As at 11 June 2012 when the applicant was formally advised of the substandard process it was appropriate for the school to refer to the director general the issue of Mr Guretti's performance in accordance with the PSMA. The respondent considers that the applicant was given a fair opportunity to provide responses at all times. The director general required an independent investigation into the substandard performance of Mr Guretti. The respondent considered the decision to dismiss the applicant based on substandard performance was appropriate and fair in the circumstances.

51 Ms Kylie Cattaway in her capacity as deputy principal at KBCHS for the last eight years was called to give evidence. Ms Cattaway gave evidence that she had had 18 years of teaching, in the main as a maths teacher. All of it had been at KBCHS or its predecessor school. Ms Cattaway described her relationship with Mr Guretti as amicable.

52 When Mr Guretti returned to KBCHS in 2011 Ms de Grace was line managing Mr Guretti and Ms Cattaway was line managing Ms de Grace. The witness indicated that her understanding was Mr Guretti did not have an interest in returning to Kalgoorlie and that his intention was to remain in Perth.

53 The witness described the performance management process which used to be quite separate:

> But then they created the employee performance document which blended the whole lot together. So the performance management starts at stage 1 which is self-review. Stage 1 is self-review. Then you meet with your line manager, you discuss, you come up with a plan. That plan is then implemented, reviewed, modified along the way.
>
> (ts 220)

54 The witness gave evidence that teachers may keep their plan or write a new plan or in circumstances where there are behaviour concerns and substandard performance occurs the line manager refers it to their superordinate. The witness indicated she was not involved with Mr Guretti because she was not his line manager. Ms de Grace was having difficulties getting the plan developed so Ms Cattaway got involved because it was not happening promptly enough and there were delays by Ms de Grace.

55 The witness gave evidence Mr Guretti requested in 2012 to change line manager. This request was put at a meeting with the witness in his classroom:

> He had mentioned to me that he was finding Adele quite negative in her responses and he had requested that I be his line manager. In that discussion and I said that I wasn't sure whether Terry would be happy with a level 4 for engaging in line management at that level and that I would get back to him. I spoke to Terry and teaching the that he didn't want a level 4 doing that role and that another level 3 may be suitable that he would have to determine whether their workload would be able to take it on and so I went back to Patrick with that feedback. And he indicated to me that he would get back and as - it must be close to when he was taking leave because I remember getting an email from him. He was supposed to meet with me on a Friday or give me his answer on a Friday and the email had been sent, "I can't meet that deadline". He was on leave. It might have been a long period when he had his knee reconstruction.
>
> (ts 233)

56 On 29 March 2012 the witness indicated she informed Mr Guretti of the possibility of a substandard performance process (exhibit Education 12). In addition the witness provided him with a copy of the employee performance policy.

57 The witness was referred to exhibit Education 19 in response to Ms Cattaway's correspondence advising of Mr Guretti's substandard performance. The witness agreed that Mr Guretti had written a comprehensive letter however the witness was not convinced by the contents.

58 In cross-examination the witness was asked whether she was aware Mr Guretti sought to have Mr Foeken as his line manager as well. Ms Cattaway was not aware of Mr Guretti's request.

59 Ms Cattaway was asked to reconsider exhibit Education 14 the letter addressed to Mr Guretti advising him that his substandard performance had been referred to the director general in accordance with s 79 of the PSMA. The witness agreed the letter was short however she had followed a sample letter and had not considered whether it was fair or not fair to advise Mr Guretti why it was that the matter was being referred to the director general:

> You said, "I don't - it wasn't concerned with fairness. It was concerned with following the policy"? --- I didn't say that I wasn't concerned, I said it I wouldn't consider it.

60 Ms Cattaway was advised there were four performance observations for the 2012 academic year. The witness was asked whether on the basis of those observations she was confident that there had been no improvement in Mr Guretti's performance. The witness indicated that it was not just based on classroom observations. Mr Guretti was also meeting with Ms Hansen in relation to curriculum.

61 The witness was then asked why following the observation on 2 May 2012 which was the last observation of Mr Guretti was he not spoken to by either Ms de Grace or herself. The witness indicated this was when Mr Guretti had raised the issue of Ms de Grace being his line manager.

62 Ms Adele de Grace gave evidence for the respondent as head of department in quantitative science at KBCHS, a position held since 2007. In total Ms de Grace has taught for 12 to 13 years in Western Australia and Canada. The witness described her relationship with Mr Guretti as mostly professional, centred around performance management.

63 In 2011 the witness had the opportunity to observe some of Mr Guretti's classes and felt he needed more support particularly in the area of curriculum and learning environment. The witness offered Mr Guretti informal chats, providing feedback through formal feedback and observations in the classroom.

64 The witness indicated there would always be a feedback sessions either written or verbal. Ms Hansen was a colleague in 2011 and in 2012 she became the teacher in charge. In that role it is important for Ms Hansen to learn the process of performance managing. So the decision was made to use Ms Hansen in that role as part of the performance management process with Mr Guretti.

65 The witness gave evidence that she was very direct in her feedback to Mr Guretti for him to realise that it was part of the PMAP and he needed to act on it. The witness was not aware that Mr Guretti had requested a change in line manager.

66 The witness advised that she was aware of the decision in 2012 to proceed with Mr Guretti through a substandard performance process:

> We were working very closely together, I definitely was aware.
>
> (ts 288)

67 The witness was asked if she could confirm whether there was anything remarkable about the number of students that passed Mr Guretti science classes at the end of 2011. The witness was unable to comment. The witness recalled there was improvement overall in the area of organising groups of children into small groups to get 'glasses and lab coats'.

68 Ms Melinda Hansen gave evidence for the respondent that for the past eight years she had been employed as a science teacher at KBCHS. In 2012 the witness indicated she became teacher in charge.

69 The witness recalled she first became aware that Mr Guretti was returning to KBSHS on the first professional development day at the beginning of 2011.

70 At the beginning of the year the witness created a document delegating the responsibilities of common assessment and exam writing and forward planning for all teachers who taught that particular year group. The document was emailed to all staff, was open to feedback, and all staff were aware of their responsibilities. On two occasions the witness was aware that Mr Guretti requested her as his line manager.

71 As the teacher in charge some of the things the witness undertook were a lead role in curriculum development, assessment moderation, behaviour management and dealing with difficult students. The development of these common assessment tasks were not specific to Mr Guretti.

72 The witness was asked whether when Mr Guretti was off on sick leave in term 3 of 2012 she delivered to his house some science exams for him to mark. The witness recalled delivering common assessments and exams. When the witness found out Mr Guretti was returning to KBCHS she could not recall commenting 'why is he coming back' (ts 306).

73 Mr Keith Dodd gave evidence on behalf of the respondent. His role is as director of labour relations on behalf of the department a position he has held since 2009. The witness gave evidence that his role involving Mr Guretti's substandard performance commenced once the school determined that Mr Guretti was substandard then the matter was referred through the regional executive director then through the labour relations directorate for their involvement.

74 The witness indicated it was at this stage the department put a recommendation to the director general that she appoint an investigator under the provisions of the PSMA. The process is that the investigator is independent. The PSMA requires the judgement of the investigator as to how they conduct that investigation. There is no requirement that the person be

interviewed. The investigator appointed to investigate Mr Guretti was Ms Sherina Bhar, and she was accepted and endorsed by the director general.

75 The witness gave evidence that from the respondent's point of view there needs to be procedural fairness in terms of arriving at the decision. On occasion there have been times where as a directorate matters have been referred back to the relevant school for consideration because the directorate has not been satisfied that a person has been afforded that fairness. Before anything proceeds to the director general the directorate needs to be comfortable that procedural fairness has been afforded the employee.

76 The witness confirmed that exhibit Education 20 was the formal appointment correspondence of the investigator. Furthermore, the report provided by the investigator was to be found in the folder page 304 to 308 and was forwarded to Mr Guretti by the director general.

77 Counsel for Mr Guretti objected to the report being tendered in evidence as the investigator was not called to give evidence. The witness indicated that he considered the report and other documentation that had been provided to the respondent. Based on that information the witness prepared a briefing note and made recommendations to the director general which outlined the investigation and made recommendations in terms of the issue of penalty. These matters were for the director general to consider.

78 Normally the department does not provide anything other than the investigator's report to Mr Guretti. The witness indicated Mr Guretti was given an opportunity to comment on the issue of penalty. The witness indicated that the recommendation of termination was made on the basis that the process had determined Mr Guretti to be substandard with the terms of his contract as a teacher. The other two penalties under the PSMA would still mean the end of the day Mr Guretti would be teaching students and having found that it was substandard it really was not considered to be an option that was considered practical. The responsibility of the department towards students is that we had a duty of care to ensure they are receiving an appropriate education.

79 In cross-examination the witness was directed to exhibit Education 21 a briefing note from the witness to the director general in particular to the second paragraph which states:

> The subsequent response in writing from Mr Guretti was given due consideration by his line manager.

The witness agreed that there was an error in the letter and on reflection Mr Guretti's response to Ms Cattaway's correspondence advising of substandard performance was not given due consideration. The witness did indicate that he had read the response from Mr Guretti although when pushed the witness could not recall the length of the letter or anything specific that had been read.

80 The witness was asked whether he was surprised Mr Guretti was not interviewed. In response it was suggested that it was up to the investigator to determine as to whether on the information they are able to make that determination. The witness declared the investigator was independent on the basis that she was not given any instruction as to how to undertake the investigation.

81 It was put to the witness that Mr Guretti was told there were areas for improvement in his teaching and there were areas where he was satisfactory but he was not told that his performance was substandard until the correspondence was said to him by Ms Cattaway in June 2012. The witness responded that's not my understanding. Mr Guretti had been advised through a series of meetings and discussions with his line manager and others that there were issues around his performance.

82 Mr Guretti was advised that it might lead to a substandard process but he was not advised that his performance was substandard. Mr Dodd was asked when did Mr Guretti get an opportunity to demonstrate an improvement in performance after he was advised that he was substandard. In response the witness indicated:

> I think the way the Act is structured, it contemplates as I say, that process happening up to a point where the person is deemed to be substandard, and then the Act comes into play and an investigator is appointed to review that process up to the point where the person is deemed to be substandard.
>
> (ts 321)

Applicant's Closing Submissions

83 Counsel submitted that Mr Guretti was not afforded procedural fairness and accordingly, the lack of procedural fairness constituted an unfairness in the dismissal as per ***Bogunovich v Bayside Western Australia Pty Ltd*** (1988) 78 WAIG 3635.

84 The respondent:

> failed to carry out an extensive inquiry into all relevant matters surrounding the alleged substandard performance as was reasonable in the situation; and
>
> failed to have reasonable grounds, on the information was available at that time, believing that Mr Guretti's performance was adequately substandard so as to justify dismissal.

As per ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 Perth 224.

85 The respondent abused the legal right to dismiss the applicant and did so in a manner that was exercised harshly and oppressively against the applicant, in the Industrial Appeal Court decision in ***Miles t/as Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385.

86 In particular, the lack of procedural fairness in this case arose due to the:

> Respondent not properly adhering to the higher standard of procedural fairness applied to it as a public sector employer;

Applicant not being afforded a proper opportunity to respond to the allegations and be properly heard in the investigation;

lack of relative fairness in the treatment of witnesses, resulting in prejudice to the Applicant;

investigator being biased and influenced by irrelevant and prejudicial matters;

investigator drawing improbable conclusions that were not reasonably open to her based on the evidence available at the time and failed to properly weigh the evidence;

lack of transparency in the making of findings and decision to take action and the Applicant not being afforded a proper opportunity to respond to the findings and proposed action;

the decision-maker being improperly informed and taking action (ie dismissal).

([4] of applicant's closing submissions)

87 The applicant submitted there were strict necessities in the context of procedural fairness that arose from the respondent's role as a public sector employer at the relevant disciplinary instruments that applied at the time of the applicant's employment namely:

the PSMA;

the Public Sector Standard – Discipline; and

the respondent's own policy.

88 In addition to the usual requirements of procedural fairness, applying the disciplinary instruments required the respondent to ensure that its decisions were based:

on a proper assessment of the facts;

procedural fairness was applied;

decisions were to be impartial and importantly capable of review.

89 The document referred to as The Discipline Policy, Procedures and Guidelines reflect that an employee should be provided with 'a hearing appropriate to the circumstances'. 'All of the information required to answer the allegations' and 'an opportunity to respond to the allegations and is all decision affecting them.'

90 Similarly, the Discipline Procedure ensures the employee 'is told the nature and particulars of the discipline issue', is provided 'with the opportunities to provide explanations' and 'copies of documentation' and has 'a right of response'. The applicant outlined that the respondent failed to adhere to the specific issues to which it was subject.

91 In the absence of a fair procedure and one that fails to incorporate the principles of natural justice the applicant submits the respondent is not entitled to subject the applicant's penalty of termination. The respondent refused to allow the applicant the opportunity to be heard in writing and in so doing denied Mr Guretti a full and proper opportunity to respond to the allegations. The seriousness of the allegation and potential action being taken by the respondent demanded that as full an investigation as possible be conducted – ***Bi-Lo and R v Ltd; Blizzard; Ex parte Downs*** [1993] 1 Qd R 151.

92 The respondent could have allowed an interview with Mr Guretti. Although such an interview might not have accorded with the respondent's policy, the absence of such an approach in the view of Mr Guretti counts against the respondent affording Mr Guretti procedural fairness. Even so the respondent was obliged to provide to Mr Guretti evidence provided by other witnesses including documentation (copies of the signage alleged to have been removed by Mr Guretti).

93 In all the circumstances it is the view of Mr Guretti that the investigator failed to conduct as extensive an investigation as was reasonable.

94 Furthermore, the basis of which the decision maker for the respondent made her findings regarding the proposed action was in the view of Mr Guretti not documented, transparent nor was it capable of review. There is no documented description or clarification as to the weight that was attached to the materials that were provided by the employees of the respondent employed at KBCHS. Nor is there any documented justification as to why the respondent failed to consider the applicant's employment at any other location other than KBCHS. Those schools included:

Governor Stirling Senior High School;

Rossmoyne Senior High School;

Mirrabooka Senior High School;

Swan View Senior High School; and

Kalamunda Senior High School.

95 There was no evidence that Mr Guretti's performance while teaching at the aforementioned schools was substandard. The limited evidence called in the proceedings relating to the Perth metropolitan area appointments was that the performance by Mr Guretti was satisfactory.

96 The Commission was invited in the applicant's closing submissions [31] to draw an adverse inference based on:

the length of appointment at each school;

the failure to call witnesses from the most recent schools.

97 Mr Guretti submits that such a contrary implication is not open to be drawn given Mr Guretti gave positive evidence about his attempts to contact more recent employers at the metropolitan schools and conversely the respondent called no evidence at all.

98 The adverse implication invited by the respondent was the similar inference the respondent drew in respect of the service of Mr Guretti's appointments to metropolitan schools.

99 Mr Guretti requested a copy of the investigation report and the materials the investigator relied upon in the investigation which enabled her to make a proper response. It is said provision of such documents can form part of the right to be heard in complex cases, Forbes, JS. (2002) Justice in Tribunals, The Federation Press: Annandale, NSW, 167–8.

100 The required provision of the material facts depends on the seriousness of the issue and the subsequent consequences as per Public Employment Industrial Relations Authority v Public Service Association of New South Wales (re-Scorzelli) (1993) 49 IR 169.

101 Mr Guretti had a legitimate belief that all relevant materials would be provided before the respondent would take any contrary action against him. Mr Guretti had an entitlement to know what the case was against him, what the documentation was in support of that case and also be given an opportunity to fully respond to the case, Kioa v West (1985) 159 CLR 550.

102 The respondent failed to provide a full copy of the investigation report thereby denying Mr Guretti a proper opportunity to respond to the findings and proposed action to be undertaken by the respondent. Thereafter having regard to the jurisdiction of the WAIRC in following the principles outlined in Johnston v Acting Director General of Department of Education (2002) WAIRC 06155; (2002) 83 WAIG 1553) Mr Guretti's counsel submits that participation in the investigation and subsequently penalty process is pointless.

103 There is no evidence that the ultimate decision maker reviewed the evidence against that provided by Mr Guretti. To the contrary, the person making the decision was informed by a memorandum prepared by the respondent's industrial relations consultant. The findings against Mr Guretti that his performance was substandard were harsh and unreasonable in the circumstances including:

> lack of a comprehensive inquiry;
>
> insufficient and paucity of evidence;
>
> a failure to consider the length of service of the applicant;
>
> the demonstrated ability and commitment by the applicant; and
>
> the dismissive effect on the applicant's prospects for future employment given the position of the respondent as the major employer of school teachers in Western Australia.

104 Further, and as an alternative to the aforementioned matters raised by Mr Guretti he submits the mass of evidence invites an inference that Mr Guretti's performance was not substandard. Within 18 months of commencing employment at KBCHS Mr Guretti was granted permanency. He continued to work at KBCHS until the end of this academic year at which time he applied for and was granted a compassionate transfer to a series of metropolitan schools in the Perth area. At no stage is any evidence before the Commission that Mr Guretti was not there during any substandard performance processes during this period.

105 Mr Guretti called two witnesses from as well as providing evidence himself as to his teaching at KBCHS following his return from Perth schools in 2011. In response the respondent called three witnesses, only one of whom was a science teacher.

106 On balance, Mr Guretti submits it is open to find when considering the written and oral evidence that Mr Guretti's performance was not substandard:

> Further and in the alternative, the applicant submits that, to the extent that his performance was substandard, (which is denied) it was not sufficiently below standard such as to justify termination of the employment relationship.
>
> Further and in the alternative, the Applicant submits that, to the extent that his performance was substandard, (which is denied) the applicant was not afforded a proper opportunity to participate in professional development such as to enable him to improve his performance and therefore the Respondent had no proper basis on which to justify the termination of the employment relationship;
>
> Further and in the alternative, the Applicant submits that, to the extent that his performance was substandard, (which is denied) the applicant was not advised that his performance was sufficiently and in fact that the employment was in jeopardy, and was therefore never given a proper opportunity to improve its performance and therefore the Respondent had no proper basis on which to justify termination of the employment relationship (cf: ***Fastidia Pty Ltd v Goodwin*** (2000) 102 IR 131 at [43]) (Note - this decision is in respect of the Section 170 CG (3) (d) of the C'th Workplace Relations Act as it then was, and is therefore persuasive bot(sic) not binding on the WAIRC);
>
> (applicant's closing submissions [37], [38] and [39])

107 Particulars raised by the applicant as relevant to the proceedings are that in September 2011 Mr Guretti was placed on a PMAP. It remains unclear where such a plan lies in the normal process of performance management with the respondent. At this stage Mr Guretti was not advised his employment was in trouble.

108 On 29 March 2012 meeting was held between Mr Guretti and his 'superordinate'. Again Mr Guretti was not informed his employment was in trouble. In June 2012 Mr Guretti was advised that he was going to be placed on a substandard performance process (exhibit Education 13). It was on this occasion that Mr Guretti was formally advised his employment was in jeopardy. Thereafter Mr Guretti provided a detailed response on why it was he considered his employment was not substandard (refer exhibit Guretti 17).

109 After he had provided his response Mr Guretti was advised that the respondent still considered his employment to be substandard. This response was provided to Mr Guretti on the last day of Term 2, 2012. Mr Guretti had a significant

proportion of Term 3 off on sick leave. The applicant asserts there to be no evidence of any formal documentation or steps taken by the respondent to assist Mr Guretti to improve his performance.

110 Further and in the alternative, (which the Mr Guretti denies), if Mr Guretti was formally advised at the meeting at 29 March 2012, then he was given an insufficient chance to improve his performance between that date and the date that his performance was alleged to be substandard in June 2012. Between those two dates there is evidence of only one official classroom surveillance. This is entirely insufficient to determine that Mr Guretti's performance as a teacher was unsatisfactory.

111 In failing to call the investigator to give evidence Mr Guretti was denied the opportunity to cross examine the investigator. Accordingly the Commission is invited to draw an adverse inference in respect of such failure.

112 On the question of the remedy the applicant submits the primary remedy available under the Act is reinstatement. The applicant requests that legal submissions on the question of remedy be postponed pending the publication of the Commission reasons for decision.

113 Counsel for Mr Guretti in a his right of reply referred to Sanzana v Director General, Disability Services Commission (2011) WAIRC 0088; (2011) 91 WAIG 2106 at [34]:

> If the performance meets the required standard, then the dismissal based on alleged substandard performance would not be sustainable.

114 If, in the case of an employee performance is substandard in matters and the employee refuses to act as is so prospects of improvement to the required standard and thereby reduced. This point is picked up at [170]:

> Given Mr Sanzana's refusal or failure to accept that his performance was substandard, to maintain that it was excellent, that he met the required timeframes and had never disregarded a mealtime management plan amongst other things in the face of overwhelming evidence to the contrary and given his behaviour towards others, retraining would not resolve the issues. Rather, the problems would continue.

Respondent's Closing Submissions

115 The respondent submitted that Mr Guretti's performance was substandard based on a fair assessment. Following the referral of Mr Guretti's substandard performance to the director general by KBCHS the matter was dealt with little time in accordance with the provisions of s 79 of the PSMA and the associated policy. Relevant considerations were taken into account and the respondent submits it was appropriate to terminate the applicant for substandard performance.

116 The respondent submitted the decision could be reviewed by the Commission as a hearing de novo having regard for the decision of Commission Kenner in Johnston v Acting Director General of Department of Education where it was stated at [29]:

> … matters referred to the Commission pursuant to s 78(2) of the PSMA are restricted to consideration by the Commission of the reasonableness of the employer's conduct, but the Commission may review the employer's decision de novo, as the circumstances warrant and determine the matter afresh and substitute its own decision for the employer's decision if that is appropriate.

117 The procedure followed by the respondent was, in all the circumstances, fair. In the alternative if the Commission finds that this was not the case the Commission can cure any procedural defect by substituting a fresh decision to that of the respondent's decision. The respondent submitted it was the task of the Commission to:

> determine whether the applicant's dismissal was unfair in all of the circumstances;
>
> determine who bears the burden of proof in the circumstances and whether the burden has been met; and
>
> determine whether the applicant has been offered procedural fairness throughout the performance management process and subsequent substandard performance process.

118 The test in determining whether a dismissal is unfair or not is well settled in this Commission. Whether an employer acted unfairly so as to amount to an abuse of that right is a test to be found in the decision of the Industrial Appeal Court of Undercliffe. In such circumstances the onus lies on the applicant to prove that the dismissal was, in all the circumstances, unfair.

119 One of the principal issues raised by the applicant is that Mr Guretti did not receive procedural fairness and in this regard the respondent referred the Commission to the decision of the Full Bench in the Department of Education and Training v Weygers (2009) WAIRC 00041; (2009) 89 WAIG 267. In that decision Ritter AP refers to a statement by Aronson and others:

> Regardless of how 'fairness' is assessed, it is clear that the onus of establishing that the standard has not been met will lie upon the party who seeks to prove breach of natural justice. It must be shown that the procedures proposed or adopted by the decision maker were 'unfair in the circumstances.'

And [31]:

> It is important to emphasise at the outset that it is insufficient for the applicants to prove that better or fairer procedures could have been adopted by Mr Bridges. They must show that those proposed were unfair in the circumstances.

120 The respondent submitted that the employee performance of the department (exhibit Education 11) in consultation with the relevant unions including the State School Teachers' Union. Section 79(1) of the PSMA defines 'substandard performance' to be:

> … the performance of an employee is substandard if and only if the employee does not, in the performance of the functions and he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions.

121 Section 79(5) requires the respondent, before it forms the opinion that the employee's performance is substandard to investigate whether or not performance of the employee is in fact substandard. Following such an investigation s79(3) provides for the employing authority to form an opinion in circumstances where the employee's performance is considered to be substandard then and only then will can the employing authority impose one of three penalties, namely:

> Withhold for such a period as the employing authority thinks fit an increment of remuneration otherwise payable to that employee; and
>
> reduce the level of classification of that employee; or
>
> terminate the employment of that Public Sector employee.

122 The respondent prior to taking any action under s 79 of the PSMA establishes a preliminary view that it is the employee's performance that is substandard. It is that preliminary view which is formed when the employee's line manager or managers conclude the ordinary performance management process and allegations of substandard performance are put to the employee. The respondent submits it is then the s 79 provisions which are activated.

123 There are two distinct processes which govern an employee's performance; a performance management process consistent with the public standards on performance management and the respondent's policy. This process is set out in clause 4.2 of the policy (exhibit Education 11) in particular at 4, 5, 6 and 7. The respondent asserts that KBCHS complied with its overall requirements in meeting Mr Guretti's performance management process. There was a performance management plan complying with the policy (exhibit Education 2) and regular classroom observations were undertaken.

124 After the delivery of Ms Cattaway's letter on 11 June 2012 the respondent submits it is entirely appropriate that no further classroom observations of Mr Guretti's teaching occur. Once a substandard performance process has been undertaken for the respondent to introduce any further issues constitutes a contamination of the evidence proceeding forwards.

125 Professional learning was identified and the respondent concedes that the tactical teaching training referred to earlier was not available to Mr Guretti in 2011 when it was first discussed. The respondent did ask the Commission to consider that KBCHS was 600 kilometres from the metropolitan area and therefore professional development was not as readily available. Further it was unfortunate that Mr Guretti was on sick leave in 2012 and seemingly declined to attend a number of programs that were available and identified as relevant to the issues identified with his performance.

