Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 8 TUESDAY 24 DECEMBER, 2013 Vol. 93—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

93 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2013 WAIRC 01058

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPELLANT
	-and-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 10 DECEMBER 2013
FILE NO/S	FBA 15 OF 2013
CITATION NO.	2013 WAIRC 01058
Result	Appeal discontinued by leave

Order

WHEREAS on 27 September 2013, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 4 December 2013, the appellant filed a notice of application for leave to discontinue this appeal; and

WHEREAS on 9 December 2013, Mr D Matthews (of counsel) on behalf of the respondent informed the Full Bench that the respondent consents to the appeal being discontinued;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2013 WAIRC 01022

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. C 5 OF 2012 GIVEN ON 15 JULY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 01022
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 15 OCTOBER 2013
DELIVERED	**:**	MONDAY, 2 DECEMBER 2013
FILE NO.	**:**	FBA 9 OF 2013
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Appellant AND THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S M Mayman**
Citation	**:**	**[2013] WAIRC 00423; (2013) 93 WAIG 1334**
File No	**:**	**C 5 of 2012**

CatchWords	**:**	Industrial Law (WA) - Scope and nature of industrial matters brought before the Commission under s 44 of the Industrial Relations Act 1979 (WA) considered - Discretionary power to refrain from further hearing considered - Was the Commission required to hear and determine all of the issues in dispute - Turns on own facts
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 6(ag), s 6(c), s 23(1), s 26, s 26(1), s 26(1)(a), s 26(1)(d)(vii), s 26(2), s 27, s 27(1)(a), s 27(1)(a)(i), s 27(1)(a)(ii), s 27(1)(a)(iii), s 27(1)(a)(iv), s 44, s 48A *Occupational Safety and Health Act 1984*, s 24(2), s 29, s 39, s 39A, s 39D, s 39G, s 40(2), s 40(2)(a), Part IV *Occupational Safety and Health Regulations 1996*, reg 2.6
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	Mr K Singh and with him Mr P Robinson
Respondent	**:**	Mr D Matthews (of counsel)
Solicitors:		
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

House v The King (1936) 55 CLR 499

Johnston v Wesfarmers Ltd (1990) 70 WAIG 2434

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of WA (1987) 68 WAIG 4

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 1873

The Director General, Department of Education v The State School Teachers' Union of WA (Inc) [2011] WAIRC 00058; (2011) 91 WAIG 166

The State School Teachers' Union of WA (Inc) v Director-General, Department of Education and Training [2008] WAIRC 00364; (2008) 88 WAIG 698

Case(s) also cited:

Re Queensland Electricity Commission; Ex Parte Electrical Trades Union of Australia (1987) 72 ALR 1

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd - Plutonic Project (2000) 80 WAIG 3162

The Hancock Family Memorial Foundation Ltd v Fieldhouse [2005] WASCA 93

Reasons for Decision

SMITH AP:

Background

1 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union) appeals against an order of the Commission in application No C 5 of 2012 made on 15 July 2013. The order was made to discontinue C 5 of 2012. The order also cancelled interim orders made on 7 February 2012 ([2012] WAIRC 00057; (2012) 92 WAIG 181) (interim order 57) and on 17 April 2012 ([2012] WAIRC 00234; (2012) 92 WAIG 538) (interim order 234). Whilst the notice of appeal does not specify the appeal is against a part of the decision, namely the order to discontinue C 5 of 2012, it is clear from the submissions made on behalf of the union that the union does not seek to set aside the orders to cancel interim order 57 and interim order 234.

2 The application was filed on 16 January 2012. The union sought a conference to be convened under s 44 of the *Industrial Relations Act 1979* (WA) (the Act) and orders compelling the Public Transport Authority (the PTA) to seek independent risk assessments of work. The grounds of the application were that the union claimed the risk assessments conducted by the PTA did not meet an acceptable standard and there had been insufficient consultation and co-operation with safety and health representatives and other employees in the workplace when developing risk assessments. The union also alleged that the generality of the language used in identifying control measures and the failure to reassess each hazard and risk, once, or if, the controls were implemented, had rendered the risk assessments unreliable and worthless in creating a safer working environment.

3 On 18 January 2012, the union filed an amended application in which it gave further and better particulars of the industrial matter sought to be addressed. In particular, in the amended schedule 1 the union stated that the inadequate risk assessment process had been identified as a potential primary cause of driver fatigue hazard which was not being addressed.

4 On 17 January 2012 and 31 January 2012, compulsory conferences were convened without a resolution of the issues in dispute being reached. A further conference was held on 2 February 2012.

5 A conference was reconvened by the Commission on 6 February 2012 as a risk assessment meeting had been scheduled for 7 February 2012 to conduct a risk assessment for shift break times for railcar drivers for various daily work schedules. At the conference Mayman C formed the opinion that the issues sought to be raised about the shift break times related specifically to a matter that was allocated to Kenner C in C 61 of 2011 and was an issue being considered by WorkSafe. This issue did not deal with the general issue of the construction of risk assessments. Commissioner Mayman informed the parties at the conclusion of the conference that the issues raised in respect of the risk assessment meeting in the notice to Transperth Train Operations (TTO) drivers would be referred to C 61 of 2011. The issue referred was discrete and the general issues in dispute that related to risk assessments remained within the scope of the matters in dispute in C 5 of 2012.

6 On 7 February 2012, the Commission issued interim order 57. For a reason that was not explained in this appeal, interim order 57 was identical in its terms (other than additional reasons set out in the last two paragraphs that commence with 'And Whereas') as an order issued in this matter on 6 February 2012: [2012] WAIRC 00051; (2012) 92 WAIG 180 (interim order 51). The purpose of interim orders 51 and 57 was to commence a process in the workplace to improve consultation on safety and health issues: ts 7, 6 December 2012 and AB Tabs 15 and 16. Interim order 57 stated as follows:

> WHEREAS on 16 January 2012 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant) notified the Western Australian Industrial Relations Commission (the Commission) of an alleged industrial dispute between the applicant and the Public Transport Authority (the respondent) and requested an urgent conference be convened pursuant to s 44 of the *Industrial Relations Act 1979* (the Act);
>
> AND WHEREAS on 17 January 2012 and 31 January 2012 a series of conferences were convened without a resolution being reached to the alleged dispute;
>
> AND WHEREAS having listed a further conference on 2 February 2012 and heard the applicant and the respondent;
>
> AND WHEREAS having heard at a Speaking to the Minutes on Monday, 6 February 2012 the views of the applicant who sought to have two separate orders, the interim order and a more comprehensive order arising out of the application and the respondent who put the view that the application may not require an additional order, the Commission is of the view, the application will in due course involve a more comprehensive order;
>
> AND WHEREAS having received a request from the respondent on Monday, 6 February 2012 under the liberty to apply clause for a further order;
>
> AND WHEREAS the Commission refers the parties to clauses dealing with dispute resolution procedures and bans and limitations in the applicable enterprise agreements and enterprise order;
>
> NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders -
>
> (1) THAT the applicant and the respondent enter into consultation on the general occupational health and safety issues in dispute with a view to identifying a list of those matters;
>
> (2) THAT attendees at the consultation on the general occupational health and safety issues will be determined by agreement between Mr Fogliani and Mr Farrell;
>
> (3) THAT a copy of this interim order is to placed [sic] in operational workplaces; and
>
> (4) THAT liberty to apply is reserved to the parties in relation to this order.

7 In accordance with interim orders 51 and 57, the union and the PTA entered into consultations on 6 March 2012.

8 As required by order 1 of interim orders 51 and 57, on 2 April 2012, the union provided to the Commission a list of general occupational safety and health issues in dispute: AB Tab 13. The list of issues was as follows:

ITEMS OF DISPUTE

1. Ownership of Safety

All stakeholders own safety as a joint responsibility.

2. Role of the Union in Risk Assessments

The Union, as a recognised stakeholder, is able to attend risk assessment workshops and participate in all stages of the risk assessment process.

3. Improvement of risk assessment consultation

The PTA agrees to improve its processes for engaging with stakeholders prior to conducting Risk Assessments. However, the Union seeks that stakeholders are involved in the whole process as per clause 5.2 of the *AS/NZS ISO 31000:2009 - Risk Management - Principles and Guidelines* and clause 1.3 of the *WA Government Risk Management Guidelines.*

4. Reporting and feedback structures do not work

A large portion of employees do not know how to report hazards. While there may be reporting mechanisms in place, employees are continuously reporting that they do not know about them, how to access them, or how to use them. However, the PTA has agreed to investigate the development of a hazard reporting form to make hazard reporting more straightforward.

Similarly, the feedback systems are being reported as not working. The PTA have shifted responsibility back onto employees to seek feedback rather than being proactive and resolving the issue.

5. Access to Policies and Procedures

ARTBIU to be given a copy of all policies/procedures relating to safety management systems relevant to their members.

ARTBIU and employees (Stakeholders) to be notified and consulted with when there are any amendments to policies/procedures that relate to safety management systems relevant to those employees.

6. OSH Delegates

WorkSafe reports to be provided so the OSH delegates matter can be resolved.

7. Move away from lag indicators and towards lead indicators

PTA to use lead indicators to review safety culture. KPIs to be developed for hazard reporting.

8. Training

The Union contends that there needs to be initial and ongoing annual training in OSH, policies, site (and division) specific risk management processes, and hazard reporting processes for all employees. The PTA disagrees.

9. Consultation

Effective consultation means achieving accepted outcomes.

10. Risk Assessment Notebook (Take 2)

Union is seeking the implementation of a Take 2 process. This will facilitate a straightforward means of reporting and dealing with of hazards. Similarly this will promote greater employee awareness and involvement in the risk assessment process, as well as a better scope of hazard identification.

11. Communication of OSH Outcomes

The PTA to implement a system similar to the suggested risk register. The risk register would facilitate better communication of OSH outcomes as well as provide checks and balances to ensure employees are satisfied with those outcomes.

12. Safe On Time Running

A formal statement from the PTA to be released that requires that 'on time running' will be instead referred to as 'safe, on time running'.

AGREED ITEMS

1. Stakeholders

The stakeholders include those that can affect be affected or perceive an affect upon themselves including:

- Management - from Managing Director to Executive to Manager and Supervisor level.
- Employees;
- Safety representatives;
- The Union/s;
- Third party contractors and rail car service providers;
- Office of Rail Safety;
- WorkSafe;
- Others.

2. Resolution of Issues Process and Committee structures

The resolution of issues process is not an agreed process and the parties will create a new and agreed resolution of issues process.

The OSH committee structure will be reviewed.

3. Improved Communication

PTA agreed in principle to allow tool box meetings, depot forums and other opportunities to discuss safety matters.

4. OSH Representative Coverage

Once the OSH delegate issue has been resolved, ensure that there is always at least one OSH representatives [sic] on duty at any given time.

5. PTA OSH Induction

The Union has been invited to attend the Stan Sexton induction process.

6. PTA HSE Handbook Availability

PTA has made the HSE Handbook available on their website.

9 Issue 6 was that WorkSafe reports be provided so the occupational safety and health delegates matter could be resolved. From the time the list of issues was provided to the Commission the election of safety and health representatives became the focus of the s 44 process.

10 On 11 April 2012, the union filed an application for discovery. The application sought correspondence provided to the PTA from the Commissioner of WorkSafe relating to the appointment of safety and health delegates. The application was heard by the Commission on 12 April 2012.

11 On 17 April 2012, the Commission granted the union's application for discovery and issued interim order 234 which provided as follows:

(1) That the respondent provide to the applicant union, as soon as is practicable, a copy of the correspondence provided by the WorkSafe Western Australia Commissioner, dated 23 March 2012, to the respondent, dealing with the issue of the appointment of delegates pursuant to the *Occupational Health and Safety Act 1984*.

(2) That the applicant union have regard that the document is to be used at the 'workplace' (as defined in the *Occupational Health and Safety Act 1984*) of the respondent to promote the appointment of delegates and ultimately the election of occupational health and safety representatives.

12 In August 2012, the Commission listed C 5 of 2012 for a report back. On 22 August 2012, the parties appeared before the Commission. At the report back, the representative for the union, Mr C Fogliani, informed the Commission that the implementation of interim order 57 had been successful and a facilitator had assisted the parties to go through the list of items in dispute, but that one of the hurdles that had slowed the process down had been the finalisation of arrangements to elect occupational safety and health delegates. Mr Fogliani also informed the Commission that:

(a) the customer service section of the PTA had recently met and had reached an agreement to elect occupational safety and health delegates;

(b) the transit officer work area was still in deliberation; and

(c) communications for the process of election of occupational safety and health delegates in the railcar driver section of the PTA had broken down entirely: ts 62 - 63 and 84 - 85, 22 August 2012.

13 A number of witnesses were called to give evidence at the report back including railcar drivers who gave evidence that there were no elected occupational safety and health representatives among the railcar driver group. Evidence was given by one railcar driver who had been a safety and health representative in 2010 that as a result of the difficulties he had raising issues and in communicating about some safety and health matters, he had resigned as a representative: ts 92 - 93, 22 August 2012. At the conclusion of the hearing of the report back Mayman C expressed an opinion to the parties that the time had come to sit down and agree a proper process to elect safety and health representatives: ts 109 and 114, 22 August 2012. Arrangements were then made for Mayman C to convene a compulsory conference at the PTA with representatives from the PTA, the union and occupational safety and health delegates.

14 The conference was convened on 13 September 2012. At that meeting a process was substantially agreed for the election of occupational safety and health representatives from the railcar drivers group. It was agreed that there would be 10 representatives to be elected, of which four would be from Claisebrook, three from Mandurah and three from Nowergup. Agreement was reached about training. It was also agreed that:

(a) the Western Australian Electoral Commission would undertake the elections for the occupational safety and health representatives; and

(b) there would be consultation with the Western Australian Electoral Commission, the PTA and the union in respect of a timetable for closing dates for nominations and the date of election.

15 At that point in time it was anticipated that the occupational safety and health representatives would be elected by 3 December 2012. A number of issues remained outstanding. These were noted in the minutes of the agreed process. These were in the main issues that related specifically to the duties and appointment of occupational safety and health representatives.

16 The election of the 10 occupational safety and health representatives was not finalised by 3 December 2012. The parties were in dispute as to how the votes should be counted. The union was in favour of preferential voting and the PTA preferred first

past the post voting. As a result of this dispute, a further conference was convened by the Commission on 28 November 2012. After that conference, Mayman C convened a further conference at the PTA on 8 January 2013 for the purpose of conferring for a second time with the occupational safety and health representative delegates, the union and the PTA to resolve the outstanding matters. After the conference minutes were prepared by the Commission and sent to the parties for their agreement. The minutes settled by the parties record that it had been agreed at the meeting on 8 January 2013 that:

(a) there would be three additional occupational safety and health representatives elected by the employees under the *Occupational Safety and Health Act 1984* (OSH Act) who were employed in the railcar driver work area of the PTA;

(b) the election process would be on the basis of first past the post;

(c) arrangements were to be put in place for the areas and functions of operation of each occupational safety and health representative;

(d) training would be undertaken by the PTA by February 2013;

(e) arrangements would be made for driver co-ordinator issues, short term vacancies and time off for occupational safety and health representatives; and

(f) the agreed minutes of the meeting of 8 January 2013 and the meeting of 13 September 2012 would be combined and reflect the PTA Railcar Driver Occupational Health and Safety Memorandum of Understanding once finalised.

17 On 28 March 2013, the associate to Mayman C sent a letter to the parties stating that as all outstanding issues were finalised at the 'meeting' convened by Mayman C on 8 January 2013, it was the intention of the Commission to close the file and that if the Commission did not hear from the parties within seven days, the file would be closed.

18 By email sent to the chambers of Mayman C on 3 April 2013, Mr Cory Fogliani on behalf of the union informed the Commission that it did not consent to the closure of the file. In the email it was stated that there were a large number of items which were still in dispute and which had not been resolved and that these were the items in the list provided to the Commission on 2 April 2012. Mr Fogliani asked for a conference to be convened so the outstanding items in dispute could be outlined. Mr Fogliani also stated in the email that whilst they now had occupational safety and health representatives, they did not have an occupational safety and health committee, employees still did not know how to report hazards in the workplace and that employees were still not being involved in the risk assessment process.

19 By email sent to the chambers of Mayman C on 4 April 2013, Mr Richard Farrell on behalf of the PTA informed the Commission that he was not aware of any attempt having been made by the union since the meeting of 8 January 2013 to progress any outstanding items now claimed to remain in dispute with the PTA's Operational Management or its People and Organisational Development Division. Mr Farrell also stated that any occupational safety and health issues should now primarily, and at least initially, be progressed within the processes established under the occupational safety and health legislative regime. He foreshadowed that the PTA would, at any relisted conference, apply to have the application dismissed. Mr Farrell also stated that if it could be demonstrated in due course that a significant issue or issues remain unaddressed under the PTA's established occupational safety, health and dispute resolution processes, it would remain open for the union to file a new application pursuing that issue.

20 On 11 April 2013, the Commission reconvened a conference in this matter. No agreement was reached as to whether the file should be closed or not. At the conclusion of the conference Mayman C requested the parties to provide to the Commission written submissions setting out their views with respect to the closing of the file and the status of the interim orders.

21 On 16 April 2013, the associate to Mayman C sent a letter to the parties in which it was stated:

> I write to record the outcome of the conference held before Commissioner Mayman on 11 April 2013. At the outset of the conference the respondent requested the Commission dismiss the application. The applicant opposed the closing of the file. The Commission discussed the issues with the parties both together and in divided conference. No agreement was able to be reached.
>
> At the conclusion of the conference Commissioner Mayman requested the parties provide to the Commission by close of business 18 April 2013 their views with respect to the closing of the file. In addition the parties are to advise the Commission as to the status of the existing orders.

22 The union in its submissions, provided to the Commission on 18 April 2013, stated as follows:

(a) The heart of the application was to seek orders from the Commission compelling the PTA to seek independent risk assessments. The main purpose of the application was the need for the PTA to undertake risk assessments in consultation with its employees and the union. This remains an outstanding issue as the PTA still do not involve the union or the employees in the risk assessment process.

(b) As required by interim order 57, the union and the PTA drafted a list of agreed and disputed safety and health issues, which the application was to ultimately deal with in more comprehensive orders. Many of these issues remain in dispute and unresolved.

(c) A large portion of employees do not know how to report hazards. Whilst there are reporting mechanisms in place, employees are reporting that they have no knowledge or access to the reporting policies. This is because there is no training or instruction on how to report hazards; and because the PTA has implemented a system, which is difficult to navigate and use.

(d) The appointment of occupational safety and health delegates under s 29 of the OSH Act is not fully resolved. The PTA and the occupational safety and health delegates for the transit officers have still not managed to agree on the number of occupational safety and health representatives.

(e) There is a need for initial and continuing training in occupational safety and health, policies and site specific risk management processes and hazard reporting. At present the employees do not receive any ongoing safety specific training ((ie) reporting hazards and conducting risk assessments). This remains an issue in dispute.

(f) The union seeks the implementation of a Take 2 risk assessment notebook process. This will enable an easy means of reporting and dealing with hazards. It will also promote a greater awareness and involvement from employees. This remains an issue in dispute, as the PTA has not addressed this issue.

(g) The PTA released a statement that required 'on time running'. The union believes that the PTA needs to promote a culture of safety as well as efficiency. Any reference to 'on time running' should instead be referred to as 'safe on time running'.

(h) The union submits the closing of the application would not be in line with the purpose of the Act to prevent and resolve conflict in relation to industrial matters.

(i) If the application is dismissed, the Commission, contrary to s 26 of the Act, would not be acting according to equity and good conscience given the number of outstanding issues which remain in dispute.

(j) There are many outstanding issues which are still causing industrial unrest in all parts of the workplace. Members of the union are still reporting that they do not believe that the issues in dispute are resolved. Dismissing the application will antagonise the workforce and create further unrest.

(k) Interim order 57 was issued with a view that there would be a more comprehensive order at a later stage. A comprehensive order has not been issued. The issues in dispute and some agreed matters have still not been resolved. This order remains current. To quash the order would increase the industrial unrest in the workplace and deteriorate the workforce's faith in the Commission to resolve disputes.

23 The PTA filed its written submissions. In its submissions it stated that the PTA maintained its application that the Commission dismiss the application under s 27(1)(a) of the Act and close the file. In support of its application to dismiss, it made the following submissions:

(a) Interim order 234 has been complied with so there is no need for that order to remain in force.

(b) Interim order 51 has also been complied with by the parties and need not remain in force. The list of 12 general occupational safety and health issues in dispute were submitted by the union following a consultation workshop held on 6 March 2012. Nor is there a need to be ongoing liberty to apply in relation to this order. While a more comprehensive order was in contemplation, the breadth of matters identified by the union and the lack of action on the part of the union to progress those matters makes it appropriate for the Commission to refrain from proceeding with that approach.

(c) A risk assessment on the subject was the occasion for the original application and the union was consulted as part of that process.

(d) Conferences held under this application have achieved the resolution of one of the identified issues in dispute. Occupational safety and health representatives have been recently elected throughout the PTA's operations, following either agreement about the number of occupational safety and health representatives or for transit officers an agreement to engage in a process under the OSH Act for resolving that question. The 'delegate matter' is therefore fully resolved, and a method for resolving the issue of the number of transit officer occupational safety and health representatives has been agreed.

(e) The other matters in dispute identified with the union as at 6 March 2012 could, should and in many cases have been, progressed by PTA management and employees in the interim. With the election and training of new or additional occupational safety and health representatives, the capacity of those employees to prioritise and progress occupational safety and health issues through the occupational safety and health regime has been reinforced over the past year.

(f) Since the report back on 22 August 2012 the PTA is not aware of any attempt by the union to progress the resolution of any of the matters it has identified as being in dispute other than the election of occupational safety and health representatives pursuant to s 29 of the OSH Act. This issue was resolved at the meeting on 8 January 2013.

(g) The union regards the application as an open-ended 'omnibus' file through which unverified claims about specific alleged safety incidents and issues can be raised as a 'first resort', often with no prior attempt to report them under the occupational safety and health representative process or to notify and resolve them under the relevant industrial instrument's dispute resolution procedure.

(h) A decision to dismiss the application will not be, and will not be taken to be, a decision on the substantive merits of the various issues raised by the union in March 2012. Where the union considers an issue still requires resolution, it would remain open for the union to seek to resolve that issue through:

(i) its members' participation in the PTA's occupational safety and health processes; or, if it wishes to progress the issue an industrial issue instead or as well;

(ii) the relevant dispute resolution processes ratified by the Commission in the applicable industrial instruments which would permit matters to be brought to the Commission in a more orderly and prioritised way.

(i) A decision to dismiss the application under s 27 of the Act would be an appropriate exercise of the Commission's discretion, ensuring that proper regard is had to objects set out in s 6(ag) of the Act which is also reflected in s 26(1)(d)(vii) of the Act. These provisions require the Commission in exercising its discretion to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; while leaving the capacity, where it is established that it is necessary, for the Commission to fulfil the further objects of providing conciliation and arbitration.

Reasons for decision given by the Commission at first instance

24 After considering the submissions of the union and the PTA, Mayman C made the following findings:

(a) There exists a number of dispute settlement procedures relating to the PTA and the union's members and persons eligible to be members where those procedures relate to occupational safety and health or industrial matters. These are the dispute resolution procedures set out in the:

(i) *Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011* (cl 48);

(ii) *Public Transport Authority (Transit Officers) Industrial Agreement 2013*;

(iii) *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011*;

(iv) *Public Transport Authority Railway Employees (Network and Infrastructure) Industrial Agreement 2011*; and

(v) *Public Transport Authority Railway Employees (Trades) Industrial Agreement 2011*.

(b) Section 24(2) of the OSH Act sets out the procedures to be followed by the PTA for resolution of issues relating to occupational safety and health.

(c) Reg 2.6 of the *Occupational Safety and Health Regulations 1996* provides a default procedure for the resolution of occupational safety matters where no procedure has been agreed between an employer and employees under s 24(2) of the OSH Act.

(d) Some of the matters raised by the union as outstanding, for example, the transit officer delegate issues are matters where there are procedures contained within Part IV of the OSH Act with which to raise such issues. Yet, none of the provisions contained within Part IV refer to the role of a union in the election process from the appointment of a delegate through to the consultation process with the employer as to how many occupational safety and health representatives the workplace may have and the carrying out of the election of occupational safety and health representatives.

(e) A Memorandum of Understanding has been reached between the PTA and the transit officer delegates relating to the election of occupational safety and health representatives.

(f) Whilst the Commission accepts that it is normal for employees who are union members to consult their union as part of the occupational safety and health process it must be accepted by the union that they are unable to formally direct their membership under the OSH Act on matters relating to occupational safety and health.

(g) With the exception of the election of the railcar driver occupational safety and health representatives by 8 January 2013, this application has in large part been left idle since August 2012. While the union in April 2012 listed a number of matters as outstanding it cannot be said they have pursued those matters before the Commission with any vigour, indeed in large part not at all.

(h) It is the Commission's view that many of the matters raised may be more effectively progressed by a series of separate applications or, alternatively, at the workplace level. That is what the regime of occupational safety and health representatives, their rights of representation, inspection, access to regular inspection of the workplace, access to training and rights as occupational safety and health committee members sets in place under the OSH Act.

(i) The union has demonstrated by its failure to actively pursue the matters it considers outstanding that it has an insufficient interest in those matters, which the Commission does not consider to be the case. However, the Commission is of the view that some of the issues may be being pursued by the occupational safety and health representatives at the workplace level and, if so, this is a positive development.

25 Commissioner Mayman then went on to express the following reasons why she found that interim orders 234 and 57 could be cancelled:

(a) Interim order 57 has served its purpose and whilst the union was keen on the potential for the issuance of a comprehensive order it is important to recognise the prospect of such an event was only ever reflected in the preamble of the interim order and never within the order itself. However, the words contained in the order's preamble will always be able to be referred to in the future by both the PTA and the union.

(b) The union stressed in its written submissions the urgency of each of the occupational safety and health issues raised, yet since those submissions have been made there has not been a single request for a conference within a three month period.

(c) Having considered the matter carefully the Commission is of the view that it ought to exercise its powers pursuant to s 27 of the Act by discontinuing the application.

(d) It remains open at any stage for the union or the PTA to refer matters to the Commission on a case by case basis and in a more orderly fashion having regard for the prioritisation of safety and health matters in the workplace.

Grounds of appeal

26 The grounds of appeal are as follows:-

The Commissioner erred in exercising the discretion granted by section 27 of the Act as:

a. The industrial matters before the Commission in C5 of 20 12, were not trivial;

b. The industrial matters before the Commission in C5 of 2012, were largely unresolved, and were necessary and desirable in the public interest;

c. The appellant, who referred the matter to the Commission, had sufficient interest in the matter;

d. The Commissioner erred in finding that the appellant was no longer actively pursuing Occupational Health and Safety issues through the Commission; and

e. The Commissioner erred in finding that the appellant should refer the outstanding industrial matters on a case by case basis and in a more orderly fashion.

The union's submissions in respect of the appeal

27 The union puts forward an argument that the Commissioner erred in exercising her discretion pursuant to s 27(1)(a) of the Act to discontinue the application on grounds that:

(a) the union invoked the Commission's jurisdiction under s 44 of the Act which gave rise to a prima facie expectation that the jurisdiction would be exercised;

(b) the circumstances of the case did not warrant the Commissioner overriding the union's prima facie expectation; and

(c) the exercise of discretion did not comply with the Commissioner's obligations under s 26(1) of the Act.

28 In support of these contentions, the union makes the following submissions:

(a) It is accepted that the discretion available to a Commissioner under s 27(1)(a) of the Act is broad and the principles that apply to appeals against the exercise of discretion are those which are formulated in ***House v The King*** (1936) 55 CLR 499 and ***Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*** [2000] HCA 47; (2000) 203 CLR 194.

(b) The Commissioner should have dealt with the dispute about the process to be followed in conducting risk assessments. The risk assessments conducted by the PTA are inadequate and insufficient and there is not enough consultation with safety and health representatives and employees in general. This issue is at the heart of the application and remained so. Once the application was initiated, it was foreseen that three steps would take place. The first was to establish safety and health representatives within the PTA. The second was the establishment of safety committees under the provisions of the OSH Act and the third was that once all of the relevant stakeholders had been established, the union, the safety and health representatives, the safety and health committee, the employees and the PTA would enter into consultations with a view to establishing risk assessments which were adequate for the purposes of PTA's business. The Commissioner erred in exercising her discretion to discontinue the application after the first step.

(c) During the course of conferences facilitated by the Commissioner, interim order 57 was made. This interim order required the parties to enter into consultation on the general occupational safety and health issues in dispute with a view to identifying a list of matters. Importantly, in the preamble of interim order 57 a statement was made in the reasons contained within the order that 'the Commission refers the parties to clauses dealing with dispute resolution procedures and bans and limitations in the applicable enterprise agreements and enterprise order'. As a result of order 57 being made, the parties identified a number of items in dispute and the list became a part of the industrial matters in dispute that the application would endeavour to provide the means to resolve. The reasons in interim order 57 also gave rise to an expectation that a further and more comprehensive order would issue in due course when necessary. Prior to the making of a comprehensive order, there needed to be the establishment of the relevant stakeholders. The union, however, did not contemplate that the Commission would deal specifically with each one of the issues raised in the issues document provided to the Commission in April 2012. It simply wanted the Commission to deal with the risk assessments and consultation process.

(d) The first part of interim order 57 was not directed to solve the issue of the inadequacy of risk assessments. Whilst it did touch on consultation, the end objective from the union's point of view was that through the application they would come to the point where all relevant stakeholders were able to consult and develop risk assessments which employees of the PTA could understand and apply. Employees were and are still facing a situation where they are unable to report risks. If hazards are unable to be reported, the PTA is not able to properly conduct risk assessments where the subject matter of the hazard is not identified.

(e) After the application was filed, the focus of the matters discussed in the conferences before the Commission deviated to establish the election of the safety and health representatives. Once those elections took place, the application should not have been discontinued. Whilst dispute resolution processes in the enterprise order and industrial agreements and the structures set out in the OSH Act are in place, those processes were rarely followed in the past. Thus, the union had and has no confidence that those processes would be followed in the future, and

so these issues move from being occupational safety and health matters to being industrial matters because they effect the employment relationship of the employees employed by the PTA. This is reflected in the large number of complaints the union is receiving from its members about these issues.

(f) The determination of the adequacy of risk assessments are matters that can only be determined by this Commission and not by the Commissioner of WorkSafe. The union, however, concedes that the process for establishing a safety and health committee is an issue that will have to be resolved through the processes that apply under the OSH Act and not by this Commission. Consequently, it says that it would have been appropriate for this Commission to adjourn the application until the committee had been established, but not to discontinue the application.

(g) The finding made by the Commission that the union had not actively pursued the matters considered to be outstanding is not correct. The union has, since the filing of the application, been constantly working outside the Commission with the PTA.

(h) The union says that whilst it is not generally prejudiced by the decision to discontinue, the Commission erred in its discretion to discontinue the application as s 44 of the Act is a vehicle to resolve industrial matters and the industrial matter at the heart of this application was and still is open to be resolved. Section 26(1)(a) of the Act requires the Commission at all times to exercise its jurisdiction with good faith and conscience and not have regard to the technicalities or legal forms. The difficulty that the union is faced by the application being discontinued is that employees are left not knowing what the appropriate processes are to resolve its safety and health issues and an onus is placed on the union to put forward several applications. The splitting of an industrial matter into several applications is not consistent with the purpose of lodging a s 44 application for a compulsory conference. A s 44 application can be lodged to resolve one issue, but if it is found during the process of dealing with that issue there are several issues in dispute, then s 44 and the provisions of the Act generally in respect of industrial matters, contemplates that the whole of the industrial matter can be heard and determined.

The PTA's submissions in respect of the appeal

29 The PTA in its written outline of submissions says that the Commissioner properly found that the occupational safety and health delegate matter and the role of the Commissioner under the s 44 process had come to an end. Insofar as the application related to other matters, (being the balance of matters raised by the union in its list of issues), the effect of the order to discontinue the application was in essence a finding that the application should be dismissed, for want of prosecution.

30 The PTA points out that generally matters in the Commission are to be dealt with 'with the maximum of expedition': s 6(c) of the Act and ***Johnston v Wesfarmers Ltd*** (1990) 70 WAIG 2434.

31 Section 44 conferences are known as 'urgent' conferences. The Commission, consistent with the purpose of such conferences, is to deal with the industrial matter in dispute in an extremely flexible and accommodating way. It does so through scheduling conferences and giving its time to facilitating, sometimes over a period, attempts to settle a dispute without the need for arbitration.

32 The Commissioner correctly found that with the exception of the election of railcar drivers and occupational safety and health representatives by 8 January 2013, that the application had in a large part been left idle since August 2012 and that the union had not pursued the matters in the list of issues with any vigour.

33 The PTA says it is clear that the Commissioner considered there to have been a long delay in prosecuting those matters, especially in the context of a s 44 process. This conclusion was, with respect, correct. In fact, it says a delay of more than a year in pursuing matters in a s 44 process would, prima facie, be enough to ground dismissal for want of prosecution in relation to those matters.

34 The PTA points out that there will be no hardship or prejudice to the union by the application being discontinued. Unlike most dismissals for want of prosecution, the dismissal of the application in this matter did not finally determine anything against the union. The union remains free to bring further applications to the Commission, under s 44 or otherwise, in relation to occupational safety and health matters, unimpeded by the dismissal of the present application.

35 The PTA also says it is inappropriate for the union to have on foot an 'omnibus' application relating to occupational safety and health matters and to use the s 44 process as one of 'first resort' in relation to 'unverified claims about specific alleged safety incidents and issues' without first trying to resolve them under other processes more suited to purpose.

36 In its oral submissions, Mr Matthews on behalf of the PTA pointed out that the submission which is now being put to the Full Bench that the occupational safety and health delegates issue was only the resolution of the first step in the process of resolving the issues in dispute between the parties, was and is not a matter that was raised in the written submissions put to the Commission at first instance. The PTA says that if what is now being put by the union had been put to the Commissioner then the matter may have been decided differently, but, in any event, it would have been open to the Commissioner to discontinue the application because s 39D of the OSH Act has its own regime for the settlement of disputes in relation to the formation of a safety and health committee and that regime involves the WorkSafe Commissioner who is required to sit in on judgment on those matters and assist the parties by making orders in relation to those matters. In addition, there are other means of pursuing issues of dispute under the dispute resolution procedures in the enterprise order and the industrial agreements.

Scheme of s 44 and the powers conferred by s 23(1), s 26(2) and s 27(1)(a) of the Act – Grounds a, b and c of the appeal

(a) The scope of the industrial dispute before the Commission

37 The scope of an industrial matter or matters should not by the nature of industrial disputes between employees and employers and/or unions be confined narrowly or to matters contained within an application for a conference brought to the Commission under s 44 of the Act. The Commission is not a court of pleadings. Also, the nature of industrial matters is that they are fluid

and often are not about existing obligations, but are about the creation of future rights and obligations. In ***The Director General, Department of Education v The State School Teachers' Union of WA (Inc)*** [2011] WAIRC 00058; (2011) 91 WAIG 166, I observed:

> The scope of matters that arise in a s 44 compulsory conference are not to be narrowly confined to the application and matters raised in submissions before the Commission but can encompass broader disputes and negotiations about matters that may sit behind an immediate dispute. In *The State School Teachers' Union of WA (Inc) v Director-General, Department of Education and Training* (2008) 88 WAIG 698 [40] (Ritter AP) (with whom Beech CC agreed [109]) found the scope of the matter in question in the s 44 conference encompassed the dispute beyond a dispute about directions given to members of the Union about industrial action and extended to the broader dispute and negotiations between the parties about a new industrial agreement and that specifically, s 26(2) of the Act allows the Commission to grant relief or redress without restriction as 'to the specific claim made or to the subject matter of the claim' [59].

38 It is apparent from the documents contained on the file for C 5 of 2012 that the scope of matters in dispute widened with the production by the union of the list of issues in April 2012. Thus, the Commission was authorised to deal with these issues as part of the industrial dispute by operation of s 26(2) of the Act when each of these issues became part of the industrial matter before the Commission.

39 Section 44 provides for an informal procedure to intervene in an industrial matter and bring parties together quickly to identify not only the issues in dispute but also to identify any impediments to resolving a dispute. It is often the task of the Commission to put in place interim orders to establish steps which are drafted in such a way to impose rights and obligations to remove such impediments. This is what occurred in this matter. It is obvious from the documents on the file of C 5 of 2012, the recorded notes of conferences convened under s 44 of the Act and the transcript of proceedings before the Commission at first instance, that what needed to occur was the election of safety and health representatives through the processes and procedures prescribed by the OSH Act. None or an insufficient number of safety and health representatives would have been one impediment to resolving the industrial dispute. Another issue that could in part be characterised as an impediment that needed to be addressed was the absence of a consultative process to identify and address the safety and health issues in dispute. Both of these issues were addressed. During a series of compulsory conferences the parties reached agreement to elect safety and health representatives. Interim order 57 required the parties to enter into consultation on occupational safety and health issues in dispute with a view to identifying a list. The list produced by the union contained not only a list of items in dispute, but also a list of agreed items. The list of agreed items contained a list of stakeholders and referred to:

(a) an agreement to create a new and agreed resolution of issues process; and

(b) an agreement by the PTA to allow tool box meetings, depot forums and other opportunities to discuss safety matters.

40 Whilst it is apparent that consultative processes were not complete in that a safety committee had yet to be established, it is conceded by the union that the only issue raised before the Commission after the list of issues was provided to the Commission until the Commission advised the parties on 28 March 2013 that Mayman C intended to close the file, was the election of safety and health representatives.

41 It is clear from the reasons given by Mayman C that she exercised the discretion conferred on her by s 27(1)(a)(iv) of the Act to discontinue the application on two grounds. These were:

(a) As the issue of election of occupational safety and health representatives had been resolved there were processes available to resolve safety and health issues under the dispute resolution provisions of the enterprise order and industrial agreements that apply to the employees of the PTA. In addition, processes for resolution of safety and health issues at a workplace are expressly prescribed in s 24(2) and Part IV of the OSH Act and reg 2.6 of the *Occupational Safety and Health Regulations 1996*.

(b) The union had not pursued the issues in dispute with any vigour in the Commission.

42 In making the decision to discontinue the application, the Commissioner formed the view that steps should be taken to attempt to resolve some occupational safety and health issues at the workplace and that if the union wished to pursue any particular occupational safety and health matters before the Commission it should do so in separate applications.

43 The essence of the union's contentions is that the Commissioner erred in law by acting upon an incorrect principle in that she failed to have regard to the requirements of s 26(1)(a) of the Act and that the decision to discontinue the application was inconsistent with the scheme of the provisions of the Act that provides for a process of dealing with and resolving industrial matters.

(b) Was the Commission obliged to hear and determine all of the issues in dispute

44 Grounds a, b and c of the grounds of appeal rely upon an argument that the provisions of s 27(1)(a)(i), (ii) and (iii) of the Act cannot be relied upon as a source of power to refrain from hearing or determining a matter.

45 Section 27(1)(a) provides:

> (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;

46 When making the decision to discontinue the application the Commissioner did not reply upon the heads of power in s 27(1)(a)(i), (ii) or (iii) of the Act. It is apparent from her reasons for decision that Mayman C relied upon s 27(1)(a)(iv) of the Act which confers a broad discretion to dismiss or discontinue hearing a matter. The words 'that for any other reason' in s 27(1)(a)(iv) express a clear intention that the criteria set out in the other subsections of s 27(1)(a) do not need to be present. The words 'any other reason' can only be said to be circumscribed by the opening words in s 27(1), '[e]xcept as otherwise provided in this Act'. To give meaning to those words, the scheme established by the Act that confers power on the Commission to enquire into and deal with industrial matters requires consideration.

47 The jurisdiction of the Commission to enquire into and deal with industrial matters arises under s 23(1) of the Act. The power to do so, however, is not unfettered and is modified by the opening words in s 23(1), '[s]ubject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter'. Section 23(1) does not, however, confer an absolute duty on the Commission once seized of an industrial matter to enquire into and deal with the industrial matter. Section 27(1)(a) confers, in effect, an injunctive power to cease dealing with an industrial matter in the circumstances prescribed.

48 The power to refrain from further hearing or determining a matter is discretionary and must be exercised according to the principles set out in s 26(1) of the Act: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of WA*** (1987) 68 WAIG 4, 6 (Olney J).

49 The powers conferred by s 44 of the Act are wide but not unlimited. Where conditions exist for their exercise, the powers under s 44 may be exercised without being read down: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1989) 69 WAIG 1873, 1883. Yet, where the discretionary decision sought to be set aside is a decision arising out of a conference or conferences convened under s 44 of the Act, the Full Bench should be cautious in making a decision to intervene: ***The State School Teachers' Union of WA (Inc) v Director-General, Department of Education and Training*** [2008] WAIRC 00364; (2008) 88 WAIG 698 [51].

50 The decision made by the Commissioner to discontinue the application involved making an evaluative judgment. As a discretionary decision, the Full Bench should only set aside such a decision in limited circumstances. In ***House v The King*** Dixon, Evatt and McTiernan JJ set out circumstances in which an appellate court should intervene to set aside a discretionary decision. At 504 - 505 their Honours observed:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

51 In this appeal the question that must be answered is did the Commissioner act upon an incorrect principle, allow extraneous or irrelevant matters to guide or affect her, mistake the facts or fail to take into account some material consideration?

52 Although the Commissioner did not in her reasons for decision expressly have regard to the requirements of s 26(1)(a) of the Act, it is clear that the findings made by her in her reasons for decision that found her decision to discontinue the application, cannot at law be characterised as matters that are contrary to or inconsistent with the duty of the Commission under s 26(1)(a) of the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

53 Of importance is the fact that the decision to discontinue the application did not or has not left the union without a remedy to resolve the industrial matters in dispute. This is a matter the Commissioner took into account and is a matter of substantial merit within the meaning of s 26(1)(a) of the Act. Following the election of safety and health representatives it is open to the union to access the dispute resolution procedures in the enterprise order and the industrial instruments which provide for a process of consultation prior to a referral of a matter to the Commission. The purpose of the dispute resolution clauses is to encourage employers and employees to resolve their disputes before bringing an application to the Commission. This is reflected expressly in s 48A of the Act which provides as follows:

> (1) In exercising its jurisdiction under this Part the Commission shall not make an award or applicable order, or register an industrial agreement, unless the award, order or industrial agreement makes provision for procedures to be followed in connection with questions, disputes or difficulties arising under the award, order or industrial agreement.
>
> (1a) The procedures referred to in subsection (1) shall provide for the persons involved in the question, dispute or difficulty to confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.
>
> (2) The Commission may order persons involved in a question, dispute or difficulty arising under an award, order or industrial agreement that is before the Commission to comply with the dispute settling procedures provided for in that award, order or industrial agreement.
>
> (3) In subsection (1) ***applicable order*** means an order with respect to which, in the opinion of the Commission, a question, dispute or difficulty capable of resolution by dispute settling procedures may arise.

54 The utilisation of the dispute resolution procedures in the circumstances of this matter is, as the PTA points out, consistent with s 26(1)(d)(vii) and object 6(ag) of the Act. Section 26(1)(d)(vii) provides:

> In the exercise of its jurisdiction under this Act the Commission —
>
> (d) shall take into consideration to the extent that it is relevant —
>
> (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

55 Object 6(ag) elevates this duty to a principal object of the Act. Thus, the power to refrain from dealing with a matter must be read with the requirements of s 48A, s 26(1)(a), s 26(1)(d)(vii) and object 6(ag) of the Act. When these provisions are read together it is apparent that it is contemplated within a scheme of conciliation and arbitration of industrial matters that the parties are to be encouraged to resolve disputes among themselves and in an appropriate case the Commission should refrain from enquiring into or dealing with an industrial matter where processes have been established to deal with the matters in dispute. When those principles are applied to the facts of this matter, it is clear that where processes include dispute resolution processes established under legislation other than the Act, such as the OSH Act, the words that empowered the Commissioner to dismiss or refrain from hearing 'for any other reason' in s 27(1)(a)(iv) are and were wide enough to contemplate the discontinuance of a matter on grounds that those processes could be activated.

56 Further, the establishment of a safety and health committee is expressly regulated by the provisions of Division 2 of Part IV of the OSH Act. If under s 39 of the OSH Act an employee requests an employer to establish a safety and health committee, the employer must do so within 21 days unless the employer refers the question whether a safety and health committee should be established for the workplace to the Commissioner of WorkSafe under s 39A of the OSH Act. Section 39G of the OSH Act provides a right of review of a decision made by the WorkSafe Commissioner to the Occupational Safety and Health Tribunal.

57 Whilst the union has argued in this appeal that it did not seek resolution of each of the matters in the list of issues, but to deal with the risk assessments and consultation processes, this was not an argument the union put to Mayman C in their written submissions. Nor did they put the argument that they also now seek to raise in this appeal that resolution of the issues in dispute could only be achieved after the completion of three steps and that the Commissioner erred in exercising her discretion to discontinue the application after the first step had been completed.

58 The union does not seek the assistance of the Commission in the second step which is the establishment of safety committees under the OSH Act. It says application C 5 of 2012 should have been adjourned until this process was complete. This, too, is not a matter raised in the written submissions that were provided to Mayman C before she made her decision. In any event, the process of establishment of a safety committee was a matter for the WorkSafe Commissioner to deal with. Once that process is complete, the task of the committee would encompass the establishment of risk assessments which the union contends is the third step in dealing with the dispute. This is expressly contemplated by s 40(2)(a) of the OSH Act. Section 40(2) of the OSH Act relevantly provides:

> (2) The functions of a safety and health committee are —
>
> (a) to facilitate consultation and cooperation between an employer and the employees of the employer in initiating, developing, and implementing measures designed to ensure the safety and health of employees at the workplace; and
>
> (b) to keep itself informed as to standards relating to safety and health generally recommended or prevailing in workplaces of a comparable nature and to review, and make recommendations to the employer on, rules and procedures at the workplace relating to the safety and health of the employees; and
>
> (c) to recommend to the employer and employees the establishment, maintenance, and monitoring of programmes, measures and procedures at the workplace relating to the safety and health of the employees; and
>
> (d) to keep in a readily accessible place and form such information as is provided under this Act by the employer regarding the hazards to persons that arise or may arise at the workplace; and
>
> (e) to consider, and make such recommendations to the employer as the committee sees fit in respect of, any changes or intended changes to or at the workplace that may reasonably be expected to affect the safety or health of employees at the workplace; and
>
> (f) to consider such matters as are referred to the committee by a safety and health representative; and
>
> (g) to perform such other functions as may be prescribed in the regulations or given to the committee, with its consent, by the employer.

59 The Commissioner took into account that the union has no role in the procedures set out in Part IV of the OSH Act. However, she left the door of the Commission open to the union to make an application or applications in the future to deal with specific industrial matters in dispute that remain unresolved after the processes set out in the OSH Act are complete.

60 For these reasons, I am of the opinion that grounds a, b and c of the appeal have not been made out.

(c) Grounds d and e of the appeal

61 In ground d of the grounds of appeal, the union says the Commissioner erred in finding that the union was no longer actively pursuing occupational safety and health issues through the Commission. The union concedes, however, that it did not seek to resolve in application C 5 of 2012 the issues in dispute that were set out in the list in 2012. Even if it is accepted that the Commissioner erred in making this observation, this error, if established, is immaterial as processes to resolve these issues remain open to the union. These processes include bringing a fresh application or applications to the Commission.

62 In ground e of the grounds of appeal, the union contends the Commissioner erred in finding that the union should refer the outstanding industrial matters on a case by case basis and in a more orderly fashion. Although I agree that the jurisdiction to deal with industrial matters through an application made under s 44 of the Act should not be confined to a single industrial matter or one or more discrete industrial matters, the observation made by the Commissioner, the subject of this ground of

appeal, cannot be said to be binding in any future matter as it does not form part of the decision. The decision, the subject of the appeal, is the order to discontinue the application.

Conclusion

63 For these reasons, I am not satisfied that any error in the exercise of the discretion conferred by s 27(1)(a) of the Act has been made out and I am of the opinion an order should be made to dismiss the appeal.

BEECH CC:

64 I have read in advance the Reasons for Decision of the Hon President, and I agree with her reasons and that the appeal should be dismissed. I wish to add that ground 5d, and the submissions at 33, are that the Commission erred at [46] of her Reasons when she stated the 'union no longer appears to be actively pursuing occupational health and safety issues through the Commission, certainly not by way of this application'. The union submits that between 15 August 2012 and 23 March 2013 the union and the PTA were actively dealing with the issues in dispute through the dispute resolution processes as referred to in the interim order. It says further that the parties were actively involved in the election process of OSH representatives.

65 However, the conclusion of the Commission at [46] is not that the union was no longer actively pursuing occupational health and safety issues; it was that the union was not doing so through the Commission. In my view, the union has not shown this was an erroneous conclusion. Indeed, during the hearing of the appeal, the union recognised that the matter was not pursued in front of the Commission: ts 20.

66 This is a significant point given the issue before the Commission was whether the application should be discontinued. The fact that the union was not using the Commission to actively pursue the occupational health and safety issues supports the view that the application was not needed for those issues to be pursued. It supports the conclusion that the application could be discontinued.

KENNER C:

67 The Union and the Authority were initially in dispute in relation to the conduct of independent risk assessments of work performed by Authority employees. That issue was the subject of an application under s 44 of the Act by the Union in January 2012, for a compulsory conference. Ultimately, as a result of a number of compulsory conferences in January and February 2012, and interim orders made by the learned Commissioner on 7 February 2012, the parties were required to consult as to a broad range of occupational health and safety issues in dispute and to identify, by way of a list, specific matters. The parties did so and identified some 12 "Items of Dispute" (see tab 13 AB).

68 Further s 44 compulsory conferences took place in August and September 2012. In September, the issues in dispute between the parties had refocussed to the election of occupational safety and health representatives for railcar drivers. A process for the election of occupational health and safety representatives was then agreed between the parties. However, all did not proceed smoothly. There were issues arising during the course of November and December 2012, culminating in s 44 compulsory conferences on 28 November 2012 and 8 January 2013 before the Commission. As a consequence of the compulsory conference on 8 January 2013, broad agreement was reached between the parties in relation to the occupational safety and health representative issue, with the assistance of the learned Commissioner, which was recorded in a minute of the conference proceedings. As at that point, the principal, if not exclusive focus of the parties in the proceedings before the Commission, was on the election of occupational safety and health representatives for railcar drivers.

69 Subsequently, in March 2013, the Commission informed the parties that it intended to discontinue the application, as "all outstanding issues" had been finalised at the January 2013 conference. After receiving written submissions from the Union and the Authority, the learned Commissioner considered that as the then principal issue of the election of occupational safety and health representatives had been resolved, other issues, including those on the Items of Dispute list, could be progressed at the workplace level, through dispute resolution procedures in the relevant industrial instruments, in conjunction with procedures available under the OSH Act and Regulations. Having reached this conclusion, the learned Commissioner exercised her discretion under s 27(1)(a) of the Act and discontinued the s 44 application.