126 The respondent addressed the Commission on exhibit Education 11, in particular the substandard performance as part of the respondent's policy at 4.3. When a line manager is of the view that an employee's performance is substandard, the manager may conclude ordinary performance management and commence substandard performance. Although the policy states that substandard performance will not normally commence it does not prohibit such action occurring and unless an employee has previously been advised that their performance is considered unsatisfactory and given a reasonable opportunity and assistance to improve to a satisfactory standard the respondent submitted the policy is a sufficiently flexible to allow for some latitude in the manner in which the aspects take place. In the case of Mr Guretti there was a considerable delay in finalising the applicant's performance management plan (PMP). These matters (that is the commencement of the PMP) was started in March 2011 (exhibit Guretti 15) and the respondent understood Mr Guretti was formally advised that his performance was considered unsatisfactory in a formal meeting on 29 March 2012 (exhibit Education 12). That was actually a meeting which took place some 10 weeks prior to the actual receipt of Ms Cattaway's letter of 11 June 2012.

127 The respondent submits there was no noticeable improvement in key factors of Mr Guretti's role as a teacher. Demonstrating a fair process overall in accordance with the policy the school then provided written notification of the areas in which Mr Guretti's performance was considered to be substandard (exhibit Education 13).

128 Once Ms Cattaway's letter was sent on 11 June 2012 Mr Guretti was invited to provide a written response and he did so, a response that was quite lengthy and was responded to by Ms Cattaway within a five day period. The applicant was informed that he did not provide an adequate explanation and the alleged substandard performance was referred to the director general of the respondent (exhibit Education 14).

129 The director general notified Mr Guretti that an investigation was being conducted and an investigator was appointed who had no previous involvement in the process. Following the completion of the investigation and the provision of the report to the director general a copy of the report of the investigation is provided to the applicant. He was provided with an opportunity to respond in writing and Mr Guretti did so (exhibit Education 16). The director general notified the applicant of the outcome of the proposed action to Mr Guretti and gave him the opportunity to respond in writing to the proposed sanction. On the latter matter, that is the proposed penalty of termination Mr Guretti chose not to respond.

130 In Kioa v West the respondent referred at [23] to Mason J description of procedural fairness as:

> … the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interest and purposes, whether public or private, which the statue seeks to advance or protect or permits to be taken into account as legitimate considerations.

131 The respondent suggested there was no established principle of procedural fairness that required an employer when investigating substandard performance to interview people or provide an employee with an opportunity for an interview. Whether such steps are required in a certain cases will depend on the case. The language used by the director general in her letter made it quite clear that there was no statement that demonstrated an intent to interview (exhibit Education 15).

132 Even if the Commission construes otherwise and decides that the applicant had a legitimate expectation that he would be interviewed in Minister for Immigration and Multicultural Affairs, ex parte Lam (2003) 214 CLR 1 Gleeson J states that:

> … If, by stating an intention to take a certain course, a decision-maker becomes bound to take that course, regardless of whether any disadvantage to a person affected results from a failure to take the course, then an expectation appears to become a right.

133 The respondent suggests there was no detriment suffered by the applicant. There was no practical injustice suffered. Mr Guretti also raises any issue that he was denied procedural fairness in that he was not provided with all of the documents. Throughout the process neither Mr Guretti or his counsel requested to be provided with further documentation. The respondent submitted had that occurred and they had been denied such documentation then the Commission may have been in a position to determine whether there had at that point been a breach of procedural fairness.

134 The respondent submitted that the applicant bears the responsibility of discharging the onus that Mr Guretti was denied procedural fairness. In Sanzana v Director General, Disability Services Commission it was held at [33] and [34]:

> To determine whether performance is substandard it is necessary to compare the actual performance with the standard to be achieved. That standard can be gathered from the evidence of standard practice, from documents such as job description forms, procedures and policies. It can also be determined by reference to training and directions given to staff, and, of course, to common sense.
>
> If performance is substandard, it does not automatically follow that dismissal is appropriate or fair. However, in the case of an employee whose performance is substandard in significant matters or to a significant degree and the employee refuses to accept that this is so, the prospects of improvement to the required standard are reduced. Accordingly dismissal may not be unfair in those circumstances. It would depend on a number of factors including the nature and degree of performance deficiency, the prospects for the performance being raised to the required standard and the practicability of an opportunity for training and correction.

135 Mr Guretti attested in his evidence that it was his opinion that he had achieved a broad range of the requirements set out in his PMAP. The respondent was left with no choice but to terminate Mr Guretti. The respondent submitted for Mr Guretti to continue teaching would have compromised the education of the students he was teaching at the time. The process undertaken to respond, review and effect Mr Guretti's termination conformed with the required statutory requirements. There were no fundamental omissions in the process used.

136 The test in determining whether a dismissal is a fair or not is well settled in this Commission. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant so as to amount to an abuse of the right is outlined by the Industrial Appeal Court in Undercliffe. The onus is on the applicant in such matters to establish that the dismissal was unfair.

137 The respondent submitted terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair referring to Shire of Esperance v Mouritz (1991) 71 WAIG 891.

138 The respondent submits the director general considered dismissal was the most appropriate penalty in the circumstance and requests the Commission consider dismissing the application.

The Commission's Findings and Conclusions

Credibility

139 The Commission has listened carefully to the evidence given by each witness and closely observed each witness. In my view Mr Guretti gave his evidence in a considered and confident manner and his detailed evidence was supported by some documentation. There is nothing in the evidence of Mr Guretti which I consider to be untruthful or improbable. I have listened carefully to the evidence given by Mr MacFarlane, Mr Holyoake, Mr Naidoo and Ms Kane on behalf of the applicant and Ms Cattaway, Ms de Grace, Ms Hansen and Mr Dodd on behalf of the respondent and in addition, closely observed each witness both in the giving of their evidence and also their manner. It is the Commission's view that each witness gave their evidence clearly and to the best of their ability. The Commission prefers Mr Naidoo's evidence over Ms Hansen's evidence with respect to the criticism of Mr Guretti returning to Kalgoorlie overheard in the staffroom. All other evidence given by Ms Hansen is accepted. In my view all of the other witnesses who gave evidence in these proceedings gave their evidence honestly and to the best of their recollection and I therefore accept the evidence they gave.

140 Mr Guretti considers he has been unfairly terminated, that he suffered a lack of procedural fairness in terms of the procedure adopted by the respondent in applying the substandard performance process. The respondent failed to give consideration to alternative penalties when dismissal was selected as the appropriate s 79 consequence under the PSMA. Further, the respondent failed to take into account Mr Guretti's conduct. It is Mr Guretti's view that the penalty of dismissal was harsh, oppressive and unjust and Mr Guretti seeks reinstatement.

141 The respondent's submission is that having reached the view that Mr Guretti was guilty of substandard performance and in accordance with the PSMA consideration was given to a range of penalties. The respondent applied the correct procedures in accordance with s 79 of the PSMA and at all stages the principles of procedural fairness were applied. The respondent considers the Commission should issue an order dismissing the application.

142 The rights, duties and obligations between employees and employers in the public sector are governed by statute in this particular case s 79 of the PSMA which is contained in Part 5 of the PSMA, headed up 'Part 5 - Substandard Performance and disciplinary matters', which outline the application and scope of the section including the rights of appeal to the Commission for relevant employees. In respect of these proceedings there was no dispute regarding the referral and the Commission finds that Mr Guretti is a relevant employee for the purposes of these proceedings. In Johnston v Mance where Kenner C discusses the purpose of proceedings as earlier referred to the Commission agrees with the reasoning of Kenner C and finds in relation to

this matter, given the nature of this application, the Commission can review the respondent's decision to terminate Mr Guretti as a hearing de novo.

143 The relevant provision of the PSMA is as follows:

> **79. Substandard performance, definition of and powers as to**
>
> (1) For the purposes of this section, the performance of an employee is substandard if and only if the employee does not, in the performance of the functions that he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions.
>
> (2) Without limiting the generality of the matters to which regard may be had for the purpose of determining whether or not the performance of an employee is substandard, regard —
>
> (a) shall be had —
>
> (i) to any written selection criteria or job specifications applicable to; and
>
> (ii) to any duty statement describing; and
>
> (iii) to any written work standards or instructions relating to the manner of performance of,
>
> the functions the employee is required to perform; and
>
> (b) may be had —
>
> (i) to any written selection criteria or job specifications applicable to; and
>
> (ii) to any duty statement describing; and
>
> (iii) to any written work standards or instructions relating to the manner of performance of,
>
> functions similar to those functions.
>
> (3) Subject to subsections (4), (5) and (6), an employing authority may, in respect of `` one of its employees whose performance is in the opinion of the employing authority substandard for the purposes of this section —
>
> (a) withhold for such period as the employing authority thinks fit an increment of remuneration otherwise payable to that employee; or
>
> (b) reduce the level of classification of that employee; or
>
> (c) terminate the employment in the Public Sector of that employee.
>
> …
>
> (5) If an employee does not admit to his or her employing authority that his or her performance is substandard for the purposes of this section, that employing authority shall, before forming the opinion that the performance of the employee is substandard for those purposes, cause an investigation to be held into whether or not the performance of the employee is substandard.

144 The Commission considers that Mr Guretti was aware that the respondent had concerns about his performance. What the Commission does not accept is that Mr Guretti knew the degree of concern the respondent had regarding his employment. It was said by Ms Cattaway in evidence that she discussed with Mr Guretti on 29 March 2012 the possibility of a substandard performance process. Exhibit Education 12 is a handwritten note by Ms Cattaway written sometime after meeting with Mr Guretti indicating she had presented the employee performance policy to Mr Guretti. When Mr Guretti was asked whether he recalled the meeting his words were 'Yes, vaguely' (ts 171). The Commission considers that Ms Cattaway did warn Mr Guretti of the substandard performance process in March 2012. I believe Ms Cattaway thought she had undertaken the task however she was a person involved in administration and most familiar with the policy and the words 'substandard process'. In the Commission's view however Ms Cattaway was unsuccessful in transmitting the seriousness of the situation to Mr Guretti in so far as there being a consequence for Mr Guretti's employment.

145 The Commission accepts that Mr Guretti received an employee performance policy (exhibit Education 11) on that same day however the copy received by Mr Guretti did not include the flowchart (21 July 2010) that copies currently have. The document is a 16 page policy statement addressing a number of procedures of which substandard performance comprises only part of the document. For example, a reader would have to be aware as to whether he/she is a s 79 employee or non s 79 employee. In addition, a reader would have to be aware of the 'jargon' of the respondent e.g. 'superordinate', 'substandard'. These are but a couple of examples. Importantly to be fully understood the document has to be read in conjunction with relevant legislation, departmental policies, awards, enterprise bargaining agreements and public sector standards.

146 The Commission considers that by the end of the meeting between Ms Cattaway and Mr Guretti even if Mr Guretti read exhibit Education 11 in its entirety he would not be aware that his employment was in jeopardy therefore the Commission does not accept that Mr Guretti was warned on 29 March 2013. The Commission accepts that Ms Cattaway may have understood that she warned Mr Guretti but based on Mr Guretti's own evidence which was he understood he was making good progress, clearly that was not the case. In making my findings I refer also to exhibit Guretti 17 (70, [2]):

> I have been an active participant in my Performance Management Action Plan and was aware it could lead to substandard performance process, but at no time was it explained to me what the Substandard Performance process meant nor was there any indication from my line manager that recent efforts being made had reached their end and that things are now progressing to Substandard Performance.

147 The Commission finds with respect to the (exhibit Education 11) policy that Ms Cattaway as the superordinate gave direct evidence that she failed to consider Mr Guretti's written response contrary to the respondent's own policy. Ms Cattaway agreed in evidence her response to Mr Guretti's letter was short. The Commission understands Ms Cattaway had been anxious to follow the correct procedure and in so doing had followed a 'sample' letter. Counsel for Mr Guretti asked Ms Cattaway:

> I don't – I wasn't concerned with fairness. I was concerned with following the policy?

Ms Cattaway in response said:

> ---I didn't say that I wasn't concerned, I said I wouldn't consider it.

(ts 257)

148 The Commission has been asked by counsel for Mr Guretti to draw an adverse inference as a result of the respondent not calling the investigator to give evidence. The rule in Jones v Dunkel (1959) 101 CLR 298 is a common rule practice that a tribunal is entitled to apply. It may be concluded that the failure to call a significant witness, such as the investigator, by the respondent, indicates that the missing evidence would not have assisted the respondent, Forbes J R S, Justice in Tribunals, (3rd ed, 2010) [12.48].

149 The Commission would like to examine the work of the investigator to ensure that before the director general determined the action she did against Mr Guretti, the respondent conducted as full and as extensive an investigation as was possible into all of the relevant matters surrounding the alleged substandard performance as was reasonable in the circumstances. The respondent must be able to demonstrate that it afforded Mr Guretti natural justice and procedural fairness in the investigative process. In examining all the notes made by the investigator during the investigation, the questions asked during the investigative process, the persons the investigator addressed and questions put in addition to her final report the Commission finds that at no stage did the investigator put any question, email, interview, nor did she phone Mr Guretti. Similarly, there was no contact with Mr Guretti's union representatives or those persons who had attended observations in his classrooms at his request. In addition the Commission finds there was no correspondence sent to Mr Guretti or his union representatives. The Commission accepts that seemingly, the investigator did consider Mr Guretti's correspondence (exhibit Guretti 17) of 2 July 2012.

150 Conversely, there are numerous pages of notes outlining questions from the investigator to Ms Cattaway. Many of the questions would have been better answered by Mr Guretti as they were questions as to how Mr Guretti felt, not how Ms Cattaway considered he felt. On the basis of the information sought by the investigator the Commission finds that Mr Guretti (with the exception of his letter of 12 July 2012 seemingly having been read by the investigator) almost appears to have been excluded from the investigation. Having made that finding I do not consider it necessary for every employee to be interviewed in such circumstances but clearly for the scope of the information being sought in this investigation including Mr Guretti's requests to change his line manager there were some significant requests being made by Mr Guretti. An interview, courtesy correspondence, an email or certainly communication by telephone at the very least would have been useful and would have allowed Mr Guretti to feel as if he had been part of the investigative process.

151 One of the identified areas of concern relating to Mr Guretti in the investigation was 'the learning environment'. The Commission finds the investigation failed to identify that KBCHS drew specific behavioural issues with children. Evidence was given by number of witnesses including Mr McFarlane, Mr Holyoake, Mr Naidoo and Ms Kane that there were problems amongst the children:

> What was the student behaviour that made the students difficult?---Right. They - generally lack of - seeing a lack of desire to actually learn anything. They were there because the law said they had to be there a lot.
>
> Yes?---They would run in any out of the classrooms. Wouldn't - wouldn't attack the teacher as much as just feel they had the right to leave and come whenever they wanted to and - and damage things if they wanted to.

(ts 14)

152 In the section Performance Issues of the investigation report written by the investigator and forwarded by the director general to Mr Guretti on 14 November 2012 the investigator states the evidence indicates:

> Ms Hansen has compiled comprehensive notes about her interaction with Mr Guretti relating to identified performance issues.

Mr Guretti notes in his correspondence written on behalf of his counsel written on 7 December 2012 that:

> Up until reading this report, I have not been made aware that Ms Hansen was involved in my performance management. I have not been involved in any discussions with her about her alleged concerns, nor have I seen any evidence of her concerns. As this is new information which has come to light and never been raised in any previous meetings, conversations or correspondence, I feel that I am disadvantaged in my ability to defend these.

(Department of Education document 294)

The Commission finds the circumstances relating to Ms Hansen's involvement in Mr Guretti's performance management without his understanding to be somewhat alarming.

153 The Commission considers critical in an investigation such as the one overseen by the investigator is that the process is fair both substantively, and by perception. The perception was that the investigation was one sided, made more so by excluding the investigator from the giving of evidence.

154 The respondent's policy (exhibit Education 11) on employee performance requires under 4.3 substandard performance for superordinates and line managers to:

- base their opinion that an employee's performance is substandard on evidence and the reasonable expectations of the role;

- not normally commence substandard performance management unless an employee has been:

  previously formally advised what aspects of their performance are considered unsatisfactory; and

  given a reasonable opportunity and assistance to improve to a satisfactory standard.

In managing substandard performance, line managers will:

- employ and demonstrate a proper and fair process; and
- treat staff with courtesy, sensitivity and consideration.

The Commission is of the view that in the circumstances Mr Guretti was not given a reasonable opportunity to improve because he did not know what 'substandard' meant until such time as he received the letter from Ms Cattaway on 11 June 2012 (exhibit Education 13). While he responded to Ms Cattaway's letter in comprehensive form he was shortly thereafter advised by the director general that an investigator was to be appointed and accordingly in the Commission's view, there was no opportunity for Mr Guretti from 11 June 2012 to improve his performance, even though he remained employed by the respondent through to February 2013.

155 In the Full Bench Decision in the Minister for Health v Drake-Brockman (2012) WAIRC 00150; (2012) 92 WAIg 203. the criteria that governs the evidentiary onus on an employer was considered by the Industrial Commission of South Australia in Bi Lo wherein the Commission observed at 229 – 230:

> An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.

156 In the same Full Bench Drake-Brockman decision once findings are made by the Commission as to the circumstances of the conduct which is said to warrant the dismissal, the next step is to make an assessment of whether a dismissal is harsh, oppressive or unfair. Heenan J in Garbett v Midland Brick Company Pty Ltd (2003) WASCA 36; (2003) 83 WAIG 893 relevantly observed [72 – 73]:

> Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other…
>
> In this State a test which has been adopted by the Commission, and approved by this Court, is to consider whether the dismissal amounted to an abuse of an employer's right to dismiss thus rendering the dismissal harsh or oppressive - ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635, ***Undercliffe*** and ***Amalgamated Metal Workers' and Shipwrights Union of Western Australia v Robe River Iron Associates*** (1989) 69 WAIG 985, 987. In cases where the alleged harsh, oppressive or unfair nature of the dismissal relates to the procedure followed by the employer in effecting the termination of employment it has been held in this State that a failure to adopt a fair procedure by the employee can lead to a finding that the dismissal was harsh, oppressive or unfair – ***Bogunovich v Bayside Western Australia Pty Ltd***, but a lack of procedural fairness may not automatically have this result - ***Shire of Esperance v Mouritz***.

157 The Commission finds that there were there were delays caused by Ms de Grace in getting Mr Guretti's performance plan implemented in an appropriate amount of time. Further, the Commission finds that the evidence demonstrates the exchange between Ms Cattaway and Mr Guretti on 29 March 2012 failed to transmit that Mr Guretti understood there was a consequence for his employment associated with moving onto substandard employment.

158 The Commission finds that Mr Guretti had a legitimate expectation to be provided with all the details associated with the investigation before the report was actually concluded. In other words Mr Guretti had a right to know what the case was against him, Kioa v West . As an example Ms Hansen appears to have made a significant contribution in a negative sense about which Mr Guretti knew nothing which was, in my opinion, a denial of natural justice.

159 When taking all the issues into account the procedure followed by the employer in seeking to terminate Mr Guretti for substandard performance it is the view of the Commission that the respondent failed to follow procedural fairness in that:

- Mr Guretti was given no opportunity to improve his performance once advised he may be moved onto the substandard process;
- Ms Cattaway did not consider Mr Guretti's detailed response of 2 July 2012 (exhibit Guretti 17) contrary to the respondent's policy;
- the investigative process gave the impression it was one sided as apart from the investigator advising in writing (respondent's discovery documents 306) she had read Mr Guretti's letter of 2 July 2012 (exhibit Guretti 17) the investigator had no contact with any persons associated with Mr Guretti;
- the investigation was limited in the evidence it considered;
- Ms de Grace failed to treat Mr Guretti with sensitivity and consideration in her observations as a line manager, contrary to the respondent's policy;
- there was a failure by the school to assist Mr Guretti to understand his role and responsibilities in relation to the performance management process;
- the investigator relied on details which were never presented to Mr Guretti which is fundamentally unfair;
- Mr Guretti asked on more than one occasion to change his line manager, a request that was overlooked; and

- it appears that the respondent based its view on Mr Guretti's substandard performance on only four observations (contrary to its own policy), the last one undertaken on 2 May 2012, some 4 weeks prior to the correspondence of 11 June 2012, an observation whereby no feedback was sought from Mr Guretti.

160 It appears to the Commission that little regard was had to the several years that Mr Guretti spent as a teacher in metropolitan schools with no issues being raised regarding his performance. One of the criticisms raised in the report was the lack of professional development Mr Guretti had undertaken yet the school was aware he had signed up to the second stage of tactical training in term three, 2012. Mr Guretti had to withdraw because of knee replacement surgery which meant that he was absent from school. The fact that Mr Guretti marked five classes of exams while on sick leave at the request of one of the teachers (some 100 exams) was simply overlooked in the investigation report. In addition the Commission finds it passing strange that Ms Hansen gave the investigator a notable amount of information yet Mr Guretti was unaware of Ms Hansen's role until he read the investigator's report. In the Commission's mind the respondent has had no regard for the length of Mr Guretti's service as a teacher and the promptness with which Mr Guretti gained his permanency following commencing his employment at KBCHS.

161 The director general forwarded correspondence to Mr Guretti advising him that in accordance with s 72(1) of the PSMA Mr Guretti's performance was considered substandard and in accordance with s 79(3) of the PSMA termination of this employment was considered to be appropriate. The director general under the particular section had the option of reduction in salary, transfer or termination. The director general chose termination but gave Mr Guretti 10 working days to respond to the proposed sanction. Mr Guretti chose not to respond:

> PRIVATE AND CONFIDENTIAL
>
> Mr Patrick Guretti
>
> C/- Mr Simon Millman
>
> Slater & Gordon Lawyers
>
> GPO Box 2557
>
> PERTH WA 6001
>
> Dear Mr Guretti
>
> In my letter to you dated 20 December 2012, I notified you that I had formed the opinion that your performance is substandard within the meaning of section 79(1) of the *Public Sector Management Act 1994* (WA) ("Act"). I also informed you that I intended to terminate your employment as a teacher with the Department of Education (the Department).
>
> You were given a reasonable opportunity to provide written submissions concerning the action I proposed to take, however I have not received any submissions from you or on your behalf. Accordingly, I maintain the view that termination of your employment, pursuant to section 79(3) of the Act, is the most appropriate action in this case.
>
> The Department expects its employees to perform their duties with diligence to the required standard. In imposing this sanction I have considered the impact of your performance on public school students and the important position of trust held by Departmental employees and the expectations of them by the wider community.
>
> In order to finalise your employment with the Department I have instructed the Personnel and Payroll Branch to calculate your pay up to 22 February 2013 as payment in lieu of notice in accordance with the *Teachers (Public Sector Primary and Secondary Education) Award 1993* as well as any outstanding entitlements that may be owed to you. Payment will be made to your usual nominated bank account. If monies are owed to the Department, these will be deducted from your final payment where the Department is properly authorised to do so.
>
> In accordance with section 78(2) of the *Public Sector Management Act, 1994* you may refer this matter to the Western Australian Industrial Commission should you wish to appeal this decision.
>
> Again, please be advised the Department of Education provides a free and confidential counselling service, PRIMEXL, should you wish to use it. PRIMEXL may be contacted on 9492 8900 or 1800 674 188 for regional areas.
>
> If you have any questions arising from this correspondence, please contact Mr Keith Dodd, Director, Labour Relations, on 9264 4921.
>
> Yours sincerely
>
> SHARYN O'NEILL
>
> DIRECTOR GENERAL

162 In all of the circumstances I find that the applicant was not given a fair go all round and was unfairly terminated (see Undercliffe). The onus in terms of proving whether a dismissal is harsh, oppressive or unfair rests with the applicant. The Commission finds, on the balance of probabilities that Mr Guretti has demonstrated the dismissal was unfair in that the respondent failed to adopt a fair procedure when seeking to place Mr Guretti on a substandard performance procedure pursuant to s 79 of the PSMA. The Commission finds Mr Guretti has discharged the onus in proving that the dismissal was unfair.

Remedy

163 Turning to the question of remedy, the Commission has yet to receive submissions from either Mr Guretti or the respondent in respect of this matter. The question was left dependent on the outcome of the hearing at first instance. It was determined that should the outcome favour Mr Guretti the Commission would leave submissions on the question of remedy until further

submissions are heard. Should the outcome favour the respondent then the need for further submissions would no longer be required.

164 The Commission declares that Mr Guretti has been unfairly dismissed. At all times, the decision of the Commission is to be in the form of an order or a declaration as per s 34(1) of the Act. Given the view of the applicant and the respondent regarding the deferral of submissions on the issue of reinstatement or re-employment the Commission might be best placed by reflecting in a declaration that Mr Guretti was unfairly dismissed. There is some hesitation whether the Commission can issue a declaration without an associated order, Minister for Police v Western Australian Police Union of Workers (2000) WAIRC 01174; (2000) 81 WAIG 356. Due to the parties' preference that at this stage the Commission decide only the issue of unfair dismissal the Commission will therefore issue a 'finding' as defined in the Act.

165 The Commission therefore considers it appropriate to issue a declaration that Mr Guretti was unfairly dismissed by the respondent and also order that the application be relisted to hear submissions on the question of reinstatement and or re-employment. A minute reflecting this view now issues. The form of the order to issue is not an issue that has been addressed by either party and therefore, if requested, the matter may be addressed at a speaking to the minutes.

2013 WAIRC 00785

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR PATRICK GURETTI
	APPLICANT
	-v-
	THE DIRECTOR GENERAL
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 SEPTEMBER 2013
FILE NO/S	U 29 OF 2013
CITATION NO.	2013 WAIRC 00785

Result	Order issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J O'Brien

Order

HAVING HEARD Mr S Millman, of counsel for the applicant and Mr J O'Brien for the respondent, I the undersigned having given reasons for decision and pursuant to the powers conferred on me under the Act, hereby –

1. DECLARE that Mr Guretti was unfairly dismissed by the respondent.
2. ORDER that the application be re-listed before the Commission to hear submissions on the question of reinstatement and/or re-employment on a date to be fixed.

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

2013 WAIRC 00761

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RONALD MILIADO
	APPLICANT
	-v-
	YUNGNGORA ASSOCIATION INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 26 AUGUST 2013
FILE NO/S	U 68 OF 2013
CITATION NO.	2013 WAIRC 00761

Result	Application discontinued
Representation	
Applicant	Mr P Cozens (of counsel)
Respondent	Ms J Edinger (of counsel)

Order

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

AND WHEREAS on 18 June 2013 a conference between the parties was convened;

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

AND WHEREAS on 20 August 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00762

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAYLENE MILIADO
	APPLICANT
	-v-
	YUNGNGORA ASSOCIATION INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 26 AUGUST 2013
FILE NO/S	U 69 OF 2013
CITATION NO.	2013 WAIRC 00762

Result	Application discontinued
Representation	
Applicant	Mr P Cozens (of counsel)
Respondent	Ms J Edinger (of counsel)

Order

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

AND WHEREAS on 18 June 2013 a conference between the parties was convened;

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

AND WHEREAS on 20 August 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00768

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00768
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 18 APRIL 2013, FRIDAY, 28 JUNE 2013
DELIVERED	**:**	TUESDAY, 27 AUGUST 2013
FILE NO.	**:**	U 213 OF 2012
BETWEEN	**:**	MARTIN THOMAS HOWELL WITT
		Applicant
		AND
		GIOVANNI (JOHN) FERRARO
		Respondent

Catchwords	**:**	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Principles applied - No dismissal at the initiative of the employer - Commission lacks jurisdiction - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(i)
Result	**:**	Dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr R Arndt (of counsel)

Case(s) referred to in reasons:

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor [1991] 173 CLR 231

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Robert Harwood v Ace Services Pty Ltd trading as Defensive Driving School (2002) 82 WAIG 2513

Reasons for Decision

1 On 3 October 2012 Martin Thomas Howell Witt (the applicant) lodged this application in the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) claiming that he was unfairly dismissed on 5 September 2012 by Giovanni (John) Ferraro (the respondent).

2 The applicant maintains that he was terminated on 5 September 2012 after an altercation with Mr Giovanni Ferraro in the respondent's office after he questioned the amount of sick leave entitlements due to him. A video of the incident also shows Mr Ferraro saying that he had no shame and telling the applicant to leave the respondent's office for no valid reason. At the time Mr Ferraro was also being loud and aggressive towards the applicant. The applicant claims that when he was leaving the respondent's office on 5 September 2012 he was assaulted by Mr Ferraro.

3 The respondent claims that the applicant was not terminated on 5 September 2012. The applicant chose to leave the respondent of his own volition and he abandoned his employment when he left the office taking the TAFE books. If the Commission finds that the applicant was terminated and an in an unfair manner the respondent accepts that the applicant mitigated his loss.

Background

4 The respondent provides pest control services to commercial and residential premises. The applicant was employed by the respondent as a senior pest management technician between 20 August 2007 and 5 September 2012 on a permanent full time basis. The applicant booked pest control jobs for technicians, he identified new work for the respondent and he undertook pest and weed control services. When the applicant ceased working for the respondent he usually worked 40 hours per week and he was paid $29 per hour.

5 The dispute over the applicant's sick leave entitlements arose when the applicant's partner became incapacitated for four weeks after having knee surgery on 25 July 2012 and she had her operation just prior to Mr Ferraro leaving Western Australia to visit family in Italy. The applicant wanted to use his sick leave as personal leave to care for her and his two young children. In Mr Ferraro's absence the applicant undertook some of his management duties. In order to assist the respondent during his partner's convalescence, the applicant worked between 9.00 am and 3.00 pm each day after 25 July 2012 and he expected that the remaining hours he normally worked would be given to him as sick/carer's leave so that he would be paid his normal wages each week. Mr Ferraro returned to work on 30 August 2012. As he was unsure about how much sick leave the applicant had to use as carer's leave he completed a summary of the sick leave entitlements he claimed was due to the

applicant up to September 2012 (the 2012 summary) (Exhibit A2 – part 2). Mr Ferraro gave the 2012 summary to the applicant on 4 September 2012. After reviewing this summary the applicant claimed that the amount of sick leave Mr Ferraro claimed was due to him was lower than the amount of sick leave due to the applicant in a summary completed by Mr Ferraro in 2010 (the 2010 summary). The applicant kept a copy of the 2010 summary in his desk however it was missing when he looked for it on or about 4 September 2012. On the afternoon of 4 September 2012 the applicant and Mr Ferraro had a discussion for some time about the quantum of the applicant's sick leave accruals and as the applicant believed the 2010 summary was correct they remained in dispute.

6 Mr Ferraro and the applicant had a further discussion about the sick leave entitlements due to the applicant on the morning of 5 September 2012. In the office at the time was Mr Ferraro's wife Ms Caterina Ferraro who occasionally assisted with the respondent's administrative duties. There was a further meeting between the applicant and Mr Ferraro on the morning of 6 September 2012 and his friend Reverend William Ross came with him to this meeting.

Evidence

Applicant

7 The applicant stated that on 5 September 2012 he asked Mr Ferraro if he could look at his time cards for the period up to 2009 as they contained information relevant to the 2010 summary, which was in dispute between the applicant and Mr Ferraro. Mr Ferraro initially said he did not have them and then he said that they could not be accessed because his personal belongings were in the store room where they were kept. The applicant and Mr Ferraro continued their discussion in the staff room and Ms Ferraro told them both to settle down. Both Mr Ferraro and the applicant traded personal insults about each other and their family members. The applicant was not happy about the situation so he returned to sit at his desk. Mr Ferraro then told him that he had no shame to continue working with the respondent and told him that he did not feel comfortable with him remaining in the office. The applicant felt uncomfortable and confused. Mr Ferraro told him he could no longer use his work vehicle. The applicant grabbed books he had completed for his Certificate III in Pest Management Control, as the answers contained in the books were being used by other employees and he decided to take the TAFE books home and think about what to do. When he was leaving the office with the TAFE books Mr Ferraro grabbed the books and tried to take them from him and in doing so Mr Ferraro shoved the applicant into a brick wall. Ms Ferraro then told Mr Ferraro to stop what he was doing and told him to call the police. The applicant maintained that Mr Ferraro was physical towards him and as he did not want to be bashed he left the respondent's premises and prior to doing so he gave his car keys to Ms Ferraro.

8 When the applicant arrived home he was informed that police officers were looking for him so he went to the police station and told them what had occurred. He was advised not to do anything further that day and to see Mr Ferraro the following day with a witness. The applicant then contacted Reverend Ross and asked him to be his witness to negotiate his ongoing employment with Mr Ferraro the following day.

9 The applicant returned to the office on 6 September 2012 at approximately 8.00 am with Reverend Ross. The applicant clocked on as usual and Mr Ferraro came out of the respondent's office and asked the applicant '[w]hat are you doing here?'. The applicant told him that he had 'come to negotiate' (ts29). Mr Ferraro asked who Reverend Ross was and he told him he was a friend. Mr Ferraro then told them to get out of the office or he would call the police so the applicant and Reverend Ross left. The applicant asked for the return of some of his personal items which were later given to him. The applicant maintained that he was still employed by the respondent when he returned to the respondent's office on 6 September 2012 as he had not resigned nor had he been terminated. The applicant returned the TAFE books to the respondent on 11 September 2012 as the police had advised him to do so as the respondent had paid for this course.

10 The applicant received a letter from the respondent dated 6 September 2012 (Exhibit R2). The applicant responded on 11 September 2012 (Exhibit A5). This correspondence (verbatim) is as follows (formal parts omitted).

Letter dated 6 September 2012

> As per your decision yesterday to walk out from the job saying to have decided to terminate your employment with us, without giving us any notice. You then went and collected your belongings and you took all the training books by force. Several times my wife and I told you that what you are doing is stealing, but you keep saying that you do not care.
>
> Your decision to leave us immediately and take the books has caused loss in business and stress to me.
>
> If all training books are not returned by the Tuesday 11 September 2012 in good conditions I will take legal action against you. Legal action will be taken also if there is any material missing or damaged.
>
> You also required to return, the office keys, mobile phone complete with charger and all work uniform.
>
> (Exhibit R2)

Letter dated 11 September 2012

> Thank you for your letter dated 6 September 2012 which I received on Monday 10 September 2012.
>
> There seems to be some confusion in relation to my employment status with your company. You indicated to me on Wednesday 5 September 2012 that you no longer wanted me to work with you. At the time I asked for you to formalise my termination in writing, as it was not my intention to cease employment.
>
> You also told me I couldn't use the company work ute for after hours personal use, so I collected my training books to place in the car so I could take home at lunch time, as we are allowed to use the company vehicle during work hours. You then attacked me and I feared for my safety so I left the premises.
>
> I attended work on Thursday 6 September at 8 am as usual, at which time you instructed me to leave the workplace or you would call the police. I was not sure what you meant, as there had been no further discussion or agreement regarding ceasing my employment.

> In your letter you have requested the return of training books which I am willing to give to you. I thought they belonged to me as they are work training books for my Certificate in Pest Management with my writing and answers in them which I completed for my qualification.
>
> I can also return the mobile phone and charger to you, however I do not have any office keys. I can also return my work uniform once my employment status is resolved. I also have personal items in the office: water bottle and current pest licence along with other paperwork which you said you will give to me, which I have not yet received.
>
> As mentioned on Wednesday 5 September 2012, there is also some discrepancy with my contractual entitlements. While I have a copy of payroll advice dated 2 September 2012, these differ from the original payroll advice that was in my work cupboard. I would therefore like to discuss my entitlements with you including leave, sales commissions and termination pay.
>
> Your actions have caused me considerable distress and financial hardship. Please advise me of a suitable time we can meet to mediate my employment status and if you are terminating my employment then a written notice and all that I am entitled to.
>
> (Exhibit A5)

11 Under cross-examination the applicant conceded that he took sick leave of approximately one week in advance when his youngest child was born in October 2007. The applicant stated that the 2010 summary was accurate and he stated that the last time he looked at this summary was in August 2012. The applicant agreed that Mr Ferraro told him before he went overseas that he may not have enough sick leave to take as carer's leave.

12 The applicant gave evidence that he did not know prior to 5 September 2012 that his time cards for the period up to June 2009 were missing. The applicant stated that on 5 September 2012 he may have accused Mr Ferraro of having no loyalty to his staff and in response Mr Ferraro may have said the applicant had no respect. The applicant conceded that he and Mr Ferraro had a heated discussion about personal matters but he could not recall saying that he was leaving nor did he tell Mr Ferraro to 'shove the job up his arse' as he did not use this language. Nor did he tell another employee Mr Darryl Flynn this when he spoke to him later that day. The applicant claimed that he took the TAFE books so they could not be used by other employees not because he was not coming back to work. He had not resigned when he left on 5 September 2012 and he had not clocked off. The applicant confirmed that Ms Ferraro told him on 5 September 2012 that if he had a problem about his sick leave entitlements he should call Wageline.

13 The applicant did not attend the respondent's premises on 6 September 2012 to confront Mr Ferraro and he stated that Reverend Ross was with him to ensure that the applicant could safely return to work and not to intimidate Mr Ferraro. The applicant agreed that when he attended the office on 6 September 2012 Mr Ferraro told him that he no longer worked with the respondent. The applicant maintained that he did not make up being assaulted by Mr Ferraro but he did not make a complaint to the police about this as he had a long term relationship with Mr Ferraro and this was a work dispute.

14 After the hearing the applicant lodged a statutory declaration containing details of his efforts to obtain alternative employment after he ceased working for the respondent and his earnings.

15 Reverend Ross gave evidence that the applicant contacted him on or about 5 September 2012 about his employment with the respondent and he told him that he wanted to return to the respondent's office to obtain payments owing to him and pick up his personal effects. When Mr Ferraro asked Reverend Ross what he was doing at the office on the morning of 6 September 2012 he told him he was the applicant's friend and there was a conversation about the applicant seeking his sick leave and annual leave payments and the return of his personal possessions. Reverend Ross stated that Mr Ferraro was unhappy with the situation and with Reverend Ross being there. Both he and the applicant were told that they should leave or the police would be called. Reverend Ross stated that he stood behind the applicant and only spoke when asked to.

Respondent

16 Mr Ferraro stated that when he was away in Italy he became aware that the applicant was working reduced hours. When Mr Ferraro was given a copy of the medical certificate for the applicant's wife just prior to going overseas he was advised by Wageline that the applicant was entitled to use 10 days' sick leave as carer's leave and he mentioned this to the applicant.

17 When Mr Ferraro returned to work he completed the 2012 summary by reviewing the applicant's time cards and information contained in the respondent's MYOB system. Mr Ferraro agreed that when he spoke to the applicant around 29 July 2012 about the applicant's wife having surgery the applicant told him that he would do his best to attend work.

18 After the applicant arrived at work on the morning of 5 September 2012 he wanted to speak to Mr Ferraro about discrepancies in his sick leave entitlements. Mr Ferraro told him that if he was concerned about this he could contact Wageline but the applicant said he did not want to do this. The applicant said that he wanted to be paid his full 40 hours per week even though he did not work full time whilst his wife was unwell.

19 Mr Ferraro completed the 2010 summary because an employee had a problem with his wages and Mr Ferraro realised that he needed to complete a proper reconciliation of his employees' entitlements.

20 Mr Ferraro conceded that during his discussion with the applicant on 5 September 2012 they both raised their voices, the applicant told him he needed to look after his staff and they both raised personal issues criticising each other and members of their families. The applicant told him he wanted to leave and Mr Ferraro said if he wanted to do so he could. The applicant then left the staff room and made a phone call. They continued their conversation in the office and the applicant told Mr Ferraro that he was unhappy and Mr Ferraro told him that he was not happy either and that is was an uncomfortable situation for them both. The applicant said he would leave and he then grabbed the TAFE books. Mr Ferraro denied that there was any discussion about the applicant's work vehicle at this point. As the respondent owned the TAFE books he followed the applicant and told him to leave the books behind and he told the applicant that he was stealing them. Ms Ferraro came outside with them and she and Mr Ferraro told the applicant to give the TAFE books back or the police would be called. Mr Ferraro

then went back inside the office to call the police. Mr Ferraro denied that he assaulted the applicant or threatened to assault him.

21 When the applicant and Reverend Ross visited the respondent's premises on the morning of 6 September 2012 the applicant clocked on. Mr Ferraro asked the applicant why he did so and the applicant said he still worked with the respondent. In response Mr Ferraro told him that he had left yesterday and the applicant said if you want to 'sack me, sack me. I got a witness here' (ts72) and he told him he was not going to sack him. When Mr Ferraro asked who Reverend Ross was, the applicant said he was there to witness Mr Ferraro 'sacking' him and again Mr Ferraro told the applicant that he left the respondent yesterday. The applicant told him that he would return the TAFE books 'when things go the way I like' (ts72) and the applicant and Reverend Ross then left.

22 Mr Ferraro claims the respondent's security DVD of what occurred on 5 September 2012 is accurate (Exhibit R1). Mr Ferraro maintained that he did not tell the applicant that he was terminated and he stated that the applicant resigned when he left the respondent's premises that day. Mr Ferraro claimed that all of the applicant's time cards were in the respondent's possession until December 2010 when a tank in a shed where employee records were temporarily stored was being filled with chemicals and it overflowed. The applicant's time cards for the period up to June 2009 became unreadable and contaminated by these chemicals.

23 Under cross-examination Mr Ferraro stated that when the applicant asked to see the time cards on 5 September 2012 he told the applicant that he had some of his time cards but not all of them. He also told the applicant he could not look for them because personal items were in the store room. Mr Ferraro agreed that he told the applicant that he had no pride to keep working with the respondent and he said this because the applicant was blackmailing him about paying him his full wages.

24 Under re-examination Mr Ferraro said that he did not know what happened to the applicant's 2010 summary. Mr Ferraro relies on an invoice of $255.75 from an accountant which he claimed was paid to review the respondent's MYOB system to deal with mistakes in his employees' leave entitlements up to 2010.

25 Ms Ferraro was working in the respondent's office on 5 September 2012 to cover for a staff member who was on leave. She was aware that the applicant and Mr Ferraro were having a discussion and she heard some of what was said but could not see what was happening. She stated that on occasions both men raised their voices and after a discussion about the applicant's entitlements Mr Ferraro told the applicant to contact Wageline. When they both came out of the staff room the applicant went to his office and they were still talking. The applicant then picked up the TAFE books and said he was leaving and Ms Ferraro stated that the applicant accused Mr Ferraro of rigging his payroll details. Ms Ferraro told the applicant to contact Wageline about his entitlements and the applicant started walking out with the car keys. She told the applicant to give the TAFE books back as they did not belong to him but he said he did not care and she told him to return his car keys as he was not in a proper state to drive. Ms Ferraro then said that the police would be called. Ms Ferraro stated that there was no physical contact between the applicant and Mr Ferraro when they were outside the respondent's building. After Mr Ferraro went inside the respondent's office the applicant started walking away.

26 Mr Flynn has worked with the respondent for approximately five years. He received a phone call from the applicant on 5 September 2012 that he missed and he then rang him back. He stated that he had an animated discussion with the applicant for approximately 10 minutes. The applicant was upset because he had had an argument with Mr Ferraro over 'a few things'. He told him he had told Mr Ferraro 'to shove his job up his arse' and said 'f*** him. I'm out of here' (ts107). He stated that he hated working for 'the wog bastard'. Mr Flynn told the applicant to settle down. The applicant then stated that he had taken his TAFE books and said that he might have 'gone a little too far'. Mr Flynn told the applicant he thought he may have 'just shot [him]self in the foot' (ts107).

27 Under cross-examination Mr Flynn stated that during the telephone conversation the applicant did not mention being assaulted. Mr Flynn was adamant that the applicant told him what he had already stated and stated that he had heard the applicant abuse Mr Ferraro behind his back on several other occasions.

Consideration

28 It became evident during the proceedings that the respondent had been incorrectly named. After the hearing the respondent confirmed the correct name of the respondent as Giovanni Battista Ferraro and Caterina Ferraro trading as Central West Pest Control. Having formed the view that it is appropriate for the respondent to be correctly named, I propose to issue an order that Giovanni (John) Ferraro be deleted as the named respondent in this application and be substituted with Giovanni Battista Ferraro and Caterina Ferraro trading as Central West Pest Control (see ***Rai v Dogrin Pty Ltd*** (2000) 80 WAIG 1375 and ***Bridge Shipping Pty Ltd v Grand Shipping SA and Anor*** [1991] 173 CLR 231).

29 An unfair dismissal claim brought under s 29(1)(b)(i) of the Act requires that the applicant, on the balance of probabilities, demonstrates that he or she has been dismissed by the employer to attract the Commission's jurisdiction and in this instance it needs to be determined if a dismissal took place.

30 A termination usually occurs when an employer's actions result in the cessation of the employment relationship. In ***Mohazab v Dick Smith Electronics Pty Ltd (No 2)*** (1995) 62 IR 200 the Full Court of the Industrial Relations Court of Australia said:

> '[T]ermination at the initiative of the employer' involves a 'termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship … [A]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship' (205).

(See Macken et al, *Law of Employment* (5th ed, 2002) 326)

31 In ***Robert Harwood v Ace Services Pty Ltd trading as Defensive Driving School*** (2002) 82 WAIG 2513 Smith C stated the following in relation to the law when it appears that an employee has resigned:

In ***NGO v Link Printing Pty Ltd*** unreported Print R7005 (del 22 January 1999), the Full Bench of the Australian Industrial Relations Commission heard an appeal in relation to whether the appellant had resigned. Mr Ngo had been interviewed by the Respondent's General Manager about his performance. At the conclusion of the interview Mr Ngo informed the General Manager of Production that he was very disappointed that the company did not trust the quality of his work and that he said, 'I resign my job because I am so disappointed.' The General Manager of Production advised Mr Ngo that he must give them a letter in writing and to give it to him tomorrow. Mr Ngo indicated that he would do so. Mr Ngo then returned to his job and completed his shift. In cross-examination Mr Ngo agreed that he said, 'I resign. Is two weeks' notice okay?' He also said in his oral evidence that at the time he resigned his mind was confused, he really (sic) nervous and his heart was jumping. On the next day Mr Ngo went to work as usual and commenced work. He was then approached by the General Manager of Production who told him he would have to finish now and that he did not have to work that day as the company would pay him up to the end of the period of his notice. The General Manager of Production also asked Mr Ngo for his letter of resignation. Mr Ngo informed the General Manager of Production that he was not resigning and he did not write the letter because he had checked with his wife and family as well as his solicitor and accountant and he wanted to continue to work. After considering these facts the Full Bench of the Australian Industrial Relations Commission held—

> 'We have had regard to the various decisions to which we were referred relating to resignations of employment. In particular we have considered the decisions that assert the existence, in certain circumstances, of a duty to clarify a resignation. The position was referred to by Murphy JR in ***Minato v Palmer Corporation Ltd*** [(1995) 63 IR 357 at 361-2] as follows:
>
> > 'The legal position was set out in the case of ***Sovereign House Security Services Ltd v Savage*** [1989] IRLR 115 where at 116 May LJ said:
> >
> > > 'In my opinion, generally speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view tribunals should not be astute to find otherwise …
> > >
> > > However, in some cases there may be something in the context of the exchange between the employer and the employee or, in the circumstances of the employee him or herself, to entitle the tribunal of fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight.'
> >
> > Those comments were considered in another case: ***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183 where at 188 Wood J said that he saw no difference in principle between words or actions of resignation. At 191 he set out the position as follows:
> >
> > > 'If words of resignation are unambiguous then prima facie an employer is entitled to treat them as such, but in the field of employment personalities constitute an important consideration. Words may be spoken or actions expressed in temper or in the heat of the moment or under extreme pressure ("being jostled into a decision") and indeed the intellectual make-up of an employee may be relevant: see ***Barclay v City of Glasgow District Council*** [1983] IRLR 313. These we refer to as "special circumstances." Where "special circumstances" arise it may be unreasonable for an employer to assume a resignation and to accept it forthwith. A reasonable period of time should be allowed to lapse and if circumstances arise during that period which put the employer on notice that further inquiry is desirable to see whether the resignation was really intended and can properly be assumed, then such inquiry is ignored at the employer's risk. He runs the risk that ultimately evidence may be forthcoming which indicates that in the "special circumstances" the intention to resign was not the correct interpretation when the facts are judged objectively.'
> >
> > We are prepared to assume, without so deciding, that it was incumbent on Link, following Mr Ngo's statement that he resigned, to allow a reasonable period of time to elapse to ascertain whether circumstances arose during the period that put Link on notice that further enquiry was necessary to see whether Mr Ngo's resignation was really intended. Mr Ngo spoke his words of resignation on the afternoon of 8 June 1998. He then resumed work for the balance of the shift, went home, resumed work the next day and, when approached by Mr Corrigan, said that he was not resigning. In our view, any reasonable period of time had elapsed well before Mr Ngo said this [46].

32 There was a conflict in the evidence about what took place between the applicant and Mr Ferraro in the respondent's office on the morning of 5 September 2012 and whether the applicant was terminated. I find that both the applicant and Mr Ferraro were unconvincing at times when giving their evidence. Furthermore, some of the evidence they gave was inconsistent with evidence given by other witnesses. I therefore have little confidence in the evidence given by both of them about the events which occurred that morning.

33 I have no hesitation in accepting the evidence given by Reverend Ross. In my view he gave his evidence honestly, in a considered manner and to the best of his recollection. Reverend Ross gave evidence that the applicant attended the respondent's office to collect personal effects and to negotiate his sick leave and annual leave entitlements. In contrast the applicant gave evidence that when he visited the respondent's premises on 6 September 2012 with Reverend Ross it was to discuss his ongoing employment with the respondent on the basis that he had not resigned the previous day.

34 Mr Ferraro gave inconsistent evidence about the reasons for the applicant's time cards in the period up to June 2009 being unavailable for the applicant to review. These time cards were critical to verifying the amount of sick leave due to the applicant and for resolving the dispute between Mr Ferraro and the applicant about this issue. Prior to the hearing the respondent's representative, on instruction from Mr Ferraro, informed the Commission that the respondent could not provide

the applicant's missing time cards which the applicant had requested be discovered as part of these proceedings to review. An email to the Commission dated 12 April 2013 about this issue stated the following:

> In relation to the time cards and sales commission records, I am instructed that the records up to about July 2009 were destroyed as a result of flood damage while the business was relocating to its present premises in about August 2009.

At the commencement of the hearing the respondent's representative then stated that his instructions were that the flood damage which destroyed the applicant's time cards up to June 2009 occurred in December 2010.

> **ARNDT, MR:** My instructions are that they were destroyed as a result of flood damage.
>
> **HARRISON C:** And when was that flood?
>
> **ARNDT, MR:** That was in late 2009. Do you want the date? Sorry, December 2010 (ts26).

During the hearing Mr Ferraro gave evidence that the applicant's time cards were destroyed when a tank containing chemicals overflowed onto a box containing the applicant's time cards in December 2010 (ts76-77). Mr Ferraro also gave evidence that he told the applicant on 5 September 2012 that he could not look at his time cards for the period up to June 2009 because his cards were in a store room containing his personal items (ts84). In response to a question about the time spent by an accountant reviewing the respondent's employee time cards Mr Ferraro stated that this task took less than one hour however when later asked about this issue he contradicted this and stated that the timeframe for the accountant's review was one day.