70 The Union now complains about the Commission's order and has brought this appeal before the Full Bench. In short, and without unnecessarily re-traversing the submissions and issues raised on the appeal, as set out in the reasons of Smith AP, the Union contended that the learned Commissioner's exercise of the power under s 27(1)(a) of the Act miscarried, and the Commission failed to have regard, or proper regard to her obligations under s 26(1) of the Act.

71 The s 44 compulsory conference power is a very broad power which enables the Commission to enquire into and deal with industrial matters promptly and with the minimum of form and technicality. Once invoked, the s 44 compulsory conference power enables the Commission to explore issues in dispute using the armoury of powers available to it under the Act. It is also the case, that industrial matters, once they are before the Commission under s 44 of the Act, may enlarge or contract, depending up on the circumstances in a particular matter or dispute. This quite commonly occurs. It did in this case.

72 In the present context, whilst the s 44 application originally brought by the Union, was concerned with the conduct of risk assessments by the Authority, self-evidently, as a result of the interim orders made by the learned Commissioner, and the production of the "Items of Dispute" document, the issues in contest between the parties, and before the Commission, significantly enlarged. However, as the brief narrative above refers, the matters in dispute again refocussed to the election of occupational safety and health representatives for railcar drivers. The Union properly conceded in my view, that that issue became the primary focus of the matter before the Commission, prior to her exercising her discretion under s 27(1)(a) of the Act to discontinue the application.

73 The learned Commissioner did not err in the exercise of her discretion. The discretion given to the Commission under s 27(1)(a) of the Act is very broad. No gloss should be placed upon the statutory power. It enables the Commission to dismiss or refrain from hearing a matter, at any stage of the proceedings, on the grounds set out in sub pars (i)-(iv). Whilst the learned Commissioner did not specifically identify which head of power she relied upon, in the absence of reference to the relevant factors in sub pars (i)-(iii), it is reasonably plain that she discontinued the application "for any other reason" in sub par (iv).

74 The issue of the election of occupational safety and health representatives had been resolved by the time the order of discontinuance was made. The terms of the interim order made by the Commission in February 2012 had been complied with. All of the other issues identified in the "Items of Dispute" list, could readily be the subject of steps taken by the parties under dispute resolution procedures in the various industrial instruments binding the parties. Furthermore and importantly, given the focus of the occupational safety and health legislation on dispute resolution at the workplace level, appropriate procedures under that legislation could be availed of. These matters were identified and relied upon by the Commission in discontinuing the application. The Commission also properly identified, and took into account, the delay in the Union formally progressing the Items in Dispute matters before the Commission.

75 Furthermore, the learned Commissioner concluded, in my view quite correctly, that there would be nothing preventing either party from making fresh application(s) to the Commission, in the event that any of the other occupational safety and health issues could not be appropriately resolved. The order of discontinuance plainly did not involve a determination of either party's rights in the substantive proceedings.

76 The Commission took into account the submissions of the Union and the Authority in determining whether she should exercise her powers under s 27(1)(a) of the Act. The parties were given a full opportunity of being heard. As with all powers exercised by the Commission, the learned Commissioner was required to exercise her broad discretion in accordance with s 26(1) of the Act: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1987) 68 WAIG 4. The Commission did so. No error in the exercise of the broad discretion given to the Commission under the Act has been demonstrated. In the absence of demonstrated error, it is not sufficient for the Full Bench to merely substitute its view for those of the Commission at first instance, if it considers that a different result should have been arrived at. In any event, in my opinion, the learned Commissioner made the correct decision on the material before her.

77 I would therefore dismiss the appeal.

2013 WAIRC 01018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPELLANT
	-and-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	MONDAY, 2 DECEMBER 2013
FILE NO/S	FBA 9 OF 2013
CITATION NO.	2013 WAIRC 01018

Result	Appeal dismissed
Appearances	
Appellant	Mr K Singh and with him Mr P Robinson
Respondent	Mr D Matthews (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 15 October 2013, and having heard Mr K Singh and with him Mr P Robinson on behalf of the appellant, and Mr D Matthews (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 2 December 2013, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2013 WAIRC 01043

HOSPITAL SALARIED OFFICERS (NURSING HOMES) AWARD 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 3 DECEMBER 2013
FILE NO/S	APPL 72 OF 2007
CITATION NO.	2013 WAIRC 01043
Result	Application dismissed

Order

WHEREAS this is an application made on the Commission's own motion pursuant to Section 40B of the *Industrial Relations Act 1979* to vary the Hospital Salaried Officers (Nursing Homes) Award 1976; and

WHEREAS the Commission set the matter down for hearing for mention on the 26th day of May 2010 and the 25th day of August 2010; and

WHEREAS the Commission convened conferences on the 14th day of October 2010, the 24th day of January 2011, the 31st August 2011, the 10th day of November 2011, the 18th day of April 2012, the 7th day of June 2012 and the 10th day of September 2012 for the purpose of conciliating between the parties; and

WHEREAS by email on the 20th day of February 2013 the Health Services Union of Western Australia (Union of Workers) advised that it agreed to the application being dismissed; and

WHEREAS by email on the 22nd day of November 2013 the Chamber of Commerce and Industry of Western Australia (Inc) advised that it agreed to the application being dismissed;

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

THAT this application be, and is hereby dismissed.

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

NOTICES—Award/Agreement matters—

2013 WAIRC 01061

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSAAG 2 of 2013

APPLICATION FOR A NEW AGREEMENT TITLED

"DENTAL OFFICERS INDUSTRIAL AGREEMENT 2013"

NOTICE is given that an application has been made to the Commission by *The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board and another* under the Industrial Relations Act 1979 for the registration of the above Agreement.

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

3. DEFINITIONS

3.1 For the purposes of this Agreement the following definitions shall apply:

(a) "Agreement" means the Dental Officers Industrial Agreement 2013

(b) "Award" means the Government Officers Salaries, Allowances and Conditions Award 1989.

(c) "Casual" employee means an employee engaged by the hour for a period not exceeding one calendar month in any period of engagement, or any employee employed as a casual on an hourly rate of pay by agreement between the Union and the employer.

(d) "Child" and "grandchild" shall be read as including children of a multiple birth or adoption.

(e) "De facto partner" means a relationship (other than a legal marriage) between two persons who live together in a 'marriage-like' relationship and includes same sex partners.

(f) "Dental officer" means a registered primary healthcare professional that provides routine and advanced levels of care for the purpose of preventing, diagnosing and treating diseases, injuries and malformations of the teeth, gums, jaws and mouth.

(g) "Employer" means the employer as defined in sub-clause 4.2 of this Agreement.

(h) "Fixed term employee" means an employee who is employed on a full-time or part time basis on a contract of service of specified duration.

(i) "Headquarters" means the place in which the principal work of an employee is carried out, as defined by the employer.

(j) "Metropolitan area" means that area within a radius of 50 kilometres from the Perth city railway station.

(k) "Partner" means either spouse or de facto partner.

(l) "Part-time employment" means regular and continuing employment of less than 38 hours per week.

(m) "Spouse" means a person who is lawfully married to that person.

(n) "Regional employee" means any employee other than one whose assigned headquarters are within the metropolitan area as defined by the Award.

(o) "Replacement employee" means an employee specifically engaged to replace an employee proceeding on maternity leave, adoption leave, other parent leave or grand parental leave.

(p) "Union" means The Civil Service Association of Western Australia Incorporated.

(q) "WAIRC" means the Western Australian Industrial Relations Commission.

4. APPLICATION AND PARTIES BOUND

4.1 This Agreement applies throughout the State of Western Australia to employees employed in the classifications prescribed in Clause 7 - Salaries within Dental Health Services as constituted at the date of registration of this Agreement who are members of, or eligible to be members of, the Union.

4.2 The Employer party to and bound by this Agreement is the Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (W A) as the Hospitals formerly comprised in the Metropolitan Health Service Board.

The Director General of Health is the delegate of the Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA). In this capacity the Director General acts as the employer for the purposes of this Agreement.

4.3 The Union party to and bound by this Agreement is The Civil Service Association of Western Australia Incorporated.

4.4 The estimated number of employees bound by this Agreement at the time of registration is 154.

4.5 This Agreement is comprehensive and it applies to the exclusion of the Public Service and Government Officers General Agreement 2011 and its successor.

4.6 Where the provisions of the Award and this Agreement are inconsistent, this Agreement will prevail.

SCHEDULE 2: SALARIES

The Classifications in Schedule 2 are as follows:

Classification
Level 1 Dentist Year 1
Level 1 Dentist Year 2
Level 1 Dentist Year 3
Level 1 Dentist Year 4
Level 1 Dentist Year 5
Level 1 Dentist Year 6
Level 2 Dentist Year 1
Level 2 Dentist Year 2
Level 2 Dentist Year 3
Level 3 Dentist
Head of Unit

Area Dental officer
Regional Dental officer
Manager Central Clinical and Support Services
Manager Community Dental Services

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

4 December 2013

INDUSTRIAL MAGISTRATE—Claims before—

2013 WAIRC 01004

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2013 WAIRC 01004
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 6 NOVEMBER 2013
DELIVERED	**:**	WEDNESDAY, 6 NOVEMBER 2013
FILE NO.	**:**	M 43 OF 2011
BETWEEN	**:**	FAIR WORK OMBUDSMAN
		CLAIMANT
		AND
		VINCENZO SALVATORE TODARO
		RESPONDENT

CatchWords	**:**	
Legislation	**:**	*Fair Work Act 2009*
		Workplace Relations Act 1996
		Fair Work Transitional Provisions and Consequential Amendments Act 2009
Instrument	**:**	Restaurant, Tearoom and Catering Workers' Award
		Notional Agreement Preserving the State Award
Result	**:**	Orders issued, penalties imposed
Representation:		
Applicant	**:**	Mr A.J. Power of Counsel and with him Ms K. Thomson
Respondent	**:**	No appearance

Case(s) referred to: *Lei and Ng* v *VST Pty Ltd* [2010] WAIRC 897

Fair Work Ombudsman v Bento Kings Meadows Pty Ltd [2013] FCCA 997

Fair Work Ombudsman v *Todaro* [2013] WAIRC 00831

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by her Honour)

1 Having read the Claimant's submissions on penalty, in addition to the supporting affidavits by Keelyann Thompson, sworn on 18 October 2013 and on 4 November 2013, I have given consideration to the penalty that is to be applied in the Respondent's case. I start by making reference to the decision of *Fair Work Ombudsman v Bento Kings Meadows Proprietary Limited* [2013] FCCA 997 ("*Bento Kings Meadows*").

2 As I have already indicated to the Claimant from my readings of its submissions which are fulsome, *Bento Kings Meadows* [supra] is the most recent relevant case and it is particularly relevant because it involves similar contraventions in the same industry as this court is dealing with in respect of the matter before it. And I think it's useful just to read from paragraph 1 [of *Bento Kings Meadows* [supra]]:

> "In many cases before this court over the last number of years it has been repeatedly identified that there is a significant risk of underpayments and breaches of workplace legislation in the restaurant and hospitality industry where vulnerable

employees such as foreign nationals on visas are employed. This case is yet another example that the risk continues to exist."

3 In my view the comments made by his Honour Judge O'Sullivan in *Bento Kings Meadows* are apposite to the situation that this court finds itself with respect to Mr Ng and Ms Lei. The difference being that Mr Ng and Ms Lei may or may not be foreign nationals on visas or may be permanent residents, although that is not really the point.

4 The point is, and I will expand upon this shortly, that they were vulnerable employees and, even if they are not people with English as their second language, the nature of the hospitality industry often involves vulnerable people, because they may be less skilled workers, having had less formal education and certainly the pay scales involved demonstrate that they are perhaps not as well paid as in other industries.

5 And for all of those reasons that often puts people in the hospitality industry in a lesser bargaining position to the people who employ them. I also note that in *Bento Kings Meadows* it was of significance that the Respondent, Bento Kings Meadows Pty Ltd, cooperated, made admissions, accepted their wrongdoing to a certain extent, expressed regret and had taken steps to comply with its obligations. In my view, this is significant because in this particular matter, the Respondent, Mr Todaro, has done none of that.

6 I do not consider that I need to traverse the facts and circumstances in this case with any degree of specificity on the basis that the circumstances of the contraventions are set out in the decision by my colleague, Industrial Magistrate Boon, in the decision of *Lei and Ng* v *VST Pty Ltd* [2010] WAIRC 897 ("the 2010 decision"), and the findings made by Industrial Magistrate Boon are not in dispute and nothing displaces those findings.

7 Furthermore, the principles upon which civil penalties are to be applied by the court are set out fully in the Claimant's submissions on penalty and, in addition, my review of *Bento Kings Meadows* demonstrates that those submissions are consistent with the principles applied in that case and no doubt other cases and I adopt those principles. I do not intend to repeat them. In my view, it is unnecessary. Those principles are not in contention and I have nothing before me that demonstrates that I ought not to adopt them fully as applicable to how civil penalties are to be decided in this particular case.

8 Mr Todaro was the sole director and secretary of VST Pty Ltd ("VST") who was found by Industrial Magistrate Boon, in the 2010 decision, to be the employer of Kenny Meng Wei Ng and Ning Wei Lei.

9 As a result of the determination in the court in *Fair Work Ombudsman* v *Todaro* [2013] WAIRC 00831, the Respondent, Mr Todaro, was found to be involved in VST's contraventions of the *Workplace Relations Act 1996 (*"WR Act"*)* and the Restaurant Tearoom Catering Workers Award 1979, as it continued to operate as a Notional Agreement Preserving the State Award, pursuant to section 728 of the WR Act. The Fair Work Ombudsman now seeks orders pursuant to section 719 of the WR Act with respect to the contraventions set out in the findings made on 16 September 2013.

10 As indicated in the Claimant's submissions, the maximum penalty for a breach of section 719(1) of the WR Act is 60 penalty units and a penalty unit is $110.00, pursuant to section 4(1) of the WR Act when read with section 4AA of the *Crimes Act 1914* (Cth) taking into account when the contraventions occurred. The maximum penalty that may be imposed is $6,600.00 with respect to each contravention.

11 As I have indicated, I have read, and refer to, annexure A to the Claimant's submissions with respect to the contravened provisions as found by the court and I adopt both annexure A and annexure B, as they set out how the court may go about its task of imposing a penalty. In annexure A, the Claimant also identifies the number of contraventions it says are applicable for the purpose of calculating the appropriate penalty, having regard to section 719(2) and (4) of the WR Act.

12 The net effect of applying these provisions and also the applicable principles are that there are eight contraventions to which a penalty can be applied. I see no reason why the court would depart from the Claimant's submissions in respect to the applicable number of contraventions and I adopt its submissions in that regard. Therefore, the total maximum penalty proposed by the Fair Work Ombudsman, having regard to the maximum penalty for each contravention, is $52,800.00, and my own computations agree with that figure and I see no reason to depart from it.

13 I note in the last column of annexure B that the Fair Work Ombudsman has set out the proposed penalty amounts that it says is applicable having regard to the nature of the contravention, amongst other things, and submits that the nature of the contraventions are in the mid to high range and their proposed penalties amounts reflects that. I note that the amount is between $4,620.00 and $5,280.00 per contravention with a proposed total penalty amount of $36,960.00 to $42,240.00.

14 Having regard to the contraventions themselves, the following comments are relevant when considering the appropriate penalty to be applied.

15 In relation to Ms Lei and Mr Ng the following is relevant. Industrial Magistrate Boon found that Ms Lei and Mr Ng were employed by VST. Mr Ng was employed initially as a casual employee from 29 December 2004 to 8 March 2005 and a full time employee thereafter until 4 December 2007. Ms Lei was employed from 29 May 2006 to 17 November 2007. During the entirety of this period, Mr Ng and Ms Lei were both underpaid entitlements and/or not paid entitlements, including entitlements in respect of wages, superannuation and annual leave.

16 These entitlements are properly categorised as minimum conditions of employment. That is, they are the minimums that an employer would be required to do in order to comply with its employment obligations with respect to its employees. That is, to pay its employees at the correct amount, to pay superannuation at the correct amount or at all and to pay annual leave entitlements at the correct amount or at all.

17 Ms Lei and Mr Ng are properly categorised as vulnerable employees in that English is their second language and their understanding of their entitlements was, for certain periods of time, rudimentary. It was only when Mr Ng did his own research into the entitlements did he draw that to the attention of Mr Todaro personally, and I accept that he did so. In short, their bargaining power was poor.

18 Mr Todaro was the sole director and secretary of VST.

19 In my view, Mr Todaro was actively involved in running the restaurant and, in that respect, I consider his actions after the 2010 decision was delivered to be telling. That is, approximately seven days after the 2010 decision, whereby it was found that VST had contravened the WR Act, VCR Pty Ltd ("VCR"), a company that Mr Todaro is the sole director, shareholder and secretary of, took over the operations of the same restaurant albeit that there was a minor name change.

20 In that regard, the sole director and secretary of one company effectively handed over the reins to the same sole director and secretary of a different company to take up the same business is demonstrative of somebody who has more than just a passing interest in a business, but is the actions of someone who is actively involved. Further, based on the timeframes considered in the 2010 decision and during the course of the decision in this particular matter, in my view, Mr Todaro was involved and has been involved in the hospitality industry for significant periods of time, and I would find it staggering that he would not be aware of his obligations with respect to the payment of entitlements to employees.

21 Furthermore, approximately seven to 10 days after the 2010 decision, VST ceased to trade and Mr Todaro during the course of these proceedings admitted that VST had no assets to pay the amounts determined in the 2010 decision. There is an irresistible inference to be drawn that the purpose of VST ceasing to trade and having VCR take over the operation of the same restaurant was to escape the obligation to pay the entitlements owed to Mr Ng and Ms Lei. Mr Todaro, by reason of the position he held in both companies, must have known what he was doing.

22 At all times Mr Todaro must have known or at least had a careless disregard for his actions. He was the sole director and secretary of VST and VCR. He initially denied knowing Mr Ng and Ms Lei. He has been involved in the restaurant industry for some time and the contraventions occurred over a lengthy period of time with respect to significant aspects of the employees' entitlements. In that regard the contraventions by Mr Todaro, as he has been found to be involved in the contraventions by VST, can only be considered serious and at the upper end of the spectrum in terms of the deliberate nature of them and their ongoing detriment to people who are properly categorised as vulnerable employees.

23 In terms of general and specific deterrence, I have already referred to *Bento Kings Meadows* and, in my view, the factors relevant to general deterrence are that a penalty in this particular case needs to have some impact upon other like-minded people involved in the hospitality industry. Furthermore, general deterrence needs to reflect that this was not a situation whereby an employer had made an honest mistake about their obligations. This involved the failure to pay minimum terms and conditions of Mr Ng's and Ms Lei's employment.

24 Furthermore, a substantial penalty needs to be applied to recognise the seriousness and the deliberateness of the breach. In terms of the size of the restaurant I have no information before me which gives me any indication as to the size of the business, but in any event my review of the submissions and of *Bento Kings Meadows* leads me to conclude that in some respects it matters not the size of Mr Todaro's business.

25 The fact is that he through his company did employ people. He took advantage of them by reason of his involvement in those companies and the involvement in the contraventions, and it is hardly surprising that in the hospitality industry there will be a very small, perhaps even family-run businesses, and very large organisations, but the same standard applies across the board. The very fact that a person, or a company may run a small family business does not alleviate them from the obligation to pay all entitlements and, as I said, this was not a case whereby there was an oversight in paying a person's wages properly.

26 In terms of specific deterrence, as best as I can tell, Mr Todaro continues through VCR to trade in the hospitality industry. He must be accountable for his actions and for the actions of the company that may well continue to employ people in that industry. The 2010 decision and the current proceedings demonstrate a complete lack of regard by the Respondent for any court processes or for any court orders.

27 His involvement meant that the employees, Mr Ng and Ms Lei, were deprived of the minimum in their terms and conditions of employment with respect to the underpayment of wages, the underpayment of superannuation and the non-payment and underpayment of annual leave. In addition, there has been absolutely no contrition on his [Mr Todaro's] part. There has been no cooperation on his part. He has, at all stages of the process, been recalcitrant in his attitude to the court process and that, in my view, demonstrates a complete lack of disregard for any obligation that he may have.

28 I turn now to the proposed penalty that would be applicable. In my view, having regard to the comments that I have made, to the submissions and to the appropriate cases, this demonstrates a level of seriousness at the upper end of the spectrum and it would be appropriate having regard to the proposed penalty amounts outlined by the Claimant to impose a penalty at the upper end of the proposed penalty range of $5,280.00 in respect of the Respondent's eight contraventions.

29 That is, in respect of each and every contravention, as outlined to the court after applying the relevant principles, a penalty at the maximum proposed penalty amount is the appropriate penalty to impose. For the avoidance of any doubt, I have been provided with proposed orders submitted by the Claimant and in respect of order 1 [in accordance with order 3 of the orders dated 16 September 2013] the Respondent is to pay penalties pursuant to section 719(1) of the WR Act in the total amount of $42,240.00 in respect of the eight contraventions of the WR Act and the Restaurant, Tearoom and Catering Workers Award 1979, as it continued to operate pursuant to item 31 of schedule A to the *Fair Work Transitional Provisions and Consequential Amendments Act 2009* as a Notional Agreement Preserving the State Award ("NAPSA").

30 The total penalty is comprised of a penalty of:

- $5,280.00 in respect of the Respondent's contravention of section 182 of the WR Act for failing to pay the basic periodic rate of pay to Mr Ng and Ms Lei, a penalty of $5,280 in respect of the Respondent's contravention of clause 18 subclause (1)(a) of the NAPSA and section 235(1) of the WR Act for failing to pay Mr Ng and Ms Lei for annual leave taken;
- $5,280.00 in respect of the Respondent's contravention of clause 18(6) of the NAPSA and section 235(2) of the WR Act for failing to pay Mr Ng and Ms Lei for accrued but untaken annual leave on termination of employment;
- $5,280.00 in respect of the Respondent's contravention of clause 18(2) of the NAPSA for failing to pay Mr Ng and Ms Lei for annual leave loading;

- $5,280.00 in respect of the Respondent's contravention of clause 9(1) of the NAPSA for failing to pay Mr Ng and Ms Lei additional rates for ordinary hours worked up to 7 pm;
- $5,280.00 in respect of the Respondent's contravention of clause 9(2) of the NAPSA for failing to pay Mr Ng and Ms Lei additional rates for ordinary hours worked on Saturdays and Sundays;
- $5,280.00 in respect of the Respondent's contravention of clause 10 of the NAPSA for failing to pay Mr Ng and Ms Lei for overtime hours worked; and
- $5,280.00 in respect of the Respondent's contravention of clause 37 of the NAPSA for failing - for failing to make superannuation contributions on behalf of Mr Ng and Ms Lei.

31 As I've already indicated in my previous orders [which is now order 2], pursuant to order 4 of the orders dated 16 September 2013, the penalty is payable within 28 days.

32 I have considered the percentage portions that ought to apportion between Mr Ng and Ms Lei and they, in my view, set out conveniently by the Claimant as $12,376.32 to Ning Wei Lei and $29,863.68 to Kenny Meng Wei Ng. By way of observation I have also considered the principles of totality with respect to those amounts.

33 When one looks at the total amount of entitlements that was owed to the two employees, which was in excess of $100,000, then as a matter of proportionality with respect to the findings made of Mr Todaro's involvement, the period of time over which the contraventions occurred, the seriousness and deliberateness of the contraventions, and without any further information in respect of Mr Todaro, the total amount reflects the seriousness and is not in some way, in my view, disproportionate.

34 Furthermore, the Claimant seeks orders that the Respondent is to provide to the Claimant evidence of the payment of the penalty being made within 24 hours of that payment being made and I see no reason why that order ought not to be made.

35 It would certainly mean that there would be no other action needed to be taken by the Fair Work Ombudsman. The Claimant also seeks liberty to apply on 7 days' notice in the event that there is noncompliance with any of the preceding orders and, in my view, given how this particular matter has unfolded and over the time period this matter has taken, I will make that order as well.

D. SCADDAN

INDUSTRIAL MAGISTRATE

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2013 WAIRC 00972

REVIEW OF DECISION OF CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 MARCH 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00972
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	THURSDAY, 27 JUNE 2013
DELIVERED	**:**	FRIDAY, 15 NOVEMBER 2013
FILE NO.	**:**	APPL 14 OF 2013
BETWEEN	**:**	CAPE AUSTRALIA T/A CAPE MARINE AND OFFSHORE PTY LTD
		Applicant
		AND
		THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
		Respondent

CatchWords	**:**	Construction Industry Long Service Leave Payments Board – What constitutes the amount of *ordinary pay* of an employee – Calculation of employer's contributions to be paid to the Board – Long service leave entitlements – Contribution days – Assessment of contributions – What constitutes *assessment* – Right of review
Legislation	**:**	*Construction Industry Portable Paid Long Service Leave Act 1985* s 3(1), s 3(3a), s 15(1), s 21, s 21(1), s 21(3), s 30, s 30(1), s 30(2)(b), s 31(1), s 34, s 34(1), s 34(2), s 34(2)(a), s 34(2)(b), s 34(2)(c), s 34(2)(d), s 34(2)(d)(i), s 34(3), s 34(4), s 34(6), s 34(6)(b), s 35A, s 50
		Fair Work Act 2009 (Cth)
		Interpretation Act 1984 (WA) s 55
		Labour Relations Legislation Amendment Act 2006 (WA)
		Construction Industry Portable Paid Long Service Leave Regulations r 8
Result	**:**	Decision issued

Representation:

Applicant	:	Mr A Power of counsel and with him Ms K McPherson of counsel
Respondent	:	Mr S Kemp of counsel

Reasons for Decision

1 The applicant applies to the Commission for a review of the decision of the Construction Industry Long Service Leave Payments Board (the Board) said to have been given on 12 March 2013. The Board's decision the subject of the review is as to what constitutes the amount of ordinary pay of an employee under s 34 of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act) for the purposes of the employer's contribution to be paid to the Board.

2 The employer is required to submit contributions to the respondent in respect of its employees employed on the Kipper Tuna & Turrum Project (the Project) for the purposes of long service leave entitlements. The terms and conditions of employment of those employees are set out in the *Kipper Tuna & Turrum Enterprise Agreement* (the Agreement) made under the *Fair Work Act 2009* (Cth).

3 By letter dated 10 December 2012 (the first letter), the respondent wrote to the applicant setting out what is described as its initial assessment of the contribution the applicant was required to pay in relation to the Project. The letter provided, formal parts omitted:

> **RE: CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985 – RETURN CALCULATIONS**
>
> After a review of the Kipper Tuna Turrum Agreement ('the Agreement') and discussions with yourself it has been determined that for the quarterly Returns submitted to the Board the calculation would be as follows;
>
> *Contribution Days*: Any day an employee receives 'ordinary pay'.
>
> Contribution Days include part days and weekends (when penalty rates do not apply), on site, in the construction industry on which an employee is entitled to receive ordinary pay. This includes rostered days off, public holidays, annual leave, paid sick leave and workers compensation.
>
> Note: Part days in the construction industry are counted as full days.
>
> The Board has been advised that employees received 'double time' on Saturdays & Sundays therefore only Monday to Friday inclusive would be recorded as Contribution Days.
>
> *Gross Pay for Contribution Days*: The calculation would be an employee's gross pay for the quarter divided by the number of calendar days in the quarter giving a 'daily rate' (as paid on Annual Leave in terms of Section 22 of the Agreement). Daily rate multiplied by the Contribution Days would be the gross pay for Return purposes.
>
> Should you wish to discuss this matter or if you have any other queries regarding the Act please contact me on [tel no.] or email: [email address]

4 As can be seen, this initial 'assessment' was that the applicant's contributions were to be calculated by reference to the employees' ordinary pay from Monday to Friday, referred to as 'contribution days', and excluded Saturdays and Sundays from the calculation.

5 By letter dated 12 March 2013 (the second letter), the respondent again wrote to the applicant in the following terms, formal parts omitted:

> LONG SERVICE LEAVE RETURNS – KTT PROJECT:
>
> The purpose of this letter is to advise that following our recent receipt of legal advice adjustments are to be made to returns submitted by Cape Marine & Offshore Pty Ltd to MyLeave for long service leave relating to the KTT Project.
>
> In our letter of 10 December 2012 we provided details of 'Contribution Days' and 'Gross Pay for Contribution Days' for your employees on the KTT Project. In our assessment of 'Contribution Days' we advised (third paragraph of our 10 December 2012 letter) that '… only Monday to Friday inclusive would be recorded as Contribution Days.' Our assessment was based on our interpretation of clause 28 of the KTT Project Agreement which details that Saturday and Sundays are '… at double the ordinary hourly rate….' therefore we (incorrectly) determined that Saturday and Sundays were not eligible as Contribution Days.
>
> Since the above letter, and our subsequent meeting and discussions, we have obtained legal advice on the KTT Project Agreement to ensure our assessment of 'Contribution Days' and 'Gross Pay for Contribution Days' is correct.
>
> The revised position is that a Contribution Day (for this specific agreement) includes not only Monday – Fridays inclusive but also Saturdays and Sundays. In line with the above advice the returns that we have received from you relating to the KTT Project are to be amended to include Saturdays and Sundays.
>
> We are hoping to finalise the adjustments as soon as possible so we can provide your employees with statements that reflect accurate information. If required an inspector of the Service & Compliance team will assist with the submission of the amended returns. Please contact me on [tel no.] if you want to discuss this matter.

6 The effect of this letter is to 'revise' the contribution days so as to include Saturdays and Sundays. The applicant says this revised assessment is in error. The applicant says that the respondent has wrongly included hours and days in its contribution calculation which do not attract ordinary pay, but attract penalty rates. The contribution is to be calculated only by reference to the 7.2 ordinary hours worked Monday to Friday, not to the additional 4.8 hours worked at double time on Monday to Friday or the 12 hours worked on Saturdays and Sundays which also attract double time.

7 The applicant also says that the respondent did not comply with the statutory requirements before adjusting its initial assessment. It seeks that the respondent's revised assessment be set aside and replaced with the initial assessment.

8 The applicant says that a reading of the first letter indicates that it may be either an assessment or an indication of an intention to cause an assessment to be made. If the latter, then consistent with s 34(6)(b) of the Act, it gives an opportunity to make submissions orally or in writing or both. However, it may also be read as indicating that an assessment has already been made, particularly by the use of the phrase 'it has been determined'.

9 The applicant also says that the second letter identifies the first letter as being an assessment of contribution days of the kind referred to in s 34 of the Act. The second letter is, according to the applicant, a demonstration of the exercise of a non-existent power to compel an amendment to the returns that the applicant is to make to the Board, rather than a notice of intention to make a further assessment or of a further assessment being made. It cannot be a notice of intention to make an assessment under s 34(6) but rather is advice of a decision having been made to adjust the returns.

10 There was no opportunity given to the applicant to make a submission as required by s 34(6)(b). The invitation to discuss in that letter is regarding the amendment to the return to be prepared and submitted by the applicant.

11 Therefore, the applicant says that neither the first nor the second letter is an assessment. That being the case, there is no obligation to make a contribution of the kind contemplated by s 34 of the Act due to the Board's non-compliance with s 34(6).

12 The applicant says that the second letter cannot be construed as an assessment issued in reliance on s 55 of the *Interpretation Act 1984* (WA), to exercise the power to correct any error or omission, because it is not in the language of an assessment or the correction of any error or omission, but uses the language of adjustment to be made to the returns.

13 As to the construction of the Act, the applicant says that the definition of ordinary pay was amended by the *Labour Relations Legislation Amendment Act 2006* (WA), to recognise the disparity between what employees received on the job and what they would otherwise have got on long service leave.

14 The applicant says that the term *ordinary pay* in s 34(1) of the Act is given meaning by the terms of the Agreement. Those terms include clause 28 – Payment of Wages, which divides the rostered hours into those worked Monday to Friday, being 7.2 hours paid at the ordinary hourly rate, plus 4.8 hours per day paid at double the ordinary hourly rate. Saturday and Sunday are 12 hour days paid at double the ordinary hourly rate. The applicant also refers to the calculations of payments due when employees are on both unauthorised and authorised leave. In the case of unauthorised leave, pay for 7.2 hours at ordinary rates is docked. For certain authorised absences including annual leave, employees are paid including allowances as if at work. Annual leave is for six weeks per annum, paid by reference to the employee's total earnings per annum which shall include allowances paid as if at work.

15 In accordance with clause 13 - Overtime, overtime is all time worked in excess of 12 hours per day or shift, and is paid for at double the ordinary hourly rate.

16 On this basis, the applicant says that ordinary pay in s 34 of the Act means the rate of pay to which the employee is entitled to during leave which is said to be consistent with the definition in s 3(1) of the Act. Clause 22 of the Agreement does not expressly include hours paid at the overtime rate. Therefore, the ordinary rate of pay is that payable in respect of the 36 hours worked on Monday to Friday, and not including Saturdays and Sundays.

17 The respondent says that the context of the Act is to provide for contributions by employers to a fund to enable employees of builders who, because of the nature of the industry, are not always able to accrue long service leave, and to do so even though they move from project to project and employer to employer. Service is with the industry rather than with the employer. The fund is managed by the Board which bears the obligation to pay employees when they take long service leave, which they accrue by the required service. There is no direct correlation between the contributions made by the employer to the fund and the payments received by the employees from the fund.

18 The respondent says that the powers of the Commission, in dealing with a review of the Board's decision, mean that it is not dealing with an appeal but is placed in the position of the Board and makes a decision by applying the provisions of the Act. In those circumstances, the Board's reasons for its decision are not a relevant consideration. There is a referral to the Commission of a dispute as envisaged by the Act.

19 The respondent says that the second letter is not an assessment under s 34(2) of the Act but is advice that the respondent has revisited the proper construction of the Act and Agreement. Therefore, there was no requirement to give notice and an opportunity to make submissions as provided in s 34(6) of the Act.

20 The respondent says that only those hours in excess of 12 per day are overtime (clause 13 of the Agreement), and reference to double the 'ordinary hourly rate' in clause 28 is not intended to be a reference to overtime and does not constitute a penalty rate. This is because clause 13 of the Agreement defines overtime as all work 'in excess of the twelve (12) hours of work per day or shift'.

21 Therefore, the hours including those above 7.2 on Monday to Friday and those on Saturday and Sunday, which are not overtime, are the rostered hours of work. These are the usual or ordinary hours of work. They are made up of 168 hours of work, paid as 264 hours. According to the calculation set out in the Agreement and the Act, it would be 1/6 of 7 divided by 365 of total earnings per annum.

22 Both parties agree that the Agreement, having been drafted in the same way as other awards and agreements, should not be interpreted with the same strict application as applies to legislation and other documents drawn up in a normal legal process.

CONSIDERATION

The Review of the Board's Decision

23 The Act is 'An Act to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes' (long title of the Act).

24 Part IV – Registration of the Act places the onus on any employer covered by the Act to apply for registration (s 30); supply information to the Board in respect of the employees who should be registered (s 30(2)(b)); provide to the Board in respect of each prescribed period, a statement in the approved form giving the information required by the form, and an amount equal to the amount required to be paid under the Act (s 31(1)). The basis for the calculation for that payment is contained in s 34.

25 There is nothing before me as to the Board's usual practice regarding the calculation of the amount to be paid under the Act. The Act does not appear to require the Board to make an initial 'assessment' upon the receipt of information from the employer seeking registration. It may do so, but that does not appear to be the type of assessment referred to in s 34(2).

26 The assessment under s 34(2) arises on the following circumstances: the employer fails or neglects to furnish a return or information as required (s 34(2)(a)); the Board is not satisfied with the return made or information furnished (s 34(2)(b)); the Board has reason to believe or suspect that an employer is liable to pay long service leave contributions under the Act (s 34(2)(c)); or the Board is of the opinion that either the amount of money paid by the employer is not correct or the calculation is not according to the Act (s 34(2)(d)). There is no suggestion that an 'assessment' for the purposes of the Act, is merely assistance to calculate. Rather it arises from the Board having reason to believe in some omission, failure, error or neglect on the part of the employer. Where the Board requires an assessment to be made in these circumstances and the employer is found to be liable to pay any contribution, the Board may determine that the employer pay a surcharge, as a fixed amount or as a percentage (s 34(3) and (4)). Section 35A, dealing with penalties for late payment, uses the term surcharge as a penalty.

27 In the circumstances, the Board is not to make an assessment unless notice of intention to do so is served on the employer and the employer has an opportunity to make a submission orally or in writing or both (s 34(6)). Such an assessment is a reviewable decision, reviewable by this Commission (s 50).

28 Therefore, the assessment, surcharge and the ability to seek review of the decision indicate a quite formal, statutory process for the correction of omission, failure, error or neglect by the employer. The process allows the employer an aspect of procedural fairness including a right to seek review.

29 The first letter appears to be an assessment of some sort made by the Board. Whether it is an assessment made under s 34(2) of the Act is not clear. It may simply be that the Board was asked by the applicant for assistance in calculating its contribution for the purposes of the return, or it may have a practice of doing so automatically on the receipt of the information contained in an application for registration under s 30(1). Alternatively, the Board may have made an assessment under s 34, as the letter opens with reference to a review of the Agreement and 'discussions with [the applicant]' and it uses the phrase 'it has been determined'. If it is such an assessment, these discussions may have been part of the employer having been given an opportunity to make a submission in accordance with s 34(6). That is unclear.

30 In any event, the Board then reconsidered the basis of the calculation contained in the first letter. The second letter makes no reference to advice to the applicant of any intention to undertake an assessment or further assessment. There is simply reference to the first letter and to 'our subsequent meeting and discussions'. It then revised its position on Contribution Days and refers to making adjustments.

31 It is difficult to know then, whether this too was an assessment, and if so, whether notice and an opportunity to make submissions were provided, other than the suggestion in the letter that there had been a meeting and discussion between the parties.

32 In the circumstances, it is not possible to determine whether the second letter is an assessment and whether it has any standing, or whether it brings with it the right of review. If either of the letters constitutes an assessment under s 34 of the Act, based on the information before me, it seems that the process of the Board was somewhat loose.

33 In any event, according to the Act, the applicant still has an obligation to make a contribution because the Act places the onus on the employer to apply for registration, provide information, calculate its contribution and make that contribution. Any invalidity of an assessment does not alter that obligation. The assessment arises only in particular circumstances and, in this case, where the ordinary pay is not assessed in accordance with the Act (s 34(2)(d)(i)).

34 Accordingly, the most appropriate order may be that the application for review be dismissed. However, I invite the parties' submissions as to the appropriate disposition of the application. If I am wrong in that, then it is appropriate to consider the merits of the application.

The Calculation of Contributions

35 The first thing to note is that the Board's correspondence, both in the first and second letters, refers to 'contribution days' and the first letter defines these as 'any day an employee receives ordinary pay', and that these 'include part days and weekends (when penalty rates do not apply), on site, in the construction industry on which an employee is entitled to receive ordinary pay'. It goes on to note the days which are included in this calculation. Accordingly, its calculation is by reference to 'contribution days'. However, neither the Act nor the '*Construction Industry Portable Paid Long Service Leave Regulations 1986*' (the Regulations) makes reference to 'contribution days'.

36 According to the Act, 'an employer shall pay to the Board in respect of a person employed by him as an employee and in respect of each week or part of a week during which that person is so employed such amounts by way of contributions as are calculated by reference to the ordinary pay payable to that employee as is prescribed' (s 34(1)). The Regulations prescribe 2% of the ordinary pay of that employee for the purposes of s 34 of the Act (r 8).

37 Therefore, the contribution is to be 2% of the ordinary pay payable for each week or part of a week during which the employee is employed. The question then arises as to what constitutes ordinary pay.

38 For practical purposes, it might be expected that the employer would pay a contribution in respect of each employee which 'contributes' to the employee's entitlement, but the Act does not provide for any accounting on the basis that the particular employee gets paid what their employer or employers have contributed to the Board in respect of that employee's employment. On one hand, the Act provides for a calculation of the entitlement to long service leave, which is to be paid at *ordinary pay* for that leave (s 21(1)). For the purposes of s 21 – Entitlement to Paid Long Service Leave and Pay only, 'ordinary pay' is defined as 'the average ordinary pay of the person over the period in which the person completed his or her most recent 220 days of service in the construction industry' (s 21(3)). The payment is paid to the person by the Board from its funds. Those funds are made up of the monies paid to the Board by employers under s 34, the proceeds of investments made by the Board, borrowings and any other amounts received by the Board under the Act (s 15(1)). Therefore, the amount paid to the person while on long service leave is calculated by reference to a formula relating to his or her average ordinary pay over the most recent period of employment and is not the amount contributed to the Board by the employer. On the other hand, under Part IV – Registration, the Act provides for contributions by the employer as part of a range of provisions dealing with the registration of employers and employees, returns by employers to the Board and, relevantly, contributions by employers and assessment by the Board.

39 There is no direct relationship between the calculation of what the employee is to receive under the Act when the employee takes leave and the calculation of the contribution the employer is to make. In fact, the Act provides for them quite separately and uses different definitions and calculations.

40 For the purposes of the Act generally, there are two definitions of ordinary pay. The first is 'the rate of pay (disregarding any leave loading) to which the person is entitled for leave (other than long service leave) to which the person is entitled' (s 3(1)). The second is '[f]or the purposes of the definition of ***ordinary pay*** in subsection (1), if the person is not entitled to paid leave (other than long service leave), the ordinary pay of the person is the rate of pay to which the person is entitled for ordinary hours of work' (s 3(3a)). These are the definitions which relate to the employer's contribution.

41 Therefore, for a person who is entitled to paid leave other than long service leave, ordinary pay, for the purposes of the employer's contribution, is the rate of pay to which the person is entitled while on leave (excluding any leave loading). If the person is not entitled to paid leave, their ordinary pay for the purposes of the employer's contribution is the rate of pay to which they are entitled for ordinary hours of work.

Calculation of Contribution for the Person Entitled to Paid Leave

42 The most significant period of paid leave, other than long service leave, is set out in clause 22 – Annual Leave of the Agreement, which provides for six weeks' leave 'paid on the basis that the six (6) weeks accrues 42/365ths of the employee's total earnings per annum, which shall include allowances paid as if at work' (clause 22 – Annual Leave, 22.1). Historically, in most awards and agreements, annual leave is that which normally attracts leave loading. There is no other 'leave loading' contained in any of the clauses of the Agreement dealing with leave. Therefore, while the Agreement does not prescribe a leave loading, annual leave is of the type of leave to be used as the basis for calculation of payment of a contribution based on 2% of ordinary pay.

43 There are other periods of authorised and paid leave within the Agreement including sick leave, bereavement leave and leave for an employee to attend jury service. These periods of leave are paid at a rate calculated at the offshore daily rate of pay. In particular, bereavement leave is calculated at a maximum of four days, with a full day's leave being a 12 hour day at the offshore daily rate of wage. A person taking leave for jury service has their pay made up to the daily rate of 12 times the hourly rate for each day spent on jury service. Sick leave is paid at the 'offshore daily rate of pay' for a maximum of 12 hours per day (clause 17). In all such cases, wages are paid including allowances 'as if at work'.

44 Therefore, there are different calculations for annual leave as compared with sick leave, bereavement leave and leave to attend jury service. However, all of the latter types of leave are based on a 12 hour day and do not appear to differentiate between Monday to Friday and Saturday and Sunday, and wages are paid as if the employee were at work.

45 In deciding which of annual leave and other leave ought to be the basis for calculation, I conclude that the intention is for it to be annual leave due to the explicit reference to excluding leave loading. Therefore, I conclude that for an employee who is entitled to paid leave, ordinary pay is the rate of pay to which they are entitled while on paid leave, other than long service leave, which I find is annual leave. Payment for annual leave is calculated by reference to the employee's total earnings per annum which includes allowances as if at work. I note that there is no definition of total earnings per annum.

Calculation of Contribution for Person Not Entitled to Paid Leave

46 For a person who is not entitled to paid leave, other than long service leave, the ordinary pay for the purposes of s 34(1) of the Act is the rate of pay to which the person is entitled for ordinary hours of work. This applies to casual employment covered by clause 7 – Contract of Employment, 7.2 of the Agreement.

47 I note that the weekly hours comprise 36 ordinary hours and 48 additional hours (clause 12 – Hours of Work, 12.2 of the Agreement). The average of 84 hours per week is part of a cycle of 186 hours in a 28 day cycle. Normal hours of work are 12 per day, worked over 15 days, one of which is allowed for travel (clause 12.1).

48 Overtime is all hours worked in excess of 12 hours per day or shift and is paid at double the ordinary hourly rate of pay (clause 13 – Overtime, 13.1 of the Agreement).

49 Clause 28 - Payment of Wages, provides for the number of 'pay hours' in a 15 consecutive day work period being 264 equivalent ordinary hours, not ordinary hours. It is noted that this clause also provides that for Monday to Friday, 7.2 hours are paid at the ordinary hourly rate prescribed at clause 29, and 4.8 hours at double the ordinary hourly rate. Saturday and Sunday are 12 hours per day at double the ordinary hourly rate. The Payment of Wages and Hours of Work

clauses do not refer to ordinary pay payable, rather they refer to ordinary hours, additional hours, equivalent ordinary hours and the ordinary hourly rate.

50 Given the roster cycle and the arrangement of hours, I conclude that references in clause 12 – Hours of Work, clause 13 – Overtime and clause 28 – Payment of Wages, do not relate to ordinary pay payable used for the purposes of the calculation of the employer's contribution. I conclude that weekly hours said to comprise 36 ordinary hours and 48 additional hours, being 'normal hours', actually constitute the total ordinary hours in that cycle. While some of those hours, the 48 so called additional hours, attract a penalty rate, they are no different from, for example, shift work hours or hours outside of the usual spread of hours which attract a penalty rate but which are not overtime. In this Agreement, overtime is only that which occurs after 12 hours in any one shift or day. Therefore, the 4.8 hours each Monday to Friday and the Saturday and Sunday hours, where they are less than a total of 12 in each day, are part of ordinary hours.

51 However, ordinary hours as such do not form the basis of the calculation of ordinary pay payable for the purposes of s 34 of the Act. Ordinary pay payable is to be calculated by reference to payment for all ordinary and additional hours in the cycle, and not including those hours which are overtime, being those hours in excess of 12 per day on any day.

52 I note in passing that the Agreement provides in clause 38 that 'Superannuation will be paid on 264 equivalent ordinary hours per cycle. Superannuation is calculated by reference to ordinary time earnings.' For all purposes of the Agreement, the normal day is 12 hours. Bereavement leave, which is not excluded for casuals, is for a 12 hour day. Other periods of authorised absences which do not apply to casuals, such as sick leave and payment for jury service, also provide for payment for a 12 hour day. I take this to be a recognition that ordinary hours, for those purposes, covers the 12 hours per day on 15 days of the cycle. These are the hours to be used for the calculation of ordinary pay payable for the purposes of the employer's contribution for a person not entitled to paid leave other than long service leave.

53 The parties are invited to make submissions in writing within seven days as to the appropriate orders.

2013 WAIRC 01001

REVIEW OF DECISION OF CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 MARCH 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAPE AUSTRALIA T/A CAPE MARINE AND OFFSHORE PTY LTD
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 NOVEMBER 2013
FILE NO/S	APPL 14 OF 2013
CITATION NO.	2013 WAIRC 01001
Result	Order issued

Order

WHEREAS this is an application for a review of a decision of the Construction Industry Long Service Leave Payments Board; and

WHEREAS on the 15th day of November 2013 the Commission issued Reasons for Decision in respect of the application inviting the parties to make submissions in writing by the 22nd day of November 2013 as to the appropriate orders; and

WHEREAS on the 21st day of November 2013 the applicant filed a Short Minutes of Order signed by the parties requesting an extension of time in which to file the further written submissions;

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

THAT the parties have until Friday the 29th day of November 2013 to file the further written submissions referred to in the Commission's decision dated the 15th day of November 2013.

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

2013 WAIRC 01013

REVIEW OF DECISION OF CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 MARCH 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAPE AUSTRALIA T/A CAPE MARINE AND OFFSHORE PTY LTD
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 2 DECEMBER 2013
FILE NO/S	APPL 14 OF 2013
CITATION NO.	2013 WAIRC 01013

Result Order issued

Order

WHEREAS this is an application for a review of a decision of the Construction Industry Long Service Leave Payments Board; and

WHEREAS on the 29th day of November 2013 the applicant filed a Short Minutes of Order signed by the parties requesting a further extension of time in which to file the further written submissions;

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

1. THAT the Order of Acting Senior Commissioner P E Scott dated 26 November 2013 be vacated.
2. THAT the parties have until Friday the 13th day of December 2013 to file the further written submissions referred to in the Commission's decision dated the 15th day of November 2013.

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

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2013 WAIRC 01024

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK ANTONINO POLIZZI
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 2 DECEMBER 2013
FILE NO/S	APPL 27 OF 2013
CITATION NO.	2013 WAIRC 01024

Result Order further varied

Representation (by written submissions)

Appellant	Mr D Jones, of counsel
Respondent	Ms R Siddique, of counsel

Order

WHEREAS an order was made in this matter on 8 October 2013 ([2013] WAIRC 00847) and amended on 14 November 2013 ([2013] WAIRC 00969);

AND WHEREAS the appellant filed and served his outline of submissions on Monday 25 November 2013, five days after the date specified in the order as amended;

AND WHEREAS the respondent has requested an extension of time in which to file his outline of submissions and for the consequential adjournment of the hearing;

AND WHEREAS the Commission, having considered the submissions by email of both parties, is of the view that an extension of time should be granted;

NOW THEREFORE I, pursuant to s 33S of the *Police Act 1892* and s 27(1)(o) of the *Industrial Relations Act 1979* hereby order that the order of 8 October 2013 ([2013] WAIRC 00847) as amended be further amended as follows:

1. THAT in order 3 the date "Wednesday 20 November 2013" be amended to "Monday 25 November 2013.
2. THAT in order 4 the date "Wednesday 27 November 2013" be amended to read "1.00 pm Wednesday 4 December 2013".

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 01005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMA AVISON
	APPLICANT
	-v-
	MAURIZIO RESTAURANT & EVENTS CATERING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 27 NOVEMBER 2013
FILE NO/S	U 45 OF 2011, B 45 OF 2011
CITATION NO.	2013 WAIRC 01005
Result	Discontinued

Order

These are applications pursuant to s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

The Commission listed a conference on 21 June 2011 for the purpose of conciliating between the parties.

On 7 June 2011 the conference was vacated and the applicant was given time to consider whether she wished to proceed with the matters.

On 18 July 2011 the applicant advised the Commission that she did not wish to proceed with her applications and the Commission contacted the applicant on a number of occasions about lodging a Notice of Withdrawal or Discontinuance form with the respect to the matters.

The applicant filed a Notice of Withdrawal or Discontinuance on 19 November 2013 in respect of the applications and the respondent consents to the matters being discontinued.