35 Mr Flynn gave clear evidence which was not broken down during cross-examination that during a telephone conversation with the applicant late on 5 September 2012, the applicant told him that he told Mr Ferraro 'to shove his job up his arse' that morning. However, Mr Ferraro did not give evidence that the applicant said this to him.

36 Given my doubts about the veracity of the evidence given by Mr Ferraro and the applicant and as their evidence was at times inconsistent and contrary to evidence given by other witnesses, I rely on evidence which was not in dispute and relevant documentation to determine if the applicant was terminated by the respondent.

37 Paragraphs 4, 5 and 6 set out the background related to this application. This matter revolves around what transpired on the morning of 5 and 6 September 2012 between Mr Ferraro and the applicant and whether Mr Ferraro terminated the applicant or if the applicant abandoned his employment.

38 I have considered the events of the mornings of 5 and 6 September 2012. I conclude that the applicant was not terminated by the respondent and I find that the applicant abandoned his employment of his own volition when he left the respondent's premises on 5 September 2012. It was not in contest that the applicant and Mr Ferraro had lengthy discussions about the quantum of the applicant's sick leave entitlements to be used as personal or carer's leave on 4 September 2012 and again on the morning of 5 September 2012. It is also not in contest that the applicant thought that he had more sick leave due to him than Mr Ferraro had calculated. I find that the applicant believed the 2010 summary, which had gone missing from his desk, was correct and the 2012 summary recently completed by Mr Ferraro did not accurately reflect the amount of sick leave available to him to take as carer's leave. I find that the applicant was agitated and annoyed when Mr Ferraro would not allow him to review his time cards to check his sick leave entitlements and he gave the applicant various reasons for them not being available on the morning of 5 September 2012. I find that as a result of this impasse the applicant and Mr Ferraro had a heated discussion which became personal and both the applicant and Mr Ferraro made derogatory comments about each other and their respective family members. I find that after this discussion the applicant returned to his desk and he and Mr Ferraro continued to insult each other. I find that Mr Ferraro then attempted to resolve the dispute about the applicant's sick leave entitlements by telling the applicant that he could contact Wageline to assist in resolving this issue but the applicant declined to do so. I find that the applicant was unsure about what to do next and he was frustrated and angry about what he believed to be a shortfall in sick leave entitlements due to him. I find that at this point the applicant decided to take the TAFE course books from his office, which belonged to the respondent, and leave the respondent's premises to return home and he made this decision of his own accord. I find that when Mr Ferraro told the applicant not to remove the TAFE books and he told the applicant he would contact police to retrieve these books because he rightly believed they remained the property of the respondent, the applicant left the respondent's premises with the books. I find that when the applicant removed these books he further inflamed an already tense situation between the applicant and Mr Ferraro. In support of my conclusion that the applicant left his employment with the respondent of his own volition on 5 September 2012 I take into account Reverend Ross's evidence that the applicant attended the respondent's premises on 6 September 2012 to finalise entitlements due to him and to collect some personal items and in my view this is consistent with the applicant ceasing his employment with the respondent the previous day. The applicant therefore abandoned his employment with the respondent.

39 I reject the applicant's claim that Mr Ferraro assaulted him after he left the respondent's office. There was no evidence on the respondent's videos of the events of 5 and 6 September 2012 to verify the applicant's claim that Mr Ferraro assaulted him after he left the respondent's office with the TAFE books. Furthermore, the applicant did not make a formal complaint about this alleged assault to police.

40 I find that Mr Ferraro did not force the applicant to leave the respondent's premises on 5 September 2012 nor did he tell him that he was terminated. The applicant's letter to the respondent dated 11 September 2012 states that on 5 September 2012 Mr Ferraro told him that his personal use of the respondent's vehicle was being restricted, not that he had been asked to cease using the vehicle, which would have occurred if the applicant had been terminated on that date. It was common ground that Mr Ferraro told the applicant that he 'had no pride to keep working' with the respondent, however, I accept that Mr Ferraro made this comment in response to derogatory comments the applicant made about Mr Ferraro and that when he said this he was not terminating the applicant.

41 There was no dispute that Mr Ferraro did not seek to clarify if the applicant had resigned when he left the respondent's premises on 5 September 2012 or in the immediate period thereafter. In my view in this instance this was unnecessary. I find that when the applicant left the respondent's premises on 5 September 2012 without completing his normal duties for that day the applicant's relationship with Mr Ferraro and therefore the respondent had broken down. Both the applicant and Mr Ferraro

had made unpleasant, derogatory and highly personal accusations about each other that morning. I find that this abusive altercation destroyed the working relationship between the applicant and Mr Ferraro given the nature of the accusations made against each other. In my view this breakdown was exacerbated when the applicant was unwilling to accept Wageline's assistance to resolve their dispute about sick leave entitlements due to him, which was an option put to him by Mr Ferraro to resolve this issue, and by the applicant's removal of the TAFE books, which belonged to the respondent, after Mr Ferraro expressly told him not to.

42 As the applicant was not terminated the Commission does not have jurisdiction to deal with this application and an order will issue dismissing the application.

2013 WAIRC 00778

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN THOMAS HOWELL WITT
	APPLICANT
	-v-
	GIOVANNI BATTISTA FERRARO AND CATERINA FERRARO TRADING AS CENTRAL WEST PEST CONTROL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 29 AUGUST 2013
FILE NO/S	U 213 OF 2012
CITATION NO.	2013 WAIRC 00778

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr R Arndt (of counsel)

Order

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

1. THAT the name of the respondent be deleted and that Giovanni Battista Ferraro and Caterina Ferraro trading as Central West Pest Control be substituted in lieu thereof.

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

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

CONFERENCES—Matters arising out of—

2012 WAIRC 01107

DISPUTE RE TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 18 DECEMBER 2012
FILE NO.	C 68 OF 2012
CITATION NO.	2012 WAIRC 01107

Result	Direction issued
Representation	
Applicant	Mr J Walker
Respondent	Mr D Hughes

Direction

WHEREAS the Union made application under s 44 of the Industrial Relations Act 1979 for a compulsory conference in relation to the dismissal by the Minister of a member of the Union Mr G Sell;

AND WHEREAS on 14 December 2012 the Commission convened a compulsory conference between the parties. At the conference the Union informed the Commission that on 31 August 2012, as a consequence of an incident at the Hakea Prison Social Club, Mr Sell and another officer Mr Bull were involved in an altercation. Mr Sell was, at the material time, a probationary prison officer undergoing training. An investigation was conducted by the Department of Corrective Services which ultimately led to the termination of Mr Sell's employment on 22 November 2012 on the grounds of unsatisfactory attitude and behaviour towards a fellow probationary prison officer. The Union contends that the conclusion of the investigation that Mr Sell was the initiator of the altercation is wrong. The Union contends that Mr Sell was acting to defend himself from the aggressive and threatening behaviour of Mr Bull;

AND WHEREAS the Minister contends that as a consequence of Mr Sell's aggressive and violent outburst towards Mr Bull and his conduct generally in relation to the incident, Mr Sell is no longer considered suitable to retain as a prison officer. In accordance with reg 5(4) of the Prisons Regulations 1982, Mr Sell's appointment was terminated.

AND WHEREAS under s 44(6)(bb)(ii) of the Act the Union seeks an interim order that Mr Sell be reinstated, pending the hearing and determination of the claim by the Union that he was harshly, oppressively or unfairly dismissed by the Minister;

AND WHEREAS to facilitate the determination of the interim application by the Union the Commission advised that directions would be made;

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

(1) THAT the Minister provide to the Union a list and copies of discoverable documents by midday 21 December 2012.

(2) THAT the Union file and serve its written submissions, including copies of any documents referred to in the submissions, in support of its claim for an interim order by 31 December 2012.

(3) THAT the Minister file and serve his written submissions, including copies of documents referred to in the submissions, in opposition to the claim for an interim order by 9 January 2013.

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

2013 WAIRC 00067

DISPUTE RE TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00067
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 14 DECEMBER 2012
DELIVERED	**:**	WEDNESDAY, 6 FEBRUARY 2013
FILE NO.	**:**	C 68 OF 2012
BETWEEN	**:**	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
		Applicant
		AND
		THE MINISTER FOR CORRECTIVE SERVICES
		Respondent

Catchwords	:	Industrial law (WA) - Termination of employment of Union member - Application for interim ordere for reinstatement pending hearing and determination - Principles applied - Application dismissed.
Legislation	:	Industrial Relations Act 1979 s 44(6)(bb)(ii)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr J Walker
Respondent	:	Mr D Hughes

Case(s) referred to in reasons:

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Department of Health (2010) 91 WAIG 360

Brown v President, State School Teachers Union of WA (1989) 69 WAIG 1390)

The Director General Department of Education and Training v The State School Teachers Union of WA (Incorporated) (2009) 89 WAIG 622

The Director General, Department of Education v The State School Teachers Union of WA (Inc) (2011) 91 WAIG 166

Westheafer v Marriage Guidance Council of WA (1985) 65 WAIG 2311

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

CSA v Director-General Department of Community Development (2002) 82 WAIG 2845

Case(s) also cited:

Western Australian Prison Officers' Union of Workers v The Minister of Corrective Services (2009) 90 WAIG 64

Chawdhury v Rottnest Island Authority [2004] WAIRC 12169

Laurent v Commissioner of Police [2009] WAIRC 00515

Civil Service Association of Western Australia Inc v Director General, Department for Community Development [2002] WACA 241.

McGrath v Commissioner of Police 92005- 85 WAIG 2006

Reasons for Decision

1 Mr Sell was employed by the Minister as a probationary prison officer at Hakea Prison. Mr Sell was employed in accordance with the terms of the Prison Officers' Award and the Department of Corrective Services Prison Officers' Enterprise Bargaining Agreement 2010. Additionally, Mr Sell's employment was subject to the terms of the Prisons Act 1981 and the Prisons Regulations 1982.

2 On 23 November 2012 Mr Sell's probationary employment was terminated by the Minister. This arose from an incident which occurred between Mr Sell and another probationary prison officer, Mr Bull, at the Hakea Social Club on 31 August 2012. Mr Sell's engagement was terminated under reg 5(4) of the Regulations on the ground that he was unsuitable to be a prison officer.

3 An application has been brought by the Union under s 44 of the Industrial Relations Act 1979, challenging the Minister's dismissal of Mr Sell. Conciliation did not resolve the dispute between the parties and the matter is to be referred for arbitration under s 44(9) of the Act. In the meantime, the Union has sought an interim order under s 44(6)(bb)(ii) of the Act, for the reinstatement of Mr Sell pending the hearing and determination of his substantive claim.

4 Both parties filed written submissions, with supporting documents. This was on the basis that the Commission deal with the interim order application "on the papers", unless the Commission was of the view that it was necessary for the parties to be further heard. That has not been necessary.

The incident

5 On the night of 31 August 2012, a social function was being held at the Hakea Prison Social Club in connection with the impending graduation of the probationary prison officer group of which Messrs Sell and Bull were members. The Social Club is on the Prison grounds. During the course of the evening it appears that Mr Sell and Mr Bull had an exchange of words and became agitated with one another. It seems at Mr Bull's initiative both then went outside onto the lawn area at the front of the Social Club. On the basis of the witness accounts from the Minister's investigation, it seems that an altercation then took place between Mr Sell and Mr Bull. This involved Mr Sell throwing several punches at Mr Bull, some of which caused Mr Bull some injury. Additionally, Mr Bull at some point after this pushed Mr Sell, who then fell over backwards striking his head which caused him an injury. Comments were also made by Mr Sell in relation to drug taking.

The Investigation

6 An investigation was conducted by the Department's Internal Investigations Unit. The conclusion of the investigation, and of Mr Johnson, the Commissioner of Corrective Services, was that Mr Sell's conduct was contrary to the Department's values and Code of Conduct and Mr Sell was considered unsuitable to be a prison officer. He was discharged in accordance with

reg 5(4) of the Regulations. The Investigation Report concluded that Mr Sell was physically violent towards Mr Bull and demonstrated attitudes towards reporting misconduct which were inappropriate.

Consideration

7 The Union has sought an interim reinstatement order under s 44(6)(bb)(ii) of the Act. This enables the Commission, in the case of claim of harsh, oppressive or unfair dismissal under s 44 of the Act, to "make any interim order the Commission thinks appropriate in the circumstances pending the resolution of the claim". Whether such an order should be made is a discretionary decision to be made by a Commissioner. The Minister referred to a decision of my own in *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Department of Health* (2010) 91 WAIG 360. In that matter, in relation to an application for an interim reinstatement order under s 44(6)(bb)(ii), I said at pars 12-17:

> [12] Section 44(6)(bb)(ii) of the Act provides as follows:
>
> > "(6) The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —
> >
> > ….
> >
> > (bb) with respect to industrial matters —
> >
> > (i) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act; and
> >
> > (ii) without limiting paragraph (ba) or subparagraph (i), in the case of a claim of harsh, oppressive or unfair dismissal of an employee, make any interim order the Commission thinks appropriate in the circumstances pending resolution of the claim;"
>
> [13] There is no question that the matter before the Commission is an industrial matter. The claim by the applicant is to the effect that its member Mr Harrison was harshly, oppressively and unfairly dismissed on or about 5 May 2010. It seeks his reinstatement without loss.
>
> [14] The Commission is empowered by s 44(b)(bb)(ii) to 'make any interim order the Commission thinks appropriate'. This confers a broad discretion on the Commission in such cases which discretion is to be exercised consistent with s 26(1)(a) of the Act.
>
> [15] In *ALHMWU v National Foods Pty Ltd* (2004) 84 WAIG 3395 I considered the relevant principles to be applied in proceedings such as these. In doing so I considered the approach of Sharkey P in an application under s 66 of the Act in *Brown v The President of the State School Teachers Union of WA* (1985) 69 WAIG 1390 and I said at [16]:
>
> > "In support of an interim order, the applicant submitted that consideration as to whether an interim reinstatement order be made under s 44(6)(bb)(ii) of the Act, involves the exercise by the Commission of a discretion, in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. Clearly, reference to s 26(1)(a) of the Act is relevant, because s 26(1)(a) applies to the exercise of the Commission's jurisdiction and powers in respect of all matters before it, including that presently under consideration. Furthermore, reference was made by the applicant to observations of Sharkey P in ***Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union, WA Branch*** (2003) WAIRC 09964 when considering the powers in s 44(6)(ba)(i) of the Act. It was there held that those powers were broad and the applicant submitted that the same approach be applied to the interpretation of s 44(6)(bb)(ii) of the Act. Some reference was also made by the applicant to the decision of Sharkey P in ***Brown v The President of the State School Teachers Union WA*** (1989) 69 WAIG 1390 in which the President considered the making of an interim order pursuant to s 66 of the Act, regarding the observance of the rules of the respondent in that case. In ***Brown***, Sharkey P, having concluded that interim orders were open to be made under s 66 of the Act, considered that the principles which apply to the granting of an interim injunction in civil proceedings were the most applicable to consideration of the granting of interim relief under s 66 of the Act. In that matter, Sharkey P at 1393 said:
> >
> > > It seems to me that the principles which apply to the granting of interim injunction proceedings are most applicable here, with such modifications as this jurisdiction requires.
> > >
> > > The applicant must therefore establish:-
> > >
> > > (a) That as a matter of discretion, it is just and correct for me to make the order in all the circumstances.
> > >
> > > (b) That, in fact, there is a substantial matter to be tried.
> > >
> > > (c) That the plaintiff has a prima facie case for relief if the evidence on which the order is made is accepted at trial.
> > >
> > > In addition, the Commission must consider:-
> > >
> > > (a) The damage which may be done to the respondent by granting the order as against the damage to the applicant if it is not granted.
> > >
> > > (b) Any irreversible consequences of the granting of the order.

(c) The promptness or otherwise of the application.

(d) Any other relevant consideration."

[16] Further at pars [22] - [26] I said as follows:

> "Significantly, Parliament has not, by enacting s 44(6)(bb)(ii) of the Act, sought to prescribe in what circumstances the Commission ought to make an interim order. The statutory provision enables the Commission to make any interim order, in the case of a claim of harsh, oppressive or unfair dismissal of an employee, 'that the Commission thinks appropriate in the circumstances', pending the resolution of the claim. This in my opinion confers on the Commission a broad discretion as to whether an interim order ought to be made. Further, the language used in s 44(6)(bb)(ii) of the Act, empowering the Commission to make any interim order that it 'thinks appropriate' is similar language to that used in s 66(2), empowering the President, on an application made pursuant to s 66 of the Act, to make any such order or give such direction 'as he considers to be appropriate'. I note also, that this is the type language used, for example, in s 23 of the Federal Court of Australia Act 1976 (Cth), empowering the Federal Court to grant interlocutory relief.
>
> To my mind, having regard to the nature of interim relief generally, not just in this jurisdiction but elsewhere, principles applicable to the making of interim or interlocutory injunctions are of assistance and I therefore respectfully adopt the observations of Sharkey P in ***Brown*** in this regard. To those observations I would add the following. The principles applicable to the grant of an interlocutory injunction are now relatively well settled in Australia: ***Australian Course Grains Pool Pty Ltd v Barley Marketing Board of Queensland*** (1982) 46 ALR 398; ***Tablelands Peanuts Pty Ltd v Peanut Marketing Board*** (1984) 52 ALR 651; ***Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 2)*** (1984) 54 ALR 730; ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396; ***Castlemaine Tooheys Ltd v South Australia*** (1986) 161 CLR 148 at 154.
>
> It is also the case that the two elements in considering the grant of interlocutory injunctions, they being a serious issue to be tried and the balance of convenience, are not to be considered in isolation: ***Bullock v The Federated Furnishing Trades Society of Australasia*** (1989) 5 FCR 464. What appears to be a strong claim on the merits may persuade a court to grant an injunction where the balance of convenience is reasonably even. However, a less strong case on the merits, may still lead to an interlocutory order being made, if there is a strong balance of convenience in favour of the grant of an order. Furthermore, there is authority for the proposition that a court may be more reluctant to grant a mandatory interlocutory injunction than a prohibitory injunction. Thus in ***Shepherd Homes Ltd v Sandham*** [1971] 1 Ch 340 it was said by Megarry J at 351 that there needs to be:
>
> > ... A high degree of assurance that at trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.
>
> However, the decision whether to grant an interlocutory mandatory order, despite this 'high degree of assurance', will often turn on whether the withholding of such an order, would lead to a greater risk of injustice than the grant of an interim order: ***Business World Computers Pty Ltd v Australian Telecommunications Commission*** (1988) 82 ALR 499.
>
> In the present circumstances, the interim order sought is in the nature of a mandatory injunction, seeking to compel the respondent employer to restore the former relationship of employer and employee that it had with Mr Gaunt, prior to his dismissal for cause, pending the hearing and determination of the substantive claim. In that sense, it is distinguishable from an interim order of a prohibitory nature, preventing a party from taking a step or doing something in the course for example, of an industrial dispute before the Commission. In my opinion therefore, the 'high degree of assurance' test, is more applicable as a guide in present circumstances, than where an order to restrain conduct is sought. This is all the more so, when as in the present circumstance, an employer has exercised its lawful right under the contract of employment and relevant award to terminate the employment of an employee, in circumstances where the employee has a statutory right of action to challenge that decision in this Commission. This includes the ability to obtain relief by way of various orders, including reinstatement, re-employment, and compensatory orders for income lost in the event of the former, and as an alternative, orders for compensation for loss and/or injury. In other words, there is a right of action available, for a dismissed employee to obtain a remedy to return him or her to their pre-dismissal circumstance, without loss. This will always however, be subject to the consideration of the possibility of an overall injustice arising, consistent with equity and good conscience, if the interim relief is not granted."

[17] I adopt and apply this approach for the purposes of the present matter.

8 In *The Director General Department of Education and Training v The State School Teachers Union of WA (Incorporated)* (2009) 89 WAIG 622 the Full Bench (Ritter AP, Smith SC, Mayman C) considered an appeal from a Commissioner who made an interim reinstatement order under s 44(6)(bb)(ii) of the Act. In dismissing the appeal Ritter AP (Smith SC and Mayman C agreeing) noted at par 33, that the Commissioner at first instance applied the approach in *Brown* and that neither party contended that that approach was incorrect. Therefore, the Full Bench did not consider the matter further on the appeal. Furthermore, at par 40 of the reasons of the decision of the Full Bench, Ritter AP noted factors which he considered to be "weighty" in his own consideration of the matter at first instance. This included whether the Union had established a prima facie case for relief at first instance, amongst other matters.

9 By way of contrast, in *The Director General, Department of Education v The State School Teachers Union of WA (Inc)* (2011) 91 WAIG 166, whilst the applicability of *Brown* was not argued at first instance, the Full Bench, (Smith AP, Beech CC and Scott A/SC) held that for the purposes of an interim order under s 44(6)(ba) of the Act, the approach in *Brown* should not be applied in applications for interim orders under that subsection of the Act.

10 In my view, the latter decision of the Full Bench is limited to the circumstances of s 44(6)(ba) of the Act. Paragraphs (i) to (iii) of s 44)(6)(ba) set out the conditions under which such an order may be made. This is distinguishable from the circumstances of a claim for an interim order under s 44(6)(bb)(ii), dealing with a claim of unfair dismissal, in which no such conditions appear. Given the broad discretion conferred on the Commission by s 44(6)(bb)(ii) of the Act, the approach in *Brown* remains, in my view, a useful guide in the exercise of the Commission's discretion. This approach should not, however, limit which matters the Commission may wish to take into account, depending upon the circumstances of the particular case.

11 I intend to adopt that approach in considering this matter.

12 As to whether there is a substantial issue which arises on the Union's claim, it is not without some oscillation that I have concluded that substantial issues do arise. On the outline of the facts before the Commission, there will no doubt be a contest as to who was the instigator of the altercation between Mr Sell and Mr Bull. There is some evidence to suggest that Mr Bull was provocative inside the Social Club on the evening in question. It appears that Mr Bull may also have instigated both he and Mr Sell moving outside to the front lawn area of the Social Club. It can reasonably be anticipated from the assertions made by the Union in its submissions, that a defence of provocation would more than likely be put by Mr Sell, at any hearing of the substantial issues in dispute.

13 An important question is the probationary employment of Mr Sell. That is a major factor. The law is settled that probationary employment is a far less secure mode of employment than permanent employment. A probationary employee can be dismissed "more easily". However, probationary employment is not a licence to dismiss unfairly: *Westheafer v Marriage Guidance Council of WA* (1985) 65 WAIG 2311; *Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951. The nature of prison officer probationary employment is expressly recognised by regs 3(4), 5(4) and 5(5) of the Regulations.

14 As to whether the Union has established a prima facie case that Mr Sell was unfairly dismissed, at this stage of the matter, the Commission can only form a very preliminary view on the factual issues arising. From the excerpts of the Investigation Report and statements attached to the Minister's submissions, it is apparent that there is a considerable conflict on the version of events between Mr Sell and Mr Bull. Additionally, the accounts by both independent witnesses, Ms Bell and Mr Eva, also conflict somewhat. Ms Bell, notably, asserts that she was not in any way affected by alcohol on the evening concerned and plainly saw Mr Sell throw punches at Mr Bull. Mr Eva, on the other hand, conceded he was affected by alcohol on the night. There is, however, a suggestion in his statement that there was some degree of provocation of Mr Sell by Mr Bull, once both of them moved to the outside area of the Social Club.

15 Importantly, Mr Eva notes that he also saw Mr Sell throw punches at Mr Bull. Furthermore, both Ms Bell and Mr Eva said they heard Mr Sell shout at Mr Bull words or words to the effect as to "getting some dexies", being a reference to illicit use of dexamphetamine drugs.

16 If the Commission were to accept the evidence as outlined in the relevant extracts of the Investigation Report and the witness statements before me, it may be open to conclude that there may have been some degree of provocation by Mr Bull both inside and outside of the Social Club, on the night in question. It is, however, also reasonably clear from the independent witness accounts, that Mr Sell was seen to throw punches at Mr Bull. Both of them also wrestled on the ground at some point. Mr Bull also manhandled Mr Sell and pushed him, causing Mr Sell to fall to the ground and injure his head. Mr Bull contended he did so in an attempt to restrain Mr Sell and to then push him away.

17 Whilst the witness accounts make reference to Mr Sell calling out about "dexies", I am not able to come to any conclusions at this preliminary stage, as to the context in which such comments were made. It also seems common ground that both Mr Sell and Mr Bull were significantly affected by alcohol on the night in question.

18 As to the Union's contention that there was no link between the incident at the Social Club and Mr Sell's employment, I am not persuaded that this is so. The Social Club is located on the Hakea Prison grounds and Mr Sell and Mr Bull were attending a staff function in connection with the impending graduation of that particular group of probationary prison officers from their training. I am satisfied for present purposes, that the incident had a relevant connection with Mr Sell's employment as a probationary prison officer: *CSA v Director-General Department of Community Development* (2002) 82 WAIG 2845 per Anderson J at par 34.

19 There was a further submission by the Union that Mr Sell was denied natural justice by the Minister, because the disciplinary provisions of Part X of the Prisons Act were not applied to him. Whilst this matter was not specifically referred to in the s 44 application made by the Union, I am not persuaded at this point, that the Minister was obliged to follow Part X. I see no reason in principle why the Minister could not rely on reg 5(4) of the Prison Regulations, as it is specific to the ongoing employment of a probationary prison officer.