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

THAT these applications be, and are hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2013 WAIRC 00955

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00955
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 5 NOVEMBER 2013
DELIVERED	**:**	TUESDAY, 5 NOVEMBER 2013
FILE NO.	**:**	B 93 OF 2013
BETWEEN	**:**	SHAUN CHATTERS
		Applicant
		AND
		ALISON SPARHAM
		Respondent

Catchwords	**:**	Industrial law (WA) – Contractual benefits claim – Claim for unpaid wages – Claim is enforceable under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) – Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	**:**	Order issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	No appearance

Reasons for Decision

Ex Tempore

1 This application has been brought by the applicant, Mr Chatters, against Mrs Alison Sparham as the respondent. The application seeks to recover denied contractual benefits. Mr Chatters has given evidence in these proceedings. He testified that he was employed by the respondent as a truck driver. The respondent is engaged in the business of the transport of mini-skips.

2 Mr Chatters testified that he started work on 26 March 2013. His evidence was that he agreed with Mrs Sparham that he would be paid a flat daily rate of $180 per day, regardless of the hours that he worked. According to his evidence Mr Chatters said that he worked each and every day over the respective period of time until the termination of his employment, doing a variety of odd jobs ranging from three to six, even nine jobs, on particular days. Regrettably, despite working from 26 March until 10 May 2013, Mr Chatters was not paid. This is despite repeated requests to the respondent for payment.

3 Mr Chatters' situation was such that it got to the point where he had to turn to welfare agencies to assist with payments for his house and support for his family. Tendered as exhibit A1 was a bundle of documents. Included is a record maintained by Mr Chatters of his days of work and jobs completed per day. The record reflects a continuous pattern of work between 26 March and 10 May 2013. Of these days Mr Chatters did testify that he received payment it seems in cash, according to the evidence, for two days on 26 and 27 March 2013 in the total sum of $360. These records also show that Mr Chatters is owed an amount of $3,900 between 26 March 2013 and 30 April 2013 and, as has now been corrected, $1440 between 1 May 2013 and 10 May 2013 according to the figures kept in the records.

4 Also in exhibit A1 is an extract from Mr Chatter's bank account, which shows that he was not in receipt of any wages paid over the respective period of his employment. Additionally, exhibit A2 is a document which is headed "Employment Plus" which is, as the Commission understands it, a welfare agency attached to the Salvation Army, reflecting the agreement for Mr Chatter's employment at $180 per day, signed by his then employer Mrs Sparham.

5 Whilst Mr Chatters also claimed an amount in relation to what he described as waiting time and kilometre payments, there is no evidence to support those particular claims.

6 The Commission finds accordingly.

7 Whilst it seems that according to Mr Chatters, the respondent's business struck trouble on the death of Mrs Sparham's husband, nonetheless, an employer's obligation as a matter of law in the State is to pay wages for the work performed by an employee. In this case the applicant, Mr Chatters, was put in a quite dreadful situation of having to seek welfare assistance whilst he was employed, to make ends meet.

8 In proceedings such as these the Commission is not able to enforce awards or orders of the Commission. I am satisfied from an examination of the Transport Workers (General) Award 1961, that it had no application to the employment of Mr Chatters at the material time. Even if it did so, I am satisfied, based upon the agreed rate of pay being in excess of the weekly minimum rate for a driver in such a position, that in any event, Mr Chatters would be able to recover the whole amount as a debt due.

9 On the basis of the evidence therefore, the Commission intends to make an order based upon exhibit A1, that the respondent pay to the applicant as a denied contractual benefit, the sum of $5,340 gross within 21 days of today.

2013 WAIRC 00954

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHAUN CHATTERS

APPLICANT

-v-

ALISON SPARHAM

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 5 NOVEMBER 2103
FILE NO/S	B 93 OF 2013
CITATION NO.	2013 WAIRC 00954

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Mr S Chatters on his own behalf and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent pay to the applicant as a denied contractual benefit the sum of $5,340 gross within 21 days.

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

2013 WAIRC 00986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AMANDA DYER

APPLICANT

-v-

THE SINGH KEHAL FAMILY TRUST TRADING AS BURSLEM MEDICAL CLINIC
DR KANWAL SINGH

RESPONDENT

CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 18 NOVEMBER 2013
FILE NO/S	U 237 OF 2012
CITATION NO.	2013 WAIRC 00986

Result	Application discontinued
Representation	
Applicant	Ms K Post (ANF)
Respondent	No appearance

Order

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

AND WHEREAS on the 7 January 2013 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS on the 8 August 2013 a further conference was convened with the parties;

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

AND WHEREAS on the 11 November 2013 this matter was listed for hearing for the applicant to show cause why this application should not be dismissed;

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

THAT the application be, and is hereby discontinued.

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

2013 WAIRC 00980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRAD STEPHEN HILTON
	APPLICANT
	-v-
	JILL JAMIESON, MANAGING DIRECTOR
	POLYTECHNIC WEST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 18 NOVEMBER 2013
FILE NO/S	U 37 OF 2013
CITATION NO.	2013 WAIRC 00980

Result	Application dismissed
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr M Taylor

Order

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

WHEREAS on the 19th day of April 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 28th day of October 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2013 WAIRC 01020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 01020
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 20 AUGUST 2013, WEDNESDAY, 21 AUGUST 2013, MONDAY, 9 SEPTEMBER 2013
DELIVERED	**:**	MONDAY, 2 DECEMBER 2013
FILE NO.	**:**	U 265 OF 2012
BETWEEN	**:**	DENNIS HOWE
		Applicant
		AND
		GOVERNING COUNCIL OF POLYTECHNIC WEST
		Respondent

Catchwords	**:**	Termination of employment - Harsh, oppressive or unfair dismissal - Principles applied - Applicant misconducted himself sufficient to warrant termination - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 26(1)(a) and s 29(1)(b)(i)
Result	**:**	Dismissed
Representation:		
Applicant	**:**	Mr S Millman (of counsel) and Mr D Stojanoski (of counsel)
Respondent	**:**	Mr D Matthews (of counsel) and Ms H Richardson (of counsel)

Case(s) referred to in reasons:

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

Byrne v Australian Airlines (1995) 61 IR 32

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

Parrish Smith v Tungsten Group Pty Ltd (2004) 84 WAIG 1311

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

Shire of Esperance v Mouritz (1991) 71 WAIG 891

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

Reasons for Decision

1 On 20 December 2012 Dennis Howe (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 30 November 2012 by the Governing Council of Polytechnic West (the respondent).

Background

2 The following is agreed between the parties:

(1) The respondent employed the applicant as a bricklaying lecturer in 1995.

(2) The applicant was appointed on a permanent basis in November 2003.

(3) The respondent transferred the applicant from Balga campus to Midland campus in May 2012.

(4) The applicant worked part-time at Midland campus. The applicant and Mr Bruce Dickie, a bricklaying lecturer, shared a class of international students. Mr Dickie taught the class for one day a week and the applicant taught the class for two days each week.

(5) On 7 August 2012 the applicant sent an email with correspondence attached to the Hon Peter Collier MLC the Minister for Education and Training (the Minister).

(6) In or around July or August 2012 the applicant made a submission to obtain a Certificate IV Training and Assessment qualification upgrade.

(7) By letter dated 30 November 2012, from Mr Wayne Collyer the respondent's Managing Director, the applicant was summarily terminated effective at that date.

3 On 30 August 2012 the respondent put the following 10 allegations to the applicant:

Allegation 1

That you have bullied Ms Pam John in the Workplace contrary to the provisions of the Occupational Safety and Health Act 1984 and the Polytechnic West Code of Professional Conduct.

Allegation 2

That you breached the Public Sector Commission's Code of Ethics (Commissioner's Instruction No.7), whereby you are required to use the resources of the state in a responsible and accountable manner that ensures the efficient, effective and appropriate use of human, natural, financial and physical resources, property and information when you made vexatious claims against Ms Pam John claiming she had acted aggressively towards you.

Allegation 3

That you made a complaint against Mr Eddie Campbell which was determined to be unfounded and vexatious.

Allegation 4

You breached the PWA Communication Protocol Policy when on 7 August 2012 you sent correspondence directly to a Minister of the Crown. Further, it is also considered a breach of the Administrative Instruction 102 - Official Communications.

Allegation 5

You acted inappropriately by placing a copy of the unauthorised email to Minister Collier on the desks of a number of lecturers. The content of the letter has personally attacked the lecturer's integrity and professionalism and is considered to be a form of bullying. You inappropriately named Mr Bruce Dickie who is particularly stressed by the nature of your comments.

Allegation 6

You made a vexatious claim in relation to breaches of safety standards at the Bricklaying work site at the Midland Campus, which is considered to be unfounded. Given a comprehensive safety inspection conducted by Mr Troy Lankford, Co-ordinator, OSH it was concluded there were no safety issues within the bricklaying workshop area.

Allegation 7

You plagiarised evidence in a submission made to obtain your Certificate IV Training and Assessment qualification upgrade. This represents a breach of the TAE Rules of Evidence requiring authenticity and as such may be a serious act of alleged fraud on your part. Further, it could be a potential breach of the PWA Plagiarism and Cheating Policy.

Allegation 8

Your performance and conduct in the workplace has consistently breached the PWA Code of Professional Conduct. Specifically, it is alleged that you have:

- On numerous occasions have been absent from the workplace and have not adequately notified management of your whereabouts,
- Ignored staff when they talk to you and have subsequently verbally abused them,
- Consistently abused staff and used inappropriate language in the workplace,
- Not completed your ARD and PA hours and have not responded to management when questioned on this matter,
- Declined to act as a subject matter expert in bricklaying and responded by saying you were too busy 'fighting grievances and management',
- Not prepared adequately for classes,
- Not provided adequate handover to fellow lecturers,
- Undermined lecturers in front of PWA students,
- Incorrectly marked exam papers; and
- Displayed an inability and unwillingness to utilise PWA electronic information systems which is a significant impediment to your ability to adequately conduct the role of a lecturer.

Allegation 9

You have displayed an aggressive and confrontational attitude to Mr Bruce Dickie, a bricklaying lecturer from the Midland Campus.

Allegation 10

On or about 25 or 26 July 2012, you maliciously damaged a clay cartage bag which was the property of a private company.

(see Exhibit R8, document D)

4 The applicant responded on 4 September 2012 rejecting some of these allegations.

5 At the hearing the respondent maintained that it was only relying on the applicant misconducting himself with respect to four allegations related to the issues specified in the respondent's letter to the applicant dated 30 August 2012. The following summary includes the applicant's responses to these allegations in his letter to Mr Collyer dated 4 September 2012.

Allegation 1

Allegation 1

That the applicant bullied Ms Pamela John on 11 May 2012 contrary to the provisions of the *Occupational Safety and Health Act 1984* and the Polytechnic West Code of Professional Conduct.

The applicant rejected bullying Ms John. He did raise his voice when speaking to her, which is something that he did on occasions, for the purpose of making a point. Ms John did the same.

Allegation 2

Allegation 4

That the applicant breached the Polytechnic West Communication Protocol policy and Administrative Instruction 102 - Official Communications when he sent an email and attachments to the Minister on 7 August 2012.

The applicant concedes that he sent the email and attachments to the Minister. However, he was never made aware that he was not to contact the Minister nor was he inducted about the requirements of the Polytechnic West Communication Protocol policy.

Allegation 3

Allegation 7

That the applicant plagiarised evidence in a submission to obtain a Certificate IV Training and Assessment qualification upgrade which may be an alleged act of fraud. It could also be a potential breach of the Polytechnic West Plagiarism and Cheating policy.

The applicant admitted that he included other lecturers' work in his Certificate IV submission but he stated that it is not uncommon amongst lecturers to use each other's material as a means of collegial cooperation. The applicant stated that he should have modified this material for his requirements but did not do so due to stress he was suffering at the time.

Allegation 4

Allegation 5

That the applicant acted inappropriately by placing a copy of his email to the Minister and attachments on the desks of a number of lecturers. The letter attacked Mr Dickie's integrity and professionalism and is considered to be bullying.

The applicant rejects the claim that he personally attacked Mr Dickie and he only stated that he was an inexperienced lecturer.

Allegation 9

The applicant displayed an aggressive and confrontational attitude to Mr Dickie.

The applicant disagreed that he was unduly or unnecessarily aggressive and confrontational to Mr Dickie or that he bullied him.

6 A copy of the email and attachments the applicant sent to the Minister was also given to other lecturers in the applicant's work area on 7 August 2012 (see Exhibit R2). The email is as follows:

Hon Peter Collier

Aug 12

Minister for Training

Re Farce Training/Duty of care

I have been a trade lecturer since 1995 have a passion for the job and am employed by Polytechnic West.

The failures I have referred to in attached correspondence represent only some of the recent issues faced. Some are easily fixed others not. I have little confidence in management to satisfactorily deal with some issues. Some of these issues at Midland Campus have existed for roughly 18 months, I have been here for 3.

Be advised given the serious nature, should I not receive some satisfactory assurance within 7 days, public disclosure may ensue.

Attached to the email was the following letter from the applicant to Ms Helen Murphy dated 2 August 2012:

Further to my letter to Bevan on 31/7 we have had further discussion (sic).

Previously I have shown Bevan personally in the Bricklaying "workshop" practical project assessment tolerances/standards exceeded by multiples of 6 to 7.

On 1/8 I also advised that practical projects were being comprised, ie competencies not fully met. For Eg, curved wall project 17.1, a serpentine wall was assessed with wedge joints rather than the 8-10 mm joint specified. Compounding this is the lack of plan. Bevan then asked the lecturer responsible, a relatively inexperienced lecturer, have students performed to his ~~own~~ satisfaction (sic). Upon agreement from the other lecturer Bevan then asked me how many years experience I have (sic) I questioned Bevan whether signing off students under these circumstances amounts to fraud?

In addition brick dust storage & use continues to be a problem posing adverse health effects. See MSDS.

I seek your assistance.

Also attached to the email was the following letter from the applicant to Mr Bevan Dashwood dated 31 July 2012:

Re: Farce?

Further to our meeting on 31/7/12 & upon your request I have listed some concerns, mostly repeated, below:

- As Trevor is already aware there are access problems through the B/L area through to the Tiling Workshop, with no tramlines. There is a lack of suitable storage: For example – blocks and brick dust. In addition brick & tile cutting facilities are inadequate & overlap posing various hazards.
- Change in F.L. to old Plumbing Store (keep closed?)
- I believe the work environment has contributed to student & my ill health, ie being wet, cold, exposed to sun & wind, in & out of air conditioning. This has probably contributed to high student absenteeism.

  We seem to disagree on the balance of Duty of Care versus simulated work environment.
- Workshop signage is inadequate: eg Safety Boots, emergency procedures, eyewash, Ipods?
- Most if not all International Students (I.S.) have experienced back pain. This is particularly typical amongst adult learners. Whilst Bruce Dickie has attempted to address this with instruction the problem is more fundamental.
- Assessment Guidelines & scheduling school holidays for I.S. are largely dysfunctional, assessment is constant.
- Course scheduling (DAP?) appears to be a problem. Bruce Dickie, an inexperienced lecturer, is developing a DAP ~~and~~ (sic) as well as delivery/assessment resources which must surely be available from Balga.
- I.S. groups appear to be one of the most challenging & yet you have ~~had~~ (sic) a succession of relatively inexperienced lecturers responsible.
- I require keys to the workshop/store.
- A desk, phone and computer are not available to me as others.
- Delivery & Assessment failures such as the omission of wall ties & weepholes, trowel cut face bricks, with standards exceeded by multiples of six/seven times, are probably the tip of the iceberg.
- Combined OH&S, resource, capacity, scheduling & strategic management failures threaten required standards, indeed object failure of the I.S. course. Obviously Balga has capacity to overcome most of these problems.

On my second day at Midland I was read the riot act on standards & guidelines. This, weeks before I was provided with the single page, unsourced Ass. Guidelines (sic). Three lecturers and yourself "advised" me to go in "harder" with the I.S. This you passed off as a random/co-incidence event.

This "advice" apparently arose from a "disputed" 2 mm discrepancy in assessing vertical alignment (plumb).

To request students to repeat projects on such basis alone, largely proves counter productive & dysfunctional for students & staff.

On 3/7/12 you forwarded me a copy of both the Code of Ethics & my JDF. This, prior to checking your emails notifying you of my ill health.

It appears you have questioned my professionalism without first checking your own?

7 The applicant's letter of termination from Mr Collyer dated 30 November 2012 is as follows:

TERMINATION OF EMPLOYMENT

I write further to a letter served on you dated 19 November 2012 whereby you were requested to respond in writing to a number of serious breaches of discipline which constitutes a significant breach of your employment obligations and responsibilities. Accordingly, you were requested to show reason why your employment should not be terminated.

You were initially requested to respond to my letter by 4.00 pm, Friday, 23 November 2012, however, following a request by Slater and Gordon, an extension was given until the close of business on Tuesday, 27 November 2012.

As of today, 29 November 2012 you have not provided a response.

You were advised that if no response was forthcoming, I would make a decision in relation to the matters raised based solely upon the information available to me. My decision also takes into account a number of previous warnings issued to you about your behavior.

On the basis of the evidence presented as a result of the independent investigations undertaken; your inappropriate communication made to a Minister of the Crown and the vexatious claim made in relation safety issues at the Midland Campus, I am terminating your employment with effect from the close of business 30 November 2012.

Shared Services Payroll Section will be notified to pay you any leave entitlements you have accredited as of 30 November 2012.

(Exhibit R8, document I)

Respondent's evidence

8 The respondent relies on the evidence of the following persons:

Pamela John, Portfolio Manager - Balga campus;

Edward Campbell, Advanced Skill Lecturer 2 - Balga campus;

Lennie Rodin, Bricklaying and Concreting Lecturer - Balga campus;

Linda Holmes, Project Officer for Training and Assessment - Polytechnic West;

Salvatore Coppolina, Wall and Floor Tiling Lecturer - Balga campus;

Bruce Dickie, Bricklaying Lecturer - Midland campus;

John Harding, former Bricklaying Lecturer - Midland campus;

Troy Younger, Wall and Floor Tiling Lecturer - Midland campus;

Trevor Bullock, Roof Plumbing Lecturer - Midland campus;

Bevan Dashwood, former Head of Programs - Midland campus;

Helen Murphy, Portfolio Manager of Construction Environment and Art - Midland campus; and

Vanessa Patro, Manager of Information and Communications Technology Operations - Polytechnic West.

Pamela John

Allegation 1

9 Ms John was the applicant's line manager between July 2011 and May 2012. The applicant came to her office on the morning of 11 May 2012 as the class he had been looking after did not have anyone to take over because another lecturer Mr Mark Bowen was not at work. The applicant was aggressive when he approached her and he then walked out and she followed him to his desk. Ms John told the applicant that he had to make up some lecturing hours but the applicant said that he had other things to do so she asked another lecturer to take over the class. Ms John denied saying 'bullshit' when the applicant said he had other plans. During their discussion she did not wave her arms around, nor was she red in the face, she was firm, she did not raise her voice and she did not point at the applicant. Ms John denied she was verbally or physically aggressive towards him nor was she intimidating when she spoke to him at his desk, nor was she close to him when she was speaking to him. As Ms John felt threatened and bullied by the applicant she later lodged a grievance against the applicant as a result of this altercation and she was aware that the applicant put in a grievance against her.

Edward Campbell

Allegation 1

10 Mr Campbell observed the incident between Ms John and the applicant on 11 May 2012 and he recorded his recollections about this incident on 29 May 2012. He did so because he wanted to make the respondent's human resource section aware that

the applicant was unprofessional, aggressive and rude towards Ms John and he said that a number of other lecturers were upset, disturbed, alarmed and disappointed about this incident.

Lennie Rodin

Allegation 1

11 Mr Rodin shared an open plan office with the applicant and other lecturers. Mr Rodin said that Ms John did not demand that the applicant take Mr Bowen's class on 11 May 2012, she only asked him to do so. During this incident Ms John did not raise her voice, she did not swear at the applicant, nor was she aggressive or intimidating towards him. Mr Rodin stated that Ms John was controlled in the circumstances and he described the applicant as being threatening, loud and intimidating when he was speaking to Ms John. Ms John was at least two metres away from the applicant when she had her discussion with him. Mr Rodin described Ms John as being thorough and efficient, professional and open.

Linda Holmes

Allegation 3

12 Ms Holmes managed the project to facilitate 800 of the respondent's employees to attain their Certificate IV Training and Assessment qualification upgrade and she prepared an information pack to assist employees in completing this process. Ms Holmes designed an evidence checklist and the information pack gives examples of suitable evidence that employees could submit. In this pack it stated that employees must provide evidence that proves the work presented is actually theirs. This information pack was provided to all employees. If an employee presented evidence in support of their application produced in collaboration with others then the employee needed to prove their active participation in that process. An external provider Trainwest marked staff assessments and in its feedback about the applicant concern was raised about the authenticity of some of his documents because there were names throughout his application of other lecturers including Mr Dexter Taylor and Mr Salvatore Coppolina.

Salvatore Coppolina

Allegation 3

13 Mr Coppolina became aware that the applicant had used some of his documents in his Certificate IV application. He rang the applicant and asked why he had been accessing his files. The applicant said that somebody gave it to him and Mr Coppolina told the applicant he did not appreciate what he had done and as far as he was concerned he had accessed his files without him knowing. During this discussion with the applicant, the applicant described Midland campus as being 'f**ked'. Mr Coppolina said that his files are kept high on a stand with his name clearly marked on them but it was an open area so technically they are available to anyone. Mr Coppolina did not collaborate with the applicant when he completed his Certificate IV application and the applicant did not ask him for help. Mr Coppolina said that lecturers often shared documents but only those that they had contributed to and created as a group.

Bruce Dickie

Allegation 4

14 Mr Dickie commenced as a casual employee with the respondent at the beginning of 2012 and he is now a permanent lecturer. Prior to working with the respondent he worked as a trainer at a registered training organisation for 18 months. When the applicant commenced working at Midland campus Mr Dickie gave up two out of his three days of lecturing the international student class to the applicant.

15 Soon after the applicant started work at Midland campus the applicant accused him of contacting Balga campus to find out about him. Mr Dickie also heard the applicant accuse Mr Harding of doing this which Mr Harding denied. The applicant and Mr Dickie soon had trouble organising their class. The applicant refused to talk about handovers and plan how the class was to be delivered, every time Mr Dickie approached him he would ignore him and the applicant was abrupt with him. When Mr Dickie raised this issue with him the applicant said 'that's the way I am'. On 7 August 2012 Mr Dickie tried to help the applicant send an email and he told him to 'f**k off' under his breath. The applicant did things to undermine him, especially in front of students, such as stating that his work was wrong within students' hearing. The applicant would ask him questions and try to organise things when he was teaching the class instead of in his own time or in the staff room. Mr Dickie stated that he did most of the preparation for their class. The applicant criticised his work which started to affect him, but he would laugh and joke with others and this made him feel like there was something wrong with him.

16 Mr Dickie was affected by the applicant's letter dated 31 July 2012 suggesting that he was inexperienced and incapable of completing certain tasks. Mr Dickie told the applicant he was unhappy about the letter and they had a heated discussion after he distributed it to other lecturers. Mr Dickie recalled possibly calling the applicant an idiot during this discussion.

17 On 22 August 2012 Mr Dickie broke down after an altercation with the applicant about where weep holes should be placed in brickwork in front of their students. The applicant refused to speak to Mr Dickie away from the students about this issue so he left the classroom. When he talked to another lecturer about this dispute he started crying and he told the lecturer that he could not handle the situation. Mr Bullock approached him and asked him why he was upset and it was difficult to talk to him because he was crying so much. Mr Dickie then contacted Ms Murphy and met with her in the coffee shop and he told her that he did not feel that he could cope anymore and that the applicant made him doubt his abilities. At the time Mr Dickie felt a fool. He loved his job but the applicant made him not want to come to work and he considered leaving his job. Mr Dickie has since received counselling. Mr Dickie was going well with his lecturing and he was on top of things before the applicant came to Midland campus. After the applicant arrived he felt that the applicant was segregating him from other lecturers and because of the applicant's negative behaviour towards him he did not want to go to work.

18 Mr Dickie stated that a meeting held on 21 August 2012 with Ms Murphy and the applicant became heated and in response to the applicant saying something that was not true he called him a liar. Mr Dickie became upset with the applicant only once in

front of their class and this was over the weep hole incident. Mr Dickie could not recall saying 'don't f**k around with me' to the applicant in front of the students nor did he recall telling the applicant 'you don't tell me what to f**king do'. Mr Dickie stated that he never used the word 'f**k' or 'f***ing' in front of students. Mr Dickie was shown statements of two students taken as part of the investigation into an allegation that the applicant bullied Mr Dickie where the students stated that Mr Dickie swore at the applicant and he then stated that if two students said he swore at the applicant he could not deny it. This was probably during the weep hole incident when he was very emotional at the time because things had been building up between him and the applicant. Mr Dickie could not recall swearing at the applicant but he may have sworn in front of the students during this incident.

John Harding

Allegation 4

19 Mr Harding stated that Mr Dickie tried to assist and mentor the applicant in the transition from teaching apprentices to adult training, as teaching international students is different to teaching apprentices, but the applicant took offence when Mr Harding or Mr Dickie said things to him when they were trying to assist the applicant. Mr Harding described the applicant as being abrupt and rude at times and he had one run in with the applicant when the applicant accused him of trying to find information on him to 'back-stab' which Mr Harding denied. After this incident the applicant's attitude towards him seemed to change and he was friendlier but he still did not trust him. The applicant constantly wrote things in a diary which he found unnerving. Mr Harding stated that the applicant's attitude towards Mr Dickie never changed. He would ignore him, the applicant was rude, arrogant and obnoxious towards Mr Dickie and he treated Mr Dickie with contempt. It was therefore becoming untenable for Mr Dickie to work with him. Mr Harding believed that the applicant did not like Mr Dickie who he found to be easy going and helpful. When Mr Dickie spoke to the applicant he occasionally grunted or said 'bullshit' or 'what's this crap' and would just walk off. He did not observe the applicant using bad language towards Mr Dickie. Mr Harding sent an email to Mr Dashwood and Mr Bullock outlining his concerns about the applicant on 29 August 2012 and he said he was not asked to send this email.

Troy Younger

Allegation 4

20 Mr Younger observed the applicant 'stirring the pot' with Mr Dickie. Mr Younger witnessed situations where Mr Dickie tried to talk to the applicant in a passive manner but the applicant tried to pick fights with him or would be argumentative and stand over Mr Dickie. In one instance the applicant was aggressive towards Mr Dickie. Mr Younger described the applicant as having an aggressive tone of voice and body language. Mr Younger described Mr Dickie as a mellow, soft spoken, polite person who usually did not raise his voice. He did not see Mr Dickie being rude to the applicant and he stated that Mr Dickie would back off if a situation became hostile.

Trevor Bullock

Allegations 3 and 4

21 Mr Bullock worked with Mr Dickie and the applicant from May 2012 and he stated that Mr Dickie took the lead with course delivery to the international students.

22 Mr Bullock observed the applicant telling Mr Dickie to 'f**k off' when Mr Dickie was assisting him to send the email to the Minister. Mr Bullock also observed the applicant telling Mr Dickie to 'f**k off' when he asked him how he was going. Mr Dickie regularly told him that the applicant told him to 'f**k off' and he saw this a couple of times from a distance. He noticed that two to three months after the applicant started work at Midland campus Mr Dickie was becoming agitated and he did not want to be at work. Mr Bullock stated that when Mr Dickie broke down on 22 August 2012 he asked him what was wrong and he said that he could not handle this situation anymore and he said that everything he did was pushed back in his face and he was constantly ignored and verbally abused. He told him he was at his wits end, he was not sleeping and he was unable to function at work. Mr Bullock stated that Mr Dickie enjoyed lecturing and he got on well with the other bricklaying lecturer Mr Harding. Mr Bullock described Mr Dickie as a placid gentle man who just wanted to get on with his work.

23 Mr Bullock assisted the applicant to complete his Certificate IV application as his mentor. The applicant was rude and demanding when asking for information to assist him to complete the requirements for this certificate and when he reviewed the applicant's application he noticed that some of the paperwork was not his own work even though the applicant declared that it was when he submitted his application.

Bevan Dashwood

Allegation 4

24 Mr Dashwood's office overlooked the desks of the applicant and Mr Dickie. On numerous occasions Mr Dashwood observed Mr Dickie trying to talk to the applicant who just ignored him and every day the applicant was confrontational and aggressive toward Mr Dickie. On some occasions Mr Dickie asked the applicant about an issue three or four times and the applicant responded 'yeah I heard ya (sic) the first time do you think I'm f**king deaf?'. The applicant also described Mr Dickie as a "f**kwit' and he heard the applicant tell Mr Dickie to 'f**k off' when Mr Dickie tried to assist him with sending an email. Eventually Mr Dashwood tried to keep Mr Dickie away from the applicant. The applicant was cordial with some lecturers but not with others. Mr Dashwood had several meetings with the applicant as he was concerned with his lack of cooperation and team work with Mr Harding and Mr Dickie. The applicant complained in one meeting about Mr Dickie being the team leader of their class and being less experienced than him and the following day he asked the applicant to be the team leader but he declined stating that he did not have time. The applicant did not assist other lectures including Mr Dickie and he was uncooperative.

25 In July 2012 meetings were held with Mr Bullock and the applicant to discuss the applicant's aggressive behaviour and poor communication with other team members.

26 The applicant's letter to him dated 31 July 2012 raising occupational health and safety matters and the fact that Mr Harding and Mr Dickie lacked experience and were not adequate to lecture in the bricklaying trade contained contradictions. Mr Dashwood defended the standards of the bricklaying lecturers and their students' assessment. He also disputed that Mr Dickie was an inexperienced lecturer as he had 20 years' experience in the building industry and he had been through a competitive interview process for his position with the respondent and he was placed first on the list for employment in this position.

27 Mr Dashwood tried to mediate between the applicant and Mr Dickie on a number of occasions and they attended two meetings with Mr Dashwood. Even though the applicant undertook to improve his conduct and behaviour this did not occur and further complaints were made about him after these meetings. At a further meeting held on 31 July 2012 the applicant was told that he needed to work at being a team player but this did not happen and Mr Dashwood told Mr Dickie to keep him informed if he continued to experience difficulties with the applicant.

28 Mr Dashwood stated that he observed Mr Dickie being pushed and 'pecked' by the applicant and their dispute was not two-way. When Mr Dickie reached the point when he was unable to deal with the applicant he was sent home on sick leave. From the time the applicant commenced working at the Midland campus he was difficult to work with and there were numerous issues and concerns about his conduct.

Helen Murphy

Allegations 2, 3 and 4

29 When the applicant commenced at Midland campus Ms Murphy asked Mr Dickie to mentor him because he had not previously worked with international students.

30 Ms Murphy stated that the applicant had a habit of not acknowledging people in a team environment and on one occasion she said good morning to him and he replied under his breath 'f**k off".

31 After the applicant started working with Mr Dickie he became distressed. He told Ms Murphy and Mr Dashwood that the applicant was not doing his preparation, he was disinterested in discussing course delivery and that he did not want to listen. The applicant was also not interested in doing a proper handover and he gave very short notice when he was going to be late and/or absent from work on his teaching days. Ms Murphy tried to support Mr Dickie. She regularly met with him to discuss how he was feeling and work on strategies to use with the applicant to help him to become an effective team member. Ms Murphy observed the applicant ignoring Mr Dickie when he approached him to discuss work related issues.

32 Ms Murphy became aware of the email the applicant sent to the Minister because he put a copy on lecturers' desks and a staff member brought it to her attention. Ms Murphy believed the applicant's comments about Mr Dickie in the letter dated 31 July 2012 attached to the email were disparaging. As she believed that the email's distribution was inappropriate she collected as many copies of the email as possible from the lecturing area.

33 On 22 August 2012 Ms Murphy was told by a lecturer that Mr Dickie was upset and on his way to the cafeteria. When she approached him he was crying and shaking. Mr Dickie told her he could not take it anymore, he had not been sleeping and he had never felt this bad before. He felt his professionalism had been challenged by the applicant because he was always telling students that the way he did things was incorrect and the applicant would not do any class preparation or listen to him about delivery. Mr Dickie was incapable of returning to the classroom so she told him to take some time off. She said it was distressing watching Mr Dickie, who was a professional person, feel so invalidated.

34 Ms Murphy monitored staff completing their Certificate IV qualification upgrades and she reviewed the documents the applicant had submitted. When she did so she discovered that some of the documents he relied on belonged to other staff members from Balga campus, including Mr Coppolina and Mr Taylor.

Vanessa Patro

Allegation 2

35 On 8 July 2013 Ms Patro received an email from Mr Frank Gannaway asking her to investigate whether the applicant had received an email sent to him on 13 September 2011 entitled 'QMS Updated - Communication Protocol Policy'. She confirmed that this email had been sent to the applicant but was not read by him.

Applicant's evidence

Allegation 1

36 The applicant denies that he bullied Ms John on 11 May 2012. That morning he took the first part of his colleague Mr Bowen's lecture from 7.30 am to 9.30 am. When Mr Bowen failed to turn up when the class recommenced at 9.45 am the applicant asked Mr Campbell and Mr Taylor if they had seen Mr Bowen and they replied 'no'. When he enquired again about Mr Bowen he was told to see Ms John. When Ms John returned to her office he went to see her but she was busy and had her back to him. He walked towards her and he asked if she had seen Mr Bowen. As she did not respond he raised his voice to get her attention but he was not yelling at the time. Ms John replied 'see Eddy or Dexter'. The applicant returned to his desk and Ms John then approached his desk and stood over him. Ms John said to him in an aggressive tone 'hang on a minute you owe me four hours' and ordered him to take Mr Bowen's class. She was waving her arms around, she was red in the face and pointing at the applicant and she swore at him calling him a 'bullshitter'. At that point he felt bullied by Ms John and excluded by his colleagues because they did not assist him to provide a replacement for Mr Bowen. On 17 May 2012 he lodged a grievance against Ms John concerning this incident.

37 The applicant said he was frustrated and upset when Mr Campbell and Mr Taylor did not deal with the issue of Mr Bowen not turning up on 11 May 2012. When he spoke to Ms John he was trying to make himself heard and he was agitated at the time. When he approached Ms John her door was open and he did not recall knocking and he only raised his voice because she did not appear to hear him. He described their conversation as amicable and he assumed that Ms John knew that Mr Bowen was

absent that morning. The applicant said Ms John was heated and aggressive and intimidating towards him when she approached him. The applicant agreed that he owed some teaching hours to the respondent and that Ms John could direct him to take Mr Bowen's class if no one was available. The applicant said he was open to taking the class however he felt he was being 'played' or not being taken seriously by Mr Taylor and Mr Campbell. He therefore refused to take the class.

Allegation 2

38 The respondent did not tell the applicant that it was the respondent's policy that employees could not send letters to the Minister and the applicant could not recall reviewing the applicant's policy documents emailed to him on 13 September 2011. After the Minister returned his correspondence to him he did not communicate further with the Minister. The applicant maintained that the email he sent to the Minister arose out of his frustration about health and safety issues not being dealt with. He initially discussed these issues with Mr Dickie and Mr Harding and then Mr Dashwood but his concerns were not being dealt with. He sent the email to the Minister because he did not receive a timely response from management at Midland campus and he was frustrated that issues were not being dealt with by management, particularly the issue of brick dust.

Allegation 3

39 When the applicant filled out his Certificate IV qualification upgrade application there were no guidelines about how his mentor could assist him with this application. He did not attend a workshop on 17 May 2012 to assist lecturers to obtain the Certificate IV qualification upgrade but he understood Mr Coppolina shared a model answer with other lecturers at this workshop and after the workshop a facilitator offered him a copy of that answer. As it was common practice and permissible to use material produced in collaboration with other lecturers he submitted Mr Coppolina's material with his application for the Certificate IV qualification upgrade and he made no attempt to deceive and the alleged plagiarism was not deliberate.

40 The applicant maintained that he submitted work incorrectly for his Certificate IV application by mistake. The applicant stated that he used the student check list as his main source for the requirements of this application, instead of the evidence guide, and the student checklist was ambiguous and could have influenced why he included someone else's work in his application. The signature on Mr Taylor's work submitted with his Certificate IV application could have been his own and he stated that he was under stress and pressure at the time and he made an obvious mistake which he was not given any opportunity to correct. The applicant stated that Mr Taylor's work was sourced from a student file and he apologised to Mr Coppolina when he rang him about using his work.

Allegation 4

41 The applicant denied being aggressive and confrontational towards Mr Dickie. On his first day at Midland campus Mr Dickie raised a discrepancy with him about a student's project assessment and he had a different view about the marking of this section of work. The applicant expressed his view but Mr Dickie kept questioning him about it and he continued to disagree with Mr Dickie. Later that day three other lecturers, Mr Harding, Mr Bullock and Mr Dashwood spoke to him separately about this issue and he felt he was being bullied about such a minor point. After working at Midland campus for a couple of months he spoke to Mr Dickie and Mr Harding to assist them with the bricklaying section's workload and he discussed occupational health and safety failures at Midland campus with them as well as the delivery and assessment of classes. He was concerned that Mr Dickie was overworked particularly given that he was an inexperienced lecturer. After raising these issues with Mr Harding and Mr Dickie he then raised them with management.

42 When he tried to assist Mr Dickie about the correct installation procedure of weep holes Mr Dickie refused his assistance.

43 The applicant maintained that he endeavoured to assist Mr Dickie and he raised his concerns about his workload with both Mr Dickie and Mr Harding and then with more senior management. He did not single Mr Dickie out or treat him any differently to other lecturers nor did he intend to put him down. In one instance Mr Dickie swore at him and on another occasion he nagged him so much about an issue he asked him to put it in writing.

44 The applicant could not recall telling Mr Dickie to 'f**k off' at any point even though Mr Dickie told him to 'f**k off' in front of students. Because the applicant worked part time he did not have time to be the coordinator of the international student class even though he was a more experienced lecturer than Mr Dickie. The applicant maintained there were problems with the international student course and he wanted to find solutions and his behaviour was not an attempt to undermine Mr Dickie. The applicant said he did not ignore Mr Dickie when he tried to approach him but he may have been withdrawn and he conceded that he may have refused to discuss class hand overs with Mr Dickie. The applicant denied that he was aggressive towards Mr Dickie.

45 The applicant denied that the email he sent to the Minister on 7 August 2012 attacked Mr Dickie's integrity and professionalism and was a form of bullying and he said it was never his intention to attack Mr Dickie by sending this letter. This email was not intended to be negative towards Mr Dickie but was an attempt to address duty of care issues, management failures and occupational, health and safety issues. The letters attached to the email only made two references to Mr Dickie - one about him not dealing with a problem properly and another about Mr Dickie being too inexperienced to develop delivery and assessment programmes. He gave copies of the email and attachments to people who he thought ought to know about the matters he was raising.

46 The applicant stated that he did not show the letter dated 31 July 2012 that he sent to the Minister to Mr Dickie before he sent it to Mr Dashwood and the Minister. The applicant did not view this letter as being critical of Mr Dickie.

47 The applicant believed Mr Dickie was a pawn in a big picture. Midland campus was under staffed and Mr Dickie was doing the job of three or four other lecturers and his correspondence was designed to assist him. He also assisted Mr Dickie in other ways by modifying the handover book and he discussed resources available to Mr Dickie. The applicant also spent time with Mr Dickie and students to give them general assistance. When Mr Dickie was conducting the class he believed it was appropriate at times to tell Mr Dickie how to do things differently in front of students in order to give students a choice and if he undermined Mr Dickie at this time it was not intentional. The applicant believed that his view about how to do weep holes

in bricks was correct but Mr Dickie did not accept his position. The applicant endeavoured to provide a united approach in front of students with Mr Dickie about this issue and if Mr Dickie had become agitated or upset he would have left the class. The applicant agreed that he did not obtain additional resources from Balga campus to give to Mr Dickie.

48 The applicant was unhappy about being transferred from Balga campus to Midland campus and he complained about it in correspondence to the respondent.

Submissions

Applicant

49 The applicant submits that his behaviour relied on by the respondent to terminate him does not warrant termination. The altercation with Ms John at its highest was minor. Sending the email to the Minister was a minor breach of the respondent's policy and the applicant only sent it because he had legitimate concerns about what was occurring at his work place and as he had no response to his concerns he sought to escalate these issues. The applicant included the work of others in his Certificate IV application by mistake and he was unaware who his mentor was to assist him to complete this application. Furthermore he was not given the opportunity to resubmit his application. The conflict with Mr Dickie was exaggerated. It was a two-way situation and the applicant did not bully Mr Dickie.

50 The statements made by Mr Rodin and Mr Campbell about the applicant's conduct towards Ms John were only made after the applicant complained about being bullied by Ms John and Ms John then made a complaint claiming she had been bullied by the applicant. Mr Rodin confirmed to the investigator who reviewed these complaints that he was asked to provide a summary of Ms Johns' interactions with the applicant on 11 May 2012. Mr Campbell also told Mr Burgess when he asked if he wrote the summary of his own volition that there was 'general discussion' about this at the time. This was a situation where two persons had a heated discussion and the applicant was being 'played' by Mr Campbell and Mr Taylor and he was frustrated.

51 The letter written by the applicant dated 31 July 2012 was about management failings and the applicant bore no ill-will towards Mr Dickie. The applicant's statement in this letter that Mr Dickie is an inexperienced lecturer is a matter of fact and Mr Dickie was being used as a management pawn to bring allegations against the applicant of bullying and harassment. There were communication difficulties between the applicant and Mr Dickie that went both ways but the applicant did not bully Mr Dickie. There is also a lack of detail in the respondent's evidence about claims that the applicant bullied and harassed Mr Dickie. It was a two-way situation and was normal rough and tumble. The applicant did not single out Mr Dickie as he did not treat him any differently than he treated other people.

52 The respondent did not conduct any meaningful mediation process to assist with the conflict between the applicant and Mr Dickie. The applicant attended four meetings only two of which were with Mr Dickie and the applicant was not given counselling with respect to his behaviour. Even if the applicant was rude and abrupt this does not mean that he bullied and harassed Mr Dickie and Mr Dickie conceded in his evidence that the applicant told him that the letter he sent on 31 July 2012 was not an attempt to get at Mr Dickie. Previous warnings given to the applicant only constituted a reprimand and the threatened action was not followed up by the respondent.

53 The applicant lacked efficient supervision to assist him to complete his Certificate IV application.

Respondent

54 The respondent argues that the applicant misconducted himself sufficient to warrant termination and previous disciplinary warnings given to the applicant should be given weight if they are to be taken into account.

55 The applicant was not a team player, which is inherent in the role of a lecturer, nor did he show respect for the 'chain of command' and his behaviour disqualified him from continuing to work as a lecturer. This was illustrated in the applicant's poor conduct towards Ms John and Mr Dickie and the manner in which he lodged his Certificate IV application. It was inappropriate for the applicant to continue to be employed in his role as a lecturer and he had received previous warnings.

56 It was never put to Ms John that she called the applicant a 'bullshitter' during their discussion about taking Mr Bowen's class and the applicant was disrespectful towards her in her role as manager and Ms John was not the aggressor or a bully.

57 The applicant embarked on a nasty and prolonged course of conduct against Mr Dickie and it was not a two-way situation. The applicant was undermining, critical and aggressive towards Mr Dickie. On two occasions Mr Dickie responded to the applicant but this was after the applicant has undermined him by sending the letter dated 31 July 2012 and the other instance was in self-defence when he was undermined by the applicant in front of students. There was no support for the applicant's claim that Mr Dickie was the aggressor and the weight of evidence is against him in this regard. Mr Dashwood and Ms Murphy gave evidence about Mr Dickie's confidence declining as a result of the applicant's behaviour. The applicant's letter dated 31 July 2012 was sent to the Minister and provided to management and the applicant ignored the impact on Mr Dickie of sending this letter which directly criticised him.

58 The applicant knew it was wrong to use the documents of other lecturers when submitting his Certificate IV application and his excuses for doing so were vague and implausible.

59 It is impracticable to reinstate the applicant as there are no jobs at Midland, Balga and Thornlie campuses for bricklaying lecturers and there is no evidence that the applicant is qualified to be reemployed in another position with the respondent. In any event the relationship between the applicant and the respondent has broken down.

Consideration

60 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in ***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch*** (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as

to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (see ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 and ***Byrne v Australian Airlines*** (1995) 61 IR 32). In ***Shire of Esperance v Mouritz***, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

61 As this dismissal was summary the onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (see ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677, 679). The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree (***Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors*** (1995) 75 WAIG 813, 919). In most cases the employee should be given an opportunity to defend allegations made against them.

62 The issue of misconduct justifying summary termination with respect to duties required of employers and employees was discussed by Sharkey P in ***Parrish Smith v Tungsten Group Pty Ltd*** (2004) 84 WAIG 1311. Sharkey P stated as follows:

> The test has been expressed in a number of cases and followed in many more (but see ***Laws v London Chronicle (Indicator Newspapers) Ltd*** [1959] 2All ER 285 at 287 and ***North v Television Corporation Ltd*** (1976) 11 ALR 599 at 609 per Smithers and Evatt JJ (FC FC)). Their Honours said in that case at page 609, quoting from Lord Evershed MR in ***Laws v London Chronicle (Indicator Newspapers) Ltd*** (op cit):-
>
> > '… since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. … I … think … that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and … therefore … the disobedience must at least have the quality that it is 'wilful'; it does (in other words) connote a deliberate flouting of the essential contractual conditions.'
>
> The well known dicta of Dixon and McTiernan JJ in ***Blyth Chemicals v Bushnell*** [1933] 49 CLR 66 at 81-82 is of assistance. Their Honours said:-
>
> > 'Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal … But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises.
>
> (See also per Kirby J in ***Concut Pty Ltd v Worrell*** (2000) 176 ALR 693 at 706 paragraph 51) [78]-[80].

63 In ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224, 229 the Full Bench of the South Australian Commission stated that the following factors were relevant when dealing with a dismissal based upon alleged misconduct. The employer will satisfy the evidentiary onus on it to demonstrate that before dismissing the employee it conducted a full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances. The employer must also give the employee every reasonable opportunity and sufficient time to answer all allegations. If the employer then believes and has reasonable grounds for deciding that the employee was guilty of the misconduct alleged and after taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, it may decide whether such misconduct justifies dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

64 I have considered all of the evidence and carefully observed each witness. Where there is any inconsistency in the evidence given by the applicant and the witnesses for the respondent I prefer the evidence of the respondent's witnesses as I do not have confidence in the veracity of the evidence given by the applicant. In my view the applicant was unconvincing and implausible at times when giving evidence. For example, the applicant was evasive when attempting to explain his reason for including the work of other lecturers in his application for the Certificate IV qualification upgrade. The weight of evidence was also against the applicant at times especially with respect to his interaction with Ms John on 11 May 2012 and his conduct towards Mr Dickie. In contrast, I find that the evidence given by the witnesses for the respondent was plausible, considered and where relevant consistent. The evidence they gave, except for Mr Dickie, was not broken down during cross-examination. Even though Mr Dickie admitted during cross-examination that he called the applicant a liar and he stated that he may have sworn at him in front of students, contrary to his evidence in chief, I find that this evidence did not undermine the other evidence he gave. I have reached this conclusion on the basis that in my view Mr Dickie gave his evidence to the best of his recollection and the remainder of his evidence was consistent with evidence given by a number of other witnesses.

Allegation 1

65 Given the weight of evidence with respect to what occurred during this incident and my views on witness credit, I find that the applicant refused a reasonable request by his manager, Ms John, to take Mr Bowen's class. The applicant did so even though he conceded that he had to make up four hours of lecturing. I find that during this incident the applicant behaved in an aggressive, rude and inappropriate manner towards Ms John, which could be regarded as bullying, and that his behaviour in this regard was not in response to any inappropriate or unacceptable behaviour on the part of Ms John. I find that as the applicant behaved inappropriately towards Ms John this allegation is made out.

Allegation 2

66 The applicant conceded that he sent the email to the Minister. I accept that when he did so he was unaware that this was contrary to the Polytechnic West Communication Protocol policy and Administrative Instruction 102 - Official Communications. In my view this is not surprising given the applicant did not read the respondent's policy which was sent to him on 13 September 2011. This allegation is not made out.

67 However, in my view that is not the end of the matter with respect to the events relevant to this allegation. Even though I have found that the allegation put to the applicant about his email to the Minister has not been made out I find that the applicant misconducted himself when he sent the email and attached correspondence to the Minister unfairly criticising Mr Dickie and his managers, in particular Ms Murphy and Mr Dashwood, and demanding that the Minister act on his concerns within seven days.

68 The applicant threatened the Minister by stating in his email that if satisfactory assurances were not received from him in relation to the issues raised in his email and attachments within seven days, he may raise these matters in the public domain. I find that in doing so the applicant behaved in a manner which was inconsistent with his obligations as an employee of the respondent. An employee has a contractual obligation and duty to act in good faith towards his or her employer and I find that requiring the Minister who oversees his employer to respond to his concerns about a colleague and his managers in a threatening manner is inconsistent with this obligation and constituted misconduct. Furthermore, if the applicant genuinely wanted to resolve his workplace concerns he should have raised matters about colleagues and his managers directly with the respondent's CEO instead of the Minister, if there was a lack of response from his managers about his concerns.

69 In my view the applicant acted in an unfair, unacceptable and inappropriate manner towards Mr Dickie when he complained to the Minister about him and escalated his accusations and claims about Mr Dickie without Mr Dickie being given any opportunity to respond to a number of serious allegations. In the circumstances I find that the applicant's conduct constituted a breach of the requirement on him to act in good faith as an employee. In the applicant's letter to Mr Dashwood he attacked Mr Dickie's capacity to lecture international students, he claimed that Mr Dickie was not providing a proper learning environment for his students and he claimed that he was incapable of properly assessing students. The applicant also stated that the international student course, which was being overseen by Mr Dickie, was failing its students. In his letter to Ms Murphy he implied that Mr Dickie was committing fraud as he was incapable of properly assessing students. All of these concerns were raised with other lecturers and his managers and were not communicated to Mr Dickie before he raised these matters with the Minister.

70 I find that when the applicant complained to the Minister about Mr Dickie and Mr Dashwood and raised a range of workplace issues without his managers, Mr Dashwood and Ms Murphy, having an adequate opportunity to respond he behaved in a manner that was destructive of the confidence and trust required between an employee and employer. The applicant's managers had insufficient opportunity to properly respond to the applicant's concerns prior to the applicant sending his email to the Minister and threatening to raise these issues in the public domain if not responded to within seven days, as the email was sent to the Minister on 7 August 2012, only five working days after the applicant complained about a range of issues in writing to Mr Dashwood and only three working days after he wrote to Ms Murphy seeking that action be taken on these issues. I find that this timeframe was clearly insufficient for the applicant's managers to properly respond. The applicant's direct manager Mr Dashwood was also not given an opportunity to respond to the applicant's claim that he was unprofessional prior to the applicant raising this matter with the Minister.

Allegation 3

71 The applicant claimed that it was an oversight when he included the work of other lecturers in his Certificate IV qualification upgrade application. I find that as it was clear that the inclusion of work undertaken by other lecturers in the applicant's application to upgrade his qualifications was transparent that the applicant did not do this deliberately. Furthermore he was not given any opportunity to resubmit his application when this issue was identified, which was available to other lecturers involved in this process. This allegation is therefore not made out.