Conclusion

20 For the foregoing reasons, I am not persuaded that it has been established at this point, that Mr Sell has a prima facie case that his dismissal was harsh, oppressive or unfair. In view of that conclusion, it is not strictly necessary for me to deal with the other matters raised by the Union, although I propose to comment on one of them. I accept that as in all cases of this kind, an employee who is not reinstated on an interim basis will suffer some financial disadvantage until such time as their substantive claim can be heard and determined by the Commission. However, it is important to note that there is no presumption created by s 44(6)(bb)(ii) of the Act, that an interim order will be made by the Commission. All of Mr Sell's rights are reserved. If he is successful on the ultimate hearing and determination of his unfair dismissal claim, he can be fully compensated for his loss by an order of the Commission.

21 In all of the circumstances the application for an interim order will be dismissed.

2013 WAIRC 00068

DISPUTE RE TERMINATION OF UNION MEMBER

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	WEDNESDAY, 6 FEBRUARY 2013
FILE NO/S	C 68 OF 2012
CITATION NO.	2013 WAIRC 00068

Result	Application for interim order dismissed
Representation	
Applicant	Mr J Walker
Respondent	Mr D Hughes

Order

HAVING heard Mr J Walker on behalf of the applicant and Mr D Hughes on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the applicant's claim for an interim order that Mr Sell be reinstated be and is hereby dismissed.

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

CONFERENCES—Matters referred—

2013 WAIRC 00366

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	TUESDAY, 18 JUNE 2013
FILE NO.	CR 2 OF 2013
CITATION NO.	2013 WAIRC 00366

Result	Direction issued
Representation	
Applicant	Mr T Kucera of counsel
Respondent	Mr D Matthews of counsel

Direction

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

(1) THAT the applicant and respondent file and serve an outline of submissions no later than 26 June 2013.

(2) THAT the matter be listed for hearing for half a day on 28 June 2013.

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

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

2013 WAIRC 00754

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00754
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 11 JUNE 2013, FRIDAY, 28 JUNE 2013
DELIVERED	**:**	WEDNESDAY, 21 AUGUST 2013
FILE NO.	**:**	CR 2 OF 2013
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 a Union member – Spent conviction order made by the Supreme Court of Western Australia – Application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) that the Commission should dismiss or refrain from hearing the matter – Case advanced on the basis that employment was lost and would not be recovered – Further proceedings are not necessary or desirable in the public interest – Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 26(1), 27(1)(a), 27(1)(a)(ii), 36A(1), 44(9); *Spent Convictions Act 1988* (WA) s 16
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr T Kucera
Respondent	**:**	Mr D Matthews
Solicitors:		
Applicant	**:**	W.G. McNally Jones Staff Lawyers
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Brewer v Bayens (2002) 26 WAR 510

Canale v Bayens [2001] WASCA 383

Koenig v Ryan [2001] WASCA 339

Neale v Sloan (1997) 27 MVR 246

The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd (2006) 86 WAIG 1268

Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia (1987) 21 IR 151

M v O'Neill [2013] WASC 187

R v Tognini (2000) 22 WAR 291

Riley v Gill (Unreported; WASCA, Library No 970731, 8 December 1997)

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1987) 68 WAIG 4

Riggall v Western Australia (2008) 37 WAR 211

Scanlon v Bove [2008] WASC 213

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Adecco, Access Personnel, Alpha Personnel and Others (2003) 83 WAIG 3335

Case(s) cited by the parties:

McKinnon v Secretary, Department of Treasury (2006) 228 CLR 423

O'Sullivan v Farrer (1989) 168 CLR 210

Reasons for Decision

1 The substantive application in this matter is one by the Union on behalf of its member, Mr M, that he has been unfairly dismissed and that he be reinstated to his former position as a Transit Officer by the Authority. Mr M was dismissed by the Authority in December 2012, following an incident which occurred in March 2010. The incident involved Mr M, in the course of his duties, assaulting a patron of the Authority at the Subiaco Train Station. Mr M was subsequently charged with and convicted of assault in May 2012. Mr M was sentenced to a fine of $5,000. The learned Magistrate found that Mr M acted beyond the scope of his lawful authority without justification. Mr M appealed against his conviction. However, when his appeal to the Supreme Court came on for hearing Mr M's appeal against his conviction had been abandoned and he only pursued an appeal against sentence, on the basis that he should have been granted a spent conviction order under the Spent Convictions Act 1988 (WA). On 17 May 2013, the Supreme Court upheld Mr M's appeal and granted him a spent conviction order.

2 The substantive unfair dismissal claim brought by the Union was adjourned, pending the outcome of Mr M's appeal to the Supreme Court. On the publication of the Court's reasons, the Union sought the relisting of the application. It was listed for mention and in the course of those proceedings, the Authority foreshadowed an application under s 27(1)(a) of the Act, that the Commission should dismiss or refrain from hearing the matter. Subsequently, following directions being made by the Commission, the Authority's application was formulated in the following terms:

> Application CR2 of 2013, which seeks the reinstatement of Mr M (*my substitution*) to his employment as a Transit Officer with the Public Transport Authority, should not proceed further in the public interest in the circumstance where Mr M not having that employment and Mr M not returning to that employment were determinative, or at the least very significant, factors in the decision of the Supreme Court of Western Australia to grant Mr M a spent conviction order on 17 May 2013

3 In support of their contentions in relation to the s 27(1)(a) application, the parties filed and served written submissions and the matter was listed for oral submissions.

Supreme Court Appeal

4 As noted above, the decision of the Supreme Court was handed down on 17 May 2013: *M v O'Neill* [2013] WASC 187. In the judgement, McKechnie J concluded that there had been a miscarriage of justice at first instance in that a spent conviction order should have been made in favour of Mr M. In his reasons for judgement, McKechnie J set out the brief factual background to Mr M's altercation with patrons at the Subiaco Train Station. His Honour referred to the findings of the learned Magistrate at first instance, in relation to the three counts of assault, which in essence, arose from one course of conduct involving Mr M's altercation with the patron.

5 During the course of the appeal, Mr M relied upon further evidence which he adduced relevant to the issue of sentencing. Mr M in his evidence, referred to the fact that he was stood down by the Authority from operational duties in October 2010, and that his employment was terminated on 28 December 2012. Mr M referred to the fact that he was at the time of the appeal proceedings, employed as a storeman. Mr M also gave evidence as to the investigation undertaken by the Authority which resulted in him being demoted for three months, leading to a loss of wages of some $1,200.

6 In relation to his future employment, Mr M gave evidence before the Court that he had received training in security and transit law whilst employed by the Authority. He also referred to the possibility of using that background and said that experience could be used to obtain "future employment in the security industry" and he also said that "in January 2013 I decided to apply to join the armed forces. I already have achieved a TEE and the army has a program to attend the Australian Defence Force Academy in the ACT and obtain a degree whilst working in the military": judgement at par 19.

7 McKechnie J then set out the three questions to be asked as to whether a spent conviction order should be made, they being is the offender unlikely to commit such an offence again?; is the offence trivial or is the offender of previous good character?; and should the offender be relieved immediately of the adverse effect that the conviction might have on the offender?: *Neale v Sloan* (1997) 27 MVR 246; *Riley v Gill* (Unreported; WASCA, Library No 970731, 8 December 1997); *R v Tognini* (2000) 22 WAR 291; *Brewer v Bayens* (2002) 26 WAR 510; *Canale v Bayens* [2001] WASCA 383; *Riggall v The State of Western Australia* (2008) 37 WAR 211; *Scanlon v Bove* [2008] WASC 213; *Koenig v Ryan* [2001] WASCA 339.

8 In addressing the three questions, based upon the submissions and evidence before the Court, McKechnie J concluded that Mr M was unlikely to commit such an offence again, was of good character, as was conceded by the Authority, and that Mr M ought be immediately relieved of the adverse effects of the conviction. His Honour was satisfied that there would be a miscarriage of justice if a spent conviction order was not made. Accordingly the appeal was allowed and the sentence at first instance was varied by the making of a spent conviction order in favour of Mr M.

Contentions of the parties

9 Without hopefully doing any injustice to the careful and helpful submissions of counsel, the following is a summary of the submissions made by the parties. For the Authority, it was contended that at the time that he brought his appeal before the Supreme Court, Mr M had abandoned the challenge to his conviction, and only sought a spent conviction order. At the time of his appeal, his employment had been terminated, and that he would not be returning to his former employment as a Transit Officer. Accordingly, the Authority submitted that the issue for the Commission to determine, was whether Mr M's application in this jurisdiction should be heard and determined, in circumstances where:

> (a) Mr M pursued his appeal before the Supreme Court on the footing that he had lost employment and would not be seeking a return to it;

(b) That Mr M argued before the Court that these were relevant considerations in the grant of a spent conviction order; and

(c) Importantly, these were matters relied upon as relevant by the Court and were either determinative, or highly significant, in McKechnie J's judgement in granting Mr M a spent conviction order.

10 The Authority referred quite extensively to the submissions and evidence before the Supreme Court in support of its submissions. The broad thrust of the evidence referred to, was to the effect that Mr M had access to the use of force option by reason of his position as a Transit Officer; Mr M's future employment in other roles would be prejudiced by his conviction; Mr M was no longer in a position of authority as a Transit Officer and no longer has the powers of that position; that the Authority itself had apparently taken steps to protect the community from Mr M (through his dismissal); and that the Court should be influenced in its consideration of the appeal, by the fact that Mr M would not in the future, be in a position to exercise lawful authority over others, as he was when he committed the offences.

11 Reference was made to the overall thrust of the submission of Mr M during the appeal, that the Authority had terminated his employment and he would not be returning to his position as a Transit Officer. The Authority also pointed to the submissions of counsel for the Western Australian Police Service before McKechnie J, in summarising Mr M's submissions on his appeal, to the effect that "here we are now told that the appellant is no longer seeking to retain, or, as it were, get back his employment with the Public Transport Authority …":19T The Authority submitted that nothing was put on behalf of Mr M in submissions in reply in the appeal, taking issue with that broad summary and indeed, Mr M's counsel generally continued that same theme.

12 In referring to McKechnie J's judgement, the Authority laid emphasis on his Honour's conclusion that Mr M had lost his employment as a Transit Officer and would not be returning to it. The Authority also pointed to other parts of McKechnie J's judgement, supporting the proposition that his Honour placed significant weight on the submissions and evidence, to that effect, and that Mr M, no longer being in a position of authority, would be unlikely to be able to exercise lawful force over others "for some time, if ever": judgement at par 33. The Authority also placed some weight on conclusions of McKechnie J, in terms of personal deterrence; Mr M had paid a heavy price for his offending, through his loss of employment; and the fact that there are consequences for those who misuse authority by the deployment of force arising from their employment.

13 Having regard to these findings, the Authority submitted that this was a case where the Commission was being put in an impossible position of being asked to undermine the outcome of the proceedings before the Supreme Court. It was submitted that the Commission, in continuing with these proceedings, would be removing a "fundamental plank in the reasoning of his Honour that led to the grant of a spent conviction order". That is, by Mr M proceeding with his application for reinstatement, and the possibility of it being granted, would be totally at odds with the case advanced by Mr M on his appeal before the Supreme Court. Mr M's case was characterised as his employment had been lost, it would not be recovered, he had paid a significant price for his offending, and there would be no further deterrent effect of a continuation of the effects of the conviction on Mr M.

14 The Union contended that a continuation of these proceedings, will not necessarily conflict with the decision of the Supreme Court and the Commission should not exercise its broad discretion under s 27(1)(a) of the Act, to dismiss or refrain from further hearing the substantive application.

15 The Union referred to the notion of the "public interest" and that a necessary starting point is the prima facie right of a party who has invoked the jurisdiction of the Commission to insist upon its exercise: *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 21 IR 151. Also, in reliance on *QEC*, that where the public interest lies in any particular case, will depend on a balancing of competing public interests and is a matter of fact and degree: per Mason CJ, Wilson and Dawson JJ at 154.

16 The Union made the general submission, that if the Commission grants the Authority's application to dismiss these proceedings Mr M will be left with no other avenue, either State or Commonwealth, to pursue a remedy for his alleged unfair dismissal. I accept that this is the case. Accordingly, the Union submitted that the Authority has a heavy onus to discharge to persuade the Commission in the present circumstances, to refrain from exercising its jurisdiction on public interest grounds: *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Adecco, Access Personnel, Alpha Personnel and Others* (2003) 83 WAIG 3335. In particular, the Union emphasised that where the public interest lies must be considered in light of the objects and purposes of the Act and having regard in particular, to the obligation on the Commission to act according to equity, good conscience, and the substantial merits of the case *without regard to technicalities or legal forms (emphasis added).* In this regard, the Union contended that the Authority's application under s 27(1)(a) is not an industrial matter but rather, is a technical legal objection, relying as it does, on the potential for a decision of the Commission to conflict with a decision of the Supreme Court.

17 A number of other submissions were made by the Union. Firstly, it was contended that as recognised by McKechnie J, it is in the public interest that Mr M be rehabilitated. Accordingly, depriving him of his ability to pursue his unfair dismissal claim will be contrary to that goal. Secondly, there is in any event, no conflict in the decision of McKechnie J, and any potential decision of this Commission in relation to Mr M's reinstatement claim. It was emphasised that the issue before the Supreme Court did not relate to whether Mr M was fairly dismissed and should be reinstated, but rather whether he should be granted a spent conviction order.

18 As a part of this submission, the Union contended that properly read, McKechnie J's judgement, in addressing the three questions to be answered as to whether Mr M should have the benefit of a spent conviction order, was not determinative, or even significant in his Honour's consideration that Mr M was either not employed by or may not be allowed to return to the Authority as a Transit Officer. A number of other factors were also relevant, including Mr M's age; the stressful circumstances of the incident; Mr M's relative immaturity and lack of experience at the time of the incident; the need for general deterrence and the rehabilitation of Mr M in the community generally. In particular, the Union submitted that McKechnie J "did not close the door to Mr M returning to work as a Transit Officer. It left open the possibility … circumstances permitting": par 40 submissions.

19 The Union also contended that by reason of s 16 of the Spent Convictions Act, the Authority is an exempt employer and may therefore have regard to Mr M's conviction in relation to his future employment. The submission therefore was that Mr M is in no different position now, than he was before his appeal to the Supreme Court. Further that the determination by the Commission in the present proceedings, will be whether Mr M was given a "fair go all round" in the industrial sense, which consideration was not relevant to nor formed any part of McKechnie J's determination in the grant of a spent conviction order to Mr M.

20 Having regard to all the circumstances of the case, extinguishing Mr M's rights at this stage of the proceedings, absent any clear jurisdictional issue, would not be appropriate in the public interest. Additionally, given the terms of the referral under s 44(9) of the Act, there are a number of issues raised in these proceedings which relate to the employment of Transit Officers more generally, and not just the circumstances of the dismissal of Mr M.

Principles to apply

21 Section 27(1)(a) of the Act provides as follows:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:

> 35 Given the construction I have placed on s 36A(1) of the Act, it is for the respondent to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:
>
> > *"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."*

23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

Industrial matter

24 As to the submission by the Union that this application under s 27(1)(a) of the Act is not an industrial matter, I am not persuaded to that view. The definition of "industrial matter" under the Act is very broad. This matter can be properly characterised as "affecting or relating or pertaining to" the dismissal of Mr M.

A balancing of competing interests

25 The present case involves a balancing of competing interests. It is generally in the public interest that industrial disputes and industrial matters be resolved by the Commission, where a party invokes the jurisdiction. This is not a case where, on its face, the Union's claim is so manifestly hopeless that it obviously has no prospect of success or that there is a clear issue of a lack of jurisdiction or for example, the case is affected by manifest delay. The issues arising in this matter are far more nuanced than that. The Commission must also have regard for the fact that it is part of the hierarchy of courts of the State, and it should not act in such a way which may undermine the due administration of justice in the State.

Loss of employment in grant of spent conviction

26 In this case, it is necessary as a first step, to reach some view as to the degree to which McKechnie J relied upon Mr M's loss of employment and it not being restored, in the grant of a spent conviction. As well as the reasons for judgement, to which I have already referred above, the Commission also has before it, the transcript of the proceedings before McKechnie J on Mr M's appeal.

27 As noted, Mr M sought to argue before the Supreme Court, that there had been a miscarriage of justice because a spent conviction order should have been made at first instance. Mr M put on affidavit evidence in support of his appeal. This evidence included reference to Mr M having had his employment as a Transit Officer terminated by the Authority. Mr M made reference to his training in security by the Authority and its use in obtaining future employment in the security industry: par 19 judgement.

28 No reference was made by Mr M in his affidavit to his application for reinstatement before this Commission, nor was the issue raised before McKechnie J in the oral submissions of the parties. I make no criticism of counsel in this regard. All that can be said therefore, is that his Honour was not aware of these proceedings, and that Mr M was seeking the restoration of his employment, in circumstances where he maintained on his appeal, that his loss of employment, and the unlikelihood of it being restored, was a significant factor in terms of the "price" paid by him for his offending, and the impact of that loss in terms of both personal and general deterrence.

29 From the transcript of the proceedings before the Court, Mr M's counsel made submissions to the effect that Mr M had lost his job as a Transit Officer, therefore his capacity to use force lawfully on members of the public had gone and he only "got that access to [the] use of force option only by virtue of his position": 9T. Reference was also made by counsel for Mr M that he had "learned an extremely valuable lesson" as a consequence of what happened to him: 10T. Counsel for Mr M also made submissions that any prospect of Mr M obtaining his employment back would involve a "rethink on the part of the Public Transit Authority" and that the Authority had "taken steps to protect the community itself from the appellant should they consider it needed protection from him": 18T. This latter submission was obviously referring to Mr M's dismissal. There was also reference by counsel for Mr M on the appeal, to him pursuing a possible career in the military and that Mr M not being in a position of authority over others again: 24T.

30 I have already referred above, to the submissions of counsel for the Western Australian Police on the appeal, to the effect that Mr M was seemingly no longer seeking to retain or to restore his employment, but was looking at other positions in the security industry and also the military: 19-20T. As the Authority correctly observed in its submissions in this matter, there was no issue taken with this submission by Mr M in his reply on the appeal.

31 In his judgement, McKechnie J referred to the three questions to be asked in relation to whether a spent conviction order should be made: par 26. In answering question one his Honour noted the submissions of Mr M as to the "serious consequences" of Mr M's offending: par 32. Reference is also made by McKechnie J to Mr M having "paid dearly for his offending [and] [t]he consequences have been brought home to him": par 39. His Honour also comments that "Despite his desires, it is unlikely that he will obtain employment where he is in a position to exercise lawful force over others for some time, if ever": par 33.

32 In addressing question three, McKechnie J noted the submissions of Mr M and said "The appellant argues there is no public interest in maintaining the conviction. He is no longer a person in authority. The community is not better protected by knowing the conviction. The community is better served by rehabilitation compared with adverse consequences": par 36. Having considered the issues to be determined in relation to question three, McKechnie J comes to the general conclusion at par 43 as follows:

> There is an obvious need for general deterrence. Peace officers of all types are given lawful authority to deploy force. It is important they should know there are consequences to the misuse of that authority. The appellant has paid a heavy penalty and lost his job. There is little extra general deterrence by the public continuation of the conviction.

33 From a fair reading overall of the transcript of proceedings and the judgement of McKechnie J, there is no doubt, that the case for Mr M for a spent conviction order, was advanced on the basis that he had lost his employment as a result of his conviction for assault and he was not going to get his job back. Mr M was considering other options, such as employment in the security industry or a career in the military. The Court clearly took into account, as a factor of significance that Mr M had lost his job and he had therefore "paid dearly" for his conduct. The conclusion that Mr M would be unlikely, if ever, to be in a position to exercise lawful force over another person was specifically identified and relied upon by McKechnie J in answering the first question, as to the likelihood of Mr M committing such an offence again in the future.

34 In relation to the third question, and the issue of general deterrence, his Honour placed considerable weight, as is evidenced from the above quote at par 43 of the judgement, on Mr M's loss of his job, as largely satisfying this element, and there being little extra general deterrence to be achieved by the continuation of the conviction.

35 I therefore conclude that Mr M's loss of employment, and the fact that it would not be recovered, was central to Mr M's appeal and the seeking of a spent conviction order. I also conclude that this was a significant factor relied upon by McKechnie J in the upholding of Mr M's appeal, and the making of a spent conviction order, as is evident by a fulsome reading of his Honour's judgement, parts of which have been referred to above, and the transcript.

How should the discretion be exercised?

36 Having reached those views on the basis of the submissions and evidence, I now consider how the discretion under s 27(1)(a) of the Act should be exercised in this case.

37 It is clear from Mr M's abandonment of his appeal against conviction and his pursuit only of a spent conviction order, that Mr M did make an election as to the course he was going to pursue. The conclusion is inescapable from the case put by Mr M to the Supreme Court that he relied heavily in both his additional evidence, and his submissions to McKechnie J, on the loss of his employment and the prospect of him not working as a Transit Officer again. This issue was repeatedly raised and relied upon by Mr M in the context of the issues to be decided by the Supreme Court.

38 Whilst it is quite correct to say, as did the Union in these proceedings, that the question of whether Mr M should be granted a spent conviction order and whether he was unfairly dismissed are quite distinct enquiries, that is really beside the point. The key point is the reliance by Mr M on this state of affairs that is his dismissal and him not being restored to his employment, as a ground to obtain a spent conviction order.

39 In my view, Mr M has made his election in the Supreme Court appeal to pursue a spent conviction order so he can obtain other employment in the future, without generally having to disclose his conviction for assault. As the Authority put it in its submissions, by seeking now to continue with these proceedings in relation to a claim for reinstatement, Mr M is attempting to both approbate and reprobate. He is content to take the benefit of the Supreme Court appeal on the one hand, by the receipt of a spent conviction order, largely based on his loss of employment, but on the other, pursue these proceedings in an attempt to recover what he said to the Supreme Court he had lost and the "price he paid" for his offending.

40 This matter has involved some difficult issues to reconcile. The Commission will not terminate a proceeding at this stage, unless there is very good reason to do so. However, after carefully considering the interests of the parties, I have come to the conclusion that for Mr M to be able to proceed with the present claim would be contrary to equity and good conscience. It has the clear potential to undermine the decision of the Supreme Court granting Mr M a spent conviction. That is a course that should not be permitted. It would not, in the present case, weighing up the competing interests of the parties, be in the public interest for the application to be heard by the Commission. Accordingly, the application is dismissed.

2013 WAIRC 00752

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	WEDNESDAY, 21 AUGUST 2013
FILE NO/S	CR 2 OF 2013
CITATION NO.	2013 WAIRC 00752

Result	Application dismissed
Representation	
Applicant	Mr T Kucera of counsel
Respondent	Mr D Matthews of counsel

Order

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

THAT the application be and is hereby dismissed.

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

2013 WAIRC 00385

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	FRIDAY, 28 JUNE 2013
FILE NO.	CR 199 OF 2013
CITATION NO.	2013 WAIRC 00385

Result	Direction issued
Representation	
Applicant	Mr K Singh and Mr P Robinson
Respondent	Mr R Farrell

Direction

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

(1) THAT the applicant and respondent file an agreed statement of facts (if any) no later than 5 days prior to the date of hearing.

(2) THAT the applicant and respondent file and serve an outline of submissions no later than 3 days prior to the date of hearing.

(3) THAT the matter be listed for hearing for 3 days on a date to be fixed.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 00708

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	FRIDAY, 9 AUGUST 2013
FILE NO/S	CR 199 OF 2013
CITATION NO.	2013 WAIRC 00708

Result	Application discontinued
Representation	
Applicant	Mr P Robinson
Respondent	Mr D Matthews of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

2013 WAIRC 00751

DISPUTE RE PAYMENT DEDUCTIONS OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 20 AUGUST 2013
FILE NO/S	PSACR 10 OF 2013
CITATION NO.	2013 WAIRC 00751

Result	Order Issued
Representation	
Applicant	Ms S Van Der Merwe
Respondent	Ms P Cameron

Order

WHEREAS this is an application pursuant to section 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS this matter was listed for hearing on 29 July 2013;

AND WHEREAS prior to the hearing the applicant advised the Commission that it did not intend to proceed with this matter;

AND WHEREAS on 31 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* (WA), hereby orders:

THAT this application be and is hereby discontinued.

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

2013 WAIRC 00099

DISPUTE RE TERMINATION OF UNION MEMBER

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, 22 FEBRUARY 2013
FILE NO.	CR 68 OF 2012
CITATION NO.	2013 WAIRC 00099

Result	Direction issued
Representation	
Applicant	Mr J Walker
Respondent	Mr D Hughes

Direction

HAVING heard Mr J Walker on behalf of the applicant and Mr D Hughes on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent provide to the applicant within 14 days of the date of this direction incident reports and any other relevant documents, in relation to the following:

(a) Incident at Hakea Social Club involving Liam Cashman and a member of the public circa 2008;

(b) Incident at Hakea Social club involving Gavin Trevena and John Dunn circa 2010;

(c) Incident at Hakea Social Club involving Anthony Cary and John Dunn circa 2005.

(2) THAT subject to any further direction or order of the Commission, any documents provided to the applicant in par (1) are to remain confidential.

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

(4) THAT the parties file an agreed statement of facts no later than three days prior to the date of hearing.

(5) THAT the matter be listed for hearing for two days on dates to be fixed.