Allegation 4

72 I find that the applicant's behaviour and conduct towards Mr Dickie was unprofessional, it was unprovoked and his behaviour constituted bullying. I find that the applicant's attitude towards Mr Dickie demonstrated that he was incapable of working effectively within a team environment which is a fundamental requirement of a collaborative teaching and learning process. In my view the applicant's misconduct in this regard alone rendered him unfit to remain employed by the respondent in his role as a lecturer.

73 Given my views on witness credit and the weight of evidence against the applicant with respect to his interactions with Mr Dickie I find that the applicant refused to act in a professional and collegiate manner towards Mr Dickie when undertaking duties associated with lecturing the international student class which is a fundamental requirement of lecturers sharing a class. I find that the applicant swore at Mr Dickie, both directly or indirectly without good cause on a number of occasions, he undermined Mr Dickie in front of his students, he ignored Mr Dickie when he endeavoured to raise pedagogic issues with him and he inappropriately required Mr Dickie to raise day to day work related matters with him in writing using the handover book. I also find that the applicant misconducted himself when he unfairly and inappropriately criticised Mr Dickie to the Minister, his managers Mr Dashwood and Ms Murphy and other lecturers, and he threatened to make these criticisms public if the Minister did not deal with his complaints within seven days of the date of sending his email.

74 I reject the applicant's claim that the applicant was responding to Mr Dickie's aggressive behaviour towards him when he was alleged to have treated him poorly as the weight of evidence was against the applicant in this regard. I also find that if Mr Dickie swore at the applicant and called the applicant a liar this was as a result of being provoked by the applicant over a lengthy period. I reject the applicant's claim that he was endeavouring to assist Mr Dickie when he raised issues about him

and his role as the lecturer of international students in his correspondence. On a fair reading of the applicant's correspondence to the Minister it is clear that he was being highly critical of Mr Dickie.

75 I find that the applicant's complaint that the respondent did not mediate problems he had with Mr Dickie has no substance. The respondent's managers organised at least four meetings to deal with the applicant's negative attitude and some of these meetings specifically related to his inappropriate conduct towards Mr Dickie. During at least one of these meetings the applicant gave an undertaking to be more responsive and positive towards Mr Dickie however the applicant's inappropriate and aggressive conduct towards Mr Dickie continued.

Conclusion

76 I find that the respondent has demonstrated that it had sufficient reason to terminate the applicant for misconduct and bullying given the applicant's behaviour with respect to Allegations 1, 2 and 4.

77 I find that the applicant was afforded procedural fairness throughout the process which resulted in his termination and that the respondent conducted a number of investigations into the applicant's behaviour. The respondent arranged for investigations to be conducted into Ms John's complaint against the applicant and the applicant's complaint against Ms John prior to the applicant being terminated and the applicant participated in these investigations. The respondent organised investigations to be undertaken into most of the events surrounding the 10 allegations put to the applicant and the applicant participated in these investigations. The applicant was given the opportunity to respond to the 10 allegations which were put to put to him on 30 August 2012, five of which were relied upon by the respondent at the hearing to demonstrate that the applicant misconducted himself. The applicant's responses to the 10 allegations and the investigation reports were considered by Mr Collyer prior to him deciding that the applicant should be terminated. The applicant also had the opportunity to respond to the respondent's view that he be terminated prior to this being effected however he chose not to do so.

78 I note the applicant's lengthy service with the respondent, however, given the extent and nature of his misconduct whilst working with the respondent and when taking into account s 26(1)(a) of the Act considerations and equity, good conscience and the substantial merits I find that the applicant has not demonstrated that he was unfairly terminated or that he was not given a fair go all round (see ***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch***).

79 An order will now issue dismissing this application.

2013 WAIRC 01017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENNIS HOWE
	APPLICANT
	-v-
	GOVERNING COUNCIL OF POLYTECHNIC WEST
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 2 DECEMBER 2013
FILE NO/S	U 265 OF 2012
CITATION NO.	2013 WAIRC 01017

Result	Dismissed
Representation	
Applicant	Mr S Millman (of counsel) and Mr D Stojanoski (of counsel)
Respondent	Mr D Matthews (of counsel) and Ms H Richardson (of counsel)

Order

HAVING HEARD Mr S Millman and Mr D Stojanoski of counsel on behalf of the applicant and Mr D Matthews and Ms H Richardson of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed.

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

2013 WAIRC 00990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE MCALEER
	APPLICANT
	-v-
	MINISTER OF HEALTH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 21 NOVEMBER 2013
FILE NO/S	U 118 OF 2013
CITATION NO.	2013 WAIRC 00990

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 19 November 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00992
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	WEDNESDAY, 13 NOVEMBER 2013
DELIVERED	**:**	FRIDAY, 22 NOVEMBER 2013
FILE NO.	**:**	U 132 OF 2013
BETWEEN	**:**	AIDAN MC DERMOTT
		Applicant
		AND
		BENEDICTINE COMMUNITY OF NEW NORCIA
		Respondent

Reasons for Decision

(as given at the conclusion of the hearing on 13 November 2013 and edited by the Commission)

1 This matter has been listed for mention only in order for Mr McDermott to inform the Commission what steps he has taken if he wishes to continue with this application. I note there is no appearance by or on behalf of Mr McDermott at this hearing. My associate informs me that she has called his name in the public area of the Commission however there is no appearance by or on behalf of Mr McDermott. There is no appearance by the respondent, however the respondent was advised by the Commission that there was no obligation on the respondent to attend.

2 This matter has been set down because of a lack of any appreciable action on the part of Mr McDermott. He was informed in the letter attached to the Notice of Hearing:

> If you do not appear at the hearing, or do not contact me before the date of the hearing, it will be open for the Commission to conclude you no longer intend to pursue your claim and the Commission may strike out your claim for want of prosecution.

3 The circumstances of this matter are as follows: on 16 August 2013 Mr McDermott lodged a claim in the Commission alleging unfair dismissal and cited as his former employer the Benedictine Community of New Norcia. A Notice of Answer was filed in the name of The Benedictine Community of New Norcia (Inc) and the Notice of Answer, which was completed by a firm of solicitors in Melbourne, states that this is the correct identity of Mr McDermott's former employer.

4 The Notice of Answer further states that the activities of The Benedictine Community of New Norcia (Inc) are trading activities and therefore, not only is the former employer an incorporated body; it is a trading corporation. It is therefore a national system employer and the WA Industrial Relations Commission does not have the jurisdiction to deal with Mr McDermott's claim. Correspondence from the firm of solicitors indicated that notwithstanding the Notice of Answer, the respondent was prepared to participate in conciliation.

5 The Commission has endeavoured to set the matter down for conciliation. On 4 October 2013 Mr McDermott sent an email to my associate, with a copy to the respondent, stating that he wished for the listing of any matter – that is, the conciliation – to be deferred as he will be seeking legal advice and representation. In response to a request from my associate, he advised that he sought a deferment for a period of up to one month. Following consultation between the Commission and the firm of solicitors in Melbourne, it became apparent that an adjournment of one month was not opposed, and accordingly Mr McDermott was advised that the listing of the matter for a conciliation conference would be deferred for one month.

6 On 30 October 2013, my associate contacted the parties to endeavour to secure a date for a conciliation conference in the week after 18 November 2013. However, although the respondent's availability was swiftly communicated to us, Mr McDermott did not respond to the Commission's subsequent email of 1 November 2013.

7 Accordingly, at my direction, my associate wrote the letter on 6 November 2013 to Mr McDermott, to which I have previously referred, stating that the Commission has not heard from Mr McDermott since 10 October 2013, and that Mr McDermott has not replied to emails of 30 October and 1 November 2013 requesting his availability for a conciliation conference.

8 The matter is complicated by the following: when Mr McDermott filled out his Notice of Application, the contact details he provided were only a post office box in New Norcia and an email address. The mail to the post office box in New Norcia has been returned to us. Therefore the only means of communicating with Mr McDermott has been the email address. It is a United Kingdom email address, by the title, and the mail returned suggests that Mr McDermott is no longer in Western Australia. As he has not replied generally to the Commission's emails, he has left the impression that he has not been as active in pursuing this matter as he ought to be.

9 The letter of 6 November 2013 was sent to the email address and that did prompt a reply on the same day. The reply stated as follows:

> I have been in contact with the legal firm Maurice Blackburn who have agreed to represent me in the matter. I have sent on the relevant information and also your contact details. I sent on the last email which outlined the dates available by the respondent. I will pass on this email to their office in Sydney.

10 A reply to him from my associate on 7 November 2013 asking for the contact details of Maurice Blackburn was unanswered. I also note for the record that no correspondence has been received from Maurice Blackburn entering an appearance on behalf of Mr McDermott even though, according to Mr McDermott's email, he has forwarded to them the Notice of Hearing in this matter for today (13 November 2013).

11 In the circumstances, where there has been no appearance and also where it appears quite likely because of the Notice of Answer that the Commission does not have the jurisdiction to deal with the matter, it would not come as any surprise if Mr McDermott did not intend to pursue this matter. Nevertheless, it is a matter for him to advise us if he is no longer pursuing the matter, and he has not done so. Neither has he taken the steps within the one month adjournment period that was granted to him to indicate that he intends to pursue the matter.

12 I reach the preliminary view that an Order ought to issue discontinuing this matter for want of prosecution. Before doing so, I will allow a period of five days from today, and if nothing is heard from either Mr McDermott or the firm of solicitors that he refers to in his email within that time, then the Order will issue together with these reasons for decision. Therefore, the hearing is adjourned on that basis and an Order will issue after five days if nothing further is heard.

2013 WAIRC 00993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AIDAN MC DERMOTT
	APPLICANT
	-v-
	BENEDICTINE COMMUNITY OF NEW NORCIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 22 NOVEMBER 2013
FILE NO/S	U 132 OF 2013
CITATION NO.	2013 WAIRC 00993

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

Order

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

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

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

2013 WAIRC 01009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRAVIS BRADLEY MCELWAIN
	APPLICANT
	-v-
	BEDFORD HARBOUR ENGINEERING
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 28 NOVEMBER 2013
FILE NO/S	B 179 OF 2013
CITATION NO.	2013 WAIRC 01009

Result	Dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance required

Order

WHEREAS an online application was received on 30 October 2013 claiming an outstanding contractual entitlement;

AND WHEREAS there was no accompanying filing fee;

AND WHEREAS there was no response from the applicant after correspondence was sent on 30 October and 6 and 13 November 2013 in relation to payment of the filing fee;

AND WHEREAS a Notice of Hearing for 21 November 2013 was sent on 15 November 2013 listing this matter for mention only to show cause as to why the application should not be dismissed;

AND WHEREAS at the hearing on 21 November 2013 there was no appearance on behalf of or by the applicant;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a) of the *Industrial Relations Act 1979*, hereby order –

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

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

2013 WAIRC 00869

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH MYLES MCNALLY
	APPLICANT
	-v-
	SPG CONSULTING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 16 OCTOBER 2013
FILE NO.	B 122 OF 2013
CITATION NO.	2013 WAIRC 00869

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr M Hager of counsel

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr M Hager 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 issue of whether the applicant is an employee or an independent contractor be heard as a preliminary issue.

(2) THAT the applicant file and serve its outline of submissions in relation to jurisdiction no later than 14 days before the date of hearing.

(3) THAT the respondent file and serve its outline of submissions in relation to jurisdiction no later than seven days prior to the date of hearing.

(4) THAT the parties provide any discovery informally by list by 31 October 2013.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 00996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPH MYLES MCNALLY
	APPLICANT
	-v-
	SPG CONSULTING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 NOVEMBER 2013
FILE NO/S	B 122 OF 2013
CITATION NO.	2013 WAIRC 00996

Result	Application discontinued by leave
Representation	
Applicant	Mr K Trainer
Respondent	Mr L Hager

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,
Commissioner.

[L.S.]

2013 WAIRC 00982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MUHAMMED FAHEEM NOOR
	APPLICANT
	-v-
	ELIZABETH VICKRIDGE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 18 NOVEMBER 2013
FILE NO/S	B 159 OF 2013
CITATION NO.	2013 WAIRC 00982

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

Order

WHEREAS an online application was received on 30 September 2013 claiming outstanding contractual entitlement;

AND WHEREAS there was no accompanying filing fee;

AND WHEREAS there was no response from the applicant after correspondence was sent on 1, 8 and 15 October 2013 in relation to payment of the filing fee;

AND WHEREAS a Notice of Hearing was sent on 17 October 2013 listing this matter for mention only for 29 October 2013;

AND WHEREAS on 17 October 2013 the applicant made contact with the Commission in relation to the hearing;

AND WHEREAS the Commission attempted to make contact with the applicant on 28 October 2013;

AND WHEREAS there was no response from the applicant;

AND WHEREAS at the hearing on 29 October 2013 there was no appearance on behalf of or by the applicant;

AND WHEREAS a letter was sent to the applicant on 30 October 2013 advising that if he did not contact the Commission by 13 November 2013 to advise the filing fee has been paid, the application will be dismissed for want of prosecution;

AND WHEREAS there was no contact from the applicant;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a) of the *Industrial Relations Act 1979*, hereby order –

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

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

2013 WAIRC 00995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HAZEL JENNIFER REID
	APPLICANT
	-v-
	AMANDA TRACEY WILSON AND MICHAEL JOHN GALLAGHER TRADING AS A MAIZE HOMEWARES
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 25 NOVEMBER 2013
FILE NO/S	B 158 OF 2013
CITATION NO.	2013 WAIRC 00995

Result	Name of respondent amended
Representation	
Applicant	Mr S Edwards as agent
Respondent	Mr R Gifford as agent

Order

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

WHEREAS on the 29th day of October 2013 the applicant filed an application to amend the name of the respondent; and

WHEREAS at a conference convened on the 12th day of November 2013 the respondent agreed to the name of the respondent being amended to "Merchants of Swanbourne Pty Ltd, as trustee for The Ample Homewares Trust trading as Merchants of Swanbourne";

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

THAT the name of the respondent in the application be amended to "Merchants of Swanbourne Pty Ltd, as trustee for The Ample Homewares Trust trading as Merchants of Swanbourne ".

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

2013 WAIRC 01041

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HAZEL JENNIFER REID
	APPLICANT
	-v-
	MERCHANTS OF SWANBOURNE PTY LTD, AS TRUSTEE FOR THE AMPLE HOMEWARES TRUST TRADING AS MERCHANTS OF SWANBOURNE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 3 DECEMBER 2013
FILE NO/S	B 158 OF 2013
CITATION NO.	2013 WAIRC 01041

Result	Application dismissed

Order

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

WHEREAS on the 12th day of November 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 28th day of November 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and hereby dismissed.

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

2013 WAIRC 01042

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HAZEL JENNIFER REID
	APPLICANT
	-v-
	AMANDA TRACEY WILSON AND MICHAEL JOHN GALLAGHER TRADING AS A MAIZE HOMEWARES
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 3 DECEMBER 2013
FILE NO/S	U 158 OF 2013
CITATION NO.	2013 WAIRC 01042

Result Application dismissed

Order

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

WHEREAS on the 28th day of November 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and hereby dismissed.

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

2013 WAIRC 01010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL SENEQUE
	APPLICANT
	-v-
	GARY MILLER
	GM MICROTUNNELLING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 29 NOVEMBER 2013
FILE NO/S	U 98 OF 2013
CITATION NO.	2013 WAIRC 01010

Result Application dismissed

Order

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

WHEREAS the Commission set the matter down for hearing for mention on the 27th day of November 2013; and

WHEREAS at the hearing there was no appearance for the applicant;

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

THAT this application be, and is hereby dismissed.

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

2013 WAIRC 00758

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER WHITE
	APPLICANT
	-v-
	DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 23 AUGUST 2013
FILE NO/S	B 77 OF 2013
CITATION NO.	2013 WAIRC 00758

Result	Order issued
Representation	
Applicant	Mr M Cox of counsel
Respondent	Mr D Matthews of counsel

Order

HAVING HEARD Mr M Cox 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 name of the respondent in the notice of application be amended from Department of Mines and Petroleum to Director General, Department of Mines and Petroleum.

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

2013 WAIRC 00798

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER WHITE
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 10 SEPTEMBER 2013
FILE NO/S	B 77 OF 2013
CITATION NO.	2013 WAIRC 00798

Result	Order issued
Representation	
Applicant	Mr M Cox of counsel
Respondent	Mr D Matthews of counsel

Order

HAVING heard Mr M Cox 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 –

(1) THAT the hearing date of 10 September 2013 be and is hereby vacated.

(2) THAT the matter be relisted for a half day hearing on a date to be fixed.

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

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

2013 WAIRC 00997

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER WHITE
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 NOVEMBER 2013
FILE NO/S	B 77 OF 2013
CITATION NO.	2013 WAIRC 00997

Result	Application discontinued by leave
Representation	
Applicant	Mr M Cox of counsel
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 00989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE YIP
	APPLICANT
	-v-
	GREG MAHNEY, CEO, ADVOCARE INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 NOVEMBER 2013
FILE NO/S	U 169 OF 2013
CITATION NO.	2013 WAIRC 00989

Result	Application discontinued
Representation	
Applicant	Mrs L Yip
Respondent	Mr G Mahney

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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Bryan Robert Keay	Gavilon Grain Australia Pty Ltd	B 163/2013	Commissioner S J Kenner	Discontinued
Derek Vause	Leslie Hansen and Pauline Hansen Trading as Hansen Earthmoving	U 139/2013	Commissioner S J Kenner	Discontinued
Jacqueline Haydock	Lower Great Southern Family Support Association (Inc)	U 123/2013	Chief Commissioner A R Beech	Discontinued
Jaimie Robson	Amber Vost Pure Style Hair Creations	U 145/2013	Commissioner S J Kenner	Discontinued
Linda Stott	Archipelago Restaurant	U 147/2013	Chief Commissioner A R Beech	Discontinued
Mr Damien Clarke	Advance Formwork Pty Ltd	B 101/2013	Chief Commissioner A R Beech	Discontinued
Robyn Leigh Mitchell	Rayleen and Neil Parsons Trust (trading as Rock Inne Tavern)	B 131/2013	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters referred—

2013 WAIRC 01055

CONFERENCE REFERRED RE DISPUTE REGARDING CLAIM FOR PAYMENT OF AN ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES

APPLICANT

-v-

CITY OF ALBANY

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 5 DECEMBER 2013

FILE NO/S CR 31 OF 2012

CITATION NO. 2013 WAIRC 01055

Result Discontinued

Representation

Applicant Ms D Butler and later Ms K Davis

Respondent Ms S Dale and later Mr J Lord (as agent)

Order

This is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979.*

The Commission listed the matter for hearing and determination on 11 July 2013.

On 18 June 2013 the Commission was advised that the parties had reached an in principle agreement to settle the matter and the hearing was vacated.

The applicant filed a Notice of Withdrawal or Discontinuance form on 18 July 2013.

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

THAT the application be, and is hereby, discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 60/2010	30/12/2010 11/10/2011 4/11/2011 23/11/2011 20/12/2011 1/02/2012	Dispute re introduction of Business Rules.	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)	Scott A/SC	PSAC 12/2013	19/04/2013	Dispute re payment of higher duties	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Agriculture and Food, Government of Western Australia	Scott A/SC	PSAC 15/2012	19/07/2012 30/07/2012	Dispute re failure to consult re changes of clauses of the Public Service Award	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Education	Scott A/SC	PSAC 33/2013	19/09/2013 20/09/2013 23/09/2013 27/09/2013 27/09/2013	Dispute re employment issues	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Department of Indigenous Affairs	Scott A/SC	PSAC 13/2013	6/05/2013 7/05/2013	Dispute re return to work	Concluded
The State School Teachers Union of W.A. (Incorporated)	Director General of the Department of Education	Scott A/SC	C 214/2013	6/08/2013	Dispute re documented education plan	Withdrawn
United Voice WA	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	Harrison C	C 202/2013	30/05/2013	Dispute re releasing union delegates to attend proceedings	Discontinued
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Coolgardie	Harrison C	C 21/2011	15/06/2011 2/08/2011	Dispute re alleged misconduct of union member	Consent
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Coolgardie	Harrison C	C 40/2011	21/06/2011 5/07/2011 2/08/2011	Dispute re alleged impending termination of union member	Consent
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Coolgardie	Harrison C	C 22/2011	15/06/2011 2/08/2011	Dispute re payment of union member	Consent
Western Australian Prison Officers' Union of Workers	The Minister for Corrective Services	Kenner C	C 226/2013	29/10/2013	Dispute re Long Service Leave	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 01016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIAM CHRISTOPHER PORTER
	APPLICANT
	-v-
	KWINANA PIZZA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 2 DECEMBER 2013
FILE NO/S	B 99 OF 2013
CITATION NO.	2013 WAIRC 01016

Result	Change of respondent's name
Representation	
Applicant	Mrs S Porter (as agent)
Respondent	Ms V Mountain (of counsel)

Order

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

AND WHEREAS on 21 November 2013 the applicant made application to change the respondent's name;

AND WHEREAS at the hearing held on 25 November 2013 the respondent agreed the respondent had been incorrectly named;

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

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

THAT the name Kwinana Pizza be deleted and Mr Cesare Violanti and Mrs Somsi Violanti trading as Kwinana Pizza be inserted in lieu thereof.

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

2013 WAIRC 01015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIAM CHRISTOPHER PORTER
	APPLICANT
	-v-
	KWINANA PIZZA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 2 DECEMBER 2013
FILE NO/S	U 99 OF 2013
CITATION NO.	2013 WAIRC 01015

Result	Change of respondent's name
Representation	
Applicant	Mrs S Porter (as agent)
Respondent	Ms V Mountain (of counsel)

Order

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

AND WHEREAS on 21 November 2013 the applicant made application to change the respondent's name;

AND WHEREAS at the hearing held on 25 November 2013 the respondent agreed the respondent had been incorrectly named;

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

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

THAT the name Kwinana Pizza be deleted and Mr Cesare Violanti and Mrs Somsi Violanti trading as Kwinana Pizza inserted in lieu thereof.

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

2013 WAIRC 00998

DISPUTE RE FUNDING CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 25 NOVEMBER 2013
FILE NO.	C 232 OF 2013
CITATION NO.	2013 WAIRC 00998

Result	Recommendation issued
Representation	
Applicant	Ms A Hamlin and Ms C Smith
Respondent	Mr M Hammond

Recommendation

WHEREAS this is an application made pursuant to section 44 of the *Industrial Relations Act 1979* (WA) by which the applicant seeks that the respondent agree to a paid meeting of the applicant with Aboriginal and Islander Education Officers (AIEOs) employed by the respondent to discuss the impact of funding and budgetary changes on their positions; and

WHEREAS on Monday, 25 November 2013 at around 11.20 am, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the applicant informed the Commission of:

1. The general meetings of members it had conducted in recent times and its concerns that due to cultural issues, AIEOs had been reluctant to speak and raise concerns particular to that group in the presence of others;
2. Its belief that in the circumstances of the changes being implemented by the respondent and the apparent lack of information being provided to its members;

that a meeting particular to this group was necessary and appropriate; and

WHEREAS the respondent objected to the paid meeting specific to AIEOs on the basis that:

1. It has already provided for a significant number of meetings of education officers generally, at significant cost; and
2. There was no evidence of any particular need for a meeting of AIEOs; and

WHEREAS having heard from the parties the Commission is of the view that given the cultural issues particular to this group of education officers and the significant changes occurring within the Department which has the potential to cause concern to this group of officers, in particular, which may not be able to be addressed in a general meeting of the Union, the Commission would recommend to the respondent that the respondent agree to provide such a paid meeting in the same way as it provides for paid meetings of employees generally;

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

1. THAT the respondent agree to provide:
   (a) A one hour paid meeting of Aboriginal and Islander Education Assistants with the Union to be held within seven days.
   (b) Reasonable travel time to attend such a meeting.
2. THAT the respondent provide a response to this recommendation to the applicant by midday on Tuesday, 26 November 2013.

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

2013 WAIRC 01050

DISPUTE RE ROSTERING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD
	APPLICANT
	-v-
	UNITED VOICE WA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 4 DECEMBER 2013
FILE NO/S	CR 224 OF 2013
CITATION NO.	2013 WAIRC 01050

Result	Order issued
Representation	
Applicant	Ms H Millar (of counsel)
Respondent	No appearance

Order

This application concerns a dispute the applicant has with the respondent and its members about the impact of a roster change. This matter was referred for hearing and determination on 22 October 2013 pursuant to s 44 of the *Industrial Relations Act 1979* (the Act).

Background

The applicant has amalgamated its warehouses at Royal Perth Hospital and Fremantle Hospital and established a single State Distribution Centre (the SDC). As a result 11 storepersons (the affected employees) are no longer required to work an afternoon shift and receive a shift allowance. Employees were notified around June 2013 of the change to working afternoon shifts and when the new day shift roster was implemented from September 2013 the applicant agreed to pay the affected employees an afternoon shift allowance for four weeks on a without prejudice basis.

At a conciliation conference between the parties no agreement was reached. The Commission issued the following interim orders on 18 October 2013 (Interim Order):

1. THAT the applicant pay the afternoon shift penalty rate to the affected employees for a period of four weeks in addition to the four week period already paid to these employees whilst they work their current day shift hours.
2. THAT at the end of this period the affected employees are to continue working in accordance with their new day shift roster until this matter is heard and determined.
3. THAT liberty to apply is granted to the parties to vary or rescind this order.

The schedule to the Memorandum of Matters Referred for Hearing and Determination is as follows:

1. The applicant is in dispute with the respondent concerning the implementation of a new roster. The applicant has amalgamated its warehouses at Royal Perth Hospital and Fremantle Hospital and established a single State Distribution Centre. As a result storepersons are no longer required to work an afternoon shift and will not be paid a shift allowance. The applicant is seeking the following:
   (a) An order that the respondent's members work in accordance with the attached roster (see Schedule 2).