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

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

2013 WAIRC 00706

DISPUTE RE TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00706
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 22 FEBRUARY 2013, WEDNESDAY, 17 APRIL 2013, THURSDAY, 18 APRIL 2013, WRITTEN SUBMISSIONS 1 MAY AND 3 MAY 2013
DELIVERED	**:**	FRIDAY, 9 AUGUST 2013
FILE NO.	**:**	CR 68 OF 2012
BETWEEN	**:**	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Applicant AND THE MINISTER FOR CORRECTIVE SERVICES Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment of a Union member – Harsh, oppressive and unfair dismissal – Whether Commission has jurisdiction – Dismissal of a probationary prison officer – Conflict between s 23(3)(d) of the *Industrial Relations Act 1979* (WA) and reg 5(4) of the *Prisons Regulations 1982* (WA) – Effect of Part X of the *Prisons Act 1981* (WA) and unfair dismissal – Statutory interpretation – Conflict between the Act and Regulations – Claim within Commission's jurisdiction – Misconduct – Not denied natural justice – Dismissal was not harsh, oppressive or unfair – Application dismissed
Legislation	**:**	Industrial and Employee Relations Act 1994 (SA); Industrial Relations Act 1979 (WA) ss 23A, 23A(1), 23A(2), 23(3)(d), 29, 29(1)(a), 44, 44(9); Industrial Relations Act 1996 (NSW) ss 84, 88; Interpretation Act 1984 (WA) s 43(1), s 46(1); Misuse of Drugs Act 1981 (WA); Police Act 1990 (NSW) ss 80, 80(3), 181D; Police Act 1998 (SA); Police Regulation Act 1958 (Vic) Pt V; Public Interest Disclosure Act 2003 (WA); Public Sector Management Act 1994 (WA) Pt 3; Prisons Act 1981 (WA) ss 6, 7, 12, 13, 13(2), 14, 96, 97, 98(1), 99, 100, 102, 103, 106, 107, 108, Pt II, Pt III, Pt V, Pt X; Police Regulations 1979 (Vic); Prisons Regulations 1982 (WA) regs 3, 3(4), 4, 5, 5(4), 5(5), 6, 30
Result	**:**	Application dismissed

Representation:

Counsel:		
Applicant	:	Mr J Walker
Respondent	:	Mr D Anderson of counsel and with him Mr D Akerman

Case(s) referred to in reasons:

Butler v Attorney-General for the State of Victoria (1961) 106 CLR 268

Chief Constable of the North of Wales Police v Evans [1982] 1 WLR 1155

Commissioner of Police v Eaton (2013) 87 ALJR 267

Ferdinands v Commissioner for Public Employment (2006) 225 CLR 130

Hall v Manahan [1919] St R Qd 217

McGrath v Commissioner of Police (2005) 85 WAIG 2006

O'Rourke v Miller (1985) 156 CLR 342

Ridge v Baldwin [1964] AC 40

The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd (2004) 84 WAIG 3787

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

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia (1985) 65 WAIG 385

TN v Walford (1998) 126 NTR 8

Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services [2013] WAIRC 00067

Case(s) also cited:

Chawdhury v Rottnest Island Authority [2004] WAIRC 12169

Civil Service Association of Western Australia Inc v Director General of Department for Community Development (2002) 82 WAIG 2845

East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth (2000) 80 WAIG 3155

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

Hutchinson v Cable Sands (WA) Pty Ltd (1999) 79 WAIG 2635

McGrath v Commissioner of Police (2005) 85 WAIG 2004

Westheafer v Marriage Guidance Council of WA (1985) 65 WAIG 2311

Reasons for Decision

1 In a decision delivered on 6 February 2013 the Commission considered an application for an interim order for the reinstatement of a member of the Union, Mr Sell. That application was dismissed. Mr Sell was employed by the Minister as a probationary prison officer at Hakea Prison. The background to the circumstances of Mr Sell's dismissal is set out in my earlier reasons for decision and I need not repeat it: *Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services* [2013] WAIRC 00067.

2 The matter was referred for hearing and determination under s 44(9) of the Act. The parties led a considerable body of evidence and made oral and written submissions in support of their various contentions. Additionally, the Commission raised with the parties, as a preliminary issue, the jurisdiction of the Commission to entertain a claim of unfair dismissal by a probationary prison officer. This issue was raised in light of a decision of the High Court in *Commissioner of Police v Eaton* (2013) 87 ALJR 267. In *Eaton*, the Court concluded that provisions in relation to the dismissal of probationary police officers under s 80(3) of the Police Act 1990 (NSW) were inconsistent with the unfair dismissal regime under s 84 of the Industrial Relations Act 1996 (NSW). This matter was raised with the parties, as Mr Sell's employment as a probationary prison officer was terminated by the Commissioner of Corrective Services, under reg 5(4) of the Prisons Regulations 1982 (WA). The issue arising is whether the terms of reg 5(4), confer an unfettered right of discharge of a probationary prison officer, as is the case in relation to probationary police officers under s 80(3) of the Police Act (NSW).

3 A further issue arises as to the effect of Part X of the Prisons Act 1981 (WA), which provides a comprehensive regime for the disciplining of prison officers. The relationship between Part X of the Prisons Act, reg 5(4) of the Regulations and the unfair dismissal jurisdiction of this Commission, also needs consideration.

4 Given that these matters go to the jurisdiction and power of the Commission to deal with the claim brought on behalf of Mr Sell, it is appropriate to turn to them first.

Prisons Act 1981 and Prisons Regulations 1982

5 The terms of the Prisons Act and the Prisons Regulations set out a detailed scheme for the appointment, duties, discipline and discharge of prison officers. Part II of the Prisons Act deals with the establishment of prisons. Under Part III, powers in relation to officers are set out. By s 6, officers, other than prison officers, may be appointed as employees under Part 3 of the Public Sector Management Act 1994 (WA). By s 7, the chief executive officer of the Department as the Commissioner for Corrective Services, is responsible for the management, control, and security of all prisons and the welfare and safe custody of

all prisoners. The chief executive officer has overall responsibility to the Minister, for the proper operation of every prison throughout the State. By s 12, the duties of officers are set out. Every officer is required to comply with the Prisons Act and Regulations, all rules, standing orders, other laws relevant to the functions of a prison officer and orders and directions of the chief executive officer. Officers also have responsibilities to maintain the security of the prison where they work and make appropriate reports and maintain records in relation to relevant matters.

6 The engagement of prison officers is set out in s 13. The Minister may engage prison officers as employees, subject to any relevant award or industrial agreement of this Commission, and subject to other terms and conditions as determined by the Minister. A prison officer, on engagement, is required to swear an oath of engagement under s 13(2). The chief executive officer has the power to dismiss a prison officer, with the consent of the Minister, if he or she is convicted of an offence that relates to the performance of their duties or fitness to hold office. By s 14, the powers and duties of prison officers are set out. These include the obligation to maintain the security of the prison where the officer serves, and obligations to obey all lawful orders given to him or her by superior officers, including the chief executive officer.

7 By Part V of the Prisons Act, the chief executive officer is empowered to make rules for the management, control and security of prisons. These include the management of prison officers and other officers of the Minister. Additionally, provision is made for the designation of senior officers as superintendents, who have the charge and superintendence of a prison and management and control of officers and prisoners as necessary, for the good government, good order and security of the prison of which he is superintendent. This includes the issuing of standing orders binding on officers and prisoners.

8 Part X deals with the discipline of prison officers. For the purposes of Part X a "prison officer" is defined in s 96 as follows:

> **96. Term used: prison officer**
>
> For the purposes of this Part —
>
> ***prison officer*** means —
>
> (a) a person engaged to be a prison officer under section 13; and
>
> (b) a person engaged as a prison officer prior to the coming into operation of section 13 and deemed to be a prison officer for the purposes of this Act by Schedule 2.

9 As mentioned by s 13, read with reg 3 of the Regulations, persons may be appointed by the Minister as a prison officer. Upon engagement, by reg 3(4), a prison officer is to serve a period of probation of nine months. It thus appears that a probationary prison officer is a person engaged as a "prison officer" for the purposes of ss 13 and 96. Accordingly, in my view, the terms of Part X of the Prisons Act, in relation to the discipline of prison officers, applies equally to probationary prison officers.

10 The terms of Part X provide a comprehensive regime for the regulation of disciplinary matters for prison officers. By s 97, all prison officers are to observe the Prisons Act and Regulations, prison rules and standing orders. Section 98(1) (a) to (e) set out a range of disciplinary offences to which Part X applies, including a breach of duty imposed by the Act, Regulations, rules or standing orders; disobeying or disregarding a lawful order; negligence or carelessness in the performance of duties; misconduct in relation to the performance of duties or fitness to hold office; and the commission of an act of victimisation under the Public Interest Disclosure Act 2003 (WA).

11 By s 99, a charge of a disciplinary offence is to be laid in writing by an authorised officer and validated by a superintendent. The charged officer is required to admit or deny the charge. If the charge is denied, a superintendent is required to hold an inquiry under s 100 in accordance with the procedure in reg 30 of the Regulations. This provides for the making of submissions and the calling of evidence in the usual way. A charged officer may be represented by the Union or another person, but not a legal practitioner. Where a charge is proved or the prison officer admits the charge, a range of penalties may be imposed under s 102, from a caution to a fine.

12 If a prison officer, or the person laying the charge, is aggrieved by a finding or penalty, he may appeal to the chief executive officer under s 103. The chief executive officer may confirm, dismiss or vary the charge or penalty as the case may be. In the case of more serious charges, a superintendent may refer the matter directly to the chief executive officer who, under s 106, is empowered to hear the charge. If the charge is upheld, a range of penalties may be imposed, from a caution through to dismissal.

13 A prison officer, who is aggrieved by a decision of the chief executive officer under s 106, may lodge an appeal under s 108, to the Prison Officers Appeal Tribunal, constituted under s 107. On such an appeal, the Tribunal may confirm, modify, or reverse any suspension, finding or penalty appealed against. The Tribunal may also make such other orders as it thinks fit.

14 The terms of the Regulations also make provision for a rank structure for prison officers in reg 4. The discharge of prison officers, and the notice prior to termination of service of prison officers, is set out in regs 5 and 6. Relevantly, for present purposes, in relation to Mr Sell, who was a probationary prison officer, reg 5(4) provides as follows:

> (4) Where the chief executive officer is of the opinion during or at the end of the period of probation of a prison officer that the prison officer is unsatisfactory in the performance of his duties or unsuitable to be a prison officer, the chief executive officer may discharge that prison officer.

15 By reg 5(5), the chief executive officer may extend the period of probation of a prison officer beyond that of the initial mandatory nine months prescribed by reg 3(4).

16 In dealing with this preliminary issue, it is necessary to refer to s 23(3)(d) of the Act which is in the following terms:

> **23. Jurisdiction of Commission**
>
> …
>
> (3) The Commission in the exercise of the jurisdiction conferred on it by this Part shall not —
>
> …

> (d) regulate the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any other Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind;

17 Section 23(3)(d) is a clear statement of legislative intention that the Commission shall not exercise its powers in relation to the specified subject matter, if there is "provision, however expressed", for that same subject matter, including a right of appeal, prescribed by other legislation. This provision is clearly intended to prevent matters within the prescribed subject matter, from being dealt with in more than one jurisdiction.

18 Given the terms of Part X of the Prisons Act, when read with the relevant Regulations, the argument is compelling that such provisions satisfy the terms of s 23(3)(d) of the Act. That is, Part X regulates the suspension, discipline, dismissal, termination and reinstatement in employment of a prison officer. There is provision in Part X for appeals in such matters. In my view therefore, the Commission's unfair dismissal jurisdiction in ss 23A and 29 of the Act, is ousted in relation to the dismissal and claim for reinstatement of a prison officer. This equally applies to an application under s 44 of the Act by a Union on behalf of a prison officer. Such an application seeks the exercise of powers by the Commission, to regulate the matters the subject of the prohibition on the exercise of the Commission's jurisdiction, in s 23(3)(d) of the Act. The terms of s 23(3)(d) do not discriminate in relation to how a matter is referred to the Commission. It is the powers of the Commission to regulate these matters that are excluded in such cases.

19 Given that the terms of Part X of the Prisons Act apply equally to all prison officers (including those on probation under reg 3(4)), the issue then becomes the effect of reg 5(4). Specifically, in the context of the statutory regime as a whole, the intention to be imputed to the legislature as to whether a decision of the chief executive officer, to discharge a probationary prison officer, is open to review in the Commission's unfair dismissal jurisdiction. Put another way, from the plain terms of reg 5(4), in the context of the statutory scheme for the engagement, suspension, discipline and discharge of prison officers, and given the nature of probationary employment generally, is there any direct collision between the terms of reg 5(4) and the unfair dismissal jurisdiction of the Commission? Can it be said that, independent of s 23(3)(d) of the Act, the Prisons Act and Regulations scheme in relation to the engagement, suspension, discipline and removal of prison officers, has effected an implied repeal of the Commission's unfair dismissal jurisdiction in relation to prison officers in this State?

20 I turn now to consider these issues.

21 Mr Sell was dismissed as a probationary prison officer, under reg 5(4), set out above. As noted at the outset of these reasons, a not dissimilar issue in relation to the dismissal of probationary police officers in New South Wales was the subject of consideration by the High Court in *Eaton*. In *Eaton*, it was held that s 80(3) of the Police Act (NSW), empowering the Commissioner of Police to dismiss a probationary police officer "at any time and without giving any reason" ousted the jurisdiction of the Industrial Relations Commission of New South Wales under s 84(1) of the Industrial Relations Act 1996 (NSW) to deal with an unfair dismissal claim by a probationary police officer. The Court held that the terms of s 80(3) of the Police Act conferred an unfettered power to dismiss a probationary police officer. The application of the Industrial Commission's unfair dismissal jurisdiction would be directly inconsistent with that unfettered power. The Court placed substantial weight on the nature of probationary employment, as a part of its consideration of the statutory provisions. Notably, and of significance for present purposes, under the NSW industrial legislation, there is no equivalent of s 23(3)(d) of the Act.

22 Relevantly, s 80 of the Police Act (NSW) provides as follows:

> **80 Appointment and promotion of constables**
>
> (1) The Commissioner may, subject to this Act and the regulations, appoint any person of good character and with satisfactory educational qualifications as a police officer of the rank of constable.
>
> (2) A person when first appointed as such a police officer is to be appointed on probation in accordance with the regulations.
>
> (3) The Commissioner may dismiss any such probationary police officer from the NSW Police Force at any time and without giving any reason.
>
> (4) The promotion of police officers within the rank of constable is subject to the regulations.

23 In relation to the decision in *Eaton*, the Minister submitted that whilst the language of s 80(3) of the NSW legislation is not identical to that in reg 5(4) of the Regulations, the effect is the same. The Minister submitted that the terms of reg 5(4) and s 29(1)(b) of the Act are irreconcilable. The Minister contended that it is clear that reg 5(4) enables the chief executive officer to dismiss a probationary prison officer "at any time" during the probationary period, if the chief executive officer is of the opinion that the probationary prison officer is unsuitable to be a prison officer. The Minister maintained that it is inconceivable that the Parliament would give the chief executive officer such a broad power, and yet render it subject to merits review before the Commission under the Act. The contention was that to afford a dismissed probationary prison officer the remedies of reinstatement, re-employment and/or compensation under s 23A of the Act, is completely irreconcilable with the broad power to discharge a probationary prison officer.

24 Furthermore, it was submitted by the Minister that the terms of Part X of the Prisons Act is similar to the terms of s 181D of the Police Act (NSW), which sets out the detailed procedure for the removal of non-probationary police officers. It was submitted that the terms of Part X contain detailed provisions in relation to the power of removal of a prison officer, as has been set out above. Under Part X, the Minister submitted that the chief executive officer is under a duty to take into consideration submissions made by the prison officer concerned and there are specific rights of appeal. From this, the Minister contended that it is quite evident that there is a contrast between the terms of Part X of the Prisons Act and reg 5(4) of the Regulations, which strongly points to there being no intended merits review of the chief executive officer's opinion that a probationary prison officer is not suitable and should be discharged.

25 Whilst the Minister accepted that the conflict in the language used in reg 5(4) of the Regulations and the relevant provisions of the Act in relation to unfair dismissal is not as acute as in the legislation under consideration in *Eaton*, the effect is largely the same. It was contended that an opinion formed by the chief executive officer under reg 5(4) that a probationary prison officer is "unsuitable", does not constitute or require the giving of reasons for that opinion. All that is necessary is that the chief executive officer forms the relevant opinion. Accordingly, it was submitted that the terms of reg 5(4) and s 80(3) of the Police Act (NSW) are analogous in effect. If no reasons had been given for Mr Sell's dismissal, and if the chief executive officer is under no obligation to provide such reasons, a determination could not therefore be made about whether Mr Sell's dismissal is harsh, oppressive or unfair. The fact that reasons were actually provided in Mr Sell's case, does not of itself alter the fundamental jurisdictional issue.

26 The Minister submitted that even if it could be contended that the chief executive officer's opinion in relation to Mr Sell was of itself, a reason for his discharge, then the Commission should pay high regard to that opinion. The Commission should not interfere with a decision of the chief executive officer who has reached the requisite opinion that a probationary prison officer is "unsuitable". The submission was, essentially, that this "opinion" is properly the province of the chief executive officer, as a part of the discharge of his responsibilities. The contention was that this proposition is supported by the ousting of the Commission's jurisdiction in relation to matters under Part X of the Prisons Act. The incorporation by Parliament, of detailed provisions regarding the rights of review of disciplinary decisions in relation to prison officers generally, is strongly suggestive of the proposition that the chief executive officer's opinion as to the suitability of a probationary prison officer, under reg 5(4), is not intended to be the subject of further review.

27 Two further matters were raised by the Minister. The first was that the range of remedies open to the Commission on a finding of an unfair dismissal under s 23A of the Act is inconsistent with the broad and unfettered powers of the chief executive officer under reg 5(4). Secondly, the terms of reg 5(4) is a specific provision applying only to probationary prison officers. In contrast, the unfair dismissal jurisdiction of the Commission under the Act is broad in scope and applies to all relevant employees within the Commission's jurisdiction throughout the State. Accordingly, the Minister submitted that this is a case where the general provisions in the Act should give way to the specific provisions for probationary prison officers.

28 On the other hand, the Union contended that the Commission's unfair dismissal jurisdiction was not affected by reg 5(4) of the Regulations. The Union submitted that as in *Eaton*, the issue is one of statutory interpretation. The submission of the Union was there are three bases upon which the circumstances in *Eaton* are distinguishable and they are:

(a) There is no inconsistency because the jurisdiction of the Commission invoked in this matter is the settlement of an industrial dispute under ss 29(1)(a) and 44 of the Act;

(b) There is no inconsistency having regard to the terms of the regulations in question; and

(c) If any such inconsistency exists, the terms of the regulations must give way to the relevant provisions of the Act.

29 For the reasons given at par 18 above, I am not persuaded by par (a) of the Union's submissions. As with the operation and effect of s 23(3)(d) of the Act, it is not how a matter comes before the Commission, but rather, the exercise of the relevant powers that is in issue.

30 The Union referred to the principle of statutory interpretation that as the Parliament will generally not wish to contradict itself all attempts should be made to reconcile competing statutory provisions. In particular, the Union referred to s 23(3)(d) of the Act and submitted that the Commission's jurisdiction is only overridden or precluded in circumstances where there is provision for an appeal concerning a decision to dismiss or discipline an employee. The existence of s 23(3)(d) of the Act, according to the Union's submission, shows a clear Parliamentary intention that the Commission's jurisdiction can be invoked in all other cases. Notably, whilst Part X makes provision for appeals in disciplinary matters, as this case concerns the exercise of the power to discharge under reg 5(4), no such right of appeal exists. Accordingly, the Union contended that s 23(3)(d) of the Act does not operate and does not preclude the Commission from dealing with the matter.

31 Further submissions were made by the Union concerning the conclusions of the Court in *Eaton*. In particular, it was emphasised that the particular language in s 80(3) of the Police Act (NSW) was fundamental, in terms of the finding of inconsistency. The language used being "at any time and without giving any reason" was submitted to be at odds with the language of the relevant provisions of the Industrial Relations Act (NSW) in particular, s 88 of that legislation, where the Industrial Relations Commission of NSW may take into account where appropriate, whether a reason for dismissal was given, and whether there had been a warning for unsatisfactory performance prior to the dismissal. It was emphasised that no similar provision exists in the Act in this jurisdiction, as to what matters the Commission may take into account when determining whether a dismissal is harsh, oppressive or unfair.

32 Accordingly, it was submitted by the Union that there was no inconsistency between the language used in reg 5(4) and the terms of the Act. As there is no irreconcilable conflict, then the Union further submitted that there was no room for the rule of statutory interpretation, that the general should give way to the specific, in this particular case.

33 Finally, the Union submitted that whilst in *Eaton*, the Court was considering a conflict between two statutes in this case, there is a conflict between the Act and the Regulations. Accordingly, it was submitted that under s 43(1) of the Interpretation Act 1984 (WA), where there is any inconsistency between subsidiary legislation and the Act, the former is void to the extent of any such inconsistency.

34 The issue to be determined in relation to the effect of reg 5(4) of the Regulations involves issues of statutory interpretation. Also relevant are the terms of Part X of the Prisons Act, set out above, dealing with discipline of prison officers. Both the Prisons Act and the relevant provisions of the Regulations must be seen as part of an overall regulatory scheme for the appointment, duties, suspension, discipline and discharge of prison officers. This is so because unlike in the case of *Eaton*, the terms of Part X of the Prisons Act apply equally to probationary prison officers.

35 The starting point is the terms of reg 5(4) set out above. The trigger for the discharge of a probationary prison officer by the chief executive officer is the formation of the requisite "opinion". The opinion to be formed by the chief executive officer is that a probationary prison officer is either, or both, "unsatisfactory in the performance of his duties" or "unsuitable" to be a prison officer. The first relates to the work performance of a probationary prison officer. The second basis for an opinion by the chief executive officer is not defined by any criteria. No obligation is placed on the chief executive officer under reg 5(4), to state the basis for the formation of the required opinion. There is also no obligation on the chief executive officer to provide reasons to a probationary prison officer for the formation of the opinion as to why the probationary prison officer is "unsatisfactory" or is "unsuitable".

36 The first contention of the Union was that as reg 5(4) provides for no avenue of appeal, then by s 23(3)(d) of the Act, the Commission's jurisdiction is not excluded. It was submitted therefore, that the Parliament has expressed the only circumstances where the Commission's jurisdiction is ousted.

37 As to the language of reg 5(4), the Union contended that the reference in s 80(3) of the Police Act (NSW) considered in *Eaton*, was important. So much can be accepted. In s 80(3) of the Police Act (NSW), the Commissioner of Police can dismiss a probationary police officer "at any time" and "without giving any reason". In *Eaton*, it was held that this conflicted with the terms of s 88 of the Industrial Relations Act (NSW) in that legislation, for example, the Industrial Commission may take into account whether a reason for dismissal was given and whether a warning was given for unsatisfactory performance, prior to dismissal. It is also to be accepted that in this jurisdiction, under s 23A of the Act, no such matters are expressly provided to be taken into account by the Commission, in an unfair dismissal claim. However, it is well settled in the jurisprudence of the Commission, that these are matters to be considered when the Commission is determining, in the exercise of its broad discretion, whether a dismissal is "harsh, oppressive or unfair" under s 23A(1) of the Act.

38 It also is to be noted, that under s 23A(2) of the Act, the only express consideration for the Commission to consider, is whether an employee was on probation for a period of three months or less. However, this consideration only applies to a case of an employee who otherwise falls within the Commission's jurisdiction, and is not in any sense determinative in the present case.

39 As to the contention that the use of the words "at any time", are not present in reg 5(4), and this is significant, I am not persuaded to this view. It is the case that reg 5(4) does not use the same language as s 80(3) of the Police Act (NSW). However, as submitted by the Minister, its effect is the same. The chief executive officer of the Department may form the required opinion "during or at the end of the period of probation" of a probationary prison officer. There is no other time that such a view may be formed in the case of a prison officer whilst he or she is still on probation. In my view, this similarly means at "any time" in the course of or at the end of the period of probation. Nothing material turns on the difference in language between these provisions, having regard to their clear meaning and effect. Having regard to the terms of reg 5(4), in my view, as in *Eaton*, in this case, it is clear that a probationary prison officer may be discharged by the chief executive officer "at any time".

40 The inclusion of the word "probation" in reg 5(4) of the Regulations is plainly for the same purposes as in s 80(3) of the Police Act (NSW). In *Eaton*, the Court considered this to be of significance. As mentioned, by reg 3(4), a prison officer is to be appointed for a mandatory period of probation for nine months, which may be extended by the chief executive officer. As opposed to the case of probationary police officers in NSW, there are no express criteria for the chief executive officer to consider whether a probationary prison officer is to be confirmed. However, it is implicit in reg 5(4), that the chief executive officer must form the opinion that a probationary prison officer has been satisfactory in the performance of his or her duties and is otherwise "suitable" to be a prison officer.

41 The notion of a probationary appointment was seen as important by Heydon J in *Eaton*, where his Honour observed at par 16 as follows:

> 16. There are many occupations which attract the interest of young people but for which some young people turn out to be unsuitable because of some factor not readily identifiable in advance. One of those occupations is the occupation of police officer. Police officers have heavy responsibilities. They sometimes work under grave pressures. How satisfactorily particular individuals bear those responsibilities and stand up to those pressures can only be learned by experience. Hence most New South Wales police officers commence their careers by being probationary constables. Probation involves a process of putting to proof. It is a process of investigation and examination. A probationary period is a "period of testing or trial for the purpose of ascertaining whether [a person] has the necessary qualifications for a permanent appointment, and the word 'probation' itself involves the idea of something in the nature of trial and experiment with a view to determining whether an applicant is to be appointed." [footnote 4 omitted] A probationary constable is one whose qualifications for non-probationary status are put to proof, investigated, examined, tested or tried. Those qualifications include aptitude, competence, integrity, performance and conduct. The probationary status of probationary constables is another factor pointing to the conclusion that s 84(1) of the IR Act does not extend to conferring on probationary constables a right to claim that a dismissal is harsh, unreasonable or unjust.