(b) A declaration that no wage maintenance payment be made to the respondent's members due to the loss of afternoon shift penalties resulting from the roster change.

2. The respondent does not oppose its members working under the new roster. The respondent argues that if this roster is implemented wage maintenance should apply to its members who no longer work an afternoon shift. The respondent is seeking the following order:

That its members who no longer work an afternoon shift be paid their normal wages, including afternoon shift penalties, until the wage payable for working a day shift exceeds their current wage rates.

After this application was listed for hearing the respondent advised the Commission that it was no longer seeking that Order 2 issue and would not be making submissions or giving evidence at the hearing. It did not consent to Order 1(a) and Declaration (b) issuing nor did it oppose them being issued. It had no submission to make about the disposal of the Interim Order.

At the hearing the applicant sought leave to delete reference to a specific roster worked by day shift employees at the SDC as this was impractical and restrictive. The applicant confirmed that employees previously working afternoon shifts were now working day shifts at the SDC without an afternoon shift penalty being paid.

Consideration

As the affected employees were given adequate notice of the roster change and received eight weeks salary maintenance without working an afternoon shift the Commission is satisfied that the order (as amended) and declaration being sought by the applicant should issue.

Interim Order

The terms of this order have now been overtaken by the order and declaration issuing so it is appropriate that an order issue that the Interim Order be rescinded.

Correct name of respondent

It became clear during the hearing that the respondent had been incorrectly named. Given the Commission's powers under s 27(1) of the Act and having formed the view that it is appropriate for the respondent to be correctly named, I will issue an order that Ms Carolyn Smith, Secretary United Voice WA be deleted as the named respondent in this application and be substituted with United Voice WA (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)

NOW HAVING HEARD Ms H Millar (of counsel) on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, in particular s 26(1)(a) considerations, hereby –

1. ORDERS THAT the name of the respondent be deleted and that United Voice WA be substituted in lieu thereof.

2. ORDERS THAT the respondent's members working at the State Distribution Centre work in accordance with the day shift roster at this centre.

3. DECLARES THAT no further wage maintenance payments be made by the applicant to the respondent's members due to the loss of afternoon shift penalties resulting from the roster change.

4. ORDERS THAT the interim order that issued on 18 October 2013 be and is hereby rescinded.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Fire and Emergency Services Fleet and Equipment Services - Enterprise Bargaining Agreement 2013 AG 16/2013	18/11/2013	Department of Fire and Emergency Services of Western Australia and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (AMWU)	(Not applicable)	Commissioner S M Mayman	Agreement registered
Derbarl Yerrigan Health Services Enterprise Agreement 2013 AG 13/2013	19/11/2013	Derbarl Yerrigan Health Service Inc.	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Chief Commissioner A R Beech	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2013 AG 18/2013	28/11/2013	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch, Public Transport Authority of Western Australia	(Not applicable)	Commissioner S J Kenner	Agreement registered
VenuesWest General Agreement 2013 AG 15/2013	10/12/2013	Mr Robert Horstman (Department of Commerce) as Agent for WA Sports Centre Trust Trading as VenuesWest	Karene Walton, Director, Media Entertainment & Arts Alliance and Carolyn Smith, Secretary, United Voice, WA Branch	Commissioner S M Mayman	Agreement registered
Waikiki Private Hospital Registered Nurses Agreement 2013 AG 17/2013	10/12/2013	The Australian Nursing Federation, Industrial Union of Workers Perth	Dr Anthony Robinson trading as Waikiki Private Hospital	Commissioner S M Mayman	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2013 WAIRC 01054

DECLARATION PURSUANT TO SECTION 42H

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED (CSA)

APPLICANT

-v-

AUSTRALIAN HEALTH PRACTITIONER REGULATION AGENCY (AHPRA)

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 5 DECEMBER 2013

FILE NO/S APPL 10 OF 2013

CITATION NO. 2013 WAIRC 01054

Result Discontinued

Representation

Applicant Ms L Kennewell

Respondent Mr D Trindade (of counsel)

Order

This is an application for a declaration that bargaining has ended pursuant to s 42 H of the *Industrial Relations Act 1979.*

The Commission listed a conference on 24 May 2013 however as the applicant advised that it intended to discontinue the matter the conference was vacated on 23 May 2013.

On 29 May 2013 the applicant filed a Notice of Withdrawal or Discontinuance form.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00973

NOTICE OF APPEAL AGAINST THE DECISION OF THE RESPONDENT RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RON COUACAUD
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF PLANNING
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MS A HILL - BOARD MEMBER
DATE	FRIDAY, 15 NOVEMBER 2013
FILE NO	PSAB 14 OF 2013
CITATION NO.	2013 WAIRC 00973

Result	Application discontinued by leave
Representation	
Appellant	Ms R Consentino
Respondent	Mr R Andretich

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,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00979

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN BRENT MEWETT
	APPELLANT
	-v-
	DIRECTOR OF EDUCATION
	MS SHARYN O'NEILL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS D HOPKINSON - BOARD MEMBER
	MR K TRENT - BOARD MEMBER
DATE	MONDAY, 18 NOVEMBER 2013
FILE NO	PSAB 10 OF 2012
CITATION NO.	2013 WAIRC 00979

Result	Appeal dismissed
Representation	
Appellant	Mr K Trainer as agent
Respondent	Ms S Bhar

Order

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 13th day of August 2012 the Board convened a hearing for the purpose of scheduling; and

WHEREAS on the 23rd day of November 2012 the Board convened a hearing to determine both the scope of the appeal and an application for an extension of time in which to file the appeal; and

WHEREAS on the 18th day of February 2013 the Board convened a Directions hearing for the purpose of preparing for the hearing of the substantive appeal; and

WHEREAS on the 17th day of May 2013 the Board set the matter down for the hearing of the substantive appeal on the 10th, 11th, 12th, 13th and 14th days of June 2013; and

WHEREAS by email on the 6th day of June 2013 the appellant's representative advised that the parties had reached an agreement in principle in respect of the appeal and requested that the hearing be vacated and the Board adjourned the hearing; and

WHEREAS on the 1st day of November 2013 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 01011

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2013 WAIRC 01011
CORAM	:	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MS G HUSK - BOARD MEMBER
HEARD	:	TUESDAY, 19 NOVEMBER 2013
DELIVERED	:	FRIDAY, 29 NOVEMBER 2013
FILE NO.	:	PSAB 12 OF 2013
BETWEEN	:	HENRY TURLINSKI Appellant AND GOVERNING COUNCIL OF PILBARA INSTITUTE Respondent

CatchWords	:	Public Service Appeal Board - Decision to dismiss - Termination of employment - Breach of discipline - Failure to obey a lawful direction - Validity of direction - Reporting structure
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr D Anderson of counsel

Reasons for Decision

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

Background

2 The appellant appeals against the respondent's decision to dismiss him for failing to obey a lawful instruction, such instruction being given on 19 April 2013.

3 The respondent is a vocational education and training college operating from a number of campuses in the Pilbara. On 8 February 2010, the appellant was appointed to the position of Technical Officer based at the Tom Price campus and also served the Newman campus. The position was responsible for developing and implementing preventative maintenance plans, undertaking maintenance and repairs of trades equipment, preparing teaching aides and equipment, and the maintenance of the grounds and gardens at Tom Price and Newman campuses.

4 Whilst the appellant was based at Tom Price, he was required to travel to Newman approximately twice per month. The appellant's letter of appointment (exhibit R5) noted that he reported to Bill McDonald, Director Karratha Group. His Job Description Form (exhibit R6) noted, under the heading of Reporting Structure, that the position of Technical Officer Level 3, his position, reported to Director Karratha Group, Level 8. The evidence demonstrates that from the middle of 2009, the respondent undertook a process of reviewing its structure and staff were notified that a link had been placed on the homepage of the intranet titled 'Organisational Realignment'. This commenced a three-stage process which included changes to staff reporting arrangements (see also exhibits R13 and R14). This process allowed for feedback from staff and for them to raise particular issues. There was an implementation schedule which set out how the changes to the structure would be effected.

5 The evidence demonstrates that from the end of 2010, the appellant was reporting to people other than Mr Bill McDonald, and that over time he reported to a number of different people.

6 In early April 2012, Mr Shaun McLoughlin was appointed to the position of Manager Planning and Facilities – West. The appellant's position had come under the direction of that position and the appellant was to report to Mr McLoughlin. By email dated 2 April 2012, the appellant and another member of staff were informed by Mr Craig Holland as follows 'Just to let you know that as at tomorrow you will both be reporting directly to Shaun' (exhibit R1).

7 Mr McLoughlin gave evidence that from the time he commenced employment in that position, the appellant reported to him and did not challenge him in his role as his manager. He described their relationship as very professional and that he had to deal with matters associated with managing the appellant such as the approval of funding for expenditure, leave applications, approval to travel, attendance at meetings, etc, approval for works, and the appellant's credit card reconciliation. The appellant himself says that he did not raise the issue of Mr McLoughlin not having authority to direct him at any point prior to the termination of his employment.

8 The circumstances leading to the appellant's dismissal are that in travelling to Newman from Tom Price, the appellant commenced very early in the morning on the first day of the trip and worked until 4.30 pm. He would stay in a hotel overnight which cost the respondent approximately $295 per night. If he could stay in the respondent's own accommodation unit, this was cheaper for the respondent but also more convenient for him. He could refresh himself and change before starting out at the end of the second day's work in Newman to travel back to Tom Price. This was after a full day's work, travelling for approximately three hours, getting home around 7.00 pm. He had done this with his previous Director's concurrence for approximately three years.

9 The appellant says he worked well and put his heart and soul into his work. He liaised with the various authorities at Karratha regarding Tom Price, and Port Hedland regarding Newman. He says he worked cooperatively but very independently.

10 In April 2013, apparently having approved the appellant's travel arrangements for approximately a year, Mr McLoughlin raised concerns with him about those travel arrangements. Those concerns were that they constituted a safety issue and he wanted to find ways to reduce costs. Under the existing arrangements the appellant was working overtime at the beginning and end of the two days to enable him to travel. The appellant and Mr McLoughlin entered into a lengthy exchange of emails and meetings during which the appellant was formally directed by Mr McLoughlin to accept his direction to change the travel arrangements to ensure that he left Tom Price and returned within working hours and did not undertake travel outside of those arrangements. The appellant objected and the two of them negotiated without success. However, the email communications clearly indicate, and the appellant does not challenge, that he was not willing to accept the instructions. At one stage, the appellant contacted the Managing Director of the respondent seeking to involve her for the purposes of retaining his independence and not being required to comply with the direction.

11 In any event, on Friday 19 April 2013, as part of a lengthy email, following a telephone meeting between Mr McLoughlin and the appellant, Mr McLoughlin issued the appellant with an instruction. At the end of this email, Mr McLoughlin included an instruction under the heading '**Instruction**'.

> I then instructed you to accept my direction in relation to your travel times to Newman and have provided you with a deadline of Monday 22 April, 12.00pm Midday to respond to this in writing. In accepting this direction I expect to receive an update Approval to Travel form for your next trip to Newman. Failure to comply with this instruction by the deadline will result in us moving from the current Stage I to Stage II of the Substandard Performance Process.

The appellant confirmed his refusal to accept the instruction to make changes to the travel arrangements and options being discussed.

12 There is no dispute that the appellant declined this instruction explicitly including continuing to attempt to negotiate a different arrangement.

13 There was a meeting between the appellant and Mr McLoughlin on 22 May 2013 where the appellant was once again advised that there was a requirement for him to comply with the direction.

14 Ultimately, following a process where the appellant was advised that the matter was being dealt with as a disciplinary one, that he had failed to comply with a reasonable direction, he was provided with an opportunity to respond and he did respond. In providing his response, the appellant did not accept the direction. In fact, he appeared to acknowledge in his letter to the Managing Director that the long working day and travel arrangements 'could create a safety issue, but never did' (exhibit R8). He again put forward a proposal in an endeavour to find common ground, but ultimately still declined to accept the direction.

15 On 13 May 2013, the respondent found that the appellant had committed a serious breach of discipline in his refusal to accept the direction. He was advised that consideration was being given to the termination of his employment and that he had an opportunity to respond (exhibit R9). The appellant responded by letter dated 17 May 2013, reiterating that he had previously

reported directly to Mr Bill McDonald and that his travel arrangements had been approved by Mr McDonald and undertaken that way for the last three years. He said that his previous comments regarding the travel arrangements and safety may have been misconstrued. In any event, he said 'I can't conform to Facilities Manager West directions when I know that the directions are against me personally and against smoothness of my work' (exhibit R10).

16 On 22 May 2013, there appears to have been a meeting with Mr McLoughlin at which the appellant was provided with a further warning that unless he agreed to comply with the direction, his employment would terminate. He declined to accept the direction. By letter dated 22 May 2013, the Managing Director terminated his employment forthwith.

Ground of the Appeal

17 The only ground on which the appellant pursues this appeal is that Mr McLoughlin did not have the authority to direct him, and therefore, the direction was invalid. In those circumstances, the dismissal was unfair.

18 He also says that his Job Description Form only required him to liaise with Mr McLoughlin and that he did not agree to the changes in organisational structure which resulted in him reporting to the Manager Planning and Facilities – West. He said he could not both report to and liaise with Mr McLoughlin.

Considerations and Conclusions

19 The evidence demonstrates, and we find, that firstly the appellant had an opportunity to participate in the process engaged in by the respondent to restructure the organisation. It must be stated though, that there is no requirement for him to consent to a change in the person to whom he reports. To require this would make management of staff impossible. When he commenced employment, the appellant reported to a particular person occupying a particular position. That person, Mr McDonald, left the employment. Further, the reporting lines changed as a result of the organisational restructure.

20 Secondly, there is no evidence within the more than 20 communications which passed between the appellant and Mr McLoughlin and others between 15 April 2013 and the letter of termination on 22 May 2013, to indicate that the appellant's objection to accepting the direction was due to Mr McLoughlin having no authority to give him that direction. He negotiated with Mr McLoughlin as if he accepted Mr McLoughlin's authority.

21 Further, the evidence is that for the year from April 2012, when Mr McLoughlin took up the position, until the time of termination of employment, in all other respects in day-to-day operational requirements and staff management issues, the appellant readily reported to Mr McLoughlin.

22 Given that the appellant did not raise this ground of objection until after the dismissal, we find that it was not a genuine objection. Further, if there was any doubt as to Mr McLoughlin's authority to direct the appellant, by email dated 23 April 2013, the Managing Director, Lyn Farrell, advised the appellant as follows:

> I am unafraid [sic] I must also say to you that I am not going to discuss this matter further with you. You have been given a reasonable instruction by your Manager and I expect you to follow it.

(exhibit R9)

23 Further still, the formal correspondence which began with the suspected breach of discipline was under the signature of the Managing Director, on behalf of the appellant's employer, and there could then have been no question that the appellant's employer was requiring him to comply with the direction given to him by Mr McLoughlin.

24 In all of those circumstances, we conclude that not only did Mr McLoughlin have authority to issue a direction to the appellant and the appellant was obliged to comply with that direction, but the appellant knew this to be the case. In those circumstances, the direction which he refused to comply with was a valid direction and as such his ground of appeal is not sustainable.

25 The appeal will be dismissed.

2013 WAIRC 01012

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HENRY TURLINSKI
	APPELLANT
	-v-
	GOVERNING COUNCIL OF PILBARA INSTITUTE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR G SUTHERLAND - BOARD MEMBER
	MS G HUSK - BOARD MEMBER
DATE	FRIDAY, 29 NOVEMBER 2013
FILE NO	PSAB 12 OF 2013
CITATION NO.	2013 WAIRC 01012

Result Appeal dismissed

Order

HAVING heard Mr H Turlinski on his own behalf and Mr D Anderson of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

NOTICES—Union Matters—

2013 WAIRC 01044

NOTICE

FBM No. 9 of 2013

NOTICE is given of an application by The Civil Service Association of Western Australia Incorporated to the Full Bench of the Western Australian Industrial Relations Commission for an alteration to its Rule 6 - Membership.

The proposed alteration seeks to insert into Rule 6 - Membership, a new sub rule (b)(iv). The proposed alteration is highlighted in **bold and underlined** text below:

EXISTING RULE 6 - MEMBERSHIP

6 - MEMBERSHIP

(a) Membership shall be confined to any person who is:

(1) employed as a public service officer under and within the meaning of the Public Sector Management Act 1994 (WA); or

(2) employed under the Forests Act, the Main Roads Act or any Act now in force or hereafter enacted whereby any Board, Commission or other body is constituted to administer any such Act; or

(3) otherwise employed in any of the established Branches of the Public Service, including State trading concerns, business undertakings and government institutions controlled by Boards; or

(4) employed by the State of Western Australia; or

(5) employed by the Crown or by any Minister of the Crown in right of the State of Western Australia; or

(6) employed by any statutory body representing the State of Western Australia; or

(7) employed by any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of the State of Western Australia; or

(8) employed in either House of Parliament of the State of Western Australia either -

(i) under the separate control of the President or Speaker or under their joint control; or

(ii) by a Committee appointed pursuant to the Joint Standing Rules and Orders of the Legislative Council and the Legislative Assembly.

(9) employed by any company or corporation in which issued shares are held by or for or on behalf of or in the interest of the State of Western Australia, or, if there are no issued shares, in which the Governing body by whatever name called includes nominees appointed by or on behalf of or in the interest of the State of Western Australia.

(10) in accordance with the agreement dated 30 May 2005 between the Civil Service Association of Western Australia and the Health Services Union of Western Australia as to the division of future membership coverage, a salaried employee (being a professional, administrative, clerical, technical and supervisory employee) employed either –

(i) by the Metropolitan Health Service or by any other Western Australian State government person, enterprise or corporation in the Perth Dental Hospital and Community Dental Health Services or any other entity or unit howsoever described or named which provides any of the services provided by the Perth Dental Hospital and Community Dental Service henceforth; or

(ii) by the Metropolitan Health Service or by any other Western Australian State government person, enterprise, corporation, agency or management unit for the provision of alcohol and drug addiction services in substitution of the operations and services provided by the Alcohol and Drug Authority.

(11) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Service Board ("Board") or by any other Western Australian State Government person, enterprise or corporation in the Perth Dental Hospital or any other such entity or unit

howsoever described or named (including Perth Dental Hospital and Community Dental Services) which provides any of the services provided by Perth Dental Hospital or the Dental Services Branch of the Health Department of Western Australia as at 6 May 1998.

(12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Board in the Graylands Selby - Lemnos and Special Care Health Services ("GSL") who, as at 6 May 1998 were financial members of the CSA until such time as they resign, retire or are permanently transferred of redeployed from the GSL or cease to be a member of the CSA.

(b) (i) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(ii) Notwithstanding the proviso in rule 6(b)(i), and without limiting the generality of rules 6(a)(10) and 6(a)(11), dental technicians, their apprentices or their trainees employed in the Perth Dental Hospital or Community Dental Health Services or any other entity or unit however described or named which provides any of the services formerly provided by Perth Dental Hospital or Community Dental Health Services shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(iii) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(c) In addition and notwithstanding the provisions of subrule (b) of this rule, membership shall be confined to:

(1) salaried officers employed by any University within Western Australia, engaged in professional, administrative, supervisory, technical, or clerical capacities other than:

(i) the Vice-Chancellor/s;

(ii) persons paid according to academic salary rates and who are substantially engaged in teaching duties or on original research;

(iii) persons whose conditions of engagement provide that their salary and status shall be equivalent to those of the academic staff.

(d) In addition to and notwithstanding the provisions of subrule (b) of this rule, membership shall be confined to tradesmen who are employed as Foremen Tradesmen or Sub-Foremen Tradesmen by Ministers of the Crown, Government Instrumentalities, Agencies or Trading Concerns, excepting the Western Australian Government Railways Commission, the State Electricity Commission of Western Australia, the Metropolitan (Perth) Passenger Transport Trust and the Government Printing Office.

Provided that the following persons shall not be eligible for membership:

(i) Supervisor Shipwrights and Supervisor Dockers employed by the State Shipping Service.

(ii) Assistant Dockmaster, South Slipway employed by the Hon. Minister for Works.

(e) Notwithstanding any of the foregoing, such persons who are employees of the Civil Service Association of Western Australia (Incorporated) provided that such persons:

(1) are not eligible to hold the offices of President, Senior Vice-President, Junior Vice-President, Honorary Treasurer or Executive Committee member, and

(2) shall not include any persons employed in Level 1 and Level 2 positions and who are eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch.

(f) No person under the age of fourteen years shall be a member.

PROPOSED RULE 6 - MEMBERSHIP

6 - MEMBERSHIP

(a) Membership shall be confined to any person who is:

(1) employed as a public service officer under and within the meaning of the Public Sector Management Act 1994 (WA); or

(2) employed under the Forests Act, the Main Roads Act or any Act now in force or hereafter enacted whereby any Board, Commission or other body is constituted to administer any such Act; or

(3) otherwise employed in any of the established Branches of the Public Service, including State trading concerns, business undertakings and government institutions controlled by Boards; or

(4) employed by the State of Western Australia; or

(5) employed by the Crown or by any Minister of the Crown in right of the State of Western Australia; or

(6) employed by any statutory body representing the State of Western Australia; or

(7) employed by any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of the State of Western Australia; or

(8) employed in either House of Parliament of the State of Western Australia either –

(ii) under the separate control of the President or Speaker or under their joint control; or

(ii) by a Committee appointed pursuant to the Joint Standing Rules and Orders of the Legislative Council and the Legislative Assembly.

(9) employed by any company or corporation in which issued shares are held by or for or on behalf of or in the interest of the State of Western Australia, or, if there are no issued shares, in which the Governing body by whatever name called includes nominees appointed by or on behalf of or in the interest of the State of Western Australia.

(10) in accordance with the agreement dated 30 May 2005 between the Civil Service Association of Western Australia and the Health Services Union of Western Australia as to the division of future membership coverage, a salaried employee (being a professional, administrative, clerical, technical and supervisory employee) employed either –

(i) by the Metropolitan Health Service or by any other Western Australian State government person, enterprise or corporation in the Perth Dental Hospital and Community Dental Health Services or any other entity or unit howsoever described or named which provides any of the services provided by the Perth Dental Hospital and Community Dental Service henceforth; or

(ii) by the Metropolitan Health Service or by any other Western Australian State government person, enterprise, corporation, agency or management unit for the provision of alcohol and drug addiction services in substitution of the operations and services provided by the Alcohol and Drug Authority.

(11) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Service Board ("Board") or by any other Western Australian State Government person, enterprise or corporation in the Perth Dental Hospital or any other such entity or unit howsoever described or named (including Perth Dental Hospital and Community Dental Services) which provides any of the services provided by Perth Dental Hospital or the Dental Services Branch of the Health Department of Western Australia as at 6 May 1998.

(12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Board in the Graylands Selby - Lemnos and Special Care Health Services ("GSL") who, as at 6 May 1998 were financial members of the CSA until such time as they resign, retire or are permanently transferred of redeployed from the GSL or cease to be a member of the CSA.

(b) (i) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March,1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(ii) Notwithstanding the proviso in rule 6(b)(i), and without limiting the generality of rules 6(a)(10) and 6(a)(11), dental technicians, their apprentices or their trainees employed in the Perth Dental Hospital or Community Dental Health Services or any other entity or unit however described or named which provides any of the services formerly provided by Perth Dental Hospital or Community Dental Health Services shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(iii) Provided further that save and except for the employees referred to in Rule 6 (a) (11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(iv) Notwithstanding the proviso in rule 6(b)(i), technical officers and their supervisors employed in zoological or veterinary nursing functions by the Zoological Parks Authority [its transferee, transmittee, assignee or successor, however described] shall be eligible for membership of the Civil Service Association of Western Australia Incorporated.

(c) In addition and notwithstanding the provisions of subrule (b) of this rule, membership shall be confined to:

(1) salaried officers employed by any University within Western Australia, engaged in professional, administrative, supervisory, technical, or clerical capacities other than:

(i) the Vice-Chancellor/s;

(ii) persons paid according to academic salary rates and who are substantially engaged in teaching duties or on original research;

(iii) persons whose conditions of engagement provide that their salary and status shall be equivalent to those of the academic staff.

(d) In addition to and notwithstanding the provisions of subrule (b) of this rule, membership shall be confined to tradesmen who are employed as Foremen Tradesmen or Sub-Foremen Tradesmen by Ministers of the Crown, Government Instrumentalities, Agencies or Trading Concerns, excepting the Western Australian Government Railways Commission, the State Electricity Commission of Western Australia, the Metropolitan (Perth) Passenger Transport Trust and the Government Printing Office.

Provided that the following persons shall not be eligible for membership:

(i) Supervisor Shipwrights and Supervisor Dockers employed by the State Shipping Service.

(ii) Assistant Dockmaster, South Slipway employed by the Hon. Minister for Works.

(e) Notwithstanding any of the foregoing, such persons who are employees of the Civil Service Association of Western Australia (Incorporated) provided that such persons:

(1) are not eligible to hold the offices of President, Senior Vice-President, Junior Vice-President, Honorary Treasurer or Executive Committee member, and

(2) shall not include any persons employed in Level 1 and Level 2 positions and who are eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch.

(f) No person under the age of fourteen years shall be a member.

The matter has been listed for hearing before the Full Bench at 10:30am on Monday, 3 February 2014 in Hearing Room 2 (Level 18). A copy of the Rules of the organisation and the proposed rule alterations may be inspected at Level 16, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the Industrial Relations Commission Regulations 2005.

S. BASTIAN

REGISTRAR 3 December 2013