42 In my view, similar conclusions may be reached in relation to the position of a prison officer. Given the probationary nature of the appointment of a prison officer, and the broad powers of the chief executive officer to discharge a probationary officer on forming the required opinion, there are respectable arguments that it would be inconsistent with that broad power to discharge a probationary prison officer, for that "opinion" to be the subject to review by the Commission and the grant of the remedies of reinstatement, re-employment loss of remuneration and compensation orders in an appropriate case.

43 The obvious question to ask is, if the chief executive officer's opinion as to whether a probationary prison officer is "suitable" is determinative of the power to discharge such an officer, by what criteria is the Commission to assess whether the chief executive officer's opinion as to "suitability" is sound or not? In my view, given the nature of the prison service, which operates under a paramilitary regime within the ranks of prison officers, and the statutory scheme which I have set out in detail above, and the obligations on and broad powers of the Commissioner for Corrective Services as the chief executive officer, to

ensure the good order and security of prisons and the officers within them, it is problematic that the Commission would be required to effectively "second guess" the opinion formed by the chief executive officer. The chief executive officer is plainly the person best placed to make an assessment about a probationary prison officer's suitability for confirmation of appointment.

44 There are also strong grounds to argue that the opinion, based upon the chief executive's qualifications, experience and responsibilities under the Prisons Act and Regulations, would not be the subject of review, unless it was expressly stated to be so in the legislation. The fact that it is not in the specific powers in relation to probationary prison officers, but there is an elaborate scheme to review for prison officers generally in Part X of the Prisons Act, is in my opinion, suggestive that no such review for probationary prison officers was intended.

45 Also, as in *Eaton*, the power of the chief executive officer to discharge a probationary prison officer is a specific and narrow power. This is contrasted with the general powers of the Commission to provide a remedy to a broad class of persons throughout the State, in relation to allegations of unfair dismissal. Similarly, in this case, the general powers of the Commission under the Act, should generally give way to the specific powers of the chief executive officer, certainly under Part X of the Prisons Act.

46 There is a further matter in this case, not arising in *Eaton*, to which I briefly averted earlier in these reasons. Both the Prisons Act and the Regulations were enacted after the enactment of the Act in 1979. The principle of statutory interpretation is that there is a presumption that statutory provisions will not contradict one another. As was said by Crennan, Kiefel and Bell JJ in *Eaton* at par 48, in referring to *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, "the question is not whether one law prevails, but whether the presumption is displaced".

47 In *Ferdinands*, the issue determined on appeal by the High Court, was whether there was an inconsistency between the provisions of the Police Act 1998 (SA) and the Industrial and Employee Relations Act 1994 (SA), in relation to the dismissal of a member of the South Australian Police. The officer concerned was convicted of assault, and the Commissioner of Police terminated his employment. The Full Court of the Industrial Relations Court of South Australia held that the Industrial Relations Commission had no jurisdiction to hear the matter. An appeal to the Full Court of the Supreme Court of South Australia upheld that decision. The High Court (Gleeson CJ, Gummow, Hayne and Callinan JJ; Kirby J dissenting) affirmed that decision. In particular, in coming to the view that the police legislation ousted the industrial legislation in South Australia, Gummow and Hayne JJ said at pars 47-51 as follows:

> 47. No conclusion can be reached about whether a later statutory provision contradicts an earlier without first construing both provisions. If, upon their true construction, there is an "[e]xplicit or implicit contradiction"[footnote 41 omitted] between the two, the later Act impliedly repeals the earlier. One example that may be given of an explicit contradiction is provided by the legislation considered in *Michell v Brown* [footnote 42 omitted] where the later Act gave the same definition of an offence as had been stated in the earlier Act, but specified a different punishment, and varied the procedure to be followed for its prosecution. It was not possible to comply with both Acts simultaneously.
>
> 48. In *Rose v Hvric* [footnote 43 omitted] , a distinction was drawn between explicit or implicit contradiction on the one hand and "merely 'inferential contradiction', as Lord Hatherley called it in *Attorney-General v Great Eastern Railway Co* [footnote 44 omitted] " on the other. Thus, it was said [footnote 45 omitted] that to show that provisions of the later Act would ground a conclusion that the train of thought of those who drafted that later Act, if logically pursued, would have led the drafters to enact an exception to the operation of the former Act, would not suffice to demonstrate implicit contradiction. It would show only an inferential contradiction. It would not show implicit contradiction because, as Gaudron J said in *Saraswati* [footnote 46 omitted] , the general presumption is that there is no contradiction between two Acts of the one legislature.
>
> 49. Reference to "implicit contradiction" may suggest that it is both permissible and useful to resort to "covering the field" tests developed in the application of s 109 of the *Constitution* [footnote 47 omitted] in deciding whether a later Act impliedly repeals an earlier. It is, however, necessary to recognise that s 109 concerns the paramountcy of a law of the Commonwealth over a law of a State. The question in the present case is not whether one law enacted by one legislature prevails over a law enacted by another legislature; it is whether the presumption that two laws made by the one legislature are intended to work together is displaced. It is unnecessary to decide in this case whether, or how much, guidance is provided in cases of allegedly implied repeal by the law that has developed in the application of s 109 [footnote 48 omitted] .
>
> 50. In the present case there would be difficulties in accommodating provisions of the *Police Act* with the application of the wrongful dismissal provisions of the Industrial Act. What would happen if the Industrial Commission were empowered to order re-employment of a member of SA Police whose appointment had been terminated? Would that person have to make a fresh oath or affirmation under s 25 of the *Police Act*? Upon re-employment of a member of SA Police by order of the Industrial Commission, could the Police Commissioner take some other less severe action against that member on account of the conviction that led the Police Commissioner to terminate his or her appointment? Or would the Police Commissioner's powers under s 40(1) be spent upon the Police Commissioner's deciding that the appointment should be terminated? In deciding whether a termination of appointment of a member of the police force was harsh, unjust or unreasonable, would the Industrial Commission be bound to take account of, and be limited to considering, matters the Police Commissioner was bound to consider when exercising the power given by s 40(1) of the *Police Act*? Or would the Industrial Commission be guided by those considerations that are usually grouped together under the description the "industrial justice" of the matter [footnote 49 omitted] ?

> 51. These difficulties in reconciling the two Acts stem from two features of the legislation which, although it is convenient to deal with them separately, are linked one to the other. First, different considerations inform the exercise of power under the *Police Act* from those that inform the exercise of power under the wrongful dismissal provisions of the Industrial Act. Secondly, the *Police Act* appears intended to deal comprehensively with questions of termination of appointment of a member of SA Police.

48 In my view, given the comprehensive scheme for the appointment, duties and responsibilities, suspension, discipline and discharge of prison officers under the Prisons Act and Regulations, the same conclusions reached in *Ferdinands* are open to be reached in this matter, at least in relation to Part X. This is despite the existence of s 23(3)(d) of the Act. It is inconceivable that the Parliament would have intended, on the making of this statutory scheme that prison officers could fall within the Commission's unfair dismissal jurisdiction, as contained in the Act, in existence at the time of the enactment of that scheme. As in *Ferdinands*, what would be the situation if a prison officer was successful in obtaining an order of re-employment? For example, there is no provision in the Prisons Act for the taking of another oath of office. Except in the case of probationary prison officers, the means by which prison officers are to be dealt with for performance and conduct issues, which may lead to termination of employment, is set out in Part X of the Prisons Act.

49 However, despite the above, and the potential for conflict, the position in relation to reg 5(4) is problematic. As a matter of general principle, delegated legislation, such as the Regulations, cannot impliedly repeal an earlier Act, unless there is an express provision empowering it: *Hall v Manahan* [1919] St R Qd 217; *TN v Walford* (1998) 126 NTR 8. There is nothing in the Prisons Act to this effect. Furthermore, is the submission of the Union in relation to s 43 of the Interpretation Act 1984, to the effect that where there is a conflict between an Act and the terms of delegated legislation the delegated legislation is deemed to be void to the extent of the inconsistency.

50 In this case, given the terms of s 23(3)(d) of the Act, which by s 46(1) of the Interpretation Act 1984, includes Reg 5(4), in the absence of any provision for an appeal from a decision of the chief executive officer, and despite my reservations expressed above, it would seem that the present legislative scheme in the Regulations is distinguishable from that considered in *Eaton*, on this basis. Despite the nature of probationary appointments of prison officers, and the broad powers of the chief executive officer, and not without some oscillation, I consider that Mr Sell's claim is not ousted on jurisdictional grounds by reason of reg 5(4).

Natural justice

51 I now consider a further argument put by the Union.

52 The Union argued that Mr Sell was denied natural justice by the Minister because he was not afforded the process set out in Part X of the Prisons Act. The Union's submission was that the Minister made up its mind to dismiss Mr Sell under reg 5(4) and therefore deprived him of the opportunity to exercise his rights under Part X. As outlined above, this involves the laying of a formal disciplinary charge, the opportunity to cross-examine witnesses, and places an onus on the Minister to establish the charges on the balance of probabilities.

53 Because the Minister used the power of the chief executive officer to discharge Mr Sell as a probationary prison officer under reg 5(4), it was contended by the Union that Mr Sell was not afforded the same level of procedural fairness. This, according to the Union's submission, made the dismissal unfair. For the following reasons, I am not persuaded to this view. Mr Sell's dismissal was not unfair because the Minister sought to use reg 5(4) to discharge him as a probationary prison officer.

54 The terms of Part X of the Prisons Act, and the relevant regulations, provide a comprehensive code in relation to the employment, discipline and dismissal of prison officers. Whilst the terms of Part X of the Prisons Act and relevant regulations are comprehensive and provide for a detailed procedure by which disciplinary offences committed by prison officers are dealt with, the fact remains that Mr Sell was not charged with or found guilty of a disciplinary offence. In my view, as I tentatively expressed in the interim order reasons for decision [2013] WAIRC 00067, nothing in Part X requires a probationary prison officer to be charged with a breach of discipline. The power resides with the chief executive officer at all times, prior to and at the end of a period of probation, to form the opinion, that a probationary prison officer is unsatisfactory or unsuitable and to discharge the officer.

55 A strikingly similar situation arose in *O'Rourke v Miller* (1984-1985) 156 CLR 342. In this case, a probationary police constable was discharged for misconduct, as a result of disorderly and drunken behaviour after a celebration, following the sitting of the probationary police officer's final examinations, at the end of his probation. Detailed provisions existed in the then Part V of the Police Regulation Act 1958 (Vic) and the Police Regulations 1979 (Vic) for the appointment, discipline and removal of police officers. It was held by Gibbs CJ, Mason, Wilson and Dawson JJ, that the separate regulations for the discharge of probationary police constables could be invoked by the Chief Commissioner, if he formed the view, at the conclusion of the probationary period, that a probationary police constable was not "suitable" to be confirmed as a member of the police force. It was held that there was no right for such a probationary police constable to be dealt with under Part V of the Police Regulation Act. As a probationary constable, the only "right" possessed by him, was for the Chief Commissioner to form a bona fide view as to the probationary police constable's suitability for confirmation of appointment, at the conclusion of the probationary period. It was also held that any material to be considered in making that decision, adverse to the constable, should be put to him for a response.

56 There is no question however, that the invoking of the regulations for the discharge of a probationary police constable in *O'Rourke*, and in the case of probationary prison officers in this case under reg 5(4) of the Regulations, that the principles of natural justice apply. The officer is entitled to be first told of allegations against him and be given an opportunity to explain: *Ridge v Baldwin* [1964] AC 40. This also applies to a probationary police constable: *Chief Constable of the North of Wales Police v Evans* [1982] 1 WLR 1155.

57 On the evidence in this matter, Mr Sell had the relevant allegations of misconduct put to him and he was afforded an opportunity to respond. There is no basis to conclude that he was denied natural justice.

The Lawson incident

58 Mr Sell and Mr Bull were part of the probationary prison officer class 167. As a part of the training, officers were required to attend on-site training at the Prison Officer Academy located at Hakea Prison. Most, if not all probationary prison officers, are accommodated on the premises whilst undergoing training. Another trainee on the course in class 167 was probationary prison officer Mr Lawson. On 5 July 2012 Mr Lawson, along with others including Mr Bull, attended a social function at the Corrective Services Social Club. The Club is located at the Hakea Prison complex. After the function, and whilst sitting in Mr Lawson's vehicle in the car park of the Club, Mr Lawson offered Mr Bull a quantity of dexamphetamine tablets. These are a prohibited drug under the Misuse of Drugs Act 1981 (WA). Mr Bull declined the offer, left Mr Lawson's vehicle and reported the matter to the Department's Professional Standards Division the next day. As a result, Mr Lawson was charged by the police with offences under the Misuse of Drugs Act. His probationary appointment was terminated by the chief executive officer under reg 5(4) of the Regulations.

59 The issue with Mr Lawson appears to have created some division amongst the trainees. Some supported Mr Bull's conduct in reporting the matter and some did not. The evidence in this case would tend to suggest that Mr Sell was in the latter camp. The significance of this incident relates to the issue of motive, if any, for what occurred at the Club on the night of 31 August 2012 between Mr Sell and Mr Bull. It was contended by the Minister that Mr Sell was in the group that did not support Mr Bull reporting Mr Lawson's conduct. It was submitted that this residual resentment was a factor in Mr Sell's conduct in assaulting Mr Bull on 31 August. This was denied by the Union.

60 I turn now to consider the Club incident leading to the dismissal of Mr Sell.

The Club incident

61 As to the evidence in relation to the Club incident on 31 August 2012, as with many cases of this kind, there was a conflict on the evidence. Both Mr Sell and Mr Bull gave contradictory accounts of the events as they occurred on the evening in question. It is common ground however, that to celebrate the conclusion of class 167 the trainees requested, and were granted permission, to hold a gathering at the Club. The Club, as mentioned, is located on the Hakea Prison property, but it is outside of the gazetted boundary of the prison. The Club is an incorporated body. The Club membership is open to employees of the Department of Corrective Services.

62 Ms Bell, another probationary prison officer at the time, testified that she spoke to representatives of the Club, who agreed that the trainees could use the premises on the night of 31 August. It was not an exclusive arrangement, as other members were also present at the Club. There was no fee involved, with the trainees each contributing to the cost of food.

63 Initially, all seemed to proceed well enough from when the event began at approximately 8pm. It was common ground, that in the course of the evening, Mr Sell consumed a considerable amount of alcohol and described himself as intoxicated, when questioned by the Commission. Mr Bull also testified that he had consumed alcohol, but not seemingly, to the extent of Mr Sell. One witness to the incident, Mr Eva, also consumed a considerable amount of alcohol. The other witness, Ms Bell, had only consumed two to three drinks over the evening. She had agreed to drive herself and others elsewhere, after the Club event had finished.

64 At approximately 10pm, according to Ms Bell's evidence, she was starting to clean up the area where the officers had been celebrating. She was approached by Mr Sell and others, to take them into Northbridge. Ms Bell testified that as she was getting ready to leave, after having packed up, she heard some raised voices. She had not seen what had initially occurred, but turned around and saw Mr Sell and Mr Bull being pulled apart by some others. She said that Mr Bull was asked by the barman, Mr Thew, another probationary prison officer, to leave the club. He did so, saying words to the effect "come on, we'll take this outside …":32T.

65 According to Mr Sell, he was waiting for Ms Bell to clear up at the end of the night. He testified that Mr Bull approached him inside the Club and said he was coming to Northbridge too. Mr Sell said he responded to the effect "that the car was full because we're picking up Carl Lawson on the way":21T. This was untrue. When questioned as to why he said this to Mr Bull, Mr Sell testified that it was a bad joke due to intoxication. He did not give any thought as to whether it may have been upsetting to Mr Bull, given a previous incident with Mr Lawson. Mr Sell said that Mr Bull then became aggressive. Mr Bull called Mr Lawson a "f… dog". Mr Sell and Mr Bull started to argue. Mr Thew came over to them and moved Mr Bull outside. In response to Mr Bull's comment to "take it outside", Mr Sell accepted that he may have said in response, words to the effect, "if he wants to have a go, I'll give him a go":26T.

66 Mr Bull's evidence as to the events inside the Club was quite different. He testified that at approximately 9:30pm, he went over to speak to Mr Sell. According to Mr Bull, Mr Sell was standing close to two others, Mr Eva and Mr Thew, and he was not by himself as Mr Sell maintained. According to Mr Bull, without him saying anything, Mr Sell said to him "here's the piece of shit":78T. When Mr Bull questioned why this was so, Mr Sell is said to have told him "because he 'dobbed in Carl (Lawson)'": 78T. Mr Bull testified that he asked Mr Sell what he would have done. Mr Bull testified that Mr Sell became quite irate. Mr Bull denied that Mr Sell made any reference to picking up Carl Lawson on the way to Northbridge. At this point, Mr Bull said he suggested to Mr Sell they should go outside, which they did. Mr Bull also accepted that he was asked to leave the Club.

67 Again, what was said to have occurred outside the Club was controversial. Mr Sell testified that Mr Bull was standing on the grassed area. He walked over to where Mr Bull was standing. They then both argued. According to Mr Sell, Mr Bull was goading him to fight. He put his face close to Mr Sell's, and said words to the effect "have a go …". He also called Mr Sell a "copper piece of shit": 22T. Mr Sell did not dispute to having called Mr Bull "a dog and a piece of shit": 26T. Mr Sell testified that he then pushed Mr Bull away from him, but Mr Bull then "rushed" back at him. Mr Sell said he thought Mr Bull was going to assault him. They both grappled. Mr Sell then punched Mr Bull in the face. When questioned as to the punches, Mr Sell said he may have hit Mr Bull twice. They both fell to the ground. Mr Sell denied punching Mr Bull when they were on the ground.

68 Mr Sell said Mr Bull was lying on the ground and not showing any further signs of aggression. He testified that he got up and walked towards the wall of the Club. The next thing Mr Sell recalled was lying on the brick paving in a pool of his own blood. According to Mr Sell, Ms Bell had come over to him and told him Mr Bull had pushed him over. An ambulance was called. Mr Bull was treated but Mr Sell refused treatment.

69 Mr Bull agreed that when outside Mr Sell came up to him. According to Mr Bull, Mr Sell was quite aggressive. Mr Bull said that Mr Sell continued to call him a "piece of shit and a dog":79T. Mr Bull testified that he asked Mr Sell what he would have done if Mr Lawson had offered him the dexamphetamine. According to Mr Bull's evidence, Mr Sell's response was to the effect "he would have taken them": 79T. In response, Mr Bull said he told Mr Sell "its pieces of shit like you that give prison officers and police officers a bad name":80T. At this point, Mr Sell pushed Mr Bull in the chest. As he was starting to fall backwards, Mr Bull said that he took hold of one of Mr Sell's arms. Having done so, Mr Bull testified that at that point Mr Sell "socked me in the face":80T. They both then fell to the ground. According to Mr Bull, Mr Sell kept punching him. He said he was struck by Mr Sell three times.

70 Whilst on the ground, Mr Bull testified that both he and Mr Sell continued to grapple with each other and rolled over close to the Club wall. According to Mr Bull, he tried to keep Mr Sell close to him, to stop being hit again. Mr Bull testified that he and Mr Sell were up against or close to the wall. Then he pushed Mr Sell away from him, and Mr Bull stepped to the right. Mr Bull said that he just wanted Mr Sell to stop hitting him. He did not throw any punches at Mr Sell.

71 Eye witness accounts of the outside altercation were given by both Ms Bell and Mr Eva. Ms Bell testified that both she and Mr Eva followed Mr Sell and Mr Bull outside, after the initial incident inside the Club. Once outside, Ms Bell said that both Mr Sell and Mr Bull were in "each other's faces". She thought they were both egging each other on. She said Mr Bull said to Mr Sell "Come on, give us a punch":32T. Mr Lawson's name came up again. Ms Bell testified that she heard Mr Bull call Mr Sell "a corrupt cop". She said Mr Sell then hit Mr Bull. Mr Bull said that Mr Sell "hits like a girl":32T. Mr Bull admitted that he said this. According to Ms Bell, there was no physical contact between them until Mr Sell punched Mr Bull. At the time this occurred, Ms Bell said that Mr Sell had his back to her. She also said Mr Sell threw some more punches, but could not see if any made contact with Mr Bull.

72 Ms Bell testified that she did not see Mr Bull throw any punches at Mr Sell. The next thing Ms Bell saw was Mr Bull holding Mr Sell up against the wall of the Club. While she could not see how Mr Bull was holding Mr Sell, she heard choking sounds as if Mr Sell was having problems breathing: 33T. She then said Mr Bull pushed Mr Sell away with both hands and Mr Sell fell "literally straight back. He did not put hands out or anything":38T. According to Ms Bell, Mr Bull did not push Mr Sell with any aggression.

73 Mr Eva also gave his version of the events on the night in question. As mentioned earlier in these reasons, Mr Eva conceded that he had consumed a considerable amount of alcohol. I infer it to be likely that Mr Eva was under the influence. Mr Eva did not observe the events inside the Club, other than to testify that he heard heated words between Mr Sell and Mr Bull. He followed them both outside. Once there, Mr Eva testified that he saw Mr Bull "in Mr Sell's face": 40T. According to Mr Eva, Mr Bull was yelling and screaming at Mr Sell and that Mr Sell was largely passive. Mr Eva characterised Mr Bull as the aggressor. Whilst in his testimony Mr Eva said he could not now recall who threw punches, he confirmed that he told investigators shortly after the incident, that he saw Mr Sell throw the punches. Mr Eva said he then saw Mr Sell get up and walk towards the Club. At the same time, Mr Bull was yelling and screaming. Mr Bull grabbed Mr Sell by the throat. He then pushed him and Mr Sell fell over and hit his head on the ground.

74 It seemed common ground that after Mr Sell regained consciousness, he was heard to shout out words to the effect "dexies, I take a thousand dexies".

75 As mentioned earlier, there is a conflict on the evidence between Mr Sell and Mr Bull. In relation to the incident inside the Club, neither Mr Eva nor Ms Bell witnessed the confrontation. Both only heard raised voices and Ms Bell saw Mr Bull and Mr Sell being pulled apart. I accept on the evidence that the Lawson incident caused some division in the class at the time it occurred. There were two camps, those in support and those in opposition to the conduct of Mr Bull in reporting Mr Lawson. I do not accept all waters were calm between Mr Bull and Mr Sell over this matter. To so conclude would be quite at odds with the references to the Lawson incident in the verbal altercations between Mr Sell and Mr Bull. It was a source of tension between them. No doubt this simmering tension was fuelled by alcohol on the night of 31 August.

76 The contention however, that when Mr Bull approached Mr Sell inside the Club, he was met with an unprovoked tirade of abuse from Mr Sell is implausible. There is no other independent evidence as to this. On the other hand, Mr Sell's testimony, that he raised going to Northbridge, is consistent with that of Ms Bell. She said that Mr Sell and some others were going to go in her car after the Club event finished. Mr Sell making a snide remark as to Mr Lawson and Mr Bull not being able to go in the same vehicle as the others is more consistent with the factual narrative to that point. It also is consistent with the underlying tension in relation to the Lawson matter. It was, for this reason, plainly provocative for Mr Sell to have made such a comment to Mr Bull. In my view, on balance, I accept that Mr Bull took umbrage to such a comment, which led to the verbal altercation between both men.

77 The overall tenor of the evidence supports that Mr Bull was upset by Mr Sell's comment and both became quite heated. Ms Bell's testimony was she heard raised voices and both Mr Sell and Mr Bull were pulled apart. The fact that Mr Bull was asked to leave the Club is consistent with this also. Additionally, although I do not place much weight on it as he was not called to testify, is the statement of Mr Thew at p 83 of the Investigation Report, that he observed Mr Bull in an aggressive stance. I also accept Ms Bell's testimony to the effect that it was Mr Bull who said words to the effect to "take the matter outside", to which Mr Sell responded, in the terms as noted above.

78 Accordingly, I consider both Mr Sell and Mr Bull were responsible for the conduct inside the Club. There was a degree of provocation by both of them, one to the other. They were both abusive of each other. Once outside the Club, the evidence that Mr Sell was simply passive, as stated by Mr Eva, is not to be accepted. Both Mr Bull and Mr Sell were in an emotionally

charged state and were both fuelled by alcohol. Ms Bell's testimony was that Mr Bull and Mr Sell were "in each other's faces". This was also stated by Mr Eva in his evidence, which is somewhat contradictory to his assertion that Mr Sell was merely passive. According to Ms Bell, both were goading each other. I accept that Mr Bull did goad Mr Sell to "have a go".

79 Given that she was the only person involved not greatly affected by alcohol I accept Ms Bell's testimony as the most reliable independent observer of the events. The incident outside was not one sided. Both Mr Sell and Mr Bull were abusing each other. I accept that Mr Sell pushed Mr Bull away and then punched Mr Bull in the face. He threw at least two and possibly more punches. I accept that before doing this, Mr Bull did move towards him. This was the evidence of both Ms Bell and Mr Eva. Mr Bull being punched in the face is consistent with the photographic evidence at pp 64-67 of exhibit A1. The photographs of Mr Bull's face show substantial bruising to his left eye.

80 I accept also on the evidence that Mr Bull did not punch Mr Sell but he was trying to subdue him. What happened after Mr Sell punched Mr Bull is less clear on the evidence. Ms Bell testified that she saw both Mr Bull and Mr Sell wrestling on the ground. She did not see what occurred next, until they were both at the Club wall. Mr Eva said both got up and Mr Sell walked towards the wall. This was also the evidence of Mr Sell. Mr Eva said that Mr Bull then went to Mr Sell and grabbed him and pushed him into the wall. Mr Sell had no recollection beyond getting up off the ground and walking to the wall of the Club. Mr Bull said they both rolled towards the wall and Mr Bull took hold of Mr Sell and held him against the wall.

81 How both Mr Sell and Mr Bull got to the wall is not a matter of great consequence. I accept that Mr Bull must have applied some pressure to Mr Sell's throat when he held Mr Sell at the wall in view of the testimony of Ms Bell that Mr Sell's breathing appeared to be laboured. I accept that Mr Bull did not aggressively push Mr Sell away from him. On the evidence, he did so with both hands and with little force. However, Mr Sell fell in such a way that he sustained a substantial wound to the back of his head, as the photos of Mr Sell in exhibit A1 reveal. It cannot be discounted on the evidence that the manner of Mr Sell's fall was as a result of, or substantially affected by, his level of intoxication.

82 I also accept on the evidence that Mr Sell appeared to be unconscious for a short period of time and when he recovered, he referred to "dexies" as noted in the evidence.

83 On all of the evidence this was not a case of a totally unprovoked assault of Mr Bull by Mr Sell. Both of them were fuelled by alcohol and Mr Bull was provocative and abusive in his behaviour, as was Mr Sell. In many respects, they both gave as good as each received. I do not accept however, that Mr Sell's conduct in punching Mr Bull could reasonably be described as self-defence. There was no evidence that Mr Bull did, or was showing a clear intention, to strike Mr Sell. This was not the evidence of Ms Bell. The fact remains that Mr Sell did punch Mr Bull repeatedly, causing him some facial injury.

84 Whilst the circumstances of Mr Sell's injury are of considerable concern, there was no evidence before the Commission that this was caused by any aggressive conduct of Mr Bull.

Proportionality – the Cashman incident

85 The Union contended that the dismissal of Mr Sell was a disproportionate response. In particular, the Union referred to a prior incident that occurred in August 2010 at the Club. On this occasion, a prison officer, Mr Cashman, was off duty and was participating in a darts competition against a team from the general public. At the conclusion of the evening, an altercation took place between Mr Cashman and a player from the other team. According to the report of the incident, and the supporting documents contained at pp 125-177 of exhibit A1, disciplinary action against Mr Cashman was discontinued and he was subject to improvement action. A number of reasons for this were cited at the time, including a lapse of some eight months from the initial incident; that the officer was off duty and not in uniform; that he was not intoxicated; that he had been employed since 1999 with no prior disciplinary issues, and that he reported the incident the next day.

86 Based on these circumstances of the Cashman incident, the Union submitted that the Minister has applied double standards. It was contended that this is a relevant consideration for the purposes of assessing whether the dismissal of Mr Sell was unfair.

87 I accept that on its face, the response of the Minister to the Cashman incident seemed very lenient. It is surprising that Mr Cashman was not the subject of disciplinary action. However, caution must be taken when comparing one circumstance with another. The fact that Mr Cashman was a relatively long serving officer, as opposed to Mr Sell being on probation, is very material. There are other distinguishing features also. In particular, the altercation between Mr Sell and Mr Bull, took place in two phases, both inside and outside of the Club, over a period of time. Additionally, Mr Sell struck Mr Bull repeatedly. This is not a case where an employee has broken rules in circumstances not generally distinguishable from other cases: *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* (2004) 84 WAIG 3787. Also, the fact of an earlier, more lenient, penalty may not of itself, mean that a later disciplinary incident leading to a different penalty is necessarily unfair: *McGrath v Commissioner of Police* (2005) 85 WAIG 2006. I am not persuaded Mr Sell's dismissal was unfair for this reason, in all the circumstances of the case.

Connection with employment

88 For the reasons that I gave in the interim decision, at par 18, which I adopt for present purposes, I consider there was a sufficient connection between the event held at the Club and Mr Sell's employment as a probationary prison officer.

Conclusions

89 The law in relation to these matters is well settled. An employer has the legal right to terminate the employment of an employee, the question for the Commission however is whether that right has been exercised so harshly or oppressively such as to amount to an abuse of that right: *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia* (1985) 65 WAIG 385 at 388.

90 Having regard to all of the circumstances of this case, and the findings that the Commission has made, I am not persuaded that the discharge of Mr Sell as a probationary prison officer has been shown to be harsh, oppressive or unfair. In all of the circumstances of the incident on 31 August, it was open in my view, for the chief executive officer to form the view the Mr

Sell was not suitable to be a prison officer. It may also be open to conclude that Mr Bull was treated leniently by the Minister in all of the circumstances, given no disciplinary action was taken against him. However, the Commission, in these proceedings, is only dealing with the circumstances of the discharge of Mr Sell.

91 For the foregoing reasons, the application is dismissed.

2013 WAIRC 00707

DISPUTE RE TERMINATION OF UNION MEMBER

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, 9 AUGUST 2013
FILE NO/S	CR 68 OF 2012
CITATION NO.	2013 WAIRC 00707

Result	Application dismissed
Representation	
Applicant	Mr J Walker
Respondent	Mr D Anderson of counsel and with him Mr D Akerman

Order

HAVING heard Mr J Walker on behalf of the applicant and Mr D Anderson of counsel and with him Mr D Akerman 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 00722

DISPUTE RE DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH TRADING AS IDENTITY WA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 16 AUGUST 2013
FILE NO.	CR 191 OF 2013
CITATION NO.	2013 WAIRC 00722

Result	Directions issued
Representation	
Applicant	Ms A Hamlin and with her Ms M Girgis
Respondent	Mr D McKenna of counsel

Directions

HAVING heard Ms A Hamlin and with her Ms M Girgis on behalf of the applicant and Mr D McKenna of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the applicant and respondent simultaneously exchange lists of all discoverable documents in their possession, custody or control by no later than 4:00pm 16 August 2013.

(2) THAT the applicant file and serve upon the respondent witness statements for all witnesses the applicant intends to call by no later than 4:00pm 20 August 2013.

(3) THAT the respondent file and serve upon the applicant witness statements for all witnesses the applicant intends to call by no later than 4:00pm 21 August 2013.

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

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

2013 WAIRC 00765

DISPUTE RE DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH TRADING AS IDENTITY WA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 AUGUST 2013
FILE NO/S	CR 191 OF 2013
CITATION NO.	2013 WAIRC 00765

Result	Application discontinued
Representation	
Applicant	Ms A Hamlin of counsel
Respondent	Mr D McKenna of counsel

Order

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

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

(2) THAT the respondent has liberty to apply for costs and expenses within 14 days of the date of this order.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 36/2013	N/A	Dispute re duties of The Australian Nursing Federation members	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Mayman C	PSAC 19/2013	18/06/2013	Dispute re annual leave	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Mayman C	PSAC 8/2013	22/03/2013 28/03/2013 16/04/2013	Dispute re treatement of Union member	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection	Mayman C	PSAC 35/2012	17/12/2012 29/01/2013 8/02/2013	Dispute re compulsory leave	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 00774

DISPUTE RE CLAUSE 47 & 48 OF THE PUBLIC SERVICE AND GOVERNMENT OFFICERS GENERAL AGREEMENT 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

PUBLIC SECTOR COMMISSION

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE WEDNESDAY, 28 AUGUST 2013

FILE NO. PSAC 18 OF 2012

CITATION NO. 2013 WAIRC 00774

Result Recommendation issued

Representation

Applicant Ms J Moore

Respondent Mr A Dores

Recommendation

WHEREAS this is an application in relation to a dispute regarding clause 47 of the *Public Service and Government Officers General Agreement 2011*; and

WHEREAS a number of conferences were convened before the Public Service Arbitrator;

WHEREAS on the 20 August 2013 the Public Service Arbitrator convened a further conference for the purpose of conciliating between the parties;

WHEREAS the Civil Service Association of Western Australia Incorporated (the applicant) and the Public Sector Commission (the respondent) have reached agreement that the Compliance Review of Approved Procedure 5 – Approved Contracts for Services Procedures will be undertaken by the Public Sector Commission in accordance with the attached document;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby recommends:

1. THAT the Public Sector Commission undertake the compliance review of Approved Procedure 5 – Approved Contracts for Services Procedures in accordance with the attached document.
2. THAT the parties consult in relation to findings of the review via the Peak Consultative Forum.
3. THAT PSAC 18 of 2012 Civil Service Association of Western Australia Incorporated v Public Sector Commission remain open.

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

2013 WAIRC 00792

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEFAN LYTWYNIW
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 4 SEPTEMBER 2013
FILE NO.	U 113 OF 2013
CITATION NO.	2013 WAIRC 00792

Result	Directions issued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Mr R Bathurst (of counsel)

Directions

HAVING heard Mr D Stojanoski (of counsel) on behalf of the applicant and Mr R Bathurst (of counsel) on behalf of the respondent the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs -

THAT the hearing be set down for 26 – 28 November 2013;

THAT discovery is to be informal;

THAT the parties draw up an agreed statement of facts;

THAT the applicant file in the Commission and serve on the respondent any signed witness statements upon which it intends to rely by close of business on 8 October 2013;

THAT the respondent file in the Commission and serve on the applicant any signed witness statements upon which it intends to rely by close of business on 6 November 2013;

THAT the applicant file in the Commission and serve on the respondent an outline of submissions by close of business on 13 November 2013;

THAT the respondent file in the Commission and serve on the applicant an outline of submissions by close of business on 20 November 2013;

THAT the parties have liberty to apply at short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Government Services (Miscellaneous) General Agreement 10 of 2013 AG 10/2013	23/08/2013	The Executive Director, Labour Relations Department of Commerce	United Voice WA	Commissioner S M Mayman	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00390

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 15 DECEMBER 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00390
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MR G TOWNSING - BOARD MEMBER MR G LEE - BOARD MEMBER
HEARD	**:**	MONDAY, 11 MARCH 2013, WEDNESDAY 19 JUNE 2013
DELIVERED	**:**	WEDNESDAY, 3 JULY 2013
FILE NO.	**:**	PSAB 1 OF 2013
BETWEEN	**:**	JOYCE CAPEWELL Appellant AND DEPARTMENT OF CORRECTIVE SERVICES Respondent

Catchwords	**:**	Industrial law – Whether the jurisdiction of the Public Service Appeal Board is enlivened under s 80I of the *Industrial Relations Act 1979* (WA) - Whether appellant considered a "government officer" for the purposes of s 80C(1) of the *Industrial Relations Act 1979* (WA) – Meaning of "government officer" – Meaning of "salaried staff of a public authority" – Board not persuaded that the appellant was a government officer – Appeal beyond the jurisdiction of the Board
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 80C(1), 80I; *Public Sector Management Act 1994* (WA) s 3
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	In person
Respondent	**:**	Mr D Hughes

Case(s) referred to in reasons:

Gerad McGinty v Department of Corrective Services (2012) 92 WAIG 190

The Australian Nursing Federation, Industrial Union of Workers Perth v The Minister for Health and Others (2004) 84 WAIG 2867

Case(s) also cited:

Li Liu v Public Transport Authority of Government of Western Australia (2005) 85 WAIG 1563

The Totalisator Agency Board v Edith Fisher (1997) 77 WAIG 1889

Reasons for Decision

1 This is the unanimous decision of the Appeal Board. Ms Capewell, the appellant, was engaged as an Aboriginal Visitor in the late 1980s and was based in Geraldton. Visitors provide support to Aboriginal prisoners in prisons throughout the State. The Aboriginal Visitor Scheme originated from the Royal Commission into Aboriginal Deaths in Custody in 1991. Ms Capewell appeals against the decision taken by the Department of Corrective Services to terminate her employment which was communicated by letter dated 6 December 2012. Whilst various grounds are set out in the notice of appeal, a preliminary issue needs to be determined, that being whether Ms Capewell was a "government officer" for the purposes of s 80C(1) of the Industrial Relations Act 1979, and hence being amenable to the jurisdiction of the Appeal Board under Part IIA of the Act. The Department contended that Ms Capewell was not a government officer at any time during her employment.

2 Accordingly, as it is necessary for a court or tribunal to first establish whether it has jurisdiction before it embarks upon the determination of the issue before it, the jurisdictional point was listed for hearing as a preliminary issue.

Contentions of the parties

3 Ms Capewell testified that because she had been employed for over 20 years as a Visitor and worked on a regular basis, she should be regarded as a government officer for the purposes of the Act. She testified that she was employed on a rostered basis, could be on call over 24 hours of the day any day of the week, and worked a range of hours from 10 to 20 per week sometimes more. Ms Capewell said she was paid approximately $31 per hour for all hours worked. She was not paid for holidays or annual leave or sick leave. Instead, Ms Capewell received a loading on her hourly rate in lieu of these benefits. In essence, Ms Capewell said that during the course of her employment, she considered herself to be a "part time/casual" employee. Whilst Ms Capewell initially testified that she worked regular hours each week, when examples of her time sheets were put to her in cross-examination, it was apparent that actual hours worked per day and total hours per week fluctuated from pay period to pay period.

4 Ms Capewell also gave evidence that towards the end of her employment, as a result of a workplace injury, she was placed on workers' compensation and was returned to work on a graduated return to work program. Ms Capewell said that she thought this confirmed that she was not a casual employee.

5 Ms Capewell said that when she first commenced employment as a Visitor, she signed a contract of employment, however she no longer had the documents, and nor did the Department. Whilst a copy of a document called "Aboriginal Visitors Scheme Conditions of Employment" was put to her in cross-examination, Ms Capewell testified that she was not familiar with this document. It is to be noted that the document appears to be out of date. A copy of it was tendered as exhibit R3.

6 Evidence was also given by Mr Larkin, the Department's Human Resources Manager. Mr Larkin outlined the duties of Visitors under the Aboriginal Visitor Scheme. For the purposes of the Department's records, Mr Larkin testified that Visitors are regarded as "casual timesheet employees" who generally work irregular hours in the performance of their duties. A copy of a note entitled "To Whom It May Concern", referring to Ms Capewell in these terms, was tendered as exhibit R2. Whilst Mr Larkin conceded that for the purposes of the rate of pay Visitors are paid a rate equivalent to a Level 1 Step 3 employee, the hourly rate is subject to a casual loading in recognition of there being no leave entitlements. In Mr Larkin's view, no relevant award or industrial agreement applies to the employment of Visitors and they are considered by the Department to be award free.

Consideration

7 Whether or not Ms Capewell was a government officer for the purposes of s 80C(1) of the Act, in order to enliven the jurisdiction of the Appeal Board, is a mixed question of fact and law. Under s 80I of the Act the Appeal Board's jurisdiction in matters of the present kind, is limited to an appeal by a "government officer" as defined in s 80C of the Act. Section 80C(1) of the Act provides as follows:

> ***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;

8 There is no contest in this matter that Ms Capewell was not a "public service officer" for the purposes of par (a) of the definition. A "public service officer" in s 3 of the Public Sector Management Act 1994 means "an executive officer, permanent officer or term officer employed in the Public Service under Part 3". There is no evidence to support the contention that Ms Capewell was employed as a public service officer under s 64(1)(a) and (b) in Part 3 of the PSM Act.

9 We turn then to whether Ms Capewell was employed as a "government officer". For these purposes, it is necessary for Ms Capewell to establish on the balance of probabilities, that she was "employed on the salaried staff of a public authority". There can be no issue taken with the proposition that the Department is a "public authority" and an "employer" as set out in s 7 of the Act. The issue is, however, whether Ms Capewell was at the material times, a member of the "salaried staff" of the Department.

10 This issue arose for consideration in a matter before the Appeal Board in *Gerad McGinty v Department of Corrective Services* (2012) 92 WAIG 190. In *McGinty*, the Appeal Board considered whether the appellant, employed as a Vocational Support Officer at Casuarina Prison under the relevant industrial instruments for prison officers, was a government officer for the purposes of s 80C(1) of the Act. In dealing with this issue, and the meaning of "salaried staff of a public authority", the Appeal Board at pars 10-11 said as follows:

> [10] There is no fixed meaning of "salary". The leading authority in this jurisdiction is *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889. In the view of Kennedy J in that case, the ordinary dictionary meaning of "salary" was the starting point for consideration, that being a "Fixed payment made periodically to a person as compensation for regular work; now usually restricted to payments made for non-manual or non-mechanical work (as opposed to wages)". He then stated that "the concept of a fixed payment is central to the definition" (at 1890).
>
> [11] Whilst at first blush it might be said that prison officers are now paid a salary on this basis, the history of the award and agreement shows that they were historically wages employees and that the payment of remuneration annually was a result of administrative changes some years ago. As noted above, the industrial instruments in part, still refer to the payment of "wages". Further, s 80C of the Act does not just refer to the payment of a "salary" to a person. The statute refers to a person employed on the "salaried staff" of a public authority. Whilst the distinction between "wages employees" and "salaried staff" in terms of somewhat anachronistic "blue collar" and "white collar" employment may no longer have the connotations it once may have had, nonetheless, the legislature has sought to confine the jurisdiction of the Arbitrator to those specific employees in s 80C of the Act. They are generally those in the administrative, technical and professional ranks of the public sector.

11 Furthermore, as referred to in the Department's written submissions, in *The Australian Nursing Federation, Industrial Union of Workers Perth v The Minister for Health and Others* (2004) 84 WAIG 2867 Kenner C considered the issue as to whether nurses, in particular Senior Registered Nurses, occupying positions such as Directors of Nursing within the South West area health services of the State, were "government officers" for the purposes of s 80C(1) of the Act. After setting out the relevant facts, and in particular, provisions of the award in question in relation to wages and other conditions, Kenner C at pars 19-20 observed as follows:

> [19] Whether or not a person is paid a "salary" or a "wage" is a matter of fact. Importantly for present purposes, the meaning of "salary" under s 80C(1) of the Act as a matter of interpretation, will involve the ordinary meaning of the words used in the statute: *Thacher and Sons Ltd v London Society of Compositors* [1913] AC 107. Dictionaries define "salary" in various ways as follows. The Shorter Oxford English Dictionary defines "salary" as "1. Fixed payment made periodically to a person as compensation for regular work; now usu. for non-manual or non-mechanical work (as op to wages). 2. Remuneration for services rendered;..." The Macquarie Dictionary defines "salary" as "A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind."
>
> [20] The issue of whether a payment was a "fixed periodical payment" and therefore a salary was the subject of consideration by the Industrial Appeal Court in *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889. In that case, after considering various dictionary definitions and judicial pronouncements on the meaning of "salary", "wage" and "income", the Court came to the conclusion that a person receiving payment by way of a commission payment, was not employed "on the salaried staff of a public authority" for the purposes of s 80C(1) of the Act. In that case, the payment lacked the essential ingredient of a fixed periodical or regular payment. (See also: *Commonwealth Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd* (1944) 69 CLR 227; *Mutual Acceptance Co Ltd v The Commonwealth Commissioner of Taxation* (1944) 69 CLR 389; *Re Shine; Ex parte Shine* [1892] 1 QB 522; *Commissioner for Government Transport v Kesby* (1972) 127 CLR 375; *Commissioner of Superannuation v Carpenter* (1983) 77 FLR 224).

12 In this case, it is common ground that Ms Capewell was paid an hourly rate of pay which was a loaded rate, compensating her for the absence of entitlements such as annual leave and sick leave. Furthermore, the evidence was that Ms Capewell did not work fixed regular hours each week, and did not receive remuneration in the form of a "fixed periodical payment" computed by time. Rather, the evidence was that Ms Capewell was paid for the hours she actually worked, as and when required, on an hourly basis. Accordingly, we are not persuaded that the payments made to Ms Capewell during the course of her employment as a Visitor could be regarded as a "salary" in accordance with the authorities. Furthermore, as was the case in *McGinty*, we are also of the view that it could not be said that Ms Capewell, was a member of the "salaried staff" of the Department, in the sense referred to in *McGinty*.

13 For the foregoing reasons, we are not persuaded that Ms Capewell was at the material time, employed on the salaried staff of a public authority to bring her with in the definition of "government officer" for the purposes of s 80C(1) of the Act. That being so, Ms Capewell's appeal is beyond the jurisdiction of the Appeal Board and must be dismissed.

14 Finally however, based upon the evidence before us, as the documented terms and conditions of employment of Visitors appear to be out-dated and not formally codified, the Department may wish to address this issue. Visitors play an important role in the prison system of the State and their conditions of employment should be clear and certain.

2013 WAIRC 00391

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 15 DECEMBER 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOYCE CAPEWELL
	APPELLANT
	-v-
	DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G TOWNSING - BOARD MEMBER
	MR G LEE - BOARD MEMBER
DATE	WEDNESDAY, 3 JULY 2013
FILE NO	PSAB 1 OF 2013
CITATION NO.	2013 WAIRC 00391

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr D Hughes

Order

HAVING heard Ms J Capewell on her own behalf and Mr D Hughes on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00755

APPEAL AGAINST DECISION TO TRANSFER EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00755
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD
		COMMISSIONER J L HARRISON- CHAIRPERSON
		MR G RICHARDS - BOARD MEMBER
		MR M TAYLOR - BOARD MEMBER
WRITTEN SUBMISSIONS	**:**	FRIDAY, 14 JUNE 2013, FRIDAY, 12 JULY 2013
DELIVERED	**:**	WEDNESDAY, 21 AUGUST 2013
FILE NO.	**:**	PSAB 8 OF 2013
BETWEEN	**:**	PETR PODLAHA
		Appellant
		AND
		MR REECE WALDOCK COMMISSIONER OF MAIN ROADS
		Respondent

Catchwords	:	Industrial Law (WA) – Public Service Appeal Board – Appeal against decision to transfer – Preliminary issue – Whether Board has jurisdiction – Application not seeking to appeal a decision referred to in s 80I(1) of the Act - Appeal dismissed
Legislation	:	*Industrial Relation Act 1979* s 7, s 80C(1) s 80I and s 80I(1)(a), (b), (c), (d) and (e) *Main Roads Act 1930* s 10(1) *Public Sector Management Act 1994* s 78
Result	:	Dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr B Kirwan

Reasons for Decision

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

2 Mr Petr Podlaha (the appellant) lodged an appeal on 22 March 2013 pursuant to s 80I of the *Industrial Relations Act 1979* (the Act) against a decision made by the Commissioner of Main Roads (the respondent) to transfer him from a position in Port Hedland to a position in Perth. The appellant claims that in making this decision the respondent breached Clause 16. – Transfers of the *Main Roads APEA Enterprise Bargaining Agreement 2012* (the Agreement). The respondent claims that the Board does not have jurisdiction to deal with this application.

3 The Board's jurisdiction is set out in s 80I of the Act as follows:

> (1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer, who is the holder of an office included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*, under section 78 of the *Public Sector Management Act 1994* against a decision or finding referred to in subsection (1)(b) of that section;
>
> (c) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary not lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed;
>
> (d) an appeal by a government officer, other than a person referred to in paragraph (b), under section 78 of the *Public Sector Management Act 1994* against a decision or finding referred to in subsection (1)(b) of that section;
>
> (e) an appeal, other than an appeal under section 78(1) of the *Public Sector* Management *Act 1994*, by any government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e).
>
> (2) In subsection (1) ***prescribed salary*** means the lowest salary for the time being payable in respect of a position included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*.
>
> (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in section 94 of the *Public Sector Management Act 1994*.

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 For the Board to have jurisdiction to deal with this application the appellant must be a government officer employed by an employer as defined and the appeal is to be lodged pursuant to the provisions of s 80I(1)(a), (b), (c), (d) or (e) of the Act.

6 The Board finds that the appellant is a government officer within the meaning of s 80C(1) of the Act. The Board also finds that the respondent is an employer as defined. It is a public authority as contained in s 7 of the Act as the Commissioner of Main Roads is established under the *Main Roads Act 1930* and the appellant was appointed as an officer of the Commissioner of Main Roads in accordance with s 10(1) of the *Main Roads Act 1930*.

7 This application relates to the appellant seeking the adjustment of a decision by the respondent to transfer him from a position in Port Hedland to one in Perth which the appellant claims is a breach of clause 16 of the Agreement. The appellant claims that the Board can deal with this application under s 80I(1)(c) and (d) of the Act as his application relates to the respondent's decision to dismiss him by default and without due process and the respondent's decision to transfer him related to disciplinary action. However, the appellant remains employed by the respondent and has not been dismissed and this application does not relate to any disciplinary action arising out of s 78 of the PSM Act. This application is therefore not an appeal related to any of the matters listed in s 80I(1)(a) to (e) of the Act.

8 This application is not within the Board's jurisdiction and will be dismissed.

2013 WAIRC 00756

APPEAL AGAINST DECISION TO TRANSFER EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETR PODLAHA
	APPELLANT
	-v-
	MR REECE WALDOCK, COMMISSIONER OF MAIN ROADS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRPERSON
	MR G RICHARDS - BOARD MEMBER
	MR M TAYLOR - BOARD MEMBER
DATE	WEDNESDAY, 21 AUGUST 2013
FILE NO	PSAB 8 OF 2013
CITATION NO.	2013 WAIRC 00756

Result	Dismissed
Representation	
Appellant	In person
Respondent	Mr B Kirwan

Order

HAVING HEARD the appellant on his own behalf 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 43/2013	Request for mediation regarding application of Enhanced Voluntary Separation	Harrison C	N/A	Concluded

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2013 WAIRC 00580

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES ROZALYN WOOTTON AND SHANE WOOTTON (SHALYN LOGISTICS)

APPLICANT

-v-

KIVA TRANSPORT

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE TUESDAY, 6 AUGUST 2013

FILE NO/S RFT 7 OF 2013

CITATION NO. 2013 WAIRC 00580

Result Application discontinued

Representation

Applicant Ms R Wootton

Respondent No appearance

Order

HAVING HEARD Ms R Wootton on behalf of the applicant and there being no appearance by 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